



HOUSE OF LORDS

European Union Committee

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20th Report of Session 2003-04

# Security at EU Council Meetings

Report

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# Security at EU Council Meetings

## Introduction

1. At its meeting on 29/30 April 2004, the Justice and Home Affairs Council adopted a Resolution on security at European Council meetings and other comparable events. Its aim is to encourage Member States to share information about individuals travelling to another Member State with the intention of protesting at such meetings and events with the intention of causing disorder. The Resolution was an initiative of the Italian Presidency in response to the disruption caused by protesters at earlier EU Council meetings (*eg* at Gothenburg) and the World Trade Organisation meeting in Seattle.

## Purpose of this Report

2. As the Committee determined at the outset of its scrutiny of the proposal, the Resolution has clear implications for civil liberties and the relationship of the Union with its citizens. The Committee began its detailed examination of the text in September 2003 and examined the draft Resolution<sup>1</sup> on seven occasions. This gave rise to substantial Ministerial correspondence, which is printed in Appendix 2 of this Report. We describe below the main issues raised by the Resolution.

## Freedom of expression—lawful protest

3. This Parliament is not immune from public expression of protest and dissent. Demonstrations are often noisy, occasionally disruptive, but normally peaceful and non-violent. But events at Seattle, Genoa and Gothenburg show how demonstrations can quickly become disturbances and then riots. Action may be needed to maintain public order and security. But tightening security has an impact on the individual's freedom of movement and expression and association and, where personal data is transferred, his or her rights of privacy.
4. There is a balance to be struck and the Committee's initial concern was that the Resolution might be misunderstood as an attempt by the Union and its institutions to shield themselves from public comment and dissent. The Minister responded by assuring the Committee that the measures in the Resolution were not targeted at legitimate, peaceful protesters. They would be focused on individuals in respect of whom there were substantial grounds for believing that they were intending to disrupt public order or commit public order offences. This reflects the language to be found in paragraphs 3 and 4 of the draft Resolution, to which we return at paragraph 18 below.

## The prescriptive/permissive nature of the Resolution

5. The Government have consistently asserted that the Resolution is a non-binding instrument and imposes no legal obligations on Member States. It is noteworthy, however, that during the negotiations the draftsman has sought

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<sup>1</sup> Doc 13915/03. ENFOPOL 92.

to make the language less prescriptive. This has been done by the use of words of invitation. It remains clear, notwithstanding the inclusion and use of verbs such as “should” or “may”, that the Resolution is intended and is likely to affect how Member States, and in particular their police authorities, will act. The Minister acknowledged that Member States “will no doubt act in accordance with it in order to try and prevent the violent scenes that we have seen at recent international events” (letter of 3 December).

6. While the Resolution may, in a formal legal sense, be “non-binding” the Committee considered that, because of its content and its likely effects in practice, it should be examined with the same care as if it were a legislative instrument. If the Resolution were not intended to have a real effect on how national police and other authorities should behave then it would not have been brought forward or have been given the political priority that it appeared, at least initially, to have.

### Scope of application

7. The Resolution applies to European Council Meetings and “other comparable events”. In response to our questions, the Minister explained that a “comparable event” would include meetings of the G8 or meetings of senior politicians from two or more Member States (letter of 31 October 2003). The latter example shows that the scope of the Resolution is very wide and hence the potential implications for the free movement of persons within the Union and for the handling of personal data that much greater.

### Relationship with existing measures—Schengen

8. Internal border controls have been removed between those Member States to whom the rules in the Schengen Convention (incorporated into the Treaties at Amsterdam) apply in full. Exceptionally border controls can be re-introduced, but only temporarily, on public policy or national security grounds (Article 2(2) of the Schengen Convention). The initial version of the proposed Resolution required any Member State applying Article 2(2) to give precedence to “targeted close checks” on suspect individuals and to mitigate inconvenience to other travellers. A number of Member States queried the relationship of the Resolution with the Schengen provisions dealing with the temporary closure of internal borders and doubted whether the Resolution was acceptable, politically or legally, as an interpretation of the Schengen rules.
9. The Italian Presidency responded to these criticisms and sought to dissociate the draft Resolution from the Schengen Convention.<sup>2</sup> Paragraph 3 was recast so as to indicate that it would apply to all Member States applying border controls<sup>3</sup> and to refer, in place of “targeted close checks”, to “intelligence-led checks focused on individuals in respect of whom there are substantial grounds for believing that they intend to enter the Member State with the

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<sup>2</sup> The amendment of the text also simplified the position as regards the position of the United Kingdom. The United Kingdom is only a party to a part of the Schengen Convention, namely that dealing with police cooperation. It is not a party to those provisions dealing with border controls and it seems clear that the UK would not have been able to apply a number of the provisions of the initial draft Resolution. Paragraph 3 of the Resolution was amended so that it extended to any Member State applying border controls whether under Schengen or otherwise.

<sup>3</sup> This amendment removed the potential difficulty of trying to determine which provision of the Resolution would apply to the UK, which is not a party to the Schengen rules applying to border controls.

aim of disrupting public order”. The Government supported this amendment: the reference to “intelligence-led checks” was “now more precise and reflects the UK practice of threat assessments complemented by effective use of police intelligence in identifying those who may pose a threat” (letter of 31 October 2003).

### **Relationship with existing measures—the 1997 Joint Action**

10. The draft Resolution also makes reference to the 1997 Joint Action regarding co-operation on law and order and security.<sup>4</sup> Indeed, paragraph 2 appears to reproduce the requirements of Article 2 of the Joint Action. We queried the nature and extent of the relationship between the two instruments and whether the Resolution would have the practical effect of extending the scope of the Joint Action both as regards the type of events to be targeted (the Joint Action is primarily aimed at “sporting events, rock concerts, demonstrations and road blocking protest campaigns”) and the information to be supplied (the Resolution is not restricted to information about groups but includes the provision of information about individuals).
11. The Minister acknowledged that there was “some overlap between the Joint Action and the Resolution. The Resolution does not extend the scope of the Joint Action. However, as you point out, the Resolution refers to information on individuals as well as groups” (letter of 3 December).
12. Paragraph 9 of the Resolution provides for liaison officers to be sent to the host Member State in order to assist the local authorities in preparing and implementing security and public order measures. It seems clear that these liaison officers will not necessarily be stationed on the borders. The provision is stated to be “by analogy with the provisions of the Joint Action of 1997”. The Minister said that the reference to liaison officers had been included to remind Member States of their potential usefulness in this context (letter of 3 December).
13. The Resolution does not make clear what powers liaison officers would have. But if the Joint Action is to be applied “by analogy”, the posting of liaison officers would be temporary: they would play an advice and assistance role and would have no powers and be unarmed; they would provide information and carry out their duties in accordance with the instructions from their home State and guidelines from the Member State to which they were seconded.<sup>5</sup>

### **Intelligence-led checks**

14. Article 3 does not require the imposition of border controls (within the Schengen area this is governed by the Convention) but, as mentioned above, indicates that if there are to be such controls then precedence should be

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<sup>4</sup> Council Joint Action 97/339/JHA of 26 May 1997 with regard to co-operation on law and order and security. [1997] OJ L 147/1. The Joint Action requires Member States to provide other Member States concerned with information, upon request or unsolicited, via central bodies, if large groups which might pose a threat to law and order and security are travelling to another Member State to participate in events such as football matches and music (rock) concerts. The information should be supplied at the earliest possible stage to all the Member States concerned, whether or not they are neighbours, including those through which the groups will transit. A Member State should supply full details about the group in question; the proposed route and stopping places; the means of transport and any other relevant information. Information on the reliability of the information should also be supplied.

<sup>5</sup> See Article 2 of the Joint Action.

given to “intelligence-led checks focused on” suspect individuals. Article 4 contains a further invitation to supply information which may be relevant to a Member State in carrying out “checks focused on travellers”. The Minister explained that an intelligence-led check was a check on the passport or identity card to confirm the identity of the holder (letter of 3 December).

### Compatibility with the 1964 Directive on free movement

15. Directive 64/221<sup>6</sup> (the 1964 Directive) is aimed at removing restrictions on free movement within the Union and relates to measures concerning entry into the territory, issue or renewal of residence permits, or expulsion from the territory, taken by Member States on grounds of public policy, public security or public health. The Directive requires such measures to be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions do not in themselves constitute grounds for the taking of such measures.
16. The Minister acknowledged that any decision, for example following an intelligence-led check, to refuse entry would have to be consistent with the 1964 Directive. A decision to refuse entry to an EU citizen (*ie* a national of a Member State) on national public policy grounds would have to be based on “the personal conduct of the individual, not for general or deterrent reasons” (letter of 3 December). She explained that the United Kingdom would only refuse entry to those
  - who have been convicted of a serious offence normally attracting a custodial sentence of two years or more, and
  - whose history and previous convictions provide evidence of a propensity to re-offend or
  - where an offence is particularly serious (drug smuggling, facilitating entry of illegal immigrants, rape, murder etc).

### Previous criminal convictions

17. Paragraph 5 of the Resolution provides that the mere existence of criminal proceedings should not automatically justify the adoption of measures under the Resolution. It appears to have been included in order to ensure compatibility with the 1964 Directive. Paragraph 5 is relevant in determining the meaning of “substantial grounds” for taking certain action under the Resolution. But the relationship of this provision with Paragraph 4 (especially the last two lines) is unclear. Paragraph 5 would suggest that something more than a criminal conviction is necessary to trigger action under the Resolution. Because of the possible consequences for the individual or individuals concerned the Committee sought clarification of this issue.

### Substantial grounds

18. There must be “substantial grounds” before information about an individual is handed over to the authorities in another Member State. Both paragraph 3 (intelligence-led checks) and paragraph 4 (provision of information) refer to

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<sup>6</sup> Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ L 56/1.

“individuals in respect of whom there are substantial grounds for believing that they intend to enter the Member State with the aim of disrupting public order and security at the event or committing offences relating to the event”. The Committee pressed the Government for clarification as to what would amount to substantial grounds for these purposes.

19. The Minister explained that the use of the expression “substantial grounds” indicated that information should only be passed on “where there is clear evidence that an individual or group is intent on causing disruption”. This prompts the further question as to what would amount to “clear evidence” of such intention. The Minister was invited to clarify the position. She replied: “Whilst it would not be possible to give a definitive criterion of clear evidence, a recent conviction involving violence, incitement or conspiracy at a similar event may show intention to enter with the aim of causing violence once more” (letter of 3 December).
20. This response was not very helpful. The Minister appeared to suggest that the existence of a criminal conviction might itself be sufficient to justify the handing over of information under the Resolution. We asked again for clarification and the Minister confirmed that something more than a recent conviction would be needed in order to establish “substantial grounds” (letter of 4 February).

#### **The nine-point risk assessment plan**

21. The Minister informed the Committee that before sending information to another Member State, the United Kingdom Police Service undertakes a nine point risk assessment plan to ensure that the sending of the information is necessary to prevent or detect crime or to enforce the rights or freedoms of others. She noted that “even if the police had clear evidence of intention to cause disruption they would still carry out the nine point risk assessment on each piece of information” (letter of 18 December). She helpfully provided a copy of the risk assessment plan, which is printed in Appendix 3 of this Report.
22. The nine-point risk assessment is clearly an important step to be taken by the police in deciding whether to pass information to another Member State and we are grateful to the Minister for this information. But the assessment does not address the issue of what amounts to “substantial grounds” or, to use the Minister’s test, “clear evidence” to justify the belief that the individual concerned intends to enter the Member State with the aim of disrupting public order or committing offences relating to the event in question. The nine-point risk assessment appears to be concerned with the balancing of competing interests and not the criteria for identifying the nature or weight of the evidence on one side of the balance. The Minister agreed (letter of 11 March 2004).

#### **The Government’s undertaking to Parliament**

23. The Committee requested the Government to deposit with Parliament any guidance given to or produced by authorities in the United Kingdom as to what factors might be relevant in determining whether or not “substantial grounds” exist. In her reply, the Minister reminded the Committee that she had supplied copies of the nine-point risk assessment currently used by police officers. She acknowledged that this did not set out the criteria for

identifying the nature or weight of evidence. But the Minister added: “Should any further guidance be issued in future in relation to this Resolution, we will deposit it with Parliament” (letter of 11 March).

24. We are grateful for this undertaking to deposit with Parliament any further guidance issued in relation to the Resolution dealing with the criteria for identifying the nature or weight of the evidence to which authorities may have regard in determining whether there are “substantial grounds” before information about an individual is handed over to the authorities in another Member State. Such disclosure would, we believe, be most helpful and might go some way to alleviate the concerns to which the Resolution gives rise.

### **Implementation—the legislative framework**

25. The correspondence disclosed that, with the exception of data protection legislation, there would be no legislative framework in the UK for the dissemination, pursuant to the Resolution, of information by the police to authorities in other Member States. The Minister referred to a positive duty on the police acting under the common law to gather, store and disseminate information about those who commit crime in order to prevent and detect crime. Secondly, there was an obligation on the police, under the European Convention on Human Rights, to prevent interference with ECHR rights (letter of 3 December). The Minister confirmed that in the exercise of its common law duty the police must act in accordance with the ECHR and with the principle of proportionality (letter of 18 December).

### **Retention of personal data**

26. Paragraph 6 of the Resolution provides that information supplied can be used not just for the purpose of border checks but also to prevent offences during the event in question. In the original version the agreement of the Member State which supplied the information was necessary if the information was to be used for purposes additional to border checks. A particular concern of the Committee was the possibility of the retention and use of information after the event in question.
27. Paragraph 8 of the Resolution states: “Personal data should be used and kept only until the end of the event for which they were supplied and only for the purposes laid down in this Resolution, unless agreed otherwise with the Member State which supplied the data”. In the United Kingdom the Data Protection Act 1998 (the 1998 Act) requires that personal data should not be kept longer than is necessary for the purpose for which it is acquired. However, it is the Government’s practice where information is passed to the authorities of another State not to impose restrictions on the length of time personal data can be held in that State (letter of 3 December).
28. We were told that the Resolution would reinforce an “unwritten agreement” that data will only be used and retained for the duration of the event being policed. The Government did not identify the field of application or detailed terms of the “unwritten agreement”. But the Minister explained that under the agreement information could only be retained and used beyond the event in question with the express agreement of the State which supplied it (letter of 4 February).
29. The Committee queried whether the Resolution would in fact strengthen the present unwritten arrangements. The Committee had particular concern on

this issue having regard to the Government's stated practice not to impose restrictions. We recommended that the final words in paragraph 8, "unless agreed otherwise with the Member State which supplied the data", should be removed. We saw the omission of these words as strengthening the position of the individual concerned. The basic rule in paragraph 8 would be clear: information should not be held or used beyond the event in question.

30. The Government was not prepared to accept this recommendation. The Minister said: "I do not believe that removing this phrase provides a greater safeguard for the individual. The Resolution encourages Member States to consult colleagues who supplied the data about retention" (letter of 18 December). The Government sought to provide some comfort to the Committee by saying that the transfer of personal data was subject to safeguards under data protection legislation (letter of 18 December) and that all Member States were bound by data protection principles in the Data Protection Directive.
31. We explored with the Minister the scope and extent of the safeguards given by that legislation, including the exceptions for national security and also for the prevention of crime both in the Directive and the 1998 Act.<sup>7</sup> The Minister helpfully drew attention to relevant provision of the 1998 Act, the supervisory role of the courts and the powers of the Information Commissioner (letters of 11 March and 2 April).
32. The difficulty we perceive is that the 1998 Act is primarily directed towards activities within the United Kingdom. The Committee is not just concerned about how information supplied under the Resolution will be handled here. We are equally, if not more, concerned about the use of information relating to United Kingdom citizens which is placed in the hands of authorities in other Member States. It is by no means clear that the Information Commissioner has the legal power to investigate and give a view as to what may be happening in relation to data on a particular individual held by police and security authorities in another Member State.
33. The correspondence has highlighted the sensitivity of the issues raised by the Resolution, particularly as regards the retention and use of personal data. The individual concerned may well not know who is holding his or her personal information and to what use it is being put, an issue to which attention was drawn in the Privy Counsellor Review Committee's recent report on the Anti-terrorism, Crime and Security Act 2001.<sup>8</sup> The Minister said: "The retention of personal data by the police and other authorities raises a number of important and sensitive issues, such as those raised by the Privy Counsellor Review Committee's conclusions on the retention of communication data when examining the Anti-terrorism, Crime and Security Act 2001. Such issues go much wider than the scope of this current Resolution" (letter of 2 April).

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<sup>7</sup> Data Protection Directive, Article 13, Data Protection Act 1998 sections 28 and 29.

<sup>8</sup> The Privy Counsellor Review Committee's report stated: "there are obvious risks to privacy in keeping information about individuals. The existence of data creates its own demand for access to it from a wide range of bodies for a variety of reasons, mostly unrelated to national security. It also creates the potential for abuse. It is, therefore, important to maintain strict limits on the Government's ability to require data to be retained and on the circumstances in which data can be accessed, and to ensure that the access rules are strictly enforced" (para 398, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC 100).

34. While the State should be enabled in the interests of national security to retain information about individuals it can be argued that there should be some independent supervision of the exercise of such powers. The recent Privy Counsellor Review Committee Report indicates that it is by no means clear that that protection is sufficient in the United Kingdom and we have no information as to whether or not the position is better in any other Member State. This is a matter to which we may need to return.

### **Recommendation**

35. The Resolution on security at European Council meetings and other comparable events raises questions of political and legal importance. These were the subject of correspondence between the Committee and the Government which we make available with this Report for the information of the House.

## APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

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The members of the Sub-Committee which undertook this scrutiny were:

Lord Brennan

Lord Clinton-Davis

Lord Denham

Lord Grabiner

Lord Henley

Lord Mayhew of Twysden

Lord Neill of Bladen

Lord Scott of Foscote (Chairman)

Baroness Thomas of Walliswood

Lord Thomson of Monifieth

## APPENDIX 2: CORRESPONDENCE

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### **Letter from Lord Grenfell, Chairman of the European Union Committee, to Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

The draft Council Resolution was considered by Sub-Committee E (Law and Institutions) at its meeting on 17 September. In your Explanatory Memorandum you say that the aim of the draft Resolution is to improve the flow of information between Member States but a glance at the text of the Resolution would suggest that its main thrust is to require any Member State which applies Article 2(2) of the Schengen Convention is to give precedence to “targeted close checks” on suspect individuals and to mitigate inconvenience to other travellers. Almost secondarily, the Resolution provides for the exchange of information between national authorities. The proposal raises a number of issues, not least the implications for civil liberties.

First, we note that the draft Resolution cites Articles 30(1)(a) and (b) TEU (provisions dealing with police cooperation) as its legal base. The draft Resolution also refers to Articles 2(2), 39 and 36 of the Schengen Convention (relating to internal border controls, police cooperation and exchange of information between police forces). If, as mentioned above, the main or a major object of the Resolution is directed at the use of Article 2(2) of the Schengen Convention (the exceptional situation when a Schengen State can introduce internal border controls) then this raises the question of the appropriateness of Article 30(1)(a) and (b) TEU as the legal base. Article 5 of the Protocol integrating the Schengen Acquis into the framework of the European Union provides that proposals and initiatives building upon the Schengen Acquis shall be the subject of the relevant provisions of the Treaties. Measures affecting border controls would at first sight appear to fall within Title IV TEC. The Committee would therefore be grateful if you could explain if and how the Government is satisfied that Article 30(1)(a) and (b) TEU provide an appropriate and adequate legal base for the proposed Resolution, at least in so far as it relates to Article 2(2) of the Schengen Convention.

A second question relates to the position of the United Kingdom. The UK is not party to the whole of the Schengen Convention and in particular is not party to those provisions (including Article 2(2)) dealing with border controls. It is surprising that this fact was not mentioned in the Explanatory Memorandum and that no explanation was offered as to which provisions of the draft Resolution would apply in the case of the UK and how they would interact with the other provisions applicable to Member States which apply Article 2(2) of Schengen. We would welcome some clarification.

It is clear that at least one Member State has problems with the draft Resolution. In a paper to the Police Cooperation Working Party (Doc 12078/03 Enfopol 78) the Dutch Government has expressed concern about the form of the instrument (a Resolution) being proposed and has queried how the measure would interact with existing Community law affecting restrictions on the rights of citizens of the Union to enter another Member State. Whilst the Dutch paper speaks of the need to “concretise the security measures in point 6” it also states “after all, increased border control is not an end in itself”. The Italian Presidency has been invited to “elaborate the EU public order criteria that justify these security measures”. The Committee would welcome your reactions to the points made in the Dutch paper.

Finally, there are particularly serious implications for civil liberties and the position of the Union. Legitimate protestors should not, as I hope you will agree, be treated

like football hooligans. There is a risk that the Resolution might be misunderstood as an attempt by the Union and its institutions to shield themselves from public dissent. Further, the detailed text raises a number of questions. Paragraph 2 is too vague in its attempt to define the individuals concerned and appears to offend against the principle of legal certainty demanded by the rights of freedom of speech and freedom of association. We would be grateful if you could explain the reference to “targeted close checks” on suspect individuals. What is envisaged? Will suspects be made the subject of an “alert” on the SIS (Schengen Information System)? If so, would their freedom to move be restricted right across the Union/Schengen States and not limited to the host State of the European Council or comparable event? We would welcome your views on this. It would also be helpful if you could give examples of what would be a “comparable international event”. For how long would the restriction of freedom of movement operate? And for how long could personal data exchanged be held and used with the agreement of the supplying country? What limits would UK authorities impose?

The Committee decided to retain the document under scrutiny.

*18 September 2003*

**Letter from Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 18 September. Since I deposited the document and EM the Presidency has produced further drafts of the draft resolution. I have deposited both Rev 2 and Rev 3 of the document. I hope that the latest draft of the document takes into account your concerns.

As an atypical act, the draft Council Resolution can have no formal legal base in the Treaties, and references to Articles 30(1)(a) and (b) TEU have consequently been removed from the revised draft. I hope this satisfies your concerns on the issue of the legal base.

I recognise that previous versions of the document did not clearly clarify the position of the UK which is not party to the provisions of Article 2(2) of the Schengen Convention. Paragraph 3 of the draft resolution (10965/3/03 Rev 3) has consequently been amended to recognise the position of the UK, Ireland and the accession states and notes that:

“For the security of European Council meetings or comparable events, any Member State applying border controls for the protection of such events, in particular under the provisions of Article 2(2) of the Schengen Convention, may also take every step to limit, as far as possible, the inconvenience caused by checks on travellers”.

The Government feels this provides sufficient opportunity for the UK to continue to exchange information with and receive information from other countries when attempting to ensure the security of European Councils or comparable events.

The Government agrees with the Netherlands that the language of the previous drafts of the Resolution were not entirely appropriate given its non-binding legal status. The Government believes that the amendments secured to the revised draft Council Resolution reflect its status as a non-binding text.

I note your concerns for civil liberties and can assure you that these measures are not targeted at legitimate, peaceful protestors. As paragraph 3 makes clear, should a Member State choose to carry out checks under the terms of this Resolution,

they will be focused on individuals on whom there are substantial grounds for believing that they are intending to disrupt public order or commit offences.

In your letter, specifically you queried what the phrase “targeted close checks” meant. You will note that that phrase has been deleted from the text and in its place the UK proposal for “intelligence-led checks focused on individuals in respect of whom there are substantial grounds for believing that they intend to enter the Member State with the aim of disrupting public order ...” has been included. The Government believes this reference is now more precise and reflects the UK practice of threat assessments complemented by effective use of police intelligence in identifying those who may pose a threat.

In your letter you raised the link between this draft Resolution and the Schengen Information System. The draft Resolution makes no reference to the Schengen Information System and as such it is impossible to say whether or not a Member State would choose to issue an alert on the basis of information passed using this Resolution. Article 8, however, makes clear that personal information transferred may only be kept until the end of the event and for the purposes for which they were supplied unless the Member States supplying the information agree otherwise.

In your letter, you asked for examples of a “comparable international event.” We would interpret this as covering meetings similar to European Councils such as meetings of the G8 or meetings of senior politicians from two or more Member States.

You asked for how long the restriction on the freedom of movement would operate. The restrictions on the freedom of movement are set out in Article 2(2) of the Schengen Convention, for those Member States who are party to those provisions. It allows for national border checks to be carried out at the internal borders for a limited period appropriate to the situation, on the grounds of public policy or national security. This resolution does not affect those provisions.

The retention of personal data in the UK is governed by the Data Protection Act 1998 which requires that personal data should not be kept longer than is necessary for the purpose for which it was acquired. This will continue to be their practice if the resolution comes into force.

*31 October 2003*

**Letter from Lord Grenfell, Chairman of the European Union Committee, to  
Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

Thank you for coming to meet Sub-Committee E (Law and Institutions) last Wednesday. It was unfortunate that the meeting was interrupted by divisions in both Houses and that consequently it was not possible to continue taking evidence from you on the proposed Council Resolution. You agreed that the most sensible way forward would be for the Committee to send you the questions which it would have put and for you to reply in writing within the next few days. We are conscious of the urgency of the matter. Accordingly I enclose a list of questions and look forward to receiving your reply.

*17 November 2003*

## Questions for Caroline Flint MP

### *Legal basis*

1. Your Explanatory Memorandum (EM) states, under “i) Legal basis”, that the Resolution is an “atypical legal act” which has “no formal legal basis in the Treaties”. If indeed there is no legal basis for it why does the EM describe the Resolution as “a legal act”?

Secondly, is it the policy of Government that the Council can pass Resolutions calling for cooperative action among Member States in any area or field of activity without the existence of any formal legal basis in the Treaties?

If a formal legal basis is in general considered to be unnecessary why were such strenuous efforts made (*ie* via the horizontal clauses) to restrict the scope for operation of the Charter of Rights?

### *Non-binding nature of the Resolution*

2. The EM states under Policy Implications: “This proposal is a non-binding Resolution which imposes no legal obligations on the countries concerned.” It is true that paragraphs 1 and 4 of the Resolution contain the words “Member States are invited to ...” though elsewhere there are words which look as if they are intended to impose binding obligations, *eg* in paragraphs 7 and 8. Is the EM technically correct in calling the Resolution “non-binding”? Would you agree that what matters from the point of view of policy (not to mention the democratic rights of UK citizens) is what is the likely effect of the adoption of the Resolution? Is it not highly probable that if the Resolution is adopted most Member States will very willingly act in accordance with it?

### *Scope of the Resolution/relationship with the Joint Action*

3. The relationship with the Joint Action of 26 May 1997 is somewhat puzzling. Does the Resolution extend the Joint Action by requiring information on individuals, including their names, as well as groups or by extending the range of events beyond those listed to which the Joint Action relates? If the Resolution is not extending the Joint Action, why is it necessary to have Article 9 (Liaison Officers) which is stated to apply “by analogy” with the Joint Action? Why does the Resolution reproduce obligations in the Joint Action? For example, Article 2 of the Resolution appears to reproduce Article 1(2) of the Joint Action.

4. Both Articles 1 and 4 contain invitations to supply information and it is unclear to the Committee why two invitations are necessary and whether, and if so to what extent, they overlap. What is your understanding of these provisions?

### *Intelligence-led checks*

5. In your Explanatory Memorandum you point out that the draft Resolution now refers to “intelligence-led checks” focused on individuals in respect of whom there are substantial grounds for believing that they intend to enter the Member State with the aim of disrupting public order” (Article 3). You say that this reference is “now more precise and reflects the UK practice of threat assessments complemented by effective use of police intelligence in identifying those who may pose a threat”. What is the UK practice of threat assessments?

6. What in practice happens during, and what are the possible consequences of, an “intelligence-led check”? Is the “suspect” stopped/ questioned/ searched/ refused entry or what?

### *Substantial grounds*

7. The Resolution provides for the supply of information on, and intelligence-led checks focused on, “individuals in respect of whom there are substantial grounds for believing that they intend to enter into the Member State with the aim of disrupting public order and security at the event”. The Resolution does not, however, identify what is meant by “substantial grounds” in this context. Can you please clarify, preferably by giving examples, what would amount to “substantial grounds” in the present context?

8. A reading of Articles 4 and 5 would suggest that previous convictions for relevant offences may constitute substantial grounds (Article 4) but should not be taken to automatically do so (Article 5). But how can a previous conviction evidence intention to enter with the aim of disruption?

9. Under what legislative framework is/would information handed over by UK authorities to authorities in other States? What safeguards exist for the individual concerned?

### *Schengen “alerts”*

10. The penultimate paragraph of the preamble to the Resolution envisages the possibility of an alert being placed on an individual. Given the dismantling and absence of internal border controls within the Schengen area it is difficult to see how practical it is to control access at the national frontier except at the Schengen perimeters. Is it envisaged that members will close their borders temporarily? How else will so called “intelligence-led checks” be conducted inside the Schengen area?

11. Could the information exchanged of information under the Resolution result in the issuing of an alert to the Schengen Information System (SIS)? According to Article 96(2) of the Schengen Convention alerts may be based on a threat that an alien may pose to public policy, public security or national security in particular where there is ‘clear evidence’ that an alien intends to commit serious criminal offences in the territory of a Party to the Convention.

### *Retention of personal data*

12. Article 8 sets out a restriction on the use and retention of personal data but that restriction may be lifted by agreement with the Member State supplying the data. What is the UK’s practice? Would the UK impose restrictions as to time retained and usage of information supplied? If not, why not?

13. The Resolution would appear to raise substantial data protection concerns. Have the Information Commissioner and the Schengen Joint Supervisory Authority been consulted on its content?

### *Freedom of expression/lawful protest*

14. The Resolution, if implemented by a Member State, could give rise to restrictions of the freedom of an individual or of groups of individuals to exercise their rights of freedom of expression and of assembly and association (EU Charter Articles 11 and 12). It seems clear from the resolution that an individual might as

a consequence of information passed under the Resolution be subject to an intelligence-led check even where there is no intention to commit a criminal act. Are you content that this is proportionate? In your Explanatory Note you say that the measures are not targeted at legitimate, peaceful protesters. But how can you be sure that lawful protest will not be stifled?

**Letter from Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 17 November.

I agree that it was unfortunate that I did not get the chance to discuss this draft resolution with Sub-Committee E on 12 November.

I enclose the Government's response to your questions.

*3 December 2003*

**Government Response to the Select Committee on the European Union**

*Legal Basis*

1. **The Explanatory (EM) states under “i) Legal basis” that the Resolution is an “atypical legal act” which has “no formal legal basis in the Treaties”. If indeed there is no legal basis for it why does the EM describe the Resolution as “a legal act”?**

**Secondly, is it the policy of Her Majesty's Government that the Council can pass Resolutions calling for cooperative action among Member States in any area or field of activity without the existence of any formal legal basis in the Treaties?**

**If a formal legal basis is in general considered to be unnecessary why were such strenuous efforts made (*ie* via the horizontal clauses) to restrict the scope for operation of the Charter of Rights?**

A Resolution is ‘atypical’ in that it is not one of the acts listed in Article 34 TEU. This Resolution does not impose binding legal obligations on Member States. It would, therefore, perhaps have been better to refer to it as a non-legally binding instrument.

The Council should act within the scope of the powers conferred upon it by the TEU. This Resolution is concerned with the exchange of information between Member States for the purposes of preventing and combating crime and thus falls within the field of activity set out in Article 30 TEU, in particular Article 30(1)(b).

*Non-binding nature of the Resolution*

2. **The EM states under Policy Implications: “This proposal is a non-binding Resolution which imposes no legal obligations on the countries concerned.” It is true that paragraphs 1 and 4 contain the words “Members States are invited to ...” though elsewhere there are words which look as if they are intended to impose binding obligations, *eg* in paragraphs 7 and 8. Is the EM technically correct in calling the Resolution “non-binding”? Surely, what matters from the point of view of policy (not to mention the democratic rights of UK citizens) is what is the likely effect of the adoption of the Resolution? Do you not agree that it is highly**

**probable that if the Resolution is adopted most Member States will very willingly act in accordance with it?**

The Resolution is a non-binding instrument. In the latest version of the Resolution the language that was more appropriate for a legally binding instrument has been replaced with language that is suitable for a non-binding instrument.

If the Resolution is adopted Member States will no doubt act in accordance with it in order to try and prevent the violent scenes we have seen at recent international events.

*Scope of the Resolution/relationship with the Joint Action*

**3. The relationship with the Joint Action of 26 May 1997 is somewhat puzzling. Does the Resolution extend the Joint Action by requiring information on individuals, including their names, as well as groups or by extending the range of events beyond those listed to which the Joint Action relates? If the Resolution is not extending the Joint Action, why is it necessary to have Article 9 (Liaison Officers) which is stated to apply “by analogy” with the Joint Action? Why does the Resolution reproduce obligations in the Joint Action? For example, Article 2 of the Resolution appears to reproduce Article 1(2) of the Joint Action.**

The resolution highlights, in one document, the range of existing measures on the sharing of information to prevent violence at European Council meetings.

I recognise there is some overlap between the Joint Action and the resolution. The resolution does not extend the scope of the Joint Action. However, as you point out, the resolution refers to information on individuals as well as groups.

The reference to Liaison Officers is included in the resolution to remind Member States of the potential usefulness of liaison officers in this context.

**4. Both Articles 1 and 4 contain invitations to supply information and it is unclear to the Committee why two invitations are necessary and whether, and if so to what extent, they overlap. What is your understanding of these provisions?**

We agree that there is a large degree of overlap between Articles 1 and 4. Article 1 provides the general rule. Article 4 provides for a more specific application of the general rule as it refers to the names of individuals convicted of relevant offences.

*Intelligence-led checks*

**5. In your Explanatory Memorandum you point out that the draft Resolution now refers to “intelligence-led checks” focused on individuals in respect of whom there are substantial grounds for believing that they intend to enter the Member State with the aim of disrupting public order” (Article 3). You say that this reference is “now more precise and reflects the UK practice of threat assessments complemented by effective use of police intelligence in identifying those who may pose a threat”. What is the UK practice of threat assessments?**

If the UK police were in receipt of intelligence that a group or individual was travelling to a specific event, before sending this information to another Member State they would carry out a nine point risk assessment to ensure that the information is necessary to prevent or detect crime or enforce the rights or

freedoms of others. An assessment of the group's capability might be added to the intelligence to assist the host country adopt the appropriate policing plan.

An example of this would be intelligence that the certain groups with a history of violence were intending to travel to France to demonstrate. The UK Police would provide historical data as to the groups' capabilities, including the tactics adopted by them. This would help foreign Law Enforcement agencies in adopting their policing for the demonstration.

**6. What in practice happens during, and what are the possible consequences of, an “intelligence-led check”? Is the “suspect” stopped/ questioned/ searched/ refused entry or what?**

An intelligence-led check is a check on the passport or identity card to confirm the identity of the holder. Any decision to refuse entry will need to be consistent with the Directive 64/221 EC. A decision to refuse entry to an EEA national public policy grounds will be based only on the personal conduct of the individual, not for general or deterrent reasons.

As far as the UK is concerned, we would only refuse entry to those

—who have been convicted of a serious offence normally attracting a custodial sentence of two years or more and

—the subject's history and previous convictions provide evidence of a propensity to re-offend or

—where an offence is particularly serious (drug smuggling, facilitating entry of illegal immigrants, rape, murder etc)

*Substantial grounds*

**7. The Resolution provides for the supply of information on, and intelligence-led checks focused on, “individuals in respect of whom there are substantial grounds for believing that they intend to enter into the Member State with the aim of disrupting public order and security at the event”. The Resolution does not, however, identify what is meant by “substantial grounds” in this context. Can you please clarify, preferably by giving examples, what would amount to “substantial grounds” in the present context?**

As you point out “substantial grounds” is not defined. It will be a matter of judgement for the Member State considering supplying information whether there are substantial grounds in a particular case. The use of the expression “substantial grounds”, however, indicates that information should only be passed on where there is clear evidence that an individual or group is intent on causing disruption. Previous convictions for relevant offences may constitute substantial grounds (Article 4) but should not be taken to automatically do so (Article 5).

Before sending information to another Member State, the UK Police Service undertakes a nine-point risk assessment plan, to ensure that it is necessary to prevent or detect crime or enforce the rights or freedoms of others.

**8. A reading of Articles 4 and 5 would suggest that previous convictions for relevant offences may constitute substantial grounds (Article 4) but should not be taken to automatically do so (Article 5). But how can a previous conviction evidence intention to enter with the aim of disruption?**

A recent conviction involving violence, incitement or conspiracy at a similar event may show intention to enter with the aim of causing violence once more. But, a 5-year-old conviction, for example, may not in itself constitute substantial grounds.

The Resolution does not itself set out the grounds on which a person can be refused entry. That is set out in Council Directive 64/221/EC of 25 February 1964. This Directive clearly states that “previous criminal convictions shall not in themselves constitute grounds for the taking of such measures”.

**9. Under what legislative framework is/would information be handed over by UK authorities to authorities in other States? What safeguards exist for the individual concerned?**

Under domestic common law, there is a positive duty on the police to gather, store and disseminate information about those who commit crime in order to prevent and detect crime. The European Convention on Human Rights imposes a positive obligation on the police to enforce rights and freedoms. It also imposes a positive obligation to prevent interference with those rights.

In disseminating information to other states, the police carry out a nine point risk assessment in respect of each piece of information it proposes to share. This balances the interests of the individual against the needs of the public at large. It also ensures that the disclosure proposed is proportionate to the legitimate aim proposed.

There are safeguards for the individual concerned. An exercise of power by the State to provide personal data is potentially judicially reviewable. Insofar as the exercise of the power involved the transfer of personal data, it would also be subject to the data protection legislation and the remedies available under that legislation.

*Schengen “alerts”*

**10. The penultimate paragraph of the preamble to the Resolution envisages the possibility of an alert being placed on an individual. Given the dismantling and absence of internal border controls within the Schengen area it is difficult to see how practical it is to control access at the national frontier except at the Schengen perimeters. Is it envisaged that members will close their borders temporarily? How else will so called “intelligence-led checks” be conducted inside the Schengen area?**

Whilst the UK does not participate in arrangements under Article 2 of the Schengen Convention, for those contracting parties who do participate, it is already possible to reimpose internal border checks temporarily where public policy or national security so require. This measure should only be used as an exception, and any Member State who wishes to reimpose border checks must inform the Presidency and other Member States in writing.

For example, the French Government decided to reinstate border controls temporarily on its borders with Belgium, Germany, Italy, Luxembourg and Spain from 22 May to 3 June 2003. This decision was taken on the grounds of the threat of terrorist acts and the risk of serious public disorder, in the context of the Summit of Heads of State or Government of the G8 Member States which was taking place in Evian-les-Bains at the beginning of June.

The proposal in this Draft Resolution to focus on intelligence-led checks is also aimed to limit, as far as possible, the inconvenience caused by the checks on travellers in such occasions.

**11. Could the information exchanged under the Resolution result in the issuing of an alert to the Schengen Information System (SIS)? According to Article 96(2) of the Schengen Convention alerts may be based on a threat that an alien may pose to public policy, public security or national security in particular where there is ‘clear evidence’ that an alien intends to commit serious criminal offences in the territory of a Party to the Convention.**

Yes, but only if the criteria for entering an alert under a specific article were met. The two most relevant alerts that may be issued are under Article 96 or Article 99 of the Schengen Convention. Both alerts are issued where there is clear evidence that the person concerned intends to commit extremely serious criminal offences, but an Article 99 alert is to exercise discreet surveillance or specific checks (if allowed under national law) on persons or vehicles and Article 96 is to refuse entry. It should also be pointed out that Article 96 only applies to ‘aliens’ (non-EEA nationals).

In addition, the decision to place an alert in the Schengen Information System is made by a national administration. It is not currently possible to include an alert in the Schengen Information System for one Member State only. This resolution could not have the legal effect of altering the Schengen Convention to make that possible. (So for example, if the French wanted to create an Article 96 alert on a US national, that person would then be refused entry to the whole of the Schengen area).

#### *Retention of personal data*

**12. Article 8 sets out a restriction on the use and retention of personal data but that restriction may be lifted by agreement with the Member State supplying the data. What is the UK’s practice? Would the UK impose restrictions as to time retained and usage of information supplied? If not, why not?**

On the retention of personal data, the current UK practice is not to impose the restrictions on the length of time personal data could be held in that Member State. However, there is an unwritten agreement that this data will only be used and retained for the duration of the event being policed. This resolution will reinforce that unwritten agreement. It is for the Member State receiving that information to make that decision in line with its national legislation.

The retention of personal data in the UK is governed by the Data Protection Act 1998 which requires that personal data should not be kept longer than is necessary for the purpose for which it was acquired. This will continue to be their practice after the resolution is adopted.

**13. The Resolution would appear to raise substantial data protection concerns. Have the Information Commissioner and the Schengen Joint Supervisory Authority been consulted on its content?**

This resolution merely reaffirms the procedures for exchanging information. Point 7 of the resolution clearly states

“Nothing in this Resolution should be interpreted as departing from the principle that the exchange of personal data shall comply with the relevant national and international legislation...”

There is no obligation for the Schengen Joint Supervisory Authority to study the content of this proposal given that the resolution does not invite Member States to

use of the SIS for exchanging data. The JSA is solely concerned with ensuring that the central technical support function of the Schengen Information System conforms to the robust data protection safeguards within the Schengen Convention.

Equally there are no new obligations within this resolution, on which the Information Commissioner would need to be consulted. However, we have drawn this resolution to the attention of the Office of the Information Commissioner.

*Freedom of expression/lawful protest*

**14. The Resolution, if implemented by a Member State, could give rise to restrictions of the freedom of an individual or of groups of individuals to exercise their rights of freedom of expression and of assembly and association (EU Charter Articles 11 and 12). It seems clear from the resolution that an individual might as a consequence of information passed under the Resolution be subject to an intelligence-led check even where there is no intention to commit a criminal act. Are you content that this is proportionate? In your Explanatory Note you say that the measures are not targeted at legitimate, peaceful protesters. But how can you be sure that lawful protest will not be stifled?**

This resolution does not in itself restrict the freedom of the individual. Where Schengen borders have been reimposed, individuals may be stopped and their passports checked based on information provided by another Member State. Those who pose no threat to public order will be allowed to enter the country and lawful protest will not be stifled.

Any action taken by a Member State to restrict free movement rights for the purpose of preventing the disruption of public order and security at a European Council or similar meeting will need to be consistent with the Directive 64/221 EC. This allows derogation from free movement rights of EU citizens and their family members on the grounds of public policy, public security and public health.

**Letter from Lord Grenfell, Chairman of the European Union Committee, to Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

Thank you for your letter of 3 December which has been considered by Sub-Committee E (Law and Institutions). We are grateful for the detailed responses given to our questions. There remain, however, a number of points on which the Committee would be grateful for further information or assurances from the Government.

*Question 2—the prescriptive/permissive nature of the text*

Your response implied that there is a new version of the text and your officials have now provided the “latest” text (Doc 13915/03, dated 4 November). We understand that this text has been agreed by jurist-linguists and would be the text likely to be put before the Council for adoption by the Council. We note that the draftsmen have sought to make the language less prescriptive by the use of words of invitation. However, it remains clear, notwithstanding the use of verbs such as “should” or “may”, that the Resolution is intended and is likely to affect how the police and border control officials will handle personal information and treat the citizen. While the Resolution may, in a formal legal sense, be “non-binding” it should, because of its content and its likely effects in practice, be considered with the same care as if it were a legislative instrument. If the Resolution were not

intended to have an effect on how national police and other authorities should behave then it would not be being brought forward or being given such political priority as it appears to have.

*Question 7—substantial grounds*

You explain that the use of the expression “substantial grounds” indicates that information should only be passed on “where there is clear evidence that an individual or group is intent on causing disruption”. This raises the question as to what would amount to “clear evidence” of such intention. This criterion, as you will appreciate, is of paramount importance to the operation of the Resolution and for the citizens concerned and therefore we would be grateful if you could clarify this.

*Question 9—the legislative framework*

You say that there would be no legislative framework in the UK for the collection and dissemination of information by the police but that there is, first, a positive duty on the police acting under the common law and, second, an obligation on the police, under the ECHR, to prevent interference with ECHR rights. The issue is, in our view, not what rights the Council may have in its business not being disrupted but how the actions proposed in the Resolution would interfere with the individual’s rights under the ECHR (of privacy, freedom of expression, assembly). Could you please confirm that the said duty at common law and the positive obligation to prevent interference with rights under the ECHR has itself to be exercised in accordance with the ECHR and therefore with the principle of proportionality. We note your explanation that proportionality is met in part by the nine point risk assessment undertaken by the police in respect of each piece of information it proposes to share. But how is the principle applied to other provisions of the Resolution, in particular control over use of information supplied (Article 8)?

*Question 12—retention of personal data*

You confirm that it is current UK practice not to impose restrictions on the length of time personal data can be held in the Member State to whom it was supplied. You go on to say that the Resolution will, however, reinforce an “unwritten agreement” that the data will only be used and retained for the duration of the event being policed. This basic rule is set out in Article 8. You do not, however, identify the field of application or detailed terms of the “unwritten agreement”. In particular what is not clear is whether the unwritten agreement to which you refer expressly envisages information with consent being held beyond the event in question. The Committee proposes that all the words in Article 8 following the word “Resolution” should be deleted.

The Committee decided to retain the proposal under scrutiny and looks forward to receiving clarification of the points set out above.

*11 December 2003*

**Letter from Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 11 December 2003.

You asked for assurance that the Resolution will be considered with the same care as if it were a legislative instrument. I can give you that assurance. Indeed, it is for the reasons you outlined that we deposited this document for scrutiny.

You asked what would amount to “clear evidence” that an individual or group is intent on causing disruption. Whilst it would not be possible to give a definitive criterion of clear evidence, a recent conviction involving violence, incitement or conspiracy at a similar event may show intention to enter with the aim of causing violence once more.

However, I can reassure you that even if the police had clear evidence of intention to cause disruption they would still carry out the nine point risk assessment on each piece of information. This risk assessment balances the interests of the individual against the needs of the public and ensures that the disclosure proposed is proportionate to the legitimate aim pursued.

Furthermore, I can confirm that the positive duty on the police under common law to gather, store and disseminate information about those who commit crime must be exercised in accordance with the ECHR and with the principle of proportionality. In addition, the transfer of personal data is subject to safeguards under data protection legislation.

The “unwritten agreement” to which I referred does not envisage information provided being held beyond the event in question. There is no exception to this. The retention of personal data in the UK is governed by the Data Protection Act 1998 which requires that personal data should not be kept longer than is necessary for the purpose for which it was acquired. I note your proposal that the words “unless agreed otherwise with the Member State which supplied the data” should be removed. However, I do not believe that removing this phrase provides a greater safeguard for the individual. The Resolution encourages Member States to consult colleagues who supplied the data about retention.

*18 December 2003*

**Letter from Lord Grenfell, Chairman of the European Union Committee, to  
Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

Thank you for your letter of 18 December which was considered by Sub-Committee E (Law and Institutions) at its meeting on 14 January. We remain concerned about the implications of the draft Resolution for civil liberties and for the rights of freedom of movement given to citizens of the Union and for the protection of personal information. Two matters remain of particular concern to the Committee.

*(a) Substantial grounds*

Both Articles 3 and 4 of the draft Resolution contain the requirement that there should be “substantial grounds for believing that they [the individuals concerned] intend to enter the Member State with the aim of disrupting public order and security at the event or committing offences relating to the event”. You say that it is not possible to give a definitive criterion of “clear evidence” that an individual is intent on causing disruption but you say that “a recent conviction involving violence, incitement or conspiracy at a similar event may show intention to enter with the aim of causing violence once more”. We note that you say “may show”. As Article 5 of the Resolution indicates the mere existence of criminal convictions does not automatically justify the adoption of the measures referred to in the Resolution. Do “the measures” referred to in Article 5 include the supply of

information under Articles 1 and 4 or is the term restricted to the “checks” envisaged in Article 3? What is the relationship between the last two lines of Article 4 (“including names of individuals convicted of offences” etc) and Article 5? If the measures referred to in Article 5 include the provision of information under Articles 1 and 4, might not Article 5 suggest that something more than a recent conviction is necessary in order to establish substantial grounds for believing that the individual has the required intentions? We would welcome clarification of these issues.

You refer to the nine point risk assessment. But that exercise appears to be concerned with the balancing of competing interests and not with the criteria for identifying the nature or weight of the evidence on one side of the balance. We do not suggest that the nine point risk assessment is not an important step to be taken by the police in deciding whether or not to pass information to another Member State but that assessment does not obviate the need for “clear evidence” to justify the belief that the individuals concerned intend to enter the Member State with the aim of disrupting public order or committing offences relating to the event in question. Do you agree?

*(b) Retention of personal data*

You reject the Committee’s proposal that the words “unless agreed otherwise with the Member State which supplied the data” should be removed. You say that you do not believe that removing the phrase would provide a greater safeguard for the individual. We disagree. Removing those words from Article 8 would in our view strengthen the basic rule that information provided should not be held beyond the event in question. You suggest that the Resolution would encourage Member States to consult colleagues who supplied the data about retention. As you will be aware from the earlier correspondence the Committee takes little comfort in this because it is, as you have said, the current UK practice not to impose restrictions on the length of time personal data can be held in the Member State to whom it has been supplied.

The Committee decided to retain the proposal under scrutiny and looks forward to receiving your response to the issues set out above.

*15 January 2004*

**Letter from Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 15 January.

I believe that the “measures” in Article 5 include the supply of information under Articles 1 and 4 and the checks under Article 3. Article 1 provides the general rule for supply of information and Article 4 a more specific application of the general rule, and the principle in Article 5 applies to both. You asked about the relationship between the last two lines of Article 4 and Article 5. Article 5 ensures the police do not automatically supply details of those with a criminal conviction, whether for a public order or unrelated offence, without believing there are substantial grounds to believe that they intend to enter the Member State with the aim of disrupting public order. The last line of Article 4 allows the police to supply the names of individuals convicted of offences provided the “substantial grounds” test is met.

I agree that Article 5 may suggest that something more than a recent conviction is needed to establish substantial grounds for believing that the individual has the required intentions.

I certainly agree that the nine point risk assessment does not alleviate the need for “clear evidence” to justify the belief that the individuals concerned intend to enter the Member State with the aims of disrupting public order.

On the retention of personal data, you suggested removing the phrase “unless agreed otherwise with the Member State which supplied the data”. However, I stand by my previous argument. There is an unwritten agreement that data supplied will only be used and retained for the duration of the event being policed and this resolution will reinforce that unwritten agreement. To act otherwise may only be by way of express agreement with the Member State which supplied the data and safeguards for individuals will exist. In the UK, the exercise of power by the State to provide personal data is potential subject to judicial review. Furthermore, insofar as the exercise of the power involved the transfer of personal data, it would also be subject to data protection legislation and remedies available under that legislation. All Member States are bound by the data protection principles under in the Data Protection Directive (95/46/EC).

*4 February 2004*

**Letter from Lord Grenfell, Chairman of the European Union Committee, to  
Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

Thank you for your letter of 4 February. This was considered by Sub-Committee E (Law and Institutions) at its meeting on 11 February.

The Committee is most grateful for the explanation of your understanding of the relationship between Articles 1, 3, 4 and 5 and for your confirmation that something more than a recent conviction is needed to establish substantial grounds for believing that the individual intends to enter a Member State with the aim of disrupting public order and security at a relevant event or committing offences relating to the event. There will be a need for “clear evidence” to justify the belief. The Committee would therefore be grateful, if the Council Resolution is adopted, for the Government to deposit with Parliament any guidance given to or produced by authorities in the United Kingdom as to what factors might be relevant, and what weight should be given to those factors, in determining whether or not there exists “substantial grounds” for the purposes of the Resolution.

The issue as regards the retention of personal data remains one of major concern to the Committee. You make clear that you do not agree with the Committee’s recommendation that the words “unless agreed otherwise with the Member State which supplied the data” should be removed from Article 8 of the draft Resolution. You say that insofar as the exercise of the power to provide personal data involves its transfer, it would also be subject to data protection legislation and remedies available under that legislation. You refer to the fact that all Member States are bound by the principles under the Data Protection Directive. We note, however, that the Directive provides exemptions in relation to security and the prevention of crime (Article 13(1)(a), (c) and (d)) and that the UK legislation maintains exemptions in respect of those matters (Data Protection Act 1998 sections 28 and 29). We would be surprised if it was only the United Kingdom who had taken advantage of the exemptions permitted by the Directive. It is therefore unclear to what extent the rights of the individual would be safeguarded by data protection legislation in a situation where a Member State, say the United

Kingdom, agreed that the information in question could be retained beyond the event in question.

The Committee decided to retain the proposal under scrutiny. I look forward to receiving your comments on the above points.

*12 February 2004*

**Letter from Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 12 February.

You asked that, if the Council Resolution is adopted, the Government deposits with Parliament any guidance on what constitutes “substantial grounds” for the purpose of the Resolution. I have provided you with copies of the nine-point risk assessment, which is currently used by officers. I recognise that this does not outline the criteria for identifying the nature or weight of the evidence. Should any further guidance be issued in future in relation to this Resolution, we will deposit it with Parliament.

You also refer to the words “unless agreed otherwise with the Member State which supplied the data” in Article 8 which relates to use of personal data obtained under the Resolution. You note that it is unclear to what extent the rights of the individual would be safeguarded by data protection legislation in a situation where a Member State agreed that the information in question could be retained beyond the event in question. As you state, the Data Protection Act 1998 provides exemptions in relation to security and prevention of crime. These reflect the exemptions set out in the Data Protection Directive to which other Member States are bound. However it is clear that rights and obligations in relation to personal data (including the data protection principles) may only be restricted when such a restriction constitutes a “necessary measure” to safeguard, for example, national security. This will be a question of fact and must be determined in each circumstance. Any Member State agreeing that personal data could be retained beyond the specified scope and purpose of the Resolution would need to be able to demonstrate, if necessary, that this was a necessary measure to safeguard security or to prevent a criminal offence.

*11 March 2004*

**Letter from Lord Grenfell, Chairman of the European Union Committee, to Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

Thank you for your letter of 11 March which was considered by Sub-Committee E (Law and Institutions) at its meeting on 24 March. You will recall that the letter dealt with two matters; guidance on what constitutes “substantial grounds” for the purpose of the Resolution and, second, the adequacy of data protection legislation in relation to Article 8 of the proposed Resolution.

First, we are most grateful for the Government’s undertaking to deposit with Parliament any further guidance issued in relation to the Resolution if adopted, and in particular dealing with the criteria for identifying the nature or weight of the evidence to which authorities may have regard in determining whether there are “substantial grounds” before information about an individual is handed over to the authorities in another Member State. Such disclosure would, we believe, be most helpful and might go some way to alleviate the concerns to which the Resolution gives rise.

The second matter relates to Article 8 on the use of personal data transferred under the Resolution. We sought clarification as to what safeguards there would be under data protection legislation for the individual concerned, given the exceptions both in the EC Directive and in domestic law relating to security and the prevention of crime. You say that whether or not a restriction would constitute a “necessary measure” to safeguard, for example, national security would be a question of fact to be determined in each circumstance. Accordingly it would be for each Member State obtaining and using personal data to justify it if challenged. This may be the theory but it is doubtful what comfort or assistance it gives to the individual concerned because he or she will not know who is holding the information and to what use it is being put. In this context the Committee recalls the conclusions of the Privy Counsellor Review Committee, when it said: “there are obvious risks to privacy in keeping information about individuals. The existence of data creates its own demand for access to it from a wide range of bodies for a variety of reasons, mostly unrelated to national security. It also creates the potential for abuse. It is, therefore, important to maintain strict limits on the Government’s ability to require data to be retained and on the circumstances in which data can be accessed, and to ensure that the access rules are strictly enforced” (para 398, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC 100).

While we recognise that the State should be enabled in the interests of national security to retain information about individuals there should, nonetheless, be some independent supervision of the exercise of such powers. It is by no means clear that there is that protection in the United Kingdom and the Committee has no information as to whether the position is better in any other Member State. Article 8 therefore remains a matter of major concern to the Committee. What assurances can the Government provide?

The Committee decided to retain the document under scrutiny.

*25 March 2004*

**Letter from Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 25 March, in which you express concern about the provisions concerning the retention of personal data in this Resolution.

As stated, any Member State invoking the national security exemption in order to retain personal data beyond the specified scope and purpose for which it was transmitted would, under the provisions of the Data Protection Directive 95/46/EC, need to be able to demonstrate, if necessary, that this was a proportionate and necessary measure to safeguard security or to prevent a criminal offence. This is a question of fact. The Directive provides for remedies for any breach of rights guaranteed by the national law applicable to the processing in question. The Data Protection Act 1998 also includes certain safeguards and, in particular, Part V deals with enforcement of the data protection principles under the Act. Under section 42 of that Part a person who is or believes himself to be directly affected by any processing of personal data may request the Information Commissioner for an assessment as to whether it is likely that such processing has been or is being carried out in compliance with the Act. In addition, where a certificate has been signed by a Minister certifying a national security exemption invoked under section 28 of the Act, a person directly affected by the certificate has a right of appeal.

As a non-binding instrument, this draft Resolution cannot be amended in a way to provide the Committee with the assurance you seek on the retention of personal data in these circumstances, as no Member State would be under a legal obligation to implement such amendments. The retention of personal data by the police and other authorities raises a number of important and sensitive issues, such as those raised by the Privy Counsellor Review Committee's conclusions on the retention of communication data when examining the Anti-terrorism, Crime and Security Act 2001. Such issues go much wider than the scope of this current Resolution.

I am grateful for the interest you have taken in this document. It has raised some issues that may need to be considered in the context of any future binding legal instruments concerning this subject at EU level.

At this stage, however, I would hope that members of the Committee might be satisfied with the effective scrutiny they have carried out of this draft Resolution and that they may be prepared to pursue their wider concerns in other ways.

*2 April 2004*

**Letter from Lord Grenfell, Chairman of the European Union Committee, to  
Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office**

Thank you for your letter of 2 April which was considered by Sub-Committee E (Law and Institutions) at its meeting on 21 April. The Committee is grateful for your prompt response.

We are also grateful for further explanation of the Data Protection Act 1998 but the Committee remains concerned about the implications of Article 8 of the draft Resolution. You say that the 1998 Act would enable an individual to request the Information Commissioner to provide an assessment as to whether it is likely that processing of data has been or is being carried out in compliance with the Act. However, the Act is primarily directed towards activities within the United Kingdom. The concern of the Committee is as much about the use of information relating to UK and other citizens which is being placed in the hands of authorities in other Member States. While the 1998 Act provides for the exchange of information between the Information Commissioner and other supervisory authorities in the Union it is by no means clear that the Commissioner has the legal power to investigate in other Member States and to give a view as to what may be happening in relation to data on a particular individual held by police and security authorities in other Member States.

As you will be aware from our earlier correspondence the Committee believes that Article 8 could and should be improved. But it appears clear from your letter, and from the earlier correspondence, that the Government are not prepared to reopen discussion on the draft Resolution or to argue for the amendments proposed by the Committee or some other amendment designed to provide safeguards for the individual concerned.

It is with misgivings that we clear the document from scrutiny.

*21 April 2004*

### APPENDIX 3: RISK ASSESSMENT FOR DISSEMINATION OF INFORMATION OUTSIDE THE UNITED KINGDOM

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Please complete the following risk assessment for any material which is to be circulated to investigative agencies outside the United Kingdom and which provides personal information:

1. What rights will disclosure infringe?
2. Is it necessary (*ie* is there a pressing social need) to disclose this information in order to prevent or detect crime or enforce the rights or freedom of others?
3. So far as we can tell has the information been obtained at source lawfully?
4. Is the information believed to be reliable/accurate?
5. What is the likely value/weight of the information?
6. How much of the information held do we need to disclose?
7. In light of all the above factors does the balance favour disclosure?
8. In what jurisdiction is the information to be used?
9. Are there additional risks to which the individual will be exposed as a result of disclosure within that jurisdiction *eg* internment without trial, death penalty, inhuman or degrading treatment?

## **APPENDIX 4: REPORTS**

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### **Recent Reports from the Select Committee**

Developments in the EU (13th Report session 2003-04, HL Paper 87)

Correspondence with Ministers (10th Report session 2003-04, HL Paper 71)

Annual Report 2003 (44th Report session 2002-03, HL Paper 191)

The Draft Constitutional Treaty (41st Report session 2002-03, HL Paper 169)

Review of Scrutiny of European Legislation (1st Report session 2002-03, HL Paper 15)

### **Recent Reports prepared by Sub-Committee E**

Further evidence by Caroline Flint MP on Asylum Procedures (18th Report session 2003-04, HL Paper 106)

The Rome II Regulation (8th Report session 2003-04, HL Paper 66)

The Future Role of the European Court of Justice (6th Report session 2003-04, HL Paper 47)

Evidence by Caroline Flint MP on Asylum Procedures (1st Report session 2003-04, HL Paper 8)

### **Session 2002-2003 Reports prepared by Sub-Committee E**

The Future Status of the EU Charter of Fundamental Rights (6th Report, HL Paper 48)

The Future of Europe: Constitutional Treaty—Draft Articles 1–16 (9th Report, HL Paper 61)

The Future of Europe: Constitutional Treaty—Draft Articles 24-33 (12th Report, HL Paper 71)

The Future of Europe: Constitutional Treaty—Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice) (16th Report, HL Paper 81)

The Future of Europe: Constitutional Treaty—Draft Articles 43–46 (Union Membership) and General and Final Provisions (18th Report, HL Paper 93)

The Future of Europe: Constitutional Treaty—Articles 33–37 (The Democratic Life of the Union) (22nd Report, HL Paper 106)

If At First You Don't Succeed ... Takeover Bids Again (28th Report, HL Paper 128)

Reforming Comitology (31st Report, HL Paper 135)

The Proposed Framework Decision on Racism and Xenophobia—an Update (32nd Report, HL Paper 136)

EU/US Agreements on Extradition and Mutual Legal Assistance (38th Report, HL Paper 153)

Evidence by Lord Filkin CBE on the Proposed Council Directive Defining Refugee Status and Those In Need of International Protection (43rd Report, HL Paper 173)