

**EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION  
AND JUSTICE AND HOME AFFAIRS MATTERS**

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL**

The EU Internal Security Strategy in Action: Five steps towards a more secure Europe

Submitted by the Home Office on November 29 2010

**SUBJECT MATTER**

1. This Explanatory Memorandum relates to the Commission's Communication "The EU Internal Security Strategy in Action: Five steps towards a more secure Europe". The Stockholm Programme, the current five year work programme for Justice and Home Affairs (JHA) agreed by Heads of Government at the European Council in December 2009, called on the Commission to "define a comprehensive EU internal security strategy". Taking this work forward, the European Council adopted in February 2010 an Internal Security Strategy (ISS). The ISS presented an overview of the general threats and challenges to internal security in the EU and the principles for how to tackle these issues. It did not recommend specific initiatives, instead calling on the Commission to propose actions for implementing the strategy. Similarly, the European Commission's Stockholm Programme Action Plan also tasked itself to present a Communication on internal security to be adopted in 2010.
2. Responding to these requests, the Commission's Communication, "The EU Internal Security Strategy in Action", seeks to translate the Council's ISS into an EU internal security plan of action. The Communication consists of an introduction, followed by a substantive section on the threats and proposals for action. It sets out five priority areas (disrupting organised crime; tackling terrorism; cyberspace security; border security; and civil contingencies) and specific initiatives for action. These are summarised in the annexed table, which also includes a column showing in which year each proposal will be brought forward and which institution/party is responsible. A section on implementation and evaluation is also included.

## **SCRUTINY HISTORY**

3. This is the first time the Commission's Communication has been presented. However the Council's Stockholm Programme, which first called for an EU internal security strategy, underwent extensive scrutiny. The first draft of the Council Conclusions document 11060/09 was cleared by the Lords' European Union Committee (EUC) on 10 December 2009 and by the Commons' European Scrutiny Committee (ESC) following a debate on 26 October 2009. The final text of the Stockholm Programme (Council Document 17024/09) was sent to the Committees on 4 January 2010. A further evidence session was held by the Lords' EUC on 17 March 2010. An evidence session was also held by the Lords' EUC on the Stockholm Action Plan on 13 October 2010. Regarding the Council's ISS, upon which this Communication seeks to build, former Home Office Minister Meg Hillier wrote to the Lords' EUC and Commons' ESC in January 2010 detailing the content of the draft ISS and noting that a Communication taking it forward was anticipated from the Commission.

## **MINISTERIAL RESPONSIBILITY**

4. Responsibility in England and Wales for policy on JHA within the EU is shared by the Home Secretary, the Secretary of State for Justice and the Attorney General. The Minister for Security (Home Office) has responsibility in England and Wales for cross-cutting resilience policy and in this role is supported by the Cabinet Office.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

5. The Scottish Cabinet Secretary for Justice has responsibility in Scotland and the Minister for the Department of Justice has responsibility in Northern Ireland for devolved JHA matters. The Scottish Government has seen and is content with this Explanatory Memorandum. We are in consultation with the Northern Ireland Executive and are awaiting clearance from their Minister for this Explanatory Memorandum. Civil protection is a devolved matter under the UK's devolution settlements and the Devolved Administrations have been consulted where appropriate in the preparation of this Explanatory Memorandum.

## **LEGAL AND PROCEDURAL ISSUES**

- (i) Legal basis
6. This Communication is not a legislative instrument. However, legislative proposals arising from the Communication would, in the majority of cases, have their legal base in Title V of the Treaty on the Functioning of the European Union (TFEU), although other proposals may have a financial or civil protection legal base.
- (ii) European Parliament procedure

7. The European Parliament (EP) has no formal role in agreeing the Communication. However, the EP's Civil Liberties, Justice and Home Affairs (LIBE) Committee has appointed Rita Borsellino (Italy EPP) as Rapporteur on the Internal Security Communication. While this is currently in the preparatory phase, it is likely that the EP will do an own-initiative report on this matter.

(iii) Voting Procedure in the Council

8. Not applicable to this Communication. The Communication is expected to be presented to Council on 2-3 December 2010 with Council Conclusions (a non-legislative statement of policy) likely to be discussed in early 2011. These Council Conclusions will be subject to agreement by unanimity amongst Member States.

(iv) Impact on United Kingdom Law

9. No impact from this Communication.

(v) Application to Gibraltar

10. Not applicable to this Communication. However, legislative proposals arising from this Communication may be applicable to Gibraltar.

(vi) Fundamental Rights Analysis

11. Not required in relation to this Communication.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

12. In respect of this Communication, none in the JHA field. However, EEA countries generally participate in EU civil protection measures and in negotiations on the rules for implementing legislation in this field.

## **SUBSIDIARITY**

13. It is appropriate for the European Commission to present a Communication on Internal Security as the Council's Stockholm Programme called on the Commission to "define a comprehensive EU internal security strategy". The recommendations within the Communication would, in theory, necessitate a response at EU level. However, individual measures will need to be judged against this principle at the time they are proposed.

## **POLICY IMPLICATIONS**

14. The Communication prefaces the section on specific initiatives with a preamble setting out the Commission's five priorities for action in the area of EU internal security: disrupting organised crime; tackling terrorism; cyberspace security; border security; and civil contingencies. The

Government broadly agrees with the need to focus on these five priority areas, which reflect the priorities identified in the ISS. The opening section goes on to comment on promoting general cooperation between Member States, EU institutions and EU agencies. This focus complements the UK stance taken through COSI, the EU's Standing Committee on operational cooperation on internal security, that there should be a more holistic approach to internal security matters. The Communication also emphasises the importance of engagement with third countries, a point also raised by the UK at meetings of COSI, before moving on to specific areas of policy.

15. **Organised crime:** This section proposes a combination of practical and legislative measures for detecting and disrupting organised criminals, with a particular focus on confiscating criminal assets. This Government supports the steps outlined for strengthening law enforcement cooperation and for greater practical action and collaboration in partnership with other Member States and EU Agencies where appropriate. This includes proposals for more joint operations and greater use of Joint Investigation Teams. We also support greater use of the 'administrative approach', which builds on the proposals for innovative, practical methods for tackling organised crime that were set out in the UK paper presented to COSI in June. Whilst the Government welcomes an increased focus on seizing criminal assets, we believe this should be achieved through practical cooperation rather than the proposal in the Communication for new EU legislation. There is no basis in the Stockholm Programme for legislation in this area. The suggested proposal within the Communication for new powers for Asset Recovery Offices is also at variance with the ISS.
16. The Communication also proposes legislation for tackling online sale of counterfeit goods. This recommendation is dependent on the outcome of the Commission's report and consultation on the implementation of the Intellectual Property Rights Enforcement Directive. This proposal pre-empted the report which is not due to be completed until March 2011. This legislative proposal does not, therefore, adhere to the better regulation principles within the Stockholm Programme, which state that new legislative proposals should only be tabled after a thorough evaluation.
17. In conclusion, whilst the Government welcomes proposals for more practical action and cooperation, we do not endorse legislative proposals that go beyond the Stockholm Programme. Such legislative proposals are also at variance with the ISS's focus on practical action, as well as the remit of COSI, which is focussed on implementing a non-legislative agenda for tackling organised crime.
18. **Counter-terrorism:** The Commission's proposals in this section include measures for addressing radicalisation and recruitment, cutting off terrorists' access to funding and material and protecting transport. The Government welcomes EU efforts to improve information sharing and coordination in the area of land transport security. However, the Commission must recognise the complex and broad nature of the sector

and avoid duplication of efforts by setting up additional groups or adopting similar measures to that of aviation and maritime security. The Government also supports the EU action plan on Enhancing the Security of Explosives, including the proposed regulation on Precursors to Explosives. However, the Government feels that other proposals in this section fail to recognise the existing bilateral and multilateral work being undertaken by Member States.

19. The Communication states that it will "consider devising a framework for administrative measures under Article 75 of the Treaty as regards freezing of assets". The Government opposes the use of Article 75, which we would see as an unnecessary expansion of the EU's work in this field. Instead we would encourage the Commission to consider the use of Article 74 that would maintain an obligation on Member States to cooperate. The Commission also states that it will promote the creation of an EU radicalisation awareness network, ministerial conference and a handbook of actions and experiences. The Government is concerned that many of these initiatives duplicate existing work at a bilateral level without adding value. The Commission should give further thought to what practical measures can usefully be taken at an EU level.
20. **Cybercrime:** This section proposes a mixture of practical and legislative measures for tackling cyber crime across the EU. The Communication seeks to improve the guidance provided to citizens to help them protect themselves from cyber threats. We believe that this is a positive approach, and would encourage the EU to help develop a cross-EU programme of public awareness, building on the work done to protect children online. The Communication also proposes measures to encourage the European Network and Information Security Agency (ENISA) to promote national Computer Emergency Response Teams (CERTs), and increase the cooperation between them. This is one of the better examples of ENISA in action and we see this as a continuing strength of the Agency. However, the Communication is at odds with the ISS in suggesting the establishment of new EU structures and capacities for tackling cyber crime, including the development of an EU cyber crime centre. We believe that any action to tackle cybercrime arising out of this communication should be undertaken within existing structures and budgets, and should not require new EU legislation. It should also not be mandatory for Member States to report cyber crime to any new EU cyber crime centre.
21. **Border security:** The Government broadly supports the proposed combination of technical innovations and enhanced cooperation to improve the management of migration and combat criminality at the external borders of the EU. However, the only true deterrent to illegal migration into the EU is an enhanced expectation of swift return to the migrant's country of origin. The Government would therefore have welcomed the inclusion of measures to strengthen capacities in the area of voluntary and forced returns. We support proposals for the remit of Frontex to be expanded to allow the handling of personal data with adequate data protection safeguards. We believe that effective

cooperation between Frontex and Europol – including the exchange of personal data concerning criminals - will be vital for effectively tackling criminality. We also welcome the proposal for EU legislation on the collection of Passenger Name Records (PNR). PNR analysis is a fundamental part of the UK's e-Borders programme and an important tool in the fight against organised crime and terrorism. Whilst the Communication does not mention intra-EU journeys – which is important to the Government – the measure does not rule out an intra-EU provision in the PNR Directive itself.

22. **Resilience to crises and disasters:** The Commission proposes in this section a broad approach to improving disaster management efficiency and coherence in the EU. Amongst the proposals, the Commission suggests establishing a coherent EU risk management policy. The Government welcomes the prospect of a credible approach to national risk assessment, including natural and man-made disasters and malicious threats. The Commission also proposes to develop an integrated approach to situation awareness by strengthening links between existing early warning and crisis cooperation EU functions. We welcome moves to streamline the array of existing early warning and alert systems where this would help improve crisis coordination and make use of EU disaster management resources more cost effective.
23. Regarding proposals to establish a pool of voluntarily pre-committed civil protection assets, the Government supports the principle of a genuinely voluntary asset pool. However we would resist moves to prioritise EU operations over national operations, or to introduce a legal presumption that Member States will pre-commit disaster response assets for EU deployment, or any move to limit the right of Member States to decide asset deployments domestically or internationally.
24. In conclusion, the Government welcomes some of the proposals brought forward in this Communication, in particular those that support greater practical cooperation between Member States and EU Agencies. However the Government maintains a number of concerns with the Communication. It departs from the Council's Internal Security Strategy by proposing new EU structures, including an EU cyber crime centre, and new competence such as powers for new asset recovery offices. It also proposes legislation, such as a revised legal framework on asset recovery, which was unforeseen in the Stockholm Programme. By contrast, the ISS explicitly acknowledges 'the framework of the Stockholm Programme'. Such legislative proposals also run counter to the focus of the ISS and COSI on practical measures and cooperation instead of new EU legislation. In addition, we do not feel that the Commission's proposals on tackling terrorism place enough focus on bilateral and multilateral cooperation between Member States. The Government will present these views at discussions of the Communication at JHA Council.

## **IMPACT ASSESSMENT**

25. There are no direct legislative impacts arising from the Communication.

## **FINANCIAL IMPLICATIONS**

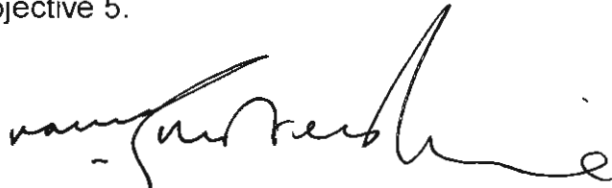
26. There will be no direct financial implications for the UK as a result of the Communication. However, individual measures proposed as a result of the Communication may have resource consequences. Those will need to be assessed as proposals are made.

## **CONSULTATION**

27. None outside Government and the Devolved Administrations.

## **TIMETABLE**

28. The Commission will present their Communication at the JHA Council on 2 December 2010. Our expectation is that Council Conclusions will be discussed in the Council in early 2011. The Presidency also envisages that the 14 December General Affairs Council will adopt Conclusions on the related Communication "Towards a stronger European disaster response: the role of civil protection and humanitarian assistance" which proposes the European Emergency Response Capacity to which the Communication covered by this Explanatory Memorandum refers as Action 4 under Objective 5.



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