



**Government Response to the
European Union Select Committee on
The Treaty of Lisbon: An Impact Assessment
(Tenth Report of Session 2007–08)**



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**Presented to Parliament
by the Secretary of State for Foreign
and Commonwealth Affairs
by Command Of Her Majesty
June 2008**

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HOUSE OF LORDS EUROPEAN UNION SELECT COMMITTEE

SESSION 2007-08: 10TH REPORT

THE TREATY OF LISBON: AN IMPACT ASSESSMENT

The Government welcomes the Committee's report on the Lisbon Treaty. The expertise, judgement and analysis of the Committee is, as always, very valuable and the Government welcomes the positive and significant contribution the Committee makes in the European field and will continue to make in the future.

The Committee's report has already been debated alongside Second Reading of the EU (Amendment) Bill in the House of Lords on 1 April and has informed the subsequent debate during Committee stage. The Government hopes that its response will prove equally useful in informing the debate during Report stage.

The Government welcomed the opportunity to contribute a significant amount of evidence – both oral and written – to the Committee's inquiry in order to inform the report. The content of that evidence is not for the most part repeated in the Government's response.

The Government would like to offer the following comments on the Committee's recommendations and conclusions:

Chapter 1: Introduction

12.1. We make this report for debate. We suggest that, exceptionally, it might be debated alongside Second Reading of the European Union (Amendment) Bill. We expect a Government response within the usual two months from publication, and ideally in time to inform Report stage of the bill (see paragraph 1.16).

The Government welcomes the Committee's detailed report. As the Committee suggested, the report was debated alongside Second Reading of the European Union (Amendment) Bill.

Chapter 2 General provisions: foundations of the Union

The structure of the Treaties

12.2. The division of material between the TEU – principles and objectives, provisions on the institutional framework, general provisions and the CFSP – and the TFEU, containing the details on how the Union is to function, is clear. The provisions of the two Treaties will have equal value. The Protocols will have the same legal status as the articles of the Treaties. The Lisbon Treaty itself is, however, a complex document, not easily accessible to the people whom it affects, and this is likely to be an obstacle to informed debate as to the merits of the Treaty (see paragraph 2.6).

The Government agrees that, as an amending treaty, the Lisbon Treaty – read in isolation – is not easily accessible to non-specialists. This is why – and in line with a request from the Committee – the Government prepared and published as Command Papers both the “Consolidated Texts of the EU Treaties as Amended by the Treaty of Lisbon” (CM 7310) and “A Comparative Table of the Current EC and EU Treaties as Amended by the Treaty of Lisbon” (CM 7311). The Government has also made these available on the FCO website, alongside a detailed “See For Yourself” guide to the Lisbon Treaty (see www.europe.gov.uk).

Values and objectives

12.3. The statement of Values in Article 2 TEU closely follows the statement of “principles” set out in Article 6(1) of the current TEU. “Respect for human dignity” and general “equality” have been added, and the Values are placed in the context of other values assumed to prevail in the Member States, such as tolerance and justice. We agree that these other values are accepted among the Member States. Respect for human dignity and equality have been recognised as general principles of EC law in the case-law of the European Court of Justice, so their addition does not, in our view, amount to a significant change (see paragraph 2.15).

The Government agrees with the Committee’s assessment of Article 2 TEU.

12.4. The statement of objectives in Article 3 TEU replaces the one found in the current TEU. While the new statement covers much of the same ground, the formulation of the objectives differs from the present provisions, and some objectives are removed and some are added, such as references to the development of “a highly competitive social market economy” and to promoting “social justice and protection”. The differences are likely to have some effect on the way in which other provisions of the Treaties are interpreted, not only by the European Court of Justice but also by the other institutions when undertaking their tasks. In certain cases, notably Article 352 TFEU (the revised version of the current Article 308 TEC, sometimes known as the “flexibility clause”), the statement of objectives will be directly relevant to the scope of Treaty provisions. In other cases the effects of the change will be felt only at the margins, in particular, to resolve uncertainty in interpretation of other Treaty provisions. Whether the changes will mean that proposals that would not be made under the existing Treaties will be brought forward, or that potential proposals will not emerge, remains to be seen (see paragraph 2.16).

Article 3 TEU provides a clear and comprehensive set of objectives replacing the comparable provisions in both the current EU and EC Treaties. The Government agrees that this covers much the same ground as the existing Treaties. Such substantive differences as there are include welcome innovations such as the explicit reference to protecting the rights of the child.

Every Explanatory Memorandum submitted to the Committees for a proposal with Article 308 as the sole legal base contains an explanation for the justification of the use of the Article. This will continue to be the case for Lisbon Treaty Article 352.

Citizenship

12.5. We note two changes of significance: the citizens' initiative, and (though other competences currently exist in these areas) the new explicit competence for measures on social security and social protection linked to rights of movement and residence. Some will see symbolic significance in the additional references to citizenship and its role in the amended TEU (see paragraph 2.20).

The Government welcomes the Committee's conclusions. The Government notes that citizenship of the European Union has existed since the Maastricht Treaty. It also recalls the conclusion of the Constitutional Affairs Committee that the Lisbon Treaty has no constitutional implications for British citizenship. It agrees that the introduction of the citizens' initiative is an important innovation providing an opportunity for citizens to raise concerns directly at the EU level.

Competences

12.6. The TEU sets out for the first time a clear statement that the Union may only exercise such competences (powers) as the Member States have conferred on it – the principle of conferral (Articles 4 and 5). All other competences remain with the Member States, which may decide to reduce the competences of the Union (see Article 48(2) TEU). The significance of these provisions lies in the articulation of these principles; their content has always been implicit in the Treaties (see paragraph 2.42).

12.7. The TFEU sets out, for the first time, categories of competences – exclusive, shared and supporting (Articles 2 to 6 TFEU) – and refers to competences in the descriptions of each category by more or less broadly-defined areas. The categories reflect the provisions of the TEC setting out the competences and the conclusions of the ECJ as it has examined those provisions over the years. Most areas of EU activity are defined as shared competences, where the list is illustrative, not exhaustive. In the case of the supporting competences, Union action “shall not entail harmonisation of Member States' laws or regulations”. The listing of areas of competences should not be regarded as determining the precise nature of the competences. For the detailed provisions relating to every competence, reference must be made to the subsequent provisions of the TFEU (see Article 2(6)) (see paragraph 2.43).

12.8. The TFEU (Article 2(2)) sets out that when the Treaties confer on the Union a competence that is shared with Member States, the Member States may only exercise their competence “to the extent that the Union has not exercised its competence” (see paragraph 2.44).

12.9. We consider that setting out the categories and the listing of areas of competence is a useful clarification (see paragraph 2.45).

The Government agrees with the Committee's assessment of the Lisbon Treaty's provisions on competences. (Conclusions 12.6 – 12.9.)

Legal personality

12.10. The Lisbon Treaty confers legal personality expressly on the EU, giving it the capacity to enter into legal relationships with other parties in its own right. But the European Community (in relation to the first pillar) has always had express legal personality and the European Union implicitly has had legal personality to the extent that it has the power to enter into international agreements under Articles 24 and 38 of the current TEU. Conferring legal personality expressly on the Union will have the effect that the other attributes of such status, such as the ability to join international organisations or to take, or be subject to, proceedings in international tribunals, will apply to the EU in the areas currently covered by the second and third pillars (see paragraph 2.58).

12.11. The conferral of legal personality does not itself affect the EU's competences, including its powers to enter into international agreements, or the relative competences of the EU and its Member States (see paragraph 2.59).

The Government agrees with the Committee's assessment of the Lisbon Treaty's provisions on legal personality. (Conclusions 12.10 and 12.11.)

Size of the Union

12.12. The amended TEU provides expressly for the European Council to set conditions of eligibility for states aspiring to become members of the EU. This codifies existing practice under which the current "Copenhagen criteria" were agreed (see paragraph 2.67).

12.13. It is significant that the Lisbon Treaty adds to the Treaties a clause confirming the right of a Member State to withdraw from the Union, and also sets out the procedure it could use to negotiate a withdrawal (see paragraph 2.68).

The Government agrees with the Committee's assessment of the Lisbon Treaty's provisions on the size of the Union. (Conclusions 12.12 and 12.13.)

Chapter 3 Simplified Treaty revision and the *passerelles*

- 12.14.** The simplified revision procedures and *passerelles* could be used to alter significantly the provisions on the face of the Treaties. But any Treaty revision by means of simplified procedures, and any changes to decision procedures by means of *passerelles*, will be subject to veto by the Government in the European Council or Council of Ministers. And, under the European Union (Amendment) Bill, government agreement to any such move will be subject to approval by both the House of Commons and the House of Lords (see paragraph 3.15).
- 12.15.** In addition, two of the *passerelles*, namely the second simplified revision procedure (Article 48(7) TEU) and the *passerelle* for measures concerning family law with cross-border implications (Article 81(3) TFEU), are subject to a veto by each national parliament, exercisable within six months. These vetoes are written into the Treaty and are independent of government. If they were needed, a procedure would be required to produce a single opinion from a bicameral Parliament. But in the UK they may never be needed, given the situation just described, viz. that both Houses will have a separate veto on government agreement in the Council (see paragraph 3.16).

The Government welcomes the Committee's assessment of the Lisbon Treaty's provisions on simplified Treaty revision and the *passerelles*. (Conclusions 12.14 and 12.15.)

Chapter 4: The Impact of the Treaty in the European Institutions

European Council

- 12.16.** The Lisbon Treaty makes highly significant changes to the European Council, the purpose of which is to make the European Council work better. It will become part of the EU's formal institutional framework and expressly subject, for the first time, to the jurisdiction of the ECJ. It will be given a more explicit leadership role in the EU (see paragraph 4.33).
- 12.17.** The creation of a full-time European Council President, in place of a six monthly rotation among heads of government, is a significant move, and is likely to make the European Council more effective at creating direction and action. This could mean a more active/activist European Council – a consequence which would be welcomed in some quarters but not in others (see paragraph 4.34).
- 12.18.** The European Council President will have two broad roles: the primary one of leading the European Council, and also ensuring the external representation of the Union on issues concerning the CFSP at his or her level and without prejudice to the High Representative (see paragraph 4.35).

The Government welcomes the Committee's conclusions on the European Council. (Conclusions 12.16 - 12.18.)

12.19. Concerns have been raised about the relationship between the European Council President and the other senior leaders of the Union, particularly the High Representative, the rotating presidency of the Council of Ministers, and the President of the Commission. There is little in the Lisbon Treaty itself to indicate how these relationships will work; only experience will show. While some progress towards clarifying this may be made before the Treaty's provisions come into operation, much will depend on practice (see paragraph 4.36).

The Government notes that the different roles identified by the Committee are themselves set out in some detail in the Treaties. But the Government recognises that, as is usual with Treaty provisions of this kind, there are other issues – relating for example to the identity and personal terms of the full-time President of the European Council and the new High Representative – that Member States must address. The Government will keep the Committee regularly informed of developments relating to the implementation of the Treaty.

Council of Ministers

12.20. The extension of the use of qualified majority voting (QMV) to more than 40 new areas is a significant change. Qualified majority voting becomes the default voting method in the Council of Ministers. Where there is a move from unanimity to QMV, if the UK wishes to block legislation it will have to construct a blocking minority rather than use a veto; the UK's share of a blocking minority goes from 32 per cent to 35 per cent. Equally, the extended use of QMV may help to advance UK interests in some cases. The extension of QMV, because it does not depend on consensus, may result in faster decision-making (see paragraph 4.69).

In assessing the significance of the use of QMV it is important to look at the substance of those changes, particularly in comparison to earlier treaties. The use of QMV was first introduced in the Treaty of Rome and was extended further by the Single European Act, which introduced the most significant extension of QMV in the EU's history. It is worth noting that of the 51 moves to QMV in the Lisbon Treaty, 16 will not apply unless the UK agrees to their use; the other 35 are issues where QMV (i) is the best way to promote UK priorities, (ii) relates to technical or procedural issues, or (iii) reflects existing practice. The Government agrees with the Committee's assessment that the Lisbon Treaty's provisions on QMV may help to advance UK interests in some cases, increase the UK's share of a blocking minority and result in faster-decision-making. The UK supports QMV to unlock decision-making in the right areas, where it is in Britain's interest.

12.21. The new system for calculating a qualified majority is more equitable and takes more account of population than the current QMV rules, and the revision is significant. The UK's voting weight increases from 8 per cent to 12 per cent (see paragraph 4.70).

The Government agrees with the Committee's assessment of the new system (Double Majority Voting) for calculating a qualified majority.

12.22. The provision requiring the Council of Ministers to meet in public when it legislates is important. The Council of Ministers will continue to meet in private when it is discussing and voting on non-legislative matters. We believe that the proceedings of the public meetings of the Council of Ministers should be recorded and published for public consumption (see paragraph 4.71).

The Government welcomes the Committee's conclusion that the provision requiring the Council of Ministers to meet in public when it legislates is important. We welcome the Treaty's new requirement that all Council discussions and votes on EU laws are to be held in public – to date, the Council has deliberated in public only on legislation subject to co-decision. We believe this new commitment will increase transparency and democratic accountability and help connect citizens to the activities of the EU.

European Commission

12.23. The Commission will have a clearer role in justice and home affairs following the merger of the first and third pillars. The Commission retains its near-monopoly of legislative initiative (see paragraph 4.107).

The Government agrees with the Committee that the Commission will have a clearer role in the area of Justice and Home Affairs. Member States retain their right, under the current Treaties, to propose measures in the area of Justice and Home Affairs. The Lisbon Treaty will introduce one small change to this right – any proposal must be made by one quarter of the Member States.

12.24. The reduction in the size of the College of Commissioners is an important change, and is intended to enable the Commission to function more effectively. If this is not the outcome, the European Council will be able to rethink its composition. The provision that seats be allocated on a strict rotation basis will mean that each Member State will not have a Commissioner of its nationality in the College for five years out of every 15. Although Commissioners ought not to be regarded as national representatives, the concern that a Member State without a Commissioner is disadvantaged will undoubtedly be raised, whether or not it is justified. The rotation rule will also be an arbitrary influence on the College's membership, and will restrict the candidates available for the posts of President of the Commission and High Representative (see paragraph 4.108).

The Government agrees with the Committee's conclusion that the reduction in the size of the College of Commissioners is an important change that is intended to enable the Commission to function more effectively.

From 1 November 2014, the number of European Commissioners will be reduced to two-thirds of the number of Member States (18 in an EU of 27), selected from all Member States on a basis of equal rotation and reflecting the demographic and geographical diversity of the Member States. HMG has long supported a smaller Commission. An unwieldy Commission would be an obstacle to EU delivery and risks creating "non-jobs" which encourage legislation in non-priority areas. The Government believe the benefits of a smaller, more effective, more efficient Commission outweigh the loss of a permanent British seat (and all Member States, not just the UK, will no longer have a guaranteed permanent seat on the Commission). What is important are the priorities delivered by the Commission, not the nationality of the Commissioner. The Government does not believe the rotation rule will restrict the candidates available for the posts of President of the Commission and High Representative.

12.25. The Treaty states that the European Council will need to take into account the elections to the European Parliament in nominating its candidate for election by the European Parliament to the post of Commission President. One consequence of this is that the European Parliamentary parties are more likely to go into European Parliamentary elections with proposed candidates for Commission President as well as their parliamentary candidates and programmes. The need for the European Council to take into account the results of the parliamentary elections is not a bar to the European Council coming to its own decision as to its preferred candidate, but the Council will continue to be unlikely to nominate a candidate who could not command the parliamentary majority necessary for election. In that sense there is no fundamental change from the current system which requires the Parliament's approval of the European Council's nominee, but the practical consequences of the Treaty provisions are as yet unclear (see paragraph 4.109).

The Government agrees with the Committee's conclusion that, in practice, there is no fundamental change from the current system of choosing the Commission President, which already requires the European Parliament's approval of the European Council's nominee.

12.26. The Treaty adds little to the formal powers of the Commission President. A more effective Commission could strengthen the Commission President's position in the balance of power among the institutions. This should be seen in the context of other factors affecting this balance (see paragraph 4.110).

The Government agrees with the Committee's conclusion.

European Parliament

12.27. The Lisbon Treaty considerably increases the powers of the European Parliament – in particular because of the extension of co-decision to a substantially larger range of areas, including agriculture, fisheries, transport and structural funds, in addition to the whole of the current “third pillar” of justice and home affairs – to the extent that the European Parliament will become co-legislator for most European laws. This will have an effect on the balance of power between the institutions (see paragraph 4.138).

The Government believes the extension of co-decision will increase democratic accountability within the EU, and the additional scrutiny will offer new opportunities to secure better regulation.

The balance of power issue is covered in the response to 12.32.

12.28. The number of MEPs will be reduced from 785 to 751. (The number of UK MEPs will increase by one from 2009.) Also, Members of the European Parliament will be described as “representatives of the Union’s citizens” instead of “representatives of the peoples of the States brought together in the Community”, which has a symbolic significance for some. The Treaty will not otherwise have a significant impact on the composition or membership of the European Parliament (see paragraph 4.139).

The Government agrees with the Committee's conclusion. A reduction in the number of MEPs is in line with the Government's goal of smaller, more efficient EU institutions.

12.28. Oversight by the European Parliament and Council of Ministers of the Commission's delegated legislation powers will be reinforced (see paragraph 4.140).

The Government welcomes the Committee's conclusion.

European Court of Justice

12.29. The Treaty significantly expands the role of the ECJ. The Treaty's most important impact on the ECJ is that it will gain jurisdiction over the justice and home affairs area as a result of the merger of the third pillar with the first. The impact of the Court's jurisdiction on the UK will differ from that on other Member States to the extent that the UK uses its opt in/out from all justice and home affairs legislation (see paragraph 4.175).

The Government notes that the Lisbon Treaty does not change the nature of the role of the European Court of Justice which is to ensure that in the interpretation and application of the Treaties that law is observed. It agrees that the most important practical impact on the role of the Court is likely to be the extension of its full jurisdiction over criminal justice and police co-operation (where it currently only has limited jurisdiction). It also agrees that this will however differ for the United Kingdom in that the Court will only have jurisdiction to the extent that the UK has chosen to participate in JHA measures.

12.30. The ECJ’s jurisdiction will not be extended to the Common Foreign and Security Policy except in two clearly defined areas. However, in exercising its oversight in a case of conflict of competence involving foreign and security policy, a decision that the competence lay elsewhere, bringing it into the Court’s jurisdiction, might lead to charges that the Court was extending its role (see paragraph 4.176).

The Government agrees that the ECJ will not have jurisdiction over the Common Foreign and Security Policy except in two clearly defined areas. The Government recalls that the Court has had jurisdiction to determine whether a matter falls within the scope of CFSP or non-CFSP policies since the Maastricht Treaty. The Lisbon Treaty moreover improves on the current situation by ensuring that non-CFSP policies cannot encroach on CFSP; thereby strengthening the “ring-fencing” of CFSP as a distinct, equal area of action.

12.31. The new provision on actions for failure to fulfil obligations is likely to place extra pressure on Member States to implement directives. In addition, the Treaty provides that action for failure to act will be able to be brought against not just the European Parliament, the Council of Ministers or the Commission, but also against the European Council, European Central Bank or any other body or agency of the Union. The Treaty also provides for a slight widening of the right of individuals to challenge EU acts (see paragraph 4.177).

The Government agrees that the new arrangements on failure to fulfil obligations will place extra pressure on Member States to comply with their obligations to implement directives; it welcomes this reinforcement of the mechanism for ensuring respect for EU law and the enforcement of a level playing field across Member States. The Government notes that the extension of the actions for failure to act reflects the increasing decision-making powers and responsibilities of the entities concerned. The Government agrees that there is a slight widening of the right of individuals to challenge EU acts.

Overall impact on institutional balance

12.32. The Treaty's effects on the balance of influence between the various EU institutions will only be observable over time. The European Parliament gains significant extra influence, which is seen by some as being at the expense of the Commission and the Council. The addition of a full-time President of the European Council introduces a rival pole of influence to the Commission President. The position of High Representative is significantly enhanced by the Treaty. But a smaller Commission may be a more effective Commission. The ECJ's jurisdiction is significantly extended. The opportunities for national parliaments to exercise their role are enhanced (see paragraph 4.187).

The Government believes that the European Council and the Council of Ministers will continue to play a key role in EU decision making after the introduction of the new Treaty. This role will be enhanced by a full-time President of the European Council who will bring greater continuity and coherence to the Union's actions. The new High Representative will bring more joined-up and clearer EU external representation. More co-decision for the European Parliament will increase accountability. The Government agrees with the Committee that a smaller Commission should be more effective. The role of the ECJ is addressed above.

Chapter 5: Fundamental Rights

The Government welcomes the Committee's conclusion that the Charter of Fundamental Rights of the European Union does not itself create or contain "new rights, which differ from those in the underlying national and international instruments, and documents from which it indicates that its provisions are derived". The Government also agrees with the Committee's conclusions on the nature and effects of the UK and Polish Protocol and of specific Articles of the Charter, in particular the conclusion that "Article 28 of the Charter does not create a free-standing right to strike".

Protection of fundamental rights in the existing EU legal framework

12.33. Notwithstanding the Charter's current lack of legally binding status, it is already an instrument of some importance to EU institutions and bodies and the Member States when taking action in the area of EU law. It is likely that, quite apart from the Treaty of Lisbon, references would increasingly be made to the Charter both before and by the ECJ (see paragraph 5.9).

The Government welcomes the Committee's conclusions. As the Committee observes, the Charter (in its 2000 version) was already referred to in European Union legislation and by the European Court of Justice, as a reaffirmation of the fundamental rights recognised in EU law. The Government also notes that, since 2001, the Commission decided to include appropriate references to the Charter in all new legislative proposals which have a specific link with fundamental rights,

taking account of the fact that the 2000 Charter was not legally binding. From 2005, the Commission decided to introduce a methodology for ensuring that its proposals respected fundamental rights as reflected in the Charter.

Fundamental rights protection under the Treaty of Lisbon

12.34. It is now clear that under the adapted Charter a distinction exists between rights (which are directly enforceable) and principles (which are only justiciable in the circumstances identified in Article 52(5)). The introduction of Article 52(5) recognises this and gives a clear indication as to its effect. But there is obscurity about how and where the distinction is to be drawn, and, in particular, a failure in the Charter and its Explanations to spell out clearly which of the Charter articles involve rights and which principles. The distinction will in practice have to be worked out in future cases before the ECJ (see paragraph 5.22).

The Government agrees with the Committee's conclusions that Article 52(5) of the Charter helpfully recognises that the Charter contains principles as well as rights and explains the scope and application of the former. The UK has consistently taken the position that establishing whether an article of the Charter reflects a right or a principle involves considering the provision in light of its source as set out in the official explanations.

12.35. Reference to national laws and practices prevents Article 35 itself from being held to establish a minimum right of access to medical treatment. Such a right could only be established (if at all) by reference to other international instruments and constitutional practices (see paragraph 5.28).

The Government agrees with the Committee's conclusions on the nature and scope of Article 35 of the Charter on health care. As the official explanations confirm (and as reflected in Article 1(2) of the UK and Polish Protocol to the Charter), this article recognises a principle to guide the EU institutions when they legislate – reflecting Article 152 of the Treaty Establishing the European Community – rather than an enforceable right.

12.36. Article 28 of the Charter does not create a free-standing right to strike: it is clear that within the Community framework, the right to collective action, including the right to strike, is already recognised as a general principle of law. Furthermore, Article 28 clearly stipulates that workers and employers have the right to collective bargaining “in accordance with Union law and national laws and practices” and the ECJ, in its December judgments, has indicated the significance of this limitation (see paragraph 5.36).

The Government agrees with the Committee's conclusions on the nature and scope of Article 28 of the Charter on the "*right of collective bargaining and action*". The right to freedom of assembly and association is guaranteed by Article 11 of the European Convention on Human Rights, which is already recognised in EU law. It is for the national law of each Member State to determine whether and to what extent it may give any additional collective action rights (bearing in mind the scope and interpretation of the Charter as set out in Article 52(6) of the Charter, and as reflected in Articles 1(2) and 2 of the UK and Polish Protocol to the Charter). As the Committee recognises, the European Court of Justice has said (in the Viking Line and Laval cases) that the right to take collective action (including the right to strike), as recognised in EU law, is to be protected, and may be restricted, in accordance with Community law and national law and practices, as Article 28 of the Charter says.

12.37. To the extent that Article 13 (freedom of the arts and sciences) is indeed an enforceable "right" and not merely a guiding "principle" it is difficult to assess whether it is a new right without further clarification as to its content. The language of Article 13 is vague and one could conclude from the Explanations that the right is limited to freedom of artistic and scientific expression. If it extends further than freedom of expression itself, then, given that the rights in the Charter are derived from international obligations binding on the Member States, Article 1 of Protocol 1 to the ECHR, which provides a right to protection of property, Article 19(2) of the ICCPR and Article 15 of the ICESCR will very probably be important in ascertaining the scope of the right in practice (see paragraph 5.47).

The Government notes the Committee's conclusion. The official explanations make it clear that this article is simply one aspect of Article 10 of the European Convention on Human Rights which upholds people's freedom of expression.

12.38. While there is not an exact symmetry between the terms of Article 14 of the Charter and those of the three instruments from which the Explanations indicate that this article is principally derived, it seems clear from the language used that the Charter right to education does not either create a new right or extend by its terms the existing right. The various components of the right to education set out in Article 14 derive from aspects of the right to education expressly included in international agreements which are legally binding on the United Kingdom (see paragraph 5.53).

The Government agrees with the Committee's conclusions that Article 14 of the Charter on the "*right to education*" does not create any new right or extend any existing rights, as the official explanations make clear.

12.39. The origins of the right to a free placement service are clearly set out in the Explanations. The language of the Charter does not indicate that a new right has been created here (see paragraph 5.55).

The Government agrees with the Committee's conclusions that Article 29 of the Charter on the "*right of access to placement services*" does not create a new right. This is a principle to guide the EU institutions when they legislate rather than an enforceable right, bearing in mind that it needs legislative action to give it content and that it derives from a very general provision in the European Social Charter (namely, Article 1(3)).

12.40. In summary, we have examined articles of the Charter which are regarded as the most controversial. On that basis, and taking account of the comments of the majority of our witnesses, we are not persuaded by suggestions that the Charter itself creates or contains new rights which differ from those in the underlying national and international instruments and documents from which it indicates that its provisions are derived. The scope of the Charter rights, as is the case with the scope of all rights, will ultimately be a matter for the courts. However, the broad rights and the language in which they are expressed in the Charter reflect existing national, EU and international obligations (see paragraph 5.56).

The Government agrees with the Committee's conclusions that the Charter does not create or contain new rights.

12.41. It is clear from Article 51(1) of the Charter that it does not apply to situations involving purely domestic law. For the Charter to be directly relevant, there must be a link to Union law. It remains of course quite conceivable that national courts applying domestic law might, in some cases, find an analogy or some inspiration in EU law, but that would not be an unusual process (paragraph 5.60).

The Government agrees with the Committee's conclusion. It is clear that the Charter will only apply to the Member States when implementing EU law, and that the Charter does not extend the field of application of Union law (as stated in Article 51 of the Charter). As that Article says "*the provisions of the Charter are addressed to the institutions, bodies, office and agencies of the Union with due regard for the principle of subsidiarity and to Member States only when they are implementing Union law*". This reflects the existing position in EU law in relation to fundamental rights.

The Charter's new status

12.42. It may appear somewhat anomalous to give legally binding status to an instrument which self-avowedly records rights deriving from other sources. However, whatever the legal effect of this change, declaring the Charter to be legally binding will send a clear message to all institutions and citizens within the Union about the EU's commitment to uphold the rights set out in the Charter (see paragraph 5.68).

The Government recalls that the Charter's purpose is to make existing rights visible and accessible. It agrees with the Committee's view that the Charter's new status will send a clear signal about the Union's commitment to upholding human rights.

12.43. Leaving aside the UK/Polish Protocol, the effect of declaring the Charter to have the same legal value as the Treaties is likely to preclude any argument that the rights and principles "reaffirmed" do not already exist as fundamental rights and principles in the area of EU law. We doubt whether this represents any great change from the position as it is and would anyway prove to be, having regard to current and emerging ECJ jurisprudence. Declaring the Charter to be legally binding will of course be likely to encourage and probably to speed the development of such jurisprudence (see paragraph 5.72).

The Government shares the Committee's view that giving legal effect to the Charter does not change the extent to which fundamental rights and principles are given legal effect in EU law.

The Government ensured that this would be the case by negotiating a package of four elements that the European Court of Justice will have to apply when considering the Charter.

Firstly, the amended Article 6 of the Treaty on European Union clearly states that the Charter shall not extend in any way the competences of the European Union as they are defined in the Treaties.

Secondly, the so-called horizontal Articles contained in Title VII of the Charter, especially Articles 51 and 52, define the field of application, scope and interpretation of the Charter. In particular, they clearly state that the Charter is aimed at the EU Institutions and the Member States only when they are implementing EU law. They also state, again, that the Charter does not extend the field of application of Union law beyond the powers of the European Union.

Thirdly, the official explanations to the Charter, which indicate the source of the rights and principles contained in the Charter, have been published, together with the Charter, in the Official Journal of the European Union (C 303 of 14 December 2007). The amended Article 6 of the Treaty on European Union states that due regard must be given to those explanations. Similarly, Article 52 of the Charter clearly states that the official explanations are a source of guidance in the interpretation of the Charter, and must be given due regard by the courts of the Union and of the Member States. By setting out the sources of (and limits on) the provisions in the Charter, the explanations show that the Charter does not create any new rights, but simply reaffirms rights that are already recognised in the law of the EU and in the Member States' own national laws.

Fourthly, the UK secured a binding Protocol guaranteeing that “*The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*”

12.44. Since we consider that the Charter reaffirms rights and principles which already substantially exist, albeit in many cases only at an international level, we expect the effect of the change in the Charter’s status to be limited. Courts at both national and EU level will continue to refer to international treaty obligations to interpret the scope of fundamental rights and identify those fundamental principles which are general principles of EU law, whether or not the Charter becomes legally binding. We expect that reference to the Charter would, if the Treaty of Lisbon enters into force, be likely to become more frequent, as the Charter’s legally binding force would make it more straightforward for individuals to enforce rights which they are guaranteed under international law (see paragraph 5.80).

The Government agrees with the Committee’s conclusions that the Charter’s principal impact will be in making clearer and more accessible rights which already exist.

12.45. Accession of the Union to the ECHR would greatly reduce the risk of inconsistencies, and provide a means of redress if they did occur, by making the Union and its institutions subject to the jurisdiction of the European Court of Human Rights. (see paragraph 5.83).

The Government agrees that the accession of the EU to the European Convention on Human Rights will provide a direct means of address against the European Union. It will also assist in reducing the risk of inconsistencies in the interpretation of rights derived from the ECHR although the Government notes that the ECJ already takes careful account of the case-law of the Strasbourg Court (as the Strasbourg Court itself acknowledged in the *Bosphorus* case).

The UK and Polish Protocol

12.46. The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol (see paragraph 5.87).

The Government agrees with the Committee’s conclusions that the UK and Polish Protocol to the Charter is not an opt-out but is aimed at guaranteeing the scope and nature of the rights and principles contained in the Charter and the Charter’s application by the European Court of Justice and national courts. The Protocol is part of a package of four elements secured by the Government precisely to set out the scope, nature and effects of the Charter as a reaffirmation of existing rights and principles (see the Government’s response to conclusion 12.43 above).

12.47. We see the broad legal effect of the Protocol as follows:

- (a) Article 1(1) reflects the fact that the Charter does not create new rights – if a national law is inconsistent with a provision of the Charter then it is also inconsistent with an EU or international norm. This also reflects Article 51 of the Charter.
- (b) Article 1(2) is in line with the frequent references in the Title IV rights to national laws and practices and also with Article 52(5) of the Charter which sets out the approach which should be taken to “principles” in the Charter. But it also brings some welcome clarity to Title IV. Article 52(5) read in the light of the Explanations could have led to a conclusion that some Title IV “rights”, such as Article 33, represent enforceable rights which could be relied upon directly before British courts. The Protocol appears to put beyond doubt that this would not be possible. In these circumstances it must be regarded as very unlikely that the ECJ would, in interpreting the Charter, hold that Title IV involved justiciable rights in relation to any Member State, but Article 1 paragraph 2 of the Protocol would in our view preclude it making such a ruling in relation to the United Kingdom. However, Title IV reflects principles which could, we think, still bear on the interpretation, or even the validity, of legislative and executive acts under Union law, as provided by the last sentence of Charter Article 52(5), and so indirectly affect individual rights. We have also noted that, to the extent that the Union legislates in areas which are within its competence quite apart from the Charter, national legislators and courts will anyway be subject to that legislation.
- (c) Article 2 reflects a common-sense interpretation of those articles in the Charter which refer to national laws and practices and of Article 52(6) of the Charter, which stipulates that “full account” is to be taken of national laws and practices where there is a reference to them. But it is a useful clarification of what might otherwise have been open to argument. Again, however, we think it unlikely that Article 2 of the Protocol precludes the use in relation to the United Kingdom and Poland of any relevant Charter articles in the way contemplated by the last sentence of Charter Article 52(5), when interpreting or ruling on the validity of legislative or executive acts taking place under Union law on the basis of a Union competence not connected with the Charter.
- (d) The Protocol should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States. But to the extent that the Explanations leave some ambiguity as to the scope and interpretation of the Charter rights, and as to the justiciability of the Title IV rights especially, the Protocol provides helpful clarification. We would not be surprised if, in considering the scope of the Charter in future, EU and domestic courts had regard to the terms of this Protocol in order to assist interpretation of the Charter’s horizontal articles, even in cases where the United Kingdom and Poland were not involved. Indeed, given that, despite media reports,

it is an interpretative Protocol rather than an opt-out, it is perhaps a matter of regret, and even a source of potential confusion, that it was not expressed to apply to all Member States (see paragraph 5.103).

The Government welcomes the Committee's conclusions on the nature and effects of the UK and Polish Protocol to the Charter, particularly its interpretative effects in respect of the rights and principles reaffirmed in the Charter, and the Charter's application by the European Court of Justice and national courts. The Government reiterates that the Protocol is part of the package of measures set out at the Government's response to conclusion 12.43 above. The Government agrees that the terms of the Protocol will assist courts in interpreting the Charter even in cases where the Protocol does not directly apply.

12.48. Ultimately, the interpretation of the Protocol is a matter for the courts and, in both the national and EU contexts, we do not think it is possible at this stage to predict precisely what courts would decide if faced with the task of interpreting the Protocol's language. Clearly, European and domestic courts could not ignore the text of the Protocol but it is likely that the ECJ will develop a tendency to refer to Charter rights and their origins, as well as new Article 6(3) TEU on the general principles of EU law, and would develop its fundamental rights jurisprudence on that basis (see paragraph 5.105).

As already stated in the response to paragraph 12.43, the Government is clear about the nature and scope of the rights and principles reaffirmed by the Charter and has successfully negotiated a package of four elements, which include but are not limited to the Protocol, that the European Court of Justice and domestic courts will have to apply when developing its fundamental rights jurisprudence. This will mean that, although courts will be able to refer directly to the provisions in the Charter, the substantive effect of the rights, freedoms and principles referred to in those provisions will not be changed in any way.

12.49. One effect of the Protocol will be to discourage the ECJ from basing its analysis of fundamental rights solely on the Charter. British courts are therefore generally unlikely to be faced with the problem of deciding, in the light of the Protocol, how they should treat case-law of the ECJ interpreting EU law on the basis of the Charter alone (see paragraph 5.109).

The Government agrees with the Committee's conclusion that the Charter and the Protocol will not change the way in which courts give effect to fundamental rights. Since the Charter simply reaffirms fundamental rights that are already part of EU law, it makes no difference of substance whether courts in their judgments refer to articles of the Charter or to the fundamental rights that those articles reaffirm.

12.50. The Protocol may have the effect of reassuring those who have concerns about giving the Charter legally binding status (see paragraph 5.110).

The Government agrees that the Charter should provide this additional reassurance.

12.51. British courts already refer to the Charter in identifying the scope of fundamental rights. Nothing in the Protocol will prevent them from continuing to do so in future, drawing on the Charter in the same way as they draw on many international human rights instruments, when interpreting the content of fundamental rights (see paragraph 5.111).

The Government agrees with the Committee's conclusions that the Protocol will not affect the courts' ability to draw on the Charter and the accompanying explanations when examining fundamental rights issues. As the Committee stated in paragraph 12.47, the Protocol is not an opt-out from the Charter, but contains interpretative provisions that reflect the effect of the Charter for all Member States.

Accession to ECHR

12.52. We have in the past identified strong reasons for supporting EU accession to the ECHR. The Strasbourg Court would then be recognised as the final authority in the field of human rights. This would assist to avoid any risk of conflict between European Union law and the European Convention on Human Rights as interpreted in Strasbourg, by placing fundamental rights on a single consistent foundation throughout the EU. We continue to be of the view that the Government should encourage Member States to pave the way for accession by the Union to the ECHR at the earliest opportunity (see paragraph 5.118).

The Government endorses the Committee's conclusions in respect of the benefits of EU accession to the European Convention on Human Rights, particularly to reduce the risk of inconsistencies in the interpretation of the Convention rights by the European Court of Justice and the European Court of Human Rights. In fact, EU accession would clarify that the decisions of the European Court of Human Rights are authoritative in this respect. In addition, the Protocol to the Lisbon Treaty on accession ensures that accession would not affect the Union's competencies as defined in the Treaties and would not change the Member States' individual position in respect of the Convention.

The Government supports the EU's early accession to the ECHR but recalls that for this to take place, all State parties to the Convention will need to ratify Protocol 14 to the Convention.

Chapter 6: Area of Freedom, Security and Justice

The Government welcomes the Committee's report in relation to implications for Justice and Home Affairs and agrees with many of the Committee's observations – particularly in relation to the safeguards provided by the UK's opt-in on matters of Justice and Home Affairs. The Government wishes to comment only on the conclusions set out below.

The Pillar Structure

- 12.53.** The merging of the First and Third Pillars will establish a more coherent and more easily understood and applied scheme of EU competence in the areas covered. The changes in legislative procedure will at the same time facilitate the passing of EU legislation by removing the need for unanimity. Whatever view may be taken about the merits of extending QMV, there will, in respect of any EU legislation that is passed, be increased scrutiny and accountability through the European Parliament and an extended role for the ECJ (see paragraph 6.19).
- 12.54.** The merging of the Pillars will have the effect of bringing criminal law and policing within the new Title V TFEU framework. This is clearly a significant change (see paragraph 6.20).

Changes to legislative procedure

- 12.55.** The move to QMV in almost all areas of FSJ is a significant change. Notwithstanding the already existing spirit of compromise in the JHA Council, the move is likely to speed up decision-making in the Council and prevent legislation being adopted at the level of “lowest common denominator”. It is likely that one effect of the change will be an increase in Union activity and the volume of legislation agreed in this area (see paragraph 6.27).
- 12.56.** The change will remove Member States’ vetoes in respect of criminal law and policing and legal migration. This means that it will be possible for the UK, in some cases, to be bound by a measure in the area of criminal law or policing against its will, although the likelihood of this happening will be greatly reduced by the existence of a general right not to opt in for the UK. The corollary of this is that one Member State, or a small group, will no longer be able to block measures supported by the UK, subject to the possibility of using the emergency brake (see paragraph 6.28).

The Government thanks the Committee for the clear conclusions highlighting the benefits of the merging of the First and Third Pillars, notably a more easily understood system. Changes to the area of JHA are significant and the Government agrees with the Committee that the move is likely to improve the decision-making process. The UK’s opt-in ensures that the UK can decide whether or not to participate in JHA measures. (Conclusions 12.53 – 12.56.)

- 12.57.** The involvement of the European Parliament in new areas of FSJ is likely to impact on the adoption of measures in this field. We would expect the European Parliament to focus on protection of citizens’ rights and to take an active role in shaping measures in the area of criminal law and policing (see paragraph 6.35).

12.58. We welcome the steps being taken by the European Parliament to address the issues raised by first reading deals. We stress the need for transparency particularly in an area of such considerable interest to citizens as FSJ (see paragraph 6.36).

The Government agrees with the Committee's conclusion with regards to the expanded role for the European Parliament in the area of Freedom, Security and Justice. However, although co-decision for police and criminal judicial co-operation is an innovation of the Lisbon Treaty, the European Parliament has played an active role, under the consultation process, in the negotiation of third pillar business since the Maastricht Treaty.

The Government notes the Committee's commitment to and concerns about transparency in the scrutiny and adoption of European legislation. The Government works closely with the European Parliament and is keen to ensure an effective dialogue throughout the process of making EU legislation. We also encourage future Presidencies to engage in dialogue with the European Parliament at an early stage in the legislative process in order to build consensus and make for efficient decision-making. (Conclusions 12.57 and 12.58.)

12.59. The retention of unanimity in matters of family law will provide an important safeguard to ensure that family law measures agreed at EU level do not negatively impact on UK law. However, it is not always clear what constitutes family law and this is likely to be a matter for some debate. We expect that an assessment would have to be made in each case. This is likely to be more important for other Member States as the UK will be able to choose whether to opt in to any civil or family law measure in any case (see paragraph 6.42).

The Government agrees that the retention of unanimity in matters of family law does provide an important safeguard in this field. It agrees also that the question of whether a proposal can be categorised as a family matter will not always be clear-cut. An assessment will need to be made on a case by case basis. Where a proposal covers both family and civil law the categorisation will need to be based on an assessment of the primary purpose of the instrument.

12.60. The *passerelle* provision in Article 81(3) TFEU is stronger than the existing *passerelle* in Article 67(2) TEC in providing that national parliaments can directly veto a proposal to make use of it. As discussed in Chapter 3, thought will have to be given as to how this right of veto will be implemented in the UK. A further protection is provided by the European Union (Amendment) Bill as the approval of both Houses is required before a Minister can vote in favour of the use of the *passerelle* in the Council of Ministers (see paragraph 6.43).

The Government agrees with the Committee regarding national Parliaments', and specifically the UK Parliament's, role in the use of the family law passerelle. Any proposal to change the current decision making arrangements for family law will be subject to the UK opt-in and furthermore, in line with the Prime Minister's commitment and clause 6 of the EU (Amendment) Bill, should a UK Minister wish to support such a move it must be with the prior approval of both Houses.

The emergency brake and enhanced cooperation

- 12.61. The introduction of an emergency brake is a noteworthy development which is of particular importance to Member States which do not have the right not to opt in to FSJ measures. Although it is unlikely to be frequently used in practice, it is likely to impact on negotiations in the Council through the possibility of its use (see paragraph 6.53).**
- 12.62. We see no reason why the UK should not be able to use the emergency brake but in practice the UK's right not to opt in to individual measures is likely to diminish the occasions where use of the emergency brake will even arise for consideration in the United Kingdom (see paragraph 6.54).**
- 12.63. The emergency brake is provided for in the Treaty itself and has the same legal value as any other Treaty provision. We consider the prospect of a challenge before the ECJ to a Member State's use of the emergency brake to be remote (see paragraph 6.55).**

The Government agrees with the Committee's conclusion that the introduction of the emergency brake for criminal judicial cooperation is a noteworthy development. The brake would be available to the United Kingdom in the same way as for other Member States but the Government agrees that the UK's extended opt-in, which already provides strong safeguards, diminishes the occasions where consideration of its use by the UK would arise. The Government also agrees with the Committee's conclusions that a legal challenge to the European Court of Justice on a Member State's use of the emergency brake is highly unlikely. (Conclusions 12.61 – 12.63.)

- 12.64. The Treaty of Lisbon facilitates enhanced cooperation in relation to judicial cooperation in criminal matters within Articles 82(2) and 83, the creation of a European Public Prosecutor (Article 86) and police cooperation within Article 87(3). It is not clear whether this will have a significant impact in practice. The procedure has not been used to date despite circumstances arising in which it may have been appropriate. However, there are diverging views on the extent of the need for cooperation in this area across the Member States and the negotiation of this flexible procedure suggests that some, at least, anticipate having recourse to it (see paragraph 6.61).**
- 12.65. Enhanced cooperation may lead to a patchwork of legislation but is a necessary element of flexibility in a Union of 27 Member States (see paragraph 6.62).**

The Government shares the Committee's assessment. (Conclusions 12.64 and 12.65.)

12.66. The Union would have external competence derived from a measure which had been adopted internally under the enhanced cooperation provisions but this would only extend to those Member States party to the enhanced cooperation (see paragraph 6.66).

The Government shares the Committee's assessment.

Jurisdiction of the European Court of Justice

12.67. The increase in the jurisdiction of the ECJ is a significant development. It replaces the complex existing regime of jurisdiction with a clear and uniform rule and is likely to increase consistency and legal certainty in the application of EU law. If the Lisbon Treaty enters into force, the ECJ will have jurisdiction over all new Title V TFEU measures (see paragraph 6.88).

12.68. For the first time, Member States will be able to be taken to the Court for failure to implement properly EU legislation in the area of criminal law and policing. This is likely to encourage them to implement more effectively measures agreed in this area. Ultimately, the question of the interpretation of an EU instrument will be a matter for the Court and its rulings will be binding on the United Kingdom. As a result it is important that any special features of UK law in this area be taken into account by the Court and in this regard, the right of Member States to intervene in any action before the Court is significant (see paragraph 6.89).

The Government agrees that the extension of full ECJ jurisdiction will allow for greater consistency and legal certainty in the application of EU law. As noted above, it will however only apply to the United Kingdom in respect of measures in which we choose to participate. We will, as now, work to ensure that special features of UK law are taken into account in the negotiation of measures and intervene in proceedings before the Court where this is necessary to promote the UK's interests or to explain the particular features of UK law. (Conclusions 12.67 and 12.68.)

12.69. The ability of the ECJ to handle its existing workload, and in particular the time taken to dispose of preliminary references by national courts, is already a matter of concern. The CILFIT criteria established by the ECJ give national courts and the ECJ no real scope for declining to make or hear a reference in any case open to any doubt (see paragraph 6.94).

12.70. The existing preliminary reference jurisdiction under Title IV and Title VI has not given rise to a large volume of cases. But the Treaty of Lisbon would open the way, even though probably only over a period, for an increase in the volume of preliminary references which could prove detrimental to both European and national legal systems and to individual litigants. The new accelerated procedure for cases where an individual is in custody represents only a limited amelioration in one particular sphere. This may not be sufficient to resolve the problems that arise in jurisdictions with limitations regarding the time spent in custody before trial or limitation periods for the conclusion of criminal proceedings. The question of delay is a general one relevant to all criminal and civil proceedings in the area of FSJ. Member States are bound under Article 6 of the ECHR to ensure that both criminal and civil proceedings are determined fairly and within a reasonable time (see paragraph 6.95).

The new arrangements for preliminary references may increase the number of cases referred to the ECJ. As the Committee notes, there is a new emergency ruling procedure, which will allow it to reach judgments more quickly in priority cases where a person is held in custody. The Government is also currently exploring ways of providing senior judicial oversight of the reference procedure at the national level as a way of ensuring that references are not made unnecessarily.

However, more generally, the UK has strongly supported continuing initiatives to improve the efficiency in the Courts across all its work - and in particular the time taken to dispose of cases. This has been already assisted by the implementation of changes provided for in the Nice Treaty and by other changes to the Court's working arrangements. Other changes introduced by the Lisbon Treaty should also assist in this regard. (Conclusions 12.69 and 12.70.)

12.71. The expansion of the ECJ's jurisdiction over criminal and civil matters is over time bound to be matched by an expansion in the range of the legal issues coming before it. The ECJ to date has had limited experience of ordinary criminal and civil proceedings and it has not been necessary for Member States to nominate judges with any such experience (paragraph 6.99).

12.72. The Treaty of Lisbon will continue to provide for one judge per Member State (which in practice means nominated as a candidate by that Member State) and for any judge to be "appointed by common accord of the governments of the Member States" for a six-year, renewable period. The creation of the new panel under Article 255 "to give an opinion on candidates' suitability" is a welcome step, but it is unclear how far, if at all, such a panel will be able to influence Member States to nominate for consideration candidates having particular expertise or experience which it would benefit the ECJ to have (paragraph 6.100).

The Government was a strong proponent of the establishment of a Judicial Appointments Panel to advise on the suitability of candidates for judicial office. Such a panel has already been established for the existing EU Civil Service Tribunal. We believe that the Panel will act as an important means of promoting the high quality of judicial appointments.

Members of the ECJ are drawn from those possessing the “qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence”. The members of the Court have traditionally come from a range of legal backgrounds including those with wide experience of national legal proceedings including at the appellate level. (Conclusions 12.71 and 12.72.)

12.73. Further, the unchanged six-year, renewable tenure appears in principle undesirable. The manner and tenure of appointments and the general working of the ECJ are all matters which may require revisiting (paragraph 6.101).

The arrangements for appointments are aimed at ensuring the judicial independence of judges while also allowing for a geographical spread of judicial representation from across the Union. The Treaty makes only modest institutional changes to the arrangements for the ECJ, although including some which should assist in on-going work to improve the efficiency of the Courts. The Government believes that the existing rules governing the appointment of judges protect the judicial independence of the Court but welcomes the new Judicial Appointments Panel as an additional means of reinforcing the quality of judicial appointments.

12.74. It is unlikely that the change to the standing rules will itself result in a flood of asylum cases. New Article 263 TFEU allows challenges to the legality of EU legislation, but challenges in domestic asylum cases tend to relate to how asylum laws are interpreted or applied in practice. Challenges on these grounds would come before the ECJ in the form of preliminary references under new Article 267 and not under new Article 263. In any event, Article 263 still requires that an individual show that an act of an EU institution or body is of “direct concern” and this is likely to remain a significant limitation in practice (see paragraph 6.103).

We agree with the Committee’s assessment.

Natural and legal persons can only challenge the legality of Community legislation, within two months of publication, where it is of ‘direct and individual concern’. As the Committee notes the Lisbon Treaty will slightly extend this to challenge regulatory acts of direct concern which do not entail implementing measures.

As the Committee notes, the requirement to show that the legislation is of ‘direct concern’ is likely to remain a significant limitation and in any event asylum seekers will most likely be concerned not with the legality of the relevant EU measure but with how it is applied to them. If there is a question of interpretation or legality it is most likely to be raised under the preliminary reference procedure rather than by direct action under Article 230.

Passerelles in FSJ

12.75. Given that all the FSJ *passerelles* require unanimity in the Council or the European Council, there is no possibility that changes will be made without the consent of the United Kingdom government (see paragraph 6.106).

The Government agrees with the Committee's assessment. Given both the UK opt-in for the FSJ provisions and the additional requirement of unanimity in the Council it is not possible for the changes provided for in the Freedom, Security and Justice *passerelles* to be made without the consent of the Government.

National parliaments and devolved administrations

12.76. There is a need to ensure that the Scottish administration is fully engaged with relevant UK Government departments and with the UK Parliament on matters of civil and criminal justice and policing at EU level (see paragraph 6.111).

The Government attaches great importance to proper involvement of the devolved administrations in developing our policy towards European business in areas which relate to devolved matters. Ministers and officials in devolved administrations are always consulted on matters of civil and criminal justice and policing at EU level and the Government recognises that this must continue.

Borders, asylum, immigration and visas

12.77. There have been important changes to the provisions on border controls, asylum and immigration. In many cases, the changes appear to reflect existing practice, for example, the new express power to conclude readmission agreements (see paragraph 6.129).

12.78. The use to which new Article 77(3) can be put is not clear. To the extent that it provides a legal basis for measures concerning identity cards, this could have important implications for States which do not have identity cards. However, Article 77(3) is subject to unanimity which provides protection for Member States and the UK also has the right to choose whether to opt in (see paragraph 6.130).

There are already a number of agreements relating to passports and identity cards between the EU Member States. The Government has already agreed on an intergovernmental basis that there should be a uniform format for passports (Resolution of the Representatives of the Governments of the Member States, meeting within the Council of 8 June 2004, supplementary to the Resolutions of 23 June 1981, 30 June 1982, 14 July 1986 and 10 July 1995 concerning the introduction of a passport of uniform pattern). It is on this basis that United Kingdom passports have the words "European Union" in addition to "United Kingdom of Great Britain and Northern Ireland" on the front cover. Similarly a set of Council Conclusions on the common minimum security standards for National Identity Cards were also agreed on an intergovernmental basis under the UK Presidency of the EU at the Justice and Home Affairs Council on 1st and 2nd December 2005.

New article 77(3) in the Lisbon Treaty would allow measures relating to passports or identity cards, including those that have previously been considered on an intergovernmental basis, to be considered under the Treaty in the future. However, as the Committee notes, this is subject to both unanimity and the UK opt-in. (Conclusions 12.77 and 12.78.)

Civil justice

12.79. The power under the current Article 65 to adopt measures of judicial cooperation in civil matters is itself potentially broad, since the list of areas of potential action given is non-exclusive. Article 81 contains a more extensive list of areas of potential action. However, these in practice are areas in which cooperation has already been undertaken under the current Article, and the list given is exhaustive (see paragraph 6.140).

12.80. In lieu of the present absolute requirement that measures taken be necessary for the proper functioning of the internal market, Article 81 provides that measures may be taken “particularly when” so necessary. But, under both existing Article 65 and new Article 81, such measures are only permissible in civil measures “having cross-border implications”, itself a significant limitation. Both the existing and the new articles are capable of giving rise to differences of view regarding the scope of their application in particular situations, and we doubt whether this is much affected by the changes in Article 81. This is an area where the new powers of national parliaments to police the subsidiarity principle may be particularly important (see paragraph 6.141).

The Government agrees with the Committee’s assessment. (Conclusions 12.79 and 12.80.)

Police and judicial cooperation in criminal matters

12.81. The new Article 82(1) confers a more specifically defined power to adopt measures of judicial cooperation in criminal matters in a more extensive but exhaustive list of areas. In particular, the new Article makes specific reference for the first time to measures to settle as well as prevent conflicts of jurisdiction and to measures to support the training of national judiciaries and their staff. The new Article replaces an existing power under Article 31(1)(a) to (d) which is of uncertain and controversial width, not least because the list of areas of potential action given is both vague and nonexclusive. Overall, the clarification and definition of power in this field by the Lisbon Treaty is unlikely to involve any significant expansion of jurisdiction, although it may encourage a more active role for the EU in the listed areas (see paragraph 6.152).

The Government agrees with the Committee's assessment.

12.82. The extent of the Union's existing competence in the area of criminal procedure under the existing Article 31 with its non-exhaustive list of areas of potential action is one of the matters of uncertainty and controversy already mentioned. The new Article 82(2) contains a specific and exhaustive list of three areas of potential action (concerning evidence, procedure and victims' rights). Other areas can only be added by unanimous Council decision after obtaining the European Parliament's consent (see paragraph 6.160).

12.83. Action in any of these areas is for the first time expressly limited to the extent necessary to facilitate mutual recognition of judgments and decisions and police cooperation in criminal matters "having a cross-border dimension". The three specific areas listed are all areas where in practice the Union has been seeking in recent years to promote measures (see paragraph 6.161).

The Government agrees with this analysis and notes in particular the requirement to show necessity and cross-border dimension before legislating in this area. (Conclusions 12.82 and 12.83.)

12.84. The new Article 83(1) contains an exhaustive list of areas of particularly serious crime with a cross-border dimension, which is on its face more extensive than the existing non-exhaustive list of three areas (organised crime, terrorism and illicit drug trafficking) in which Article 31(1)(e) currently gives the Union power to adopt minimum rules concerning the definition of criminal offences and penalties. However, the new exhaustive list reflects areas in which the Union has in practice already adopted measures under the current Article with its non-exhaustive list and may therefore be regarded as simply recognising the *status quo*. While the Treaty of Lisbon clarifies and defines the Union's power to harmonise criminal offences and sanctions in a manner which will preclude further expansion, there is room for argument and uncertainty about the scope of some of the offences now for the first time specifically mentioned, e.g. sexual exploitation, corruption and computer crime (see paragraph 6.175).

The Government believes that Article 83(1) provides a clearly defined, closed list of areas of cross border crime falling within the scope of EU competence. Any expansion of this list is only possible through unanimous decision of the Council.

The current list, with the exception of illicit arms trading and sexual exploitation of women, includes areas where the EU has legislated before. The scope of potential approximation of criminal offences and sanctions is limited to "serious and cross border" crime.

- 12.85.** Different views were expressed to us on the question whether the new Article 83(2) in Title V supersedes the competence to establish minimum rules relating to criminal offences recognised, to date only in environmental contexts, by the Court in Cases C-176/03 and C-440/05. The answer is important because it is only in respect of measures proposed under Title V that the United Kingdom has a right not to opt in (see paragraph 6.187).
- 12.86.** Our view is that Article 83(2) constitutes a *lex specialis*, which is framed and apt to subsume and supersede any competence which would otherwise exist under articles outside Title V. Its language is the language of conferral of competence (“directives may establish minimum rules ...”), not the language of procedure. Further, since the competence recognised in Cases C-176/03 and C-440/05 did not extend to the power to set minimum sanctions, Article 83(2) must in that respect go beyond procedure, and it seems implausible to suggest that the Treaty drafters intended there to be two overlapping articles conferring differing degrees of criminal competence, according to which was chosen as the base. The emergency brake introduced by Article 83(3) with express reference to Article 83(2) also seems clearly designed to apply to the exercise of criminal competence such as that recognised in Cases C-176/03 and C-440/05. The natural meaning of the language is, in short, that the competence recognised in those cases is being subsumed within Title V. On that basis the UK’s right not to opt in is preserved (see paragraph 6.188).
- 12.87.** In the last analysis, even if we were to be held wrong in the views expressed about the UK’s opt-in in the previous paragraphs, it is clear from the language of Article 83(3) that the United Kingdom would retain the benefit of an emergency brake, in the event that a draft directive were promoted adopting minimum rules with regard to the definition of criminal offences and sanctions outside Title V in terms the UK considered would affect fundamental aspects of its criminal justice system (see paragraph 6.189).

The Government welcomes the Committee’s conclusions, in particular in relation to the purpose and use of Article 83(2) as a *lex specialis*. (Conclusions 12.85–12.87.)

- 12.88.** There are already moves to reform Eurojust and to grant it a greater role in enhancing cooperation between national authorities. New Article 85 may facilitate more ambitious developments in the longer term (see paragraph 6.196).

The Government supports the work of Eurojust and is, as the Committee notes, currently engaged in negotiations to consider how its organisation and operation could be developed within the current Treaties to improve further the assistance it provides to the UK and other Member States in investigating and prosecuting serious and organised crime. Article 85 provides a basis for future initiatives as considered necessary.

12.89. Proposals for a European Public Prosecutor are not new, but this is the first time the structure for implementing this idea has been included in the Treaties. The inclusion of Article 86 in the TFEU makes it more likely that this post will one day be created. Any proposal to establish an EPP or subsequently extend its scope would require unanimity, and the UK's opt-in would apply to such a measure. In the absence of unanimity, a group of Member States could proceed by enhanced cooperation (see paragraph 6.209).

12.90. If the UK were not to participate in the creation of the EPP, then it should not be affected by it. Although UK citizens living abroad could be subject to the EPP's jurisdiction, the EPP could have no jurisdiction in the UK itself. Any obligation on Member States to recognise European Arrest Warrants issued by the EPP would have to be provided for in EU legislation under Title V, and the UK's right to opt in would apply. If it did not opt in, then it would not be obliged to recognise European Arrest Warrants issued by the EPP (see paragraph 6.210).

The Government agrees with the Committee's assessment on the impact of any enhanced cooperation agreement to create a European Public Prosecutor. The Government is clear, and in agreement with the Committee, that the UK opt-in and unanimity will apply to any proposal to create a European Public Prosecutor. As the Committee concludes, should we not opt-in to such a proposal then a subsequent agreement to create a European Public Prosecutor would not be binding on the UK. (Conclusions 12.89 and 12.90.)

12.91. The inclusion of an express reference to the principle of mutual recognition in the criminal field by the Treaty of Lisbon lends some support to the view that cooperation is, wherever possible, to be preferred to harmonisation. But the new Article 82(1) includes within mutual recognition the approximation of laws and regulations under Articles 82(2) and 83. In reality and in the light of the Union's activity to date in the criminal field, we doubt whether the introduction of general and unexplained references to mutual recognition will prove to have much significance (see paragraph 6.218).

The Government welcomes the express acknowledgement in the Treaty that mutual recognition should be the basis for judicial cooperation, formalising what was first established at the Tampere European Council and has since been put into practice with initiatives such as the European Arrest Warrant. Although Article 82(2) includes a reference to approximation, it is clear that this is only “to the extent necessary” to facilitate mutual recognition and should not therefore be an end in itself. The creation of minimum rules concerning the definition of criminal offences and sanctions in Article 83 is limited to areas of particularly serious crime with a cross-border dimension and is, for the first time, based on a list of crimes where EU action may be considered.

12.92. The new provisions on police cooperation in Article 87 TFEU reflect the existing provisions in Article 30 TEU (see paragraph 6.221).

12.93. The reason for urgently continuing the current negotiations on the proposed Decision on Europol is, we assume, to prevent the European Parliament having powers of co-decision in relation to the constitution and functions of Europol as an agency. We regard it as unfortunate that the Member States should be attempting to override the effect of a provision of a Treaty they have just signed (see paragraph 6.226).

We agree with the Committee’s conclusion that Article 87 TFEU reflects Article 30 TEU. Negotiation on the draft legal instrument, to replace the Europol Convention, commenced in January 2007, prior to the Lisbon Treaty being agreed. In developing the proposals the Council has fully consulted, and incorporated amendments from, the European Parliament. It is important that measures such as this, where significant progress has been made with the negotiations, are not delayed pending the ratification and full implementation of the Lisbon Treaty. (Conclusions 12.92 and 12.93.)

Issues of “cross-border”

12.94. Attempts by the Commission to use the existing Treaty competence in respect of cross-border measures to affect purely internal procedures have been rejected by the Member States. It seems clear that there is no support for an expansive construction of “cross-border” in EU legislation at present. There is no reason why the Lisbon Treaty should add any impetus to such an expansion (see paragraph 6.233).

12.95. There are, however, difficulties in defining “cross-border”. As we highlighted in our Report on the European Small Claims Procedure, this will be a matter to be resolved on a case-by-case basis. We reiterate our conclusion that any definition of “cross-border” must be suited to the aim and requirements of the particular proposal. In the event of a dispute, the ECJ will be the final arbiter, but this is another area in which the new powers of national parliaments to police the subsidiarity principle may be particularly important (see paragraph 6.234).

We agree with the Committee both that the Lisbon Treaty should not add any impetus to an expansive construction of ‘cross-border’, and that what ‘cross-border’ means in any particular context has to be assessed on a case-by-case basis.

As the Committee has noted, in the fields of civil and criminal justice, that the Treaty provisions refer to ‘cross-border’ indicates that the Union legislature should be particularly alert to subsidiarity when interpreting and applying that term. (Conclusions 12.94 and 12.95.)

National security and internal security

12.96. It may be significant that the Treaties for the first time make clear that national security is a matter solely for the Member States (see paragraph 6.242).

12.97. It is unfortunate that a number of provisions of the Treaties refer to “internal security” when the meaning of that expression is unclear (see paragraph 6.243).

As the Committee notes, Article 4(2) provides important confirmation that national security remains the sole responsibility of each Member State.

The concept of “internal security” is distinct from that of “national security”. It applies specifically in the context of Justice and Home Affairs activity including aspects of law enforcement and illegal migration and has been used in that context since the Maastricht Treaty. As noted in the Government’s evidence to the Committee, it would cover in particular matters relating to public order within a Member State and in particular matters falling within the responsibility of the police authorities.

Under new Article 12 (c) of the EU Treaty, National Parliaments will have increased rights of scrutiny of the development of legislation on police cooperation, cooperation in criminal matters, and in the evaluation of measures under the wider Freedom, Security and Justice Title. This will become an additional factor in determining the EU’s involvement in internal security matters. (Conclusions 12.96 and 12.97.)

The UK opt-ins

12.98. The opt-ins in the amended FSJ and Schengen Protocols will together apply to the whole area of FSJ, including those matters which currently fall within the Third Pillar and require unanimity. The right given to the UK to choose whether or not to opt in is, in certain respects, more flexible than the existing opt-in arrangements (see paragraph 6.257).

12.99. The extension of the FSJ Protocol to the entire area of freedom, security and justice will allow the UK to decide, on an individual basis, whether to opt in to any proposed measure in the field. The inclusion of Article 4a confirming that the opt-in provisions will apply also to amending measures is a welcome clarification (see paragraph 6.261).

The Lisbon Treaty extends our existing UK opt-in. For all JHA measures the UK will have the right to choose what it participates in. As well as extending our opt-in to measures which currently fall within the third pillar (police and criminal judicial cooperation) they make two improvements to the existing arrangements for Title IV measures (civil justice, asylum and immigration) by: (i) making explicit that they apply to amending measures and (ii) applying them to individual Schengen building measures where we participate in the underlying part of Schengen.

The Government agrees with the Committee that Article 4a is a useful clarification of the UK's position. (Conclusions 12.98 and 12.99.)

12.100. The amended FSJ Protocol differs significantly from its predecessor insofar as it permits the other Member States to eject the United Kingdom from an existing measure where it declines to participate in an amending measure. However, the right to eject the UK is subject to an important restriction: the UK's non-participation in the amending measure must render the system "inoperable". This is intended to set a high threshold and we would expect that some form of technical inoperability would, in practice, be required. We expect such cases to be rare (see paragraph 6.267).

12.101. The test for requiring the UK to bear costs of non-participation is a strict one: costs must be "necessarily and unavoidably" incurred as a "direct" consequence of the cessation of UK participation (see paragraph 6.269).

The Government agrees with the Committee's assessment on the repercussions of any decision by the UK not to opt-in to an amending measure under the Freedom, Security and Justice Opt-in Protocol. The Government agrees with the Committee that the test of "inoperability" sets a high threshold and that such cases would be rare. Similarly we agree with the Committee's assessment regarding the criteria for the imposition of consequential costs on the UK for its non-participation. The "direct" and "necessarily and unavoidably" incurred test is a strict one. (Conclusions 12.100 and 12.101.)

12.102. The extension of the opt-in arrangements puts the UK (and Ireland) in a special position. For those who support full UK participation in EU FSJ measures, this is likely to be viewed as an undesirable development. Those who have fears regarding the effect of a move to QMV in this area on national sovereignty, on the other hand, can see the opt-in as providing some reassurance. An extended right not to opt in for the UK is different from a veto under unanimity and, where the UK chooses not to opt in, other Member States will be able to adopt measures without UK participation. This may change the negotiating dynamic in the Council (see paragraph 6.274).

12.103. At present there is no systematic parliamentary scrutiny of UK decisions on whether or not to opt in to particular FSJ measures. The House of Commons European Scrutiny Committee has recently drawn attention to this, in the context of the Lisbon Treaty. We do so too, and we intend to give the matter further consideration (see paragraph 6.275).

The Government is committed to effective Parliamentary scrutiny of EU legislation.

Parliament currently has scrutiny over proposals, which are subject to the existing UK opt-in (for asylum, migration and civil justice issues); this covers the opt-in as well as the substance of the proposal. In the Government's view this has worked well ever since the opt-in was introduced in the Amsterdam Treaty. Under the Lisbon Treaty, Parliament will, of course, continue to exercise that scrutiny over all JHA measures.

We are considering how the EU scrutiny process can be enhanced, and we will be consulting the relevant Scrutiny Committees in that work. In this context the Lord President, Baroness Ashton of Upholland, appeared before your Lordships' Select Committee on 13 May. At that evidence session Baroness Ashton set out the Government's approach to the JHA-opt-in. (Conclusions 12.102 and 12.103.)

12.104. Like the FSJ Protocol, the Schengen Protocol increases the UK's flexibility to choose whether to participate in Schengen-related measures. It is clear that the UK will no longer be bound, as it is at present, to take part in Schengen-building measures where it participates in the underlying *acquis*. However, nothing in the Lisbon Treaty changes the position as regards the UK's right to opt in to Schengen-building measures where it has not opted in to the underlying *acquis*. In such cases, the Council may continue to refuse the UK's request to participate (see paragraph 6.279).

12.105. Article 5(3) of the Schengen Protocol is an important new addition as it provides for a mechanism whereby the UK can be ejected from participation in parts of the underlying Schengen *acquis* which it has accepted if it declines to participate in a Schengen-building measure. This is the understandable *quid pro quo* of the UK's new freedom to choose not to participate in such measures. Again, we expect such cases to be rare in practice (see paragraph 6.282).

12.106. In order for costs to be imposed on the UK as a result of the cessation of its participation in a Schengen-building measure, such costs must be "direct financial consequences" which are "necessarily and unavoidably incurred". This is a strict test (see paragraph 6.283).

12.107. Under the FSJ and Schengen Protocols the UK cannot be forced to participate in an FSJ measure against its will. If the UK takes the view that a proposed measure has features which cannot be accommodated within a Common Law system or are otherwise unsuitable for application to the UK, the UK is free both to refuse to opt in and, if it wishes, to play no further part at all in relation to the proposal. However, as outlined above, a decision by the UK not to participate in an amending measure or a Schengen-building measure may have particular consequences for the UK. In a case where the UK is threatened with ejection from an existing measure, the Government will have to make a judgment as to which course of action best serves the UK interest. As we have already said, we do not expect such cases to arise frequently (see paragraph 6.287).

The Government agrees with the Committee that the new Schengen opt-in protocol is an improvement on the existing arrangements – giving the UK greater flexibility. We welcome and agree with the Committee’s conclusion that should a Schengen Building Measure be incompatible with the Common Law system or otherwise unsuitable for the United Kingdom then we have the flexibility not to opt-in and play no further part in the proposal if we so wish. The UK cannot be obliged to participate in any Schengen Building Measures. In exercising the opt-in under the Schengen Protocol the Government will carefully consider, as the Committee suggests, the full implications of non-participation. Furthermore we agree with the Committee’s assessment that ejection from underlying parts of the Schengen acquis as a result of UK non-participation in future measures will be rare. In taking any decision on this issue, the Council is obliged to seek to retain the widest possible participation of the Member State concerned, under new Article 5(3) of the Schengen Protocol. In line with the Committee’s assessment on the implications of non-participation under the Freedom, Security and Justice opt-in we agree that the criteria for imposing consequential costs on the UK are strict. (Conclusions 12.104 – 12.107.)

12.108. The apparent success of the UK approach to the Rome I negotiations should not be regarded as a one-off or non-repeatable occurrence. It seems likely that there will be further cases where the other Member States have a clear interest in securing UK involvement and will be prepared and willing for the UK to take an active part in negotiations into which the UK has for the time being not opted (see paragraph 6.292).

The Government welcomes the constructive co-operation provided by the European Commission, European Parliament and other Member States during the negotiations on the Rome I Regulation. This led to an outcome where the Government is hopeful the UK can participate in that instrument.

For the future, opt-in decisions will be assessed on a case by case basis and all options will be available. A range of different considerations will influence the final decisions and the importance of each one will vary greatly from case to case. None of them is likely to be decisive on its own. One consideration is the reality that our negotiating position is generally stronger where we participate from the outset. Another is that participants in the negotiations may not always be as willing to accommodate our concerns in the event that we were to follow a course similar to Rome I.

12.109. The suggestion that the UK, having opted in to a proposal, could argue that its opt-in did not extend to fundamental amendments of the proposal during negotiations raises an interesting legal question. But the question is unlikely to arise since the Government appear to accept that this would not be possible. In some areas of criminal law and policing, a dramatic change during negotiations may permit the UK to use the emergency brake to halt a measure's progress. In other cases, the UK may end up bound by a measure with which it does not fully agree; this is the nature of QMV. The risk of this situation arising will presumably be considered before the UK elects to opt in (see paragraph 6.296).

The Government broadly agrees with the Committee's conclusion. It is clearly right that a measure may be amended during the course of negotiations: this could either make the measure more or less advantageous from the UK's perspective. As it has since the introduction of the opt-in under the Treaty of Amsterdam, the Government will weigh factors such as this in the balance when deciding whether to opt-in.

12.110. It is important to maintain a proper balance between liberty and security. We share witnesses' concerns that a pick-and-choose approach by the UK might result in the UK participating in the bulk of coercive security-based measures while eschewing rights-based measures and urge the Government to take a balanced approach to participation in this area (see paragraph 6.305).

12.111. We note the possibility that the Commission may propose coercive and rights-based measures in one instrument thus requiring the UK, if it wishes to participate in the coercive measure, to participate in the rights-based measures as well. Packaging measures in this way is unlikely to be possible in most cases but it may be feasible in some areas and would require the United Kingdom to take a view on whether this was desirable and acceptable (see paragraph 6.306).

EU law and national law are required to observe human rights, particularly those set out in the European Convention of Human Rights. It follows from those requirements that any measures to improve co-operation against crime must also respect fundamental rights and safeguards. As the Secretary of State for Justice stated at the evidence session the UK will seek to co-operate to the maximum extent consistent with the UK's national interest. In considering whether to opt-in the UK will thoroughly examine all proposals. (Conclusions 12.110 and 12.111.)

12.112. Decisions by the UK to opt in to measures in the areas of civil and criminal law and policing will impact in a special way on devolved administrations, but particularly Scotland. The extension of the opt-in under the Lisbon Treaty to cover criminal law and policing is significant. The need for cooperation between administrations is clear. We expect the Government to consult closely with the Scottish Executive when deciding whether to opt in to measures in these areas, and we understand that this already occurs (see paragraph 6.308).

Ministers and officials in devolved administrations are always consulted on opt-in decisions. There is a well-established system of Ministerial correspondence and, in case it is needed, a dispute-resolution mechanism in the Joint Ministerial Committee on Europe (JMC(E)). Opt-in decisions are made in consultation with Scottish Ministers. This generally works well and will certainly be continued, with special regard being placed on measures that would have previously fallen under the Third Pillar.

12.113. If concerns regarding a possible West Lothian question arising in the EU parliamentary context develop, they will no doubt receive further consideration by Member States and the European Parliament itself. If the question is seen as raising a real problem here, it will also exist in cases of enhanced cooperation. But we do not consider that the UK should or will be likely to be influenced by such concerns in its decision whether to opt in (see paragraph 6.311).

The Government agrees that such considerations ought not to influence the decision whether to opt-in to a proposed measure. The Secretary of State for Justice made clear when giving evidence to Sub-Committee E, that as elected representatives of the people, UK MEPs should not be bound by the UK Government's position. They may have profound disagreements with HMG's position and should not be excluded from a vote in which they would be, like all other MEPs, representing their constituents and not the stance of the national government.

Transitional arrangements

12.114. We would expect the Commission to introduce measures to convert some of the more significant Title VI instruments, such as the European Arrest Warrant, soon after the Treaty of Lisbon enters into force. We would not be surprised if the Commission adopted a "repeal and replace" approach in order to ensure legal certainty (see paragraph 6.323).

12.115. It seems unlikely that the Commission will seek to convert all Title VI measures. We urge the Government to liaise closely with the Commission to ensure that measures which require redrafting or renegotiating are the subject of amendment measures before the end of the transitional period (see paragraph 6.324).

12.116. Any proposals brought forward to convert existing Third Pillar instruments into First Pillar measures would have to be made under Title V of the amended TFEU. Upon adoption, such proposals would come within the ECJ's jurisdiction immediately and would not be subject to a five-year transitional period. The United Kingdom would be able to use its opt-ins and could, if it wished, choose not to participate in an amendment or a "repeal and replace" measure (see paragraph 6.325).

We agree with the Committee's assessment, and will be liaising closely with the Commission on this. (Conclusions 12.114 – 12.116; also conclusions 12.121 – 12.124.)

12.117. The question of what constitutes an "amendment" under the Transitional Protocol proved controversial among our witnesses. But in our view it will be clear which proposed measures are "amendments" and Article 10(2) is unambiguous: any amendment, however small, will bring the amended act under the ECJ's general jurisdiction and within the Commission's enforcement powers (see paragraph 6.330).

12.118. We do not share the Commission's interpretation of Article 9 of the Protocol. Article 9 says that the acts' legal effects are "preserved until those acts are repealed, annulled or amended". The obvious conclusion is that when those acts are repealed, annulled or amended, their legal effects are no longer preserved. It is difficult to understand how Article 9 can be read as meaning that only the amended parts of the act will have direct effect. If that were the meaning of Article 9 then the qualification in that article regarding repeal, annulment or amendment would be obsolete: insofar as amendments are introduced on a new Title V TFEU legal base they will be capable of having direct effect by default (see paragraph 6.331).

12.119. In practice, both of these issues will be circumvented if the Commission adopts a "repeal and replace" approach (see paragraph 6.332).

12.120. The Transitional Protocol leaves unclear from what date an amendment has the effect described in the Protocol. This ambiguity may be a reason for the Commission to prefer a "repeal and replace" approach whenever an amendment is contemplated (see paragraph 6.334).

The Government agrees with the Committee that for the purpose of Article 10(2) of the Transitional Protocol any amendment, however small, will bring the amended act under the ECJ's general jurisdiction and within the Commission's enforcement powers. We also agree with the Committee that under Article 9 of the Protocol the whole of an amended third pillar measure will be capable of having direct effect (rather than just the amended part of the measure). As the Committee says, these issues will be circumvented if the Commission adopts a 'repeal and replace' approach.

So far as the question of when the consequences flowing from an amendment will take effect our view is that this will occur on the entry into force of the amending measure. (Conclusions 12.117 - 12.120.)

- 12.121. The possibility under Article 10(4) of the Transitional Protocol of exercising a block opt-out protects the UK's right to choose whether to participate in new measures in the FSJ field. However, we expect that the Government will be fully engaged with the Commission and other Member States to ensure that measures which might prompt them to use the block opt-out are amended before the expiry of the transitional period. Article 10(4) provides an emergency exit for the UK where the amendment of a controversial measure has not proved possible within the available time (see paragraph 6.339).**
- 12.122. Provided that the Government undertake the task of sifting through existing Title VI measures in good time, they will be less likely to find themselves in the position of having to use the block opt-out and the question of costs will not arise. If the block opt-out is used, then, as with the costs provision in the FSJ and Schengen Protocols, we consider that the test for imposing costs is set at a high level (see paragraph 6.342).**
- 12.123. The right under Article 10(5) of the Transitional Protocol for the UK to opt back in to measures will ensure that, if the UK at the end of the five-year transitional period uses its block opt-out in relation to those Title VI measures which are not by then amended or re-enacted, the UK may immediately thereafter choose to opt back in to particular Title VI measures covered by that block exemption (see paragraph 6.344).**
- 12.124. But the Treaty does not leave open the option of retaining the *status quo* in respect of Title VI measures after the transitional period. At the end of that period at the latest, the UK must either accept the Commission's enforcement powers and the ECJ's jurisdiction in respect of such measures or exercise its block opt-out, again accepting that if it chooses to opt back in to any particular existing measure, the Commission's enforcement powers and the ECJ's jurisdiction will apply (see paragraph 6.345).**

We agree with the Committee's assessment, in particular that the possibility under Article 10(4) of the Transitional Protocol of exercising a block opt-out protects the UK's right to choose whether to participate in new measures in the FSJ field. The Government will be liaising closely with the Commission on this issue. (Conclusions 12.121 – 12.124 ; also conclusions 12.114 – 12.116.)

Civil Protection

12.125. The Solidarity Clause does not seem to us to have any legal significance; it does not enable Member States to do anything which they could not do without it. It does however serve to emphasise the political will of the Member States to stand together in the face of adversity (see paragraph 6.349).

The Government notes the Committee's conclusion. It agrees that the provision covers action which can already be undertaken by Member States and underpins the political will of Member States to assist each other in responding to crises.

Chapter 7: EU Foreign, Defence and Development Policies

External action of the EU

12.126. The changes to the structure of the Treaties serve to consolidate, streamline and clarify the provisions on the EU's external relations. They do not change the overall objectives of the EU's external policies (see paragraph 7.16).

The Government agrees with the Committee's conclusions that the structure of the Treaties serves to consolidate, streamline and clarify the provisions on the EU's external action.

The Common Foreign and Security Policy (CFSP)

The Government welcomes the Committee's conclusions 12.127 - 12.142 on the Common Foreign and Security Policy and on Development Co-operation and Humanitarian Aid.

12.127. The Treaty will not change the scope of the CFSP or transfer any additional powers to the EU in this area. The new provisions in the Treaty could lead to a more active role for the EU in the area of CFSP, but much will depend on the degree of consensus among Member States regarding such a role (see paragraph 7.20).

The Government agrees with the Committee's conclusion that the Lisbon Treaty will not change the scope of the CFSP or transfer additional powers to the EU in this area. As the Government said in its response to the report of the House of Commons Foreign Affairs Committee, Member States' political will is central to the development of the CFSP. The Government considers that the Lisbon Treaty's reforms of the EU's external policy structures are important as a means of improving coherence within the EU institutions working on foreign and external policy and therefore a useful strengthening of the EU framework for delivering on the global agenda set out in the December 2007 European Council Declaration on Globalisation.

12.128. The new procedure allows for decisions defining an EU action or position on a proposal from the High Representative to be adopted by qualified majority voting. However, the European Council must unanimously agree to request a proposal for a decision in a specific policy area (see paragraph 7.28).

The Government agrees with the Committee's conclusion.

12.129. The evidence is that the Lisbon Treaty has preserved the independence of the UK's foreign and defence policy, subject to the constraints arising when unanimous agreement does prove possible. The fundamental principles of the CFSP will not change under the new Treaties. In particular, the principle of unanimity and the search for consensus in decision-making will continue to apply to the CFSP (see paragraph 7.36).

The Government agrees with the Committee's conclusions.

12.130. We conclude that the Lisbon Treaty will provide for safeguards against encroachment of other areas of EU activities into the area of CFSP. This should protect the intergovernmental character of the CFSP. The Lisbon Treaty will also strengthen the system for upholding and protecting the rights of persons who are subject to restrictive measures adopted under the CFSP (paragraph 7.41).

The Government agrees with the Committee's conclusions.

12.131. The new data protection provision in the CFSP field is significant because of its possible repercussion on the area of EU home affairs. Article 39 TEU is conspicuously different from Article 16 TFEU as a Treaty basis for data protection measures because it does not govern the activities of the EU institutions and bodies, and excludes oversight by the European Parliament and the Court of Justice. Clarity is needed as to the scope and purpose of Article 39 (paragraph 7.50).

Article 39 TEU provides recognition that data protection also applies to the processing of personal data by Member States in relation to the Common Foreign and Security Policy. A separate provision for CFSP – adopted and applied in accordance with the specific rules and procedures applicable in this area – is appropriate given the distinct, intergovernmental character of CFSP.

Article 39 TEU applies only to the Common Foreign and Security Policy. Activities carried out in relation to Justice and Home Affairs will be subject to the arrangements set out in Article 16 TFEU.

Development Cooperation and Humanitarian Aid

12.132. The Lisbon Treaty reforms in the area of development policy will make clear that the primary objective of development cooperation is to reduce and eliminate poverty. This is in line with current UK policy and legislation. The Lisbon Treaty will have implications for the internal organisation of the Commission and its Directorates-General in relation to development policy. The creation of a specific legal basis for the EU's existing humanitarian aid activities aims to improve the efficiency of decision-making in this area and ensure that the EU's humanitarian aid respects international humanitarian principles (paragraph 7.58).

The Government welcomes the Committee's conclusions on development policy and humanitarian aid, including the fact that for the first time, it will be a legal requirement to ensure that development aid is first and foremost used to tackle and eradicate poverty. The Government believes that this will offer a clear purpose, set out in primary law, for EU development co-operation, which is fully in line with the UK's approach.

The Government notes the Committee's suggestion that the implementation of the Lisbon Treaty might have implications for the internal organisation of the Commission services dealing with these policy areas and their corresponding budget lines. The Government is confident that these high priority policy areas will continue to have strong institutional backing.

Consular protection

12.133. The Lisbon Treaty will allow the EU to adopt directives to facilitate the implementation of the Treaty provisions on consular protection. However, the requirement for Member States' missions in third countries to assist each others' nationals on the same conditions as they would their own nationals already exists under the current Treaties, and this is not, therefore, a significant change (see paragraph 7.60).

The Government agrees with the Committee's conclusions. The requirement for Member States' missions to assist each others' nationals exists under the current Treaties and the provision of consular assistance itself remains a matter for Member States.

The High Representative

- 12.134. The creation of a High Representative for Foreign Affairs and Security Policy/Vice-President of the Commission represents an important institutional innovation of the Lisbon Treaty, which could have a significant impact on the way the EU formulates and implements its external policies. In light of the evidence, the post could bring additional coherence and effectiveness to the EU's external action, but much will depend on the way the High Representative exercises his powers, as well as his working relationships with the Member States, the President of the European Council, and the President of the Commission (see paragraph 7.75).**
- 12.135. The post brings together three functions that exist under the current Treaties (the Council Presidency, the Commissioner for External Relations and the High Representative). The chairing of the Foreign Affairs Council by the High Representative is a key innovation which will give the incumbent a further degree of influence over decision-making in the area of CFSP. This could lead to a change in the way the Member States interact with the High Representative and contribute to EU policy-making in this area (see paragraph 7.76).**

The Government agrees with the Committee's conclusions on the High Representative for Foreign Affairs and Security Policy. The Government believes that the High Representative will improve the EU's ability to deliver coherently and effectively where the Member States agree the EU should act. The Government agrees with the Committee that the post of High Representative could bring additional coherence and effectiveness to the EU's external action. It also agrees that this will depend on the way the High Representative exercises his powers and on his working relationship with the Member States and the Presidents of the European Council and Commission. As the Government said in its response to the report of the Foreign Affairs Committee of the House of Commons, it will place a premium on ensuring that the right individual is selected for this post and the other key roles. (Conclusions 12.134 and 12.135.)

- 12.136. It is clear that the Treaty changes nothing in the UK's right to retain its seat on the UN Security Council, its role as a permanent member, its right to speak, and its individual vote and veto. Where the EU has a unanimous common position, the UK will be required to request that the High Representative present that position; but that possibility does not displace the UK's right to speak and vote (see paragraph 7.82).**

The Government agrees with the Committee's conclusion that the Lisbon Treaty provisions have no impact on the UK's rights, role, individual vote and veto as a permanent member of the UN Security Council.

The European External Action Service

12.137. The creation of an External Action Service is an important institutional innovation of the Lisbon Treaty. The Service is intended to provide the High Representative and the EU with analysis and support, as well as improve the consistency of the EU's representation in third countries and at international organisations (see paragraph 7.98).

The Government agrees with the Committee's conclusion on the creation of an External Action Service (EAS).

12.138. The Treaty of Lisbon leaves most of the details on the structure and functioning of the External Action Service to be decided upon by the Council acting unanimously after entry into force of the Treaty. The UK has the experience to play a leading role in elaborating a concept for the Service in a methodical and systematic way. And we would expect the Diplomatic Service and the EAS to work closely together (see paragraph 7.99).

12.139. Parliament should have an opportunity to scrutinise the draft concept for this Service well in advance of any political agreement being reached on its structure, functioning and financing. It is a matter that the Committee may want to come back to at a later date. In the meantime, we look forward to being kept informed by the Government of progress being made in the negotiations on the establishment of the Service (see paragraph 7.100).

The Government will of course play a full part in the discussions on the organisation and functioning of the EAS and work closely with it. The Minister for Europe wrote to the Chair of the Committee on 22 April 2008 to reaffirm the Government's commitment to keeping both Houses of Parliament informed across the full range of Treaty implementation issues. An update on those preparatory technical discussions on Treaty implementation issues (including the External Action Service) which had already taken place or were planned was also included in the letter. (Conclusions 12.138 and 12.139.)

12.140. The Government are committed to engage positively with the UK's EU partners in building an effective External Action Service. We would welcome assurances from the Government that, where it is in line with UK policy, they will contribute to providing the Service with high quality personnel with the necessary language skills, including secondees, and adequate financial resources (see paragraph 7.101).

The Government agrees it will be important that the UK is properly represented within the EAS, as the Foreign Secretary set out in his evidence to the Foreign Affairs Committee in December 2007. To date, only technical, preparatory discussions on the organisation and function of the EAS have taken place. It would therefore be premature to have a fixed plan on UK secondee numbers and financial resources. However, it will be in the UK's interest that the services is fully effective and would therefore seek to commit appropriate resources (including personnel), to enable this to happen.

12.141. Effective mechanisms should be put into place at the appropriate time to exercise parliamentary oversight over the Service at the national level (see paragraph 7.103).

The Government welcomes the Committee's conclusion and parliamentary interest in the EAS. The Government will work with the Scrutiny Committees as they bring forward proposals for parliamentary oversight of the EAS at the national level.

12.142. The Lisbon Treaty states that the Union delegations will work closely with the missions of the Member States, and not replace them. The Government should encourage the Diplomatic Service to engage positively with the External Action Service (see paragraph 7.105).

The FCO and other Whitehall departments will engage positively with the European External Action service.

The Common Security and Defence Policy

12.143. The central role of NATO in the defence policy of certain Member States such as the UK will continue to be recognised under the new Treaties (see paragraph 7.111).

12.144. Under the new Treaties all the EU Member States, including the six Member States of the EU which are not also members of NATO, will have an obligation to come to each others' aid and assistance if one of them is attacked on their territory. However, this obligation will fall on each EU Member State individually, and not on the EU and its institutions. As regards the EU Member States, such as the UK, which are also members of NATO, the Lisbon Treaty will not change the current situation with regards to their collective defence, which will continue to be organised and implemented in the framework of NATO (see paragraph 7.117).

12.145. Permanent Structured Cooperation is a form of enabling framework allowing the Member States who so wish to cooperate more closely in the area of defence capabilities development. Permanent Structured Cooperation is not a major departure from current practice. Rather, it represents a continuation and deepening of current forms of cooperation. Its objective is to create a political dynamic among Member States towards the improvement of European defence capabilities. Most of these new capabilities should be available to both NATO and the EU and could therefore serve to strengthen both organisations. While recognising that under Permanent Structured Cooperation some decisions will be taken by qualified majority voting, all decisions of substance will be taken unanimously by the participating Member States. Furthermore, the new Treaties will provide that “national security remains the sole responsibility of each Member State” (new Article 4 TEU) (see paragraph 7.126).

12.146. The provisions on the European Defence Agency and on crisis management missions are a codification of current practice and will therefore have little impact on the European Security and Defence Policy/Common Security and Defence Policy (see paragraph 7.129).

The Government agrees with the Committee’s analysis of the Common Security and Defence provisions of the Lisbon Treaty. The essential nature, level of ambition and functioning of the European Security and Defence Policy (re-named the Common Security and Defence Policy by the Lisbon Treaty) remains unchanged. Substantive decisions with military and defence implications remain for Council to take by unanimity. All forces are offered to the EU by Member States on a voluntary basis for undertaking the specific military and civilian crisis management tasks set out in the Treaty. As the Committee notes, these tasks have been expanded slightly to take account of the development of ESDP since 2003 when the first ESDP operation was launched. Member States will still have the capacity, as they do now, to undertake unilateral military action. (Conclusions 12.143 – 12.146).

Chapter 8: Social Affairs

Employment and Social Affairs

12.147. The “emergency brake” negotiated by the UK Government as regards social security measures for migrant workers and their dependants is significant and we are satisfied that, if required, it will achieve the purpose for which it is designed (see paragraph 8.14).

The Government welcomes the Committee’s agreement that the mechanism of the emergency brake as regards social security measures will achieve the purpose for which it was designed.

12.148. The increased emphasis on social dialogue is also significant, but we are concerned that there is insufficient involvement of UK small business. We trust that UK small business organisations along with their colleagues in Brussels can resolve this matter to their mutual satisfaction and thereby ensure the proper involvement of the UK small business sector (see paragraph 8.15).

As noted in the Government's response to the Committee's report [HL 120] on the Green Paper on Labour Law, the Government agrees that it is important for small firms to be engaged in social dialogue at EU level. We are unaware of any intentions from UK small business organisations to join UEAPME, the European level organisation representing SMEs with recognised Social Partner status. Nonetheless, as the Committee is aware, small business interests do fall within the overall remit of Business Europe, which counts small businesses among its members, and of course of the CBI, its UK representative.

More broadly, the Government recognises that the Commission has made significant efforts to engage small businesses in other aspects of European policy making and to specifically assess the impact of new policies on SMEs. Indeed a current European Commission consultation on proposals for an EU Small Business Act considers measures to support Europe's SMEs; the UK Government has consulted widely with UK small business representatives in developing its response and has been encouraged that many of these organisations are also responding directly to the Commission with their views.

Education, Vocational Training and Youth

12.149. The inclusion amongst the Treaty's objectives of the protection of children's rights will have an important impact by making future legislative instruments subject to an assessment of their impact on children's rights (see paragraph 8.28).

12.150. The new Articles 9 and 10 TFEU may be of particular assistance to children (see paragraph 8.29).

The Government agrees with the Committee's conclusions. (Conclusions 12.149 and 12.150.)

12.151. The inclusion in the Treaty of a specific provision on the participation of young people in democratic life in Europe does not amount to a significant extension of EU competence beyond action that is already taking place (see paragraph 8.30).

12.152. The new provision relating to vocational training does not amount to a significant extension of EU competence (see paragraph 8.31).

The Government agrees with the Committee's conclusions. (Conclusions 12.151 and 12.152.)

Sport

- 12.153. The inclusion of a legal base for sport builds on action already undertaken by the Community, which has recognised the role of sport in forging identity and bringing people together. It is nonetheless significant (see paragraph 8.45).**
- 12.154. The provision of a legal base for sport within the Treaty is intended to permit the special nature or “specificity” of sport to be recognised by the European institutions (see paragraph 8.46).**
- 12.155. The provision of a legal base for sport is also intended to ensure that EU legislation does not impose unintended consequences upon sporting activities and that the ability of sport to play an important role in European society is recognised (see paragraph 8.47).**
- 12.156. A legal base for EU action on sport is intended to provide a transparent basis for EU-level funding of sporting projects (see paragraph 8.48).**
- 12.157. Action in this area cannot go further than supporting, coordinating or complementing Member States’ actions and we urge the Government to ensure that the European institutions adhere to this provision (see paragraph 8.49).**

The Government welcomes the Committee’s conclusions regarding the impact of the Treaty in relation to the new legal base for sport. As the Committee notes, the Treaty reference to the specificity of sport will provide for sport’s significant social and economic role to be acknowledged and considered in greater detail.

A dedicated budget will allow for the relationship between sport and other areas, such as health, to be built upon to the benefit of Member States and their citizens. The EU will play a supporting role, complementing national actions – the UK supports this as an appropriate way forward and endorses the Committee’s reference to the importance of retaining subsidiarity. (Conclusions 12.153 – 12.157.)

Culture

- 12.158. The move from unanimity to QMV in the area of culture is a small but significant step. In the view of the DCMS, this will have a positive effect (see paragraph 8.54).**

The Government welcomes the Committee’s conclusions. This is a small but positive step in the area of culture. It will lead to a simplification of the decision-making process for programmes which support co-operative cultural initiatives being developed at a European level.

Public Health

12.159. The Lisbon Treaty strengthens the provision on the limits of EU action in the field of public health policy. However, in practice, the application of this provision could be influenced by differing perceptions across the EU of the scope of public health policy (see paragraph 8.62).

The Government agrees with the Committee on the effects of the Lisbon Treaty on the limits on EU action in the field of public health. In relation to national control of healthcare services, the Lisbon Treaty makes it clearer than ever before that decisions on national health services are for Member States.

12.160. The new measures on which action can be taken do not represent an extension of EU competence beyond action that is already taking place. However, the explicit reference to mental health in the Lisbon Treaty is significant, reflecting the importance of the issue and the work undertaken on it by the European Commission and Member States (see paragraph 8.63).

The Government agrees with the Committee that the measures in the Treaty do not represent an extension of EU competence in public health. We welcome the explicit reference to mental health in the Treaty, and agree that the EU can play a significant role in working across policy sectors to improve mental health. This reflects the responses to the consultation on the EU Green Paper on mental health, and the report of this Committee on EU action in mental health*.

*“Improving the mental health of the population: can the European Union help?”
Report of the House of Lords European Union Committee, April 2007.

Consumer Protection

12.161. The new prominence given to consumer protection by the Lisbon Treaty is of limited significance (see paragraph 8.68).

We agree that the Treaty has no major implications for consumer protection as no substantive or textual changes have been made to the consumer protection provisions.

Chapter 9: Finance and the Internal Market

Finance

12.162. The formalisation of the Eurogroup has historical significance but no impact on the operation of ECOFIN. We are content that the Lisbon Treaty has no significant impact in the area of financial affairs or trade policy (see paragraph 9.12).

The Government welcomes the Committee's conclusion that the new Eurogroup provisions and Protocol will have no impact on the operation of ECOFIN in the future. The Government believes the Lisbon Treaty is helpful in explicitly recognising that the Eurogroup will meet "informally". We believe that ECOFIN remains the proper forum for formal discussions and decisions.

The Government also agrees that there should be no significant impact from the Lisbon Treaty on the areas of financial affairs or trade policy more generally.

Internal Market and Competition

12.163. We would be concerned if any possible symbolic downgrading of the principle of undistorted competition were translated into efforts to depart from the principles of free competition that have formed the cornerstone of the internal market. However, Article 51 of the TEU gives equal weight to the Treaty Articles and Protocols and Articles 81-83 of the TEC will remain the same as Articles 101-103 of the TFEU. Therefore, the change does not appear to be significant (see paragraph 9.18).

We agree that the principle of undistorted competition is a cornerstone of the internal market. This position on competition remains unchanged under the Lisbon Treaty.

The new Protocol on the Internal Market makes clear that the reference to the internal market in the new provision on objectives (Article 3 TEU) "includes a system ensuring that competition is not distorted". As the Committee notes, Protocols are legally binding and under Article 51 TEU form an integral part of the Treaty itself.

This Protocol is in addition to the detailed treaty provisions relating to the rules and powers on competition which remain unchanged under the Lisbon Treaty.

As the Law Society of England and Wales have noted in their report on the Lisbon Treaty published in January 2008: "... a Protocol records that the EU's internal market includes a system which ensures that competition is undistorted. This does not change the current legal position".

Intellectual Property

12.164. The new Article 118 of the TFEU is a restatement of existing powers. Although the Treaty of Lisbon would not confer additional intellectual property powers on the EU, it marks a statement of political intent and a commitment to achieving the Community patent. The move to QMV, in itself, is not significant (see paragraph 9.24).

The Government agrees with the Committee's conclusions.

Energy

- 12.165. The new provisions in the Lisbon Treaty may raise the profile of the issue of energy but they do not constitute a major innovation. However the extension of QMV may be seen as significant (see paragraph 9.33).**
- 12.166. The insertion of Article 194(2) is important as it helps to define the boundaries between EU and Member States' competence by making clear that Member States retain sovereignty over national energy resources and have the right to determine their energy mix and the structure of their energy supply (see paragraph 9.34).**

The Government agrees that the new provisions on energy in the Lisbon Treaty do not constitute a major innovation as the EU has already implemented a wide range of measures on energy policy under the existing legal bases of the EC Treaty. The new energy article reflects the growing importance of energy as a political and economic issue in the EU and will help ensure that policies on energy markets, energy security and energy efficiency are coherent and mutually reinforcing. We note that the Committee considers that the extension of QMV may be seen as significant. We consider that the new provisions are likely to result in a small and technical extension of QMV but believe that in practice this is unlikely to result in significant change. QMV is not new on energy issues. The EU has previously passed legislation on energy by QMV using other legal bases, in particular Single Market legal bases. (Conclusions 12.165 and 12.166.)

Services of General Interest

- 12.167. The impact of the Treaty of Lisbon on Services of General Interest is not significant (see paragraph 9.40).**
- 12.168. Given that Article 51 of the TEU, as amended by the Treaty of Lisbon, gives Protocols and Annexes equal weight to the Treaty Articles, the split between Article 14 and the Protocol on Services of General Interest is not one of significance (see paragraph 9.41).**

The Government agrees with the Committee's conclusions on Services of General Economic Interest. (Conclusion 12.167 and 12.168.)

Tourism

- 12.169. The Treaty amendment in the area of tourism represents a small but significant expansion of competence. We see the tourism industry as an area of commercial enterprise in which individual Member States need to establish, to the degree that suits their own circumstances, the extent to which the activities of the industry are supported by government intervention (see paragraph 9.48).**

12.170. The Treaty excludes the power to harmonise national laws in this area but we nevertheless urge the European institutions to ensure that the principle of subsidiarity is fully respected when drawing up any policy framework in relation to tourism (see paragraph 9.49).

The Government welcomes the Committee's conclusions and agrees that Member States need the flexibility to establish their own policy and regulatory environment to suit and develop their tourism sector. The Commission in its last Communication "Agenda for a sustainable and competitive European tourism" (October 2007), also recognises the importance of respecting the principle of subsidiarity and acknowledges the voluntary nature of stakeholders' engagement with the process. (Conclusions 12.169 and 12.170.)

General conclusion

12.171. The impact of the Treaty of Lisbon on the Single Market will be limited (see paragraph 9.50).

The Government agrees with the Committee's conclusion.

Chapter 10: Environment, Agriculture and Fisheries

Environment

12.172. The introduction into the Treaty of a specific reference to climate change is of strategic rather than legal significance (see paragraph 10.11).

The Government agrees with the Committee's conclusion that the introduction into the Treaty of a specific reference to climate change is of strategic rather than legal significance.

12.173. The provision to support, coordinate and supplement the action taken by Member States in the field of civil protection may have some significance in reducing the vulnerability of the Member States to environment-related disasters (see paragraph 10.12).

The Government welcomes the Committee's conclusion on civil protection. The Lisbon Treaty creates a specific legal base for EU action to encourage co-operation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural and man-made disasters.

The existing Treaties already list civil protection as an area of EU activity. EU action to date in this area has primarily involved measures to enhance EU disaster response by facilitating information sharing and financial support within the EU.

Agriculture, Fisheries and Animal Welfare

12.174. Under the European Union (Amendment) Bill, Ministers will have to secure the approval of both Houses of Parliament before agreeing to any change of procedure affecting a nationally sensitive environmental policy measure (see paragraph 10.13).

The Government agrees with the Committee that the ‘passerelle’ in Article 192(2) TFEU would allow the Council, acting unanimously, to decide to extend the ordinary legislative procedure (co-decision and QMV) to apply to those aspects of environmental policy identified. As the Committee notes, not only is such a move subject to unanimity in the Council, but under Clause 6(f) of the EU (Amendment) Bill both Houses of Parliament would have prior control over the taking of any such decision.

12.175. The move to co-decision in agriculture and fisheries is significant. It will bring more transparency and accountability to the policy-making process, allowing third parties to raise concerns more easily with policy makers and facilitating national parliamentary scrutiny of agricultural and fisheries decision-making (see paragraph 10.36).

The Government agrees with the Committee’s conclusion.

12.176. We urge the European institutions to ensure that the application of the ordinary legislative procedure does not unduly extend the length of the decision-making process. As regards fisheries, particular efforts may need to be made to ensure that the more complex procedure does not hinder the timely management of fisheries (see paragraph 10.37).

The Government understands the Committee’s concern that a more complex procedure has the potential to hinder timely management of fisheries, but would like to offer some reassurance that in practice this should not be the case.

Firstly, not all aspects of Common Fisheries Policy management are subject to the ordinary legislative procedure. Those like the setting of annual catch and effort limits which require timely implementation are exempted for the very reason that any substantive delay threatens the long-term viability of the very stocks they are designed to protect.

More generally, however, this does not mean that a move to the ordinary legislative procedure for other matters necessarily implies a significant increase in the length of the decision-making process. Changes that have been made in previous Treaties have resulted in the time taken to co-decide on EU legislation actually decreasing. In particular, it is notable that between 2004-2007, 64% of legislation was agreed at first reading, with only 8% going to conciliation between the European Parliament and the Council.

While there is no guarantee this trend will continue following the 2009 European Parliament elections, European institutions have consistently demonstrated a collective will for making substantial legislative progress in a wide-variety of policy areas and there is nothing to suggest that this will not be the case in future.

12.177. The future policy impact of the move to co-decision is not clear. Much depends on the European Parliament itself, but the weight of the evidence suggests that the agriculture and fisheries committees of the European Parliament will in future represent, and be closely overseen by, a wider range of interests than the narrow producer interests that have historically dominated those committees. For these reasons, we expect that the change is likely to assist rather than impede further reform of both the common agricultural and fisheries policies (see paragraph 10.39).

The Government agrees with the Committee's conclusion.

12.178. Maintaining the various exceptions to co-decision, while justified in the light of the required timescales, may be significant as important decisions will continue to rest solely with the Council. We would urge the Commission to publish its annual proposals on the fixing and allocating of fishing opportunities as early as possible each year in order that the European Parliament can be informally consulted and allowing time for national parliaments to scrutinise the proposals more effectively (see paragraph 10.40).

The Government agrees that exempting, for example, the setting of catch limits from the ordinary legislative procedure is justified because of the urgency of implementation of such measures. These exemptions are simply an example of the EU adopting a sensible and practical approach to the annual fisheries negotiations and other similar measures. However, it is absolutely clear that the significantly earlier preparation of their proposals, which the Commission are seeking to achieve, will allow for more extensive consultation of all stakeholders and interested parties and should therefore result in more fully considered and effective legislation.

12.179. The abolition of the distinction between compulsory (agricultural) and non-compulsory expenditure is a significant step alongside the application of the ordinary legislative procedure to agriculture policy. The change will make the agricultural budget-setting process more transparent, open and balanced (see paragraph 10.45).

The Government agrees that this change to the annual budget procedure is a significant one. We also agree that the change will be a positive one.

12.180. The clause on exclusive competence for the conservation of marine biological resources under the Common Fisheries Policy represents a codification of ECJ case-law (see paragraph 10.48).

The Government agrees with the Committee that this clause simply represents codification of existing case law as part of the greater clarity which the Lisbon Treaty provides in setting out the categories of competence conferred on the Union. The Lisbon Treaty makes no change to the competence of either Member States or the Commission when it comes to fisheries: Community competence over fisheries is shared, except for conservation of marine biological resources under the Common Fisheries Policy, where it has been exclusive since the UK's Treaty of Accession came fully into force in 1979.

12.181. The new Article 13 TFEU re-affirms the European Union's commitment to animal welfare. It will help to ensure greater consistency across the EU as regards animal welfare (see paragraph 10.55).

The Government agrees that the Lisbon Treaty re-affirms the EU's commitment to animal welfare and incorporates the legally-binding provisions that were in the Protocol to the Amsterdam Treaty into the main body of the Lisbon Treaty.

12.182. We acknowledge the concerns of the fishing industry and draw attention to the potential consequences of applying the provisions on animal welfare to commercial fisheries given the nature of death to which netting and landing can lead (see paragraph 10.56).

Given that fisheries matters were already covered by the previous mention of "agriculture" in the Amsterdam Protocol, the Government considers that the Lisbon Treaty does not actually extend the scope of the animal welfare provisions beyond those already agreed under the Treaty of Amsterdam. It is also important to note that the Lisbon Treaty (like the Amsterdam Protocol) does not require the Community or Member States to give precedence to animal welfare considerations – just to take them into account. This does not therefore rule out consideration of other factors such as economic or practical experience when developing policy in these areas.

12.183. We note that the possibility of allowing exemptions from animal welfare rules on grounds of religion, cultural tradition and regional heritage is included in the current animal welfare Protocol. The new Treaty article does not therefore amend the *status quo* in this regard (see paragraph 10.57).

The Government agrees that the Lisbon Treaty reconfirms the exemptions based around religious and cultural rights, for instance to account for slaughter without stunning under Halal (Muslim) and Kosher (Jewish) religious practices, which are also allowed under current UK legislation.

Chapter 11: National Parliaments—The Democratic Challenge

Obligations on national parliaments

12.184. Following the deletion of “shall” from three of the four places where it occurred, we regard it as settled that the Lisbon Treaty places no obligations on national parliaments. Even if a sense of obligation can be construed from some of the other languages, it is inconceivable that anyone would seek to enforce these obligations. In any case, national parliaments will in our view be under a strong political obligation to take seriously the new opportunities created by the Treaty (see paragraph 11.49).

The Government agrees with the Committee’s conclusions.

Yellow and orange cards

12.185. The yellow and orange card procedures are a useful innovation. It may be that they will seldom be invoked, but this is true of many of the sanctions available to scrutineers in a democracy. The existence of a sanction gives scrutiny teeth, while making it less likely that the sanction will need to be deployed. The Commission can disregard adverse votes from national parliaments and maintain its proposal; but this may be politically difficult, and if an orange card has been played the proposal is unlikely to find the necessary majority in the Council (see paragraph 11.50).

12.186. The extension of the period allowed for scrutiny from six to eight weeks makes the yellow and orange card procedures significantly easier for national parliaments to operate than would otherwise be the case. In practice this Parliament may have even longer, since English is usually the first language to emerge from the Commission translators, and it is typically another month before the last language emerges and the formal scrutiny period begins. Nonetheless it will be challenging even for this Committee to reach a considered view on subsidiarity within this time, particularly if, in the case of an adverse opinion, time needs to be factored in to put a motion to the House, and particularly if much of the period falls in recess (see paragraph 11.51).

12.187. A well-founded reasoned opinion may be ineffective for lack of the necessary supporting votes from other chambers within the eight weeks. The success of the card procedure will depend on coordination between national parliaments (see paragraph 11.52).

- 12.188.** The increasing trend towards “first reading deals” makes it all the more important that there should be a period for parliamentary scrutiny. It has consequences for parliamentary scrutiny beyond the question of subsidiarity, making it more important for national parliaments to make their views known upstream. The burden is on national parliaments; those which leave it to the end of the eight weeks to express a view, or even later, risk being too late to make any difference. We do not however consider that this undermines the yellow and orange card procedures: during the eight weeks allowed for playing the card, no formal legislative step can be taken, save in case of urgency (see paragraph 11.53).
- 12.189.** The card procedures apply only to the principle of subsidiarity, and not to proportionality. National parliaments will continue to police the proportionality principle by the other means at their disposal (see paragraph 11.54).
- 12.190.** We expect the playing of a yellow or orange card to be a rare event. That being so, we caution the Commission and the European Court of Justice against drawing any inference from the non-playing of the cards. The absence of a yellow or orange card will not signify that national parliaments support a proposal (see paragraph 11.55).
- 12.191.** Article 352(2) TFEU, which applies the yellow card procedure expressly to measures under Article 352 (the “flexibility clause”, currently Article 308 TEC), does not add anything of substance. Proposals adopted on the basis of Article 308 are no different from other proposals and fall under the subsidiarity monitoring procedures without any special article. Article 352(2) seems chiefly political, because of the sensitivity of Article 308 proposals (see paragraph 11.56).
- 12.192.** The novelty of the card procedures, and their prominence in the Treaty, should not give rise to overestimation of their importance. Breaches of the subsidiarity principle in draft legislative acts are quite rare. National parliaments will no doubt take the new procedures seriously, but they should not distract attention from scrutiny of policy. Nonetheless, a beneficial consequence of the new procedures will be an intensification of day-to-day cooperation between national parliaments. This will bring advantages in areas wider than the monitoring of subsidiarity (see paragraph 11.57).

Article 308

12.193. The reformulation of Article 308 to exclude the reference to “the operation of the common market” makes clear that, in future, new Article 352 can be applied to any area of the EU’s activity – except the CFSP (see paragraph 11.58).

The Government welcomes the Committee’s conclusions on the Lisbon Treaty provisions on the yellow and orange card procedures and Article 352(2) TFEU (ex-Article 308). The Government will continue to highlight any use of Article 352(2) TFEU (ex-Article 308) in its Explanatory Memoranda. (Conclusions 12.185 – 12.193.)

Impact on the procedures of this House

12.194. The Lisbon Treaty will have consequences for the procedures of this House and our Committee. The Committee’s terms of reference and the Scrutiny Reserve Resolution will require amendment; the House will need to decide whether to delegate its vote in the yellow and orange card procedures to the Committee; and a solution will be needed to the problem which will arise if most of the time allowed by those procedures for parliamentary scrutiny falls in recess. More broadly, we will need instructions from the House as to how far and how formally we should widen our focus, from the traditional dialogue with UK Ministers in Whitehall, to engagement with other national parliaments, EU institutions and the UK’s devolved assemblies. There may be resource implications; and it will be desirable to consult the House of Commons. If the European Union (Amendment) Bill is passed, we will put these matters to the Procedure Committee (see paragraph 11.59).

The Government agrees that it is for the Houses of Parliament to develop their own rules in regard to scrutiny of EU legislation and the functioning of the yellow and orange cards. The Government is committed to ensuring that the new provisions in relation to national Parliaments in the Treaty operate effectively, and will work with both Houses of Parliament to make sure that they do so.



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