House of Commons

European Scrutiny Committee

European Union Intergovernmental Conference: Government Responses to the Committee's Thirty–fifth Report of Session 2006–07 and The Committee's Third Report of Session 2007–08

First Special Report of Session 2007–08

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European Scrutiny Committee

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

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers —

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

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

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

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First Special Report

On 9 October 2007 the European Scrutiny Committee published its Thirty-fifth Report of Session 2006-07, *European Union Intergovernmental Conference* (HC 1014). On 27 November 2007 the European Scrutiny Committee published its Third Report of Session 2007-08, *European Union Intergovernmental Conference: Follow-up report* (HC 16-iii [Incorporating HC 1015 i-ii]) On 10 December 2007 we received the Government's observations on the Report. The observations are reproduced as the Appendix to this Special Report

Government response

Letter to the Chairman of the European Scrutiny Committee from the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, 10 December 2007

I am delighted to enclose a copy of the Government's response to the Committee's reports "European Union Intergovernmental Conference" (9 October) and "European Union Intergovernmental Conference: Follow-up report" (27 November).

I welcome the Committee's detailed scrutiny of the IGC and the provisions of the Reform Treaty. As the Minister for Europe, Jim Murphy, and I have made clear both during evidence sessions with the Committee and in subsequent correspondence the Government is confident that the UK's demands on the four red lines have been met in the Reform Treaty. The red lines safeguard the UK in four key areas of national sovereignty: our common law system and police and judicial processes, our independent foreign policy, our tax and social security system, and UK social and labour legislation.

On CFSP, I welcome the Committee's conclusion that the "largely intergovernmental nature of the CFSP and ESDP will be maintained, with no significant departures from the arrangements which currently apply in the EU Treaty". On tax and social security, the UK's position is protected not only by the retention of unanimity for tax matters but with a strengthened brake for social security, which may be used (as the Committee's report acknowledges) "in cases where 'important' rather than 'fundamental' aspects of a Member State's social security system would be affected".

For JHA, I am pleased to note the Committee's comment that "we accept that the UK retains the final right to choose" on JHA matters. The Government believes that the clear and comprehensive opt-in arrangements allow the UK the flexibility to participate in co-operation in this important area without being bound to take part where this is not in the national interest.

On the Charter of Fundamental Rights, the package of safeguards secured in the Reform Treaty guarantees that nothing in the Charter of Fundamental Rights will give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation.

In addition, the Reform Treaty will not impose obligations on national parliaments, as the Government has made clear.

The Reform Treaty will allow the EU to move on from institutional navel-gazing and enhance its ability to deliver on the issues that matter to people: the challenges and opportunities of globalisation, climate change, global peace and security. I look forward to debating these important issues, as well as the issues raised by the Committee, on 11 December.

Government response to the Committee's Thirty-fifth Report of Session 2006-07, European Union Intergovernmental Conference (HC 1014)

The Government welcomes the Committee's report on the European Union Intergovernmental Conference and has noted the contents.

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

Paragraph 5: Since the Presidency report was distributed on Thursday 14 June, and the draft IGC mandate was first circulated the following Tuesday on 19 June at 5:00 pm in the evening, we require the Government to clarify what "further discussions" on the issues identified in the Presidency report took place before the draft IGC mandate was produced.

The Government set out its general approach to agreeing a new Treaty in the then Minister for Europe's Written Ministerial Statement of 5 December 2006. During the German Presidency of the EU, as the Committee is aware, there were a series of meetings of 'focal points' – two officials from each Member State – at which UK officials repeated the Government's publicly stated position. These meetings took place on 24 January, 2 May and 15 May. No text was provided or discussed at these meetings – the first draft text of an IGC mandate was not provided until 19 June.

On 25 March, the German Presidency, along with the Presidents of the European Commission and European Parliament, signed a 'Berlin Declaration', setting out the aspiration of "placing the EU on a renewed common basis" before the European Parliament elections in mid-2009. There was no mention of the old Constitutional Treaty in this political declaration. There followed a series of unilateral statements by a number of Member States, in public. For example, the Dutch Prime Minister Jan Peter Balkenende meeting the Prime Minister in London on 16 April said at the press conference afterwards:

> *"we should work with the idea of having an amending treaty…it shouldn't have the characteristics of a constitution."*

The then Prime Minister echoed that position, at the same press conference.

And Nicolas Sarkozy said at the G8 on 7 June:

"It should be a new treaty and not a small constitution".

This public approach was not surprising, given the clear signal already delivered by the French and Dutch electorates. In bilateral contacts with each Member State, the German Presidency had asked for their general position on the nature of any new Treaty. The Prime Minister had set out the UK's general approach to any new Treaty before the Liaison Committee on 18 June. Foreign Ministers had a discussion of the issues around drawing up a new Treaty on Sunday 17 June, ahead of the General Affairs and External Relations Council on 18 June. As the Committee is aware, for that discussion the German Presidency produced a short note summarising, broadly, the well-known positions of those Member States who had ratified the Constitutional Treaty on the one hand and of those who had not, on the other. They stated that this reflected the bilateral consultations they had had with Member States. In drawing up a draft Mandate for discussion at the June European Council, the German Presidency took account of Member States' positions, which were public, on the nature of a new Treaty. A draft Mandate was circulated, for the first time, at the fourth and final meeting of focal points on 19 June. Fundamentally, that draft Mandate reflected the political reality that the "constitutional" approach had been rejected. There was then an intensive negotiation at the European Council on the main terms of a new, amending Reform Treaty, which was reflected in the final IGC Mandate agreed by all EU leaders.

Paragraph 14: We are far from convinced that a Commission monopoly of the right of initiative needs any longer to be preserved and maintained and would be grateful for the Minister's assessment.

The Commission's role in the legislative process is important but is balanced by the strong role preserved for the Council of Ministers and the European Parliament. In all cases the Council of Ministers can amend or reject Commission proposals, as can the European Parliament for approximately 80% of EU legislation.

In relation to the Union's Common Foreign and Security policy, the Commission will not enjoy the right of initiative under the Reform Treaty. Member States also have the right of initiative under Justice and Home Affairs.

We are satisfied with the arrangements as the Government believes they are in the UK's national interest. The role of the Council of Ministers and the European Parliament allows for stringent scrutiny of all EU legislation.

Paragraph 19: However, we doubt the significance of the "greater opportunities" for national parliaments to be involved in any meaningful manner in the workings of the EU without independence from Government whipping systems on subsidiarity and a "red card" system that compels the Commission to withdraw any proposal which threatens to breach the subsidiarity principle.

The Reform Treaty gives national parliaments a direct say in the EU's law making procedures for the first time. HMG welcomes this strengthening of the role of national parliaments.

The 'orange card' provision would compel the Commission to withdraw a proposal if a simple majority of national parliaments contest on ground of subsidiarity and if the

Council (by 55% of Member States) or the European Parliament (by a simple majority) agree.

The operation of the yellow/orange card system is for Parliament to decide. It is unlikely that the Government would be 'whipping' on the use of the yellow or orange cards. HMG wants to work with Parliament to help both Houses exercise this independent power.

Paragraph 21: We are concerned that removing the "distinction" between the EU and EC in relation to matters now dealt with under the Third Pillar (with the consequent increase in the powers of the Commission to bring infraction proceedings and those of the ECJ to interpret and apply Union measures) will change the legal relationship between the EU and national governments in a way that will increase their powers in relation to UK law. We call on the Government to set out the safeguards they will expect to gain from the IGC to prevent this happening.

There will be no imposition of ECJ jurisdiction except where we choose to accept it . Our opt-in will allow us to remain outside a new proposal where we consider that ECJ jurisdiction in that area would be detrimental to the UK's national interest.

Under the agreement on transitional arrangements, all existing third pillar measures will be exempt from ECJ jurisdiction for five years after the entry into force of the Reform Treaty. Towards the end of that five years the UK will have the right, if it chooses, to opt-out of all remaining third pillar measures in order to avoid ECJ jurisdiction. We may then opt-in to measures, in accordance with existing arrangements, where we are willing to accept ECJ oversight.

Paragraph 25: A final section is entitled "Europe as an actor on the global stage" and is concerned with the conduct of external relations by the EU. The Commission argues that all aspects of external relations ("external action policies") need to be "geared to work together to better effect". It states that the IGC Mandate recognises this point by providing that all such policies – CFSP, trade, enlargement, development and humanitarian assistance – "are placed on an equal political and legal footing". In apparent contradiction, the Opinion notes that respect for the particular interests of Member States will be maintained by "retaining specific decision-making procedures" (i.e. unanimity) in the area of the Common Foreign and Security Policy. We note that this could be interpreted as contradictory and call on the Government to set out clearly what safeguards it will expect from the IGC to ensure that the particular interests of the UK 'will be maintained'.

There is no contradiction. Trade, enlargement policy, the CFSP and development assistance are all important EU activities today. The aim is that they reinforce one another, for example enlargement negotiations promote stability and democracy and therefore our security in the EU neighbourhood.

In terms of the safeguards secured, CFSP will remain as now in a separate treaty (the Treaty on European Union) – and there will be no pillar collapse. This reinforces its intergovernmental nature. Unanimity will also remain the rule for setting CFSP policy, and QMV will exist only for secondary and implementing measures – as it has done since Amsterdam.

A new sub-paragraph in Article 11 TEU underlines the distinct character of CFSP and states explicity that it is subject to specific rules and procedures.

There is also an explicit Treaty provision excluding ECJ jurisdiction over CFSP. Article 2 (223) which creates a new Article 240(a) of the Treaty on the Functioning of the Union (TOFU) which states:

> *"The Court of Justice of the European Union shall not have jurisdiction in respect of provisions concerning the CFSP, nor in respect of acts adopted on their basis."*

As regards the relationship between CFSP and non-CFSP matters, new wording in Article 25 TEU makes clear that the implementation of non-CFSP policies shall not affect the procedures and powers relating to the exercise of CFSP – and *vice versa*.

Lastly the IGC will agree two political declarations confirming that all 27 Member States agree that the Reform Treaty does not affect their powers to conduct their own foreign policy. Our CFSP safeguards are watertight.

Paragraph 35: The White Paper notes that the Reform Treaty provides for the creation of a European Public Prosecutor, but points out that the Government sees no need for such a prosecutor and adds that "under the new Treaty, the UK would be able to prevent a European Public Prosecutor from having any role in the UK". We would seek firm confirmation that this safeguard has been agreed by the IGC and that, even where a relevant regulation had been adopted under enhanced cooperation, there could be no question of a European Public Prosecutor having any role in the UK, except with the UK's agreement.

We can confirm that we will be able to prevent a European Public Prosecutor from having any role in the UK. Under the Reform Treaty, the provision for creating a European Public Prosecutor is subject to unanimity, – so we would be able to block it. But where all Member States do not agree (and the UK would not), the matter can be referred to the European Council, after which nine or more Member States could go ahead to create an EPP under enhanced co-operation, if they so wished.

Such arrangements would only apply to those Member States that chose to participate. The UK would stay outside of any such proposal – and the European Public Prosecutor would not therefore have a role in the UK. Article 69E states:

'In order to combat crimes affecting the financial interests of the Union, the Council …may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a

case, the authorisation to proceed with enhanced cooperation referred to in Article 10(2) of the Treaty on European Union and Article 280d(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.'

Paragraph 38: We agree that it is not helpful to its scrutiny role not to have the process outlined and asks the Government to have the process clarified at the IGC. We further ask the Government to set out its proposals for the process that will operate in the UK Parliament and for clarifying how the UK Parliament will be allowed to respond on issues of subsidiarity independent of the executive.

The orange card provision will be in addition to the yellow card. The orange card would compel the Commission to withdraw a proposal if a simple majority of national parliaments contest on subsidiarity grounds and if the Council (55% of Member States) or European Parliament (simple majority) agree.

We will work with Parliament on this, in whatever way is most effective. We understand that Parliamentary scrutiny committees already operate a pilot process, based on the Constitutional Treaty's yellow card provision, with other national Parliaments through COSAC. We welcome Parliament's participation in this exercise and hope the initiative will prove useful in informing Parliament's decisions on utilising the Reform Treaty provisions.

Paragraph 40: We would wish the Government to make clear whether or not these powers will in any way prevent the UK from concluding its own treaties in the same areas as the Union, despite the provisions of the new Article 3(2) EC on exclusive external competence.

As is the case with the existing JHA opt-in, where the UK has not opted in to a measure in this area it retains the ability to conclude international agreements in the same field.

A declaration to the Treaty will also state: *"The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title IV of Part Three insofar as such agreements comply with Union law."*

Paragraph 42: The White Paper also refers to procedures for 'simplified treaty revision' i.e. the amendment of the Treaties without going through the full procedure of an intergovernmental conference as currently provided for in Article 48 EU. The White Paper states that procedures to revise the Treaties without an IGC already exist in the Single European Act and Treaties of Maastricht, Amsterdam and Nice. We ask the Government to clarify the relevant provisions as they are not identified by the White Paper. We note that the "simplified revision procedure" was provided for in Articles IV-444 and 445 of the Constitutional Treaty and was described, in each case, at the time by the Government as a new provision.

While these particular provisions are new, passerelles – i.e. provisions allowing for changes to treaty provisions without the full procedure in Article 48 TEU - are not and have been provided for in previous treaties. Passerelles in the existing treaties include:

— Article 42 TEU: Police and Judicial Cooperation in Criminal Matters;

— Article 22, second paragraph, TEC: Citizenship;

— Article 67(2), second indent TEC: Visas, Asylum, Immigration and other Policies related to the Free Movement of persons;

— Article 133(7): Common Commercial Policy;

— Article 137(2b, second paragraph) TEC: Social Provisions;

— Article 175 (2, second paragraph): Environment.

Paragraph 42: We are concerned that these provisions could allow substantial changes to be made without convening an IGC and so lead to even less transparency in the way the EU is governed, and less accountability of governments to their national parliaments. We ask the Government to outline what safeguards they would put in place to prevent this further erosion of transparency and accountability.

The new general 'passerelle' clauses in the Reform Treaty are subject to a triple lock: unanimity in the European Council; consent by the majority of MEPs; and the right of veto by any national parliament.

In addition, the Prime Minister made clear in his Post-European Council statement in October: *"we will make a provision in the Bill that any proposal to activate the mechanisms in the treaty that provide for further moves to QMV, but which require unanimity of member states, will have to be subject to a prior vote by this House."*

Paragraph 45: Taken as a whole, the Reform Treaty produces a general framework which is substantially equivalent to the Constitutional Treaty. Even with the 'opt-in' provisions on police and judicial cooperation in criminal matters, and the Protocol on the Charter, we are not convinced that the same conclusion does not apply to the position of the UK under the Reform Treaty. We look to the Government to make it clear where the changes they have sought and gained at the IGC alter this conclusion in relation to the UK.

There are significant changes of structure, of content and of consequence. The change of structure is that the constitutional concept has been abandoned. The Constitutional Treaty as a consolidating Treaty was unprecedented. The Reform Treaty, by contrast, amends the existing Treaties – just like the Single European Act, Maastricht, Nice and Amsterdam.

We have also secured extra safeguards on each of the red lines set out by the Government ahead of the June European Council. These changes are:

- The extension and strengthening of the UK's current opt-in arrangements (on visas, immigration, asylum and civil law) to cover areas of criminal law and police co-operation;

- A new legally binding Protocol which guarantees that the Charter of Fundamental Rights provides no greater rights than are already provided by UK law and that nothing in the Charter extends the ability of any court – European or domestic – to strike down UK law;

- CFSP in a separate Treaty – so no pillar collapse, express language excluding ECJ over CFSP and new Declarations confirming that nothing in the new Treaty affects the existing powers of Member States to formulate and conduct their foreign policy, including at the UN; and

- A strengthened emergency brake, including a veto power, on social security.

In addition, and for the first time, the Treaty will confirm that national security is the sole responsibility of Member States.

Paragraph 49: Nevertheless, these changes are clearly regarded as substantial by the Government. The Committee is aware that changes in names may be viewed as no more than changes in terminology, whilst the flag and the anthem of the EU were in fact adopted as long ago as 1986. We recognise the Government's wish to distance itself from the previous public perception of taking part in the creation of a constitution. We would wish to explore the reality and significance of the new approach with the Government.

The Foreign Secretary wrote in detail on the red lines and where the Reform Treaty text reflects them to the Foreign Affairs Committee, copied to the European Scrutiny Committee, on 11 and 18 October. Copies of this correspondence are included at Annex A.

Paragraph 50: It has also been pointed out that the Constitutional Treaty did not supplant all the previous Treaties in any event, since it only amended the Euratom Treaty, and in that sense did not create a 'Constitution'. Accordingly, we do not consider that references to abandoning a 'constitutional concept' or 'constitutional characteristics' are helpful and consider they are even likely to be misleading in so far as they might suggest the Reform Treaty is of lesser significance than the Constitutional Treaty. We believe that the Government must offer evidence if it is to assert that the process are significantly different.

The Reform Treaty differs from the Constitutional Treaty in structure, content and legal effect. The Constitutional Treaty as a consolidating Treaty, was unprecedented. The Reform Treaty, by contrast, amends the existing Treaties, just like the Single European Act, Maastricht, Nice and Amsterdam.

The Government does not agree the significance of the distinction is in any way affected by the position in relation to the Euratom Treaty. The latter deals only with a very limited and discrete area – atomic energy cooperation. The Constitutional Treaty would have repealed and replaced the existing EC and EU Treaties in their entirety, completely collapsing the pillar structure and creating a new Union based on a single, 'constitutional' Treaty. It can not be regarded as simply amending the existing Treaties as was the case for the Maastricht, Amsterdam and the Nice Treaties and will be the case for the Reform Treaty.

Paragraph 59: We would be concerned that, following a reference to the ECJ from some other Member State, the Court might find that a measure adopted at EU level (such as Council Directive 200/43/EC) had to be given an extended interpretation in the light of the wide grounds for prohibiting discrimination under the Charter.

The Charter records existing rights by which EU Member States, including the UK, are already bound when they implement EU law. The Court has already held that the right to be treated equally is part of EU law. The Courts will be able to interpret the rights recorded in the Charter as they always have done. The Charter does not change that or make it easier.

To take the example as provided, the ECJ could not use the Charter's non-discrimination Article (Article 21) to extend the scope of existing anti-discrimination legislation such as the Race Directive (2000/43/EC). Nor does Article 21 extend the EU's ability to adopt anti-discrimination legislation. The explanation to Article 21 makes it quite clear that Article 21 does not create any power to enact anti-discrimination laws. "Nor does it lay down a sweeping ban of discrimination in such wide-ranging areas."

A double protection will be provided by the replacement to Article 6 of the EU Treaty (under the Lisbon Treaty) which provides that the Charter does not extend the EU's competences, and that its provisions have to be interpreted in accordance with the Charter explanations and the "horizontal" articles (Articles 51 and 52).

UK legislation then has a triple protection in the form of the UK Protocol to the Charter, which provides that the Charter does not create any greater rights than already apply in EU law nor extend the powers of any court – European or domestic – to strike down UK laws.

Paragraph 60: We would wish the Government to show how they have secured the UK from such interpretations and ask that they secure the phrasing "notwithstanding other provisions in the Treaties or Union law generally" in the text of the Protocol.

For the reasons set out above, the Government is content with the agreed Charter safeguards which guarantee that the Charter will not create any new enforceable rights or extend existing ones.

Paragraph 62: As far as we are aware, avoidance of doubt provisions are a rarity in the Treaties and lead us to question why, in this case, the specific reference was only to Title IV. We would seek more concrete evidence from the Government that this provision could not be read as suggesting that the other provisions of the Charter do not create justiciable rights applicable to the United Kingdom.

Protocol Article 1(1) acts as a legally binding guarantee that nothing in the Charter extends the ability of any court – domestic or European – to strike down UK law. Article 1(2) gives social and economic rights (Title IV of the Charter) as an illustration ("in particular") of the overall protection under Article 1(1).

The Charter creates no new enforceable rights – the rights in the Charter are existing rights. The UK Protocol guarantees that the Charter does not extend the justiciability of the rights and principles contained in it by the ECJ or UK courts any more widely than at present. That is clear for all rights in the Charter.

In the Constitutional Treaty, we were satisfied that the Charter package did not extend the powers of any court – whether in the UK or in Europe – to strike down UK legislation.

However, others voiced concerns about the binding nature of the Charter and were worried that it might affect our social and labour legislation.

We listened to those concerns and responded. Thanks to the agreement at the June European Council there are now even clearer safeguards (including the UK Protocol) to make clear that it creates no new enforceable rights and no new EU powers to act. The Protocol guarantees the protection of UK laws. It also provides a triple protection, for extra reassurance, for UK social and economic rights.

Paragraph 62: We would seek to clarify with the Government what protection there is for their safeguards in this area and if the ECJ could decide that the exception would not apply, because the UK had made provision of some kind in an area (e.g. in relation to limits on working time) even if the provision did not exactly match what the ECJ might consider was required by the Charter. We would wish to know what value the Government's claimed safeguards would provide if this was to occur.

The package negotiated by the UK, which includes the Protocol, is legally-binding and very clear. The Protocol has the same legal force as the Treaties – no Court can strike it down or ignore it. The Charter will not extend the powers of any court and not create any new enforceable rights in the UK.

The Working Time Directive gives workers a right not to be forced to work more than 48 hours a week on average, but allows Member States to offer certain workers a choice to work longer than 48 hours if they wish to. The Charter simply records this. The Charter cannot be used to change it. If we agreed to negotiate changes to the Working Time directive – that would be done in a mutual way – by negotiating legislation in Brussels, not by the Charter.

Paragraph 65: The previous Committee had reservations about the voting arrangements for the adoption of criminal justice measures under that Treaty, but accepted that the 'emergency brake' procedure could provide an effective mechanism to protect Member States which are initially outvoted. However, an emergency brake cannot be applied very frequently and it may be difficult to protect against the repackaging of controversial proposals into smaller measures.

The Emergency Brake can be used whenever a Member State considers that a proposal affects fundamental aspects of its criminal justice system, and is an additional safeguard alongside the comprehensive Justice and Home Affairs opt-in arrangements. There are no limits on the frequency with which it can be applied.

Were controversial proposals to be reintroduced, it would remain open to the United Kingdom to decide whether the emergency brake should still be used. This is of course in addition to the relevant opt-in arrangements.

Paragraph 67: Even when the emergency brake is in principle available, we consider that the interests of the UK would be better protected if it were confirmed that the UK is free to revoke its decision to opt in if the final text is not acceptable. We will seek to explore with the Government the necessity of achieving this agreement at the IGC.

This would be unworkable in practice: other Member States would not take UK views in negotiation seriously if we had the right to opt out once we had opted in. It is also unnecessary. The current opt-in works well for asylum, migration and civil justice – and there has been no need to opt-out once we have opted in. If we have serious concerns about a proposal, we will not opt in.

Paragraph 68: If at that stage 55% of the members of the Council or a majority of the European Parliament agree with the objections, the proposal is not to be given further consideration. However, since this degree of opposition would in any event be sufficient to prevent adoption of a measure by co-decision, we consider that the procedure adds very little by way of democratic control over the Commission and the EU institutions. In our view, the required thresholds for preventing further consideration of a proposal must be much lower if the procedure is to have any real utility.

Paragraph 75: We note the new provisions on the role of national parliaments. In our view, these mark only a minor improvement on the proposals contained in the Constitutional Treaty. If these are to have any real utility, the threshold for discontinuing a proposal which has been objected to by national parliaments on subsidiarity grounds must be made lower than 55% of the members of the Council or a majority of votes in the European Parliament.

The Government notes the Committee's opinion but does not agree. The Reform Treaty gives national parliaments the ability to force the Commission, and, if necessary, the European Council and European Parliament to reconsider a proposal if they think it breaches the subsidiarity principle.

Paragraph 70: In our view, these are matters of entitlement, not obligations and it is wholly a matter for Parliament to decide whether it wishes to use these opportunities: there should be no question of being under any legal obligation to do so. We put this point to the Minister on 4 July who said he took the point we were making and undertook to "continue that dialogue on the matter". Subsequently, the Minister stated in a letter of 31 July to the Chairman of the EU Select Committee in the House of Lords that the wording of the new Article on the role of national parliaments was "inappropriate" and that this would be raised in the IGC, where the Government would press for more appropriate language.

Paragraph 76: We wish to emphasise that the proposals in the Reform Treaty raise a serious difficulty of constitutional order in as much as they appear to impose, whether by accident or design, a legal duty on national parliaments "to contribute actively to the good functioning of the Union" by taking part in various described activities. National parliaments, unlike the European Parliament, are not creations of the Treaties and their rights are not dependent on them. In our view, the imposition of such a legal duty on the Parliament of this country is objectionable as a matter of principle and must be resisted.

The Government is confident that that the Reform Treaty imposes no obligations on national Parliaments – we listened to Parliament's concerns and secured changes to the text to make that clear. We do not feel that there is now any ambiguity. That position has been

acknowledged by all Member States and by the Presidency; Portuguese Foreign Minister Amado wrote to the Foreign Secretary to confirm that:

> "this article imposes no obligation on national Parliaments and is purely declaratory in nature".

The Reform Treaty gives new powers to national Parliaments to scrutinise EU proposals directly; it does not impose obligations.

The Protocol of the role of national Parliaments does not impose any obligation. It uses the word 'shall' because it refers to the need for the European Parliament to cooperate with national Parliaments. The Treaty does not say that any individual Parliament must take part in cooperation. In fact, interparliamentary cooperation does take place, through the COSAC mechanism established by national parliaments themselves; the article reflects this reality.

Paragraph 71: We welcome the emphasis placed by the European Council on providing EU citizens with "full and comprehensive information" and involving them in "permanent dialogue" which is said to be "particularly important" during the IGC. However, the evidence until now has not been consistent with these ideals, with an essentially secret drafting process conducted by the Presidency, with texts produced at the last moment before pressing for agreement. The compressed timetable now proposed, having regard to the sitting terms of national parliaments, could not have been better designed to marginalise their role.

The Government has been committed to keeping Parliament informed during the IGC process.

The Government set out its general approach to agreeing a new Treaty in the then Minister for Europe's Written Ministerial Statement of 5 December 2006. The Prime Minister had set out the UK's general approach to any new Treaty before the Liaison Committee on 18 June. All IGC papers have been forwarded to Parliament and also published on the Council websites. In that regard there has been more transparency than many previous IGCs. Ministers have attended seven evidence sessions with the EU scrutiny Committees since June and remain available to give evidence as required. The EU Reform Treaty was also discussed in the Queen's speech debates in the House of Lords on 7 November and the House of Commons on 12 November.

Paragraph 72: As far as the substance of the Reform Treaty and its comparison with the Constitutional Treaty are concerned, we accept that references to the "constitutional concept" or "constitutional characteristics" in trying to distance the present proposals from the creation of a Constitution are less than helpful. What matters is whether the new Treaty produces an effect which is substantially equivalent to the Constitutional Treaty. We consider that, for those countries which have not requested derogations or opt outs from the full range of agreements in the Treaty, it does, and refer readers to the table in the Annex to this report.

The Constitutional Treaty as a consolidating Treaty was unprecedented. The Reform Treaty, by contrast, amends the existing Treaties – just like the Single European Act, Maastricht, Nice and Amsterdam. The Government also notes the conclusions of the

Danish Ministry of Justice in its report "Report on certain constitutional questions in connection with Denmark's ratification of the Lisbon Treaty" published on 4 December. The report states that "*it is the Justice Ministry's conclusion that, for Denmark, the Lisbon Treaty does not transfer new powers to the Union. On this basis, the Justice Ministry concludes that Denmark can ratify the Lisbon Treaty by normal procedure*" (unofficial translation). Under the Danish Constitution, if powers are transferred to an international organisation by a Treaty, that Treaty can only be ratified by a referendum or by a 5/6 majority in Parliament. The Danish Ministry of Justice concluded that a referendum was required on the Constitutional Treaty.

The Government welcomes and agrees with the Committee's recognition of the importance of what is referred to as the Government's 'opt-outs and derogations'. As the Committee states:

> *"What matters is whether the new Treaty produces an effect which is substantially equivalent to the Constitutional Treaty. We consider that, for those countries which have not requested derogations or opt outs from the full range of agreements in the Treaty, it does."*

The UK has secured a range of extra protections, including strengthened opt-ins and UK specific legal guarantees.

Paragraph 73: We explain in this report our concerns about the security of the United Kingdom's position under the Charter. In our view, it requires to be made clear that the Protocol No.7 to the Reform Treaty takes effect notwithstanding other provisions of the Treaty or Union law generally.

For the reasons provided above, the Government is content that the agreed Charter safeguards guarantee that the Charter will not create any new enforceable rights or extend existing ones and that the legal status quo will be retained.

Paragraph 74: We note that the 'opt-in' arrangements under the Protocol on the position of the United Kingdom and Ireland will apply to the areas transferred by the Reform Treaty to Title IV. In our view, it should be made clear that the United Kingdom retains the ability also to 'opt-out' of participating in a measure in these sensitive fields, if UK interests are not fully protected in the final text of any measure.

This would be unworkable in practice: other Member States would not take UK views in negotiation seriously if we had the right to opt out once we had opted in. It is also unnecessary - the current opt-in works well for asylum, migration and civil justice. If we have serious concerns about a proposal, we will not opt in.

The extension and strengthening of the UK's existing opt-in to all Justice and Home Affairs fully meets the UK's red line.

Foreign and Commonwealth Office, 10 December 2007

Government response to the Committee's Third Report of Session 2007-08, European Union Intergovernmental Conference: Follow-up report, (HC 16-iii)

The Government welcomes the Committee's report on the European Union Intergovernmental Conference and has noted the contents.

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

Paragraph 7: The Minister undertook to write to us to confirm if the consultation was by letter or by e-mail but at the time of this report no reply has been received.

A letter to the Committee covering this point was sent on 26 November.

The IGC Mandate was 'discussed by Ministers in the days leading up to the June European Council'. In particular, there was a Cabinet discussion on 21 June. As the Prime Minister's Official Spokesman stated in his briefing to journalists when describing the 21 June Cabinet meeting:

> "There was a discussion on the EU where the Prime Minister again reiterated his four red lines, and said that all four would have to be achieved, otherwise he was prepared to walk away from a deal."

European issues are discussed regularly by the Prime Minister and Ministerial colleagues within the Cabinet.

Paragraph 8: We welcome the acknowledgement by the Secretary of State of the strength of the points we have made with regard to the IGC process. We again recall that as recently as June of this year the European Council not only emphasised the "crucial importance of reinforcing communications with the European citizens….and involving them in permanent dialogue" but also stated that this would be "particularly important during the upcoming IGC and ratification processes". Such statements now ring hollow, and we reiterate our earlier comment that the process could not have been better designed to marginalise the role of national parliaments and to curtail public debate, until it has become too late for such debate to have any effect on the agreements which have been reached.

The Government has been committed to keeping Parliament informed during the IGC process.

The Government set out its general approach to agreeing a new Treaty in the then Minister for Europe's Written Ministerial Statement of 5 December 2006. The Prime Minister had set out the UK's general approach to any new Treaty before the Liaison Committee on 18 June. All IGC Presidency papers have been forwarded to Parliament. Ministers have attended seven evidence sessions with the EU scrutiny Committees since June and remain available to give evidence as required. The EU Reform Treaty was also discussed in the Queen's speech debates in the House of Lords on 7 November and the House of Commons on 12 November.

We launched new pages on the FCO website at the beginning of September, at http://www.fco.gov.uk/eureformtreaty, dedicated to keeping the public informed on the IGC process and the Reform Treaty. These pages include a range of information, including the complete draft text of the Treaty and the Government's White Paper on the IGC from July, as well as summaries explaining what the Reform Treaty will mean in practice for the UK.

Paragraph 16: We are not persuaded that the text of the Reform Treaty has been amended so as to put beyond any doubt the principle that no obligation must be imposed on Parliament. In our view, the obvious amendment would have been to use the word "may" instead of "shall" in Article 8c EU as well as in Article 63 and Article 9 of the Protocol on the role of national parliaments in the Union. The statement "National parliaments contribute to the effective functioning of the European Union" is one from which an obligation can readily be inferred. Given its constitutional significance, we must emphasise that this is not an area in which any ambiguity is tolerable and we shall look to the Government to ensure that its original undertakings are met in any new text.

The Government is confident that the Reform Treaty imposes no obligations on national Parliaments. Parliament's concerns were noted and we secured changes to the text to make that clear. We are confident that there is now no ambiguity. That position has been acknowledged by all Member States and by the Presidency. Portuguese Foreign Minister Amado wrote to the Foreign Secretary to confirm that:

> *"this article imposes no obligation on national Parliaments and is purely declaratory in nature".*

The Reform Treaty gives new powers to national Parliaments to scrutinise EU proposals directly; it does not impose obligations.

The Protocol on the role of national Parliaments refers to the need for the European Parliament to cooperate with national Parliaments. The Treaty does not impose an obligation on individual Parliament to take part in such cooperation. In fact, interparliamentary cooperation already takes place, through the COSAC mechanism established by national parliaments themselves; the article reflects this reality.

Paragraph 21: In view of the intention by the Foreign Affairs Committee to conduct its own inquiry into the foreign policy aspects of the Reform Treaty, we confine ourselves to the observation that – apart from a few cases where new provision will be made for voting by QMV – the largely intergovernmental nature of the CFSP and ESDP will be maintained, with no significant departures from the arrangements which currently apply under the EU Treaty.

The Government's red line has been secured. As the Committee say "… the largely intergovernmental nature of the CFSP and ESDP will be maintained, with no significant departures from the arrangements which currently apply under the EU Treaty."

Paragraph 25: As far as we can establish, the only material change is that the 'emergency brake' may now be applied in cases where 'important' rather than 'fundamental' aspects of a Member State's social security system would be affected.

Control of tax and social security is a fundamental aspect of sovereignty. As the Committee recognise, we have secured a strengthened red line. Not only does it cover 'important' (not just 'fundamental') aspects of social security, but expressly provides that if there is no agreement on a proposal at the European Council (i.e. by unanimity) within four months, the proposal falls.

Paragraph 38: It is clear that the Government accepts that the Charter will be legally binding, and it has stated that the Protocol is not an opt-out. Since the Protocol is to operate subject to the UK's obligations under the Treaties, it still seems doubtful to us that the Protocol has the effect that the courts of this country will not be bound by interpretations of measures of EU law given by the ECJ and based on the Charter. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but the under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation.

The Committee is correct in saying that the Charter will be legally binding and that the UK Protocol to the Charter does not constitute an opt-out. It is not intended to be one. The Charter records rights which already exist in EU law and already bind all Member States when they implement EU law. The courts will be able to interpret the rights recorded in the charter as they always have done. The Charter cannot however be used to mint new rights. This is guaranteed by the package of safeguards agreed at the Reform Treaty Intergovernmental Conference. These safeguards include:

- "Horizontal" Charter articles setting out the scope and application of the Charter.
- Explanations to the Charter articles, which help identify the sources of each specific Charter provision in existing law. They also confirm that the Charter cannot be used to expand any of the EU's policy areas. These must be taken into account by the courts when they interpret the Charter.
- A new Treaty article ensures that the Charter will not extend the competences of the EU and that the rights, freedoms and principles in the Charter will be limited in scope by the "horizontal" Articles.
- A Declaration by all Member States on the Charter ensuring no extension of the EU's powers to act.
- A UK Protocol to the Charter which guarantees that the Charter does not create any greater rights than already apply in EU law nor extend the powers of any court to strike down UK laws.

The Government is confident that these safeguards will preserve the legal status quo in all Member States. The UK Protocol guarantees this position for the UK.

Paragraph 39: If, as the Foreign Secretary assured us, every part of the Charter is sourced back to existing rights "with no right for the ECJ or anyone to extend their reach" it is hard to see why the Protocol is necessary, since on this basis the Charter could not, by itself, lead to laws in the United Kingdom being reinterpreted or invalidated.

Paragraph 40: Given the open texture of the drafting of the Charter (which is by no means unusual with human rights instruments) we doubt if it is possible to guarantee that it will not be developed and amplified by the ECJ. We equally doubt if it is possible to guarantee that the ECJ will not draw on the Charter as a new source for interpreting measures of Union law such as Directives.

In the Constitutional Treaty, the Government was satisfied that the Charter package did not extend the powers of any court – whether in the UK or in Europe – to strike down UK legislation.

However, others voiced concerns about the binding nature of the Charter and were worried that it might affect our social and labour legislation.

We listened to those concerns and responded, negotiating the UK Protocol to the Charter, which sets out how the Charter will apply to the UK. It simply provides an extra guarantee of what the Government has always believed to be the case. The Protocol puts the matter beyond doubt in primary EU law. It has the same legal force and status as the Treaty articles themselves.

Therefore if, despite what the Charter provisions say, someone tried to use the Charter to create new rights, UK law would be protected by our Protocol.

Paragraph 41: If the ECJ does interpret a measure of Union law in this way, we believe the resulting interpretation would be binding in the UK, because of the UK's treaty obligations, notably the duty of sincere cooperation under Article 4(3) EU. These obligations are not excluded or restricted by the Protocol. On the contrary, and as the recitals make clear, the Protocol is subject to those obligations.

Paragraph 42: In our view, the only way of ensuring that the Charter does not affect UK law in any way is to make clear, as we have already suggested, that the Protocol takes effect "notwithstanding the Treaties or Union law generally." We note that this kind of provision has been made in the Protocol to the EC Treaty on the acquisition of property in Denmark (No. 16) and in the Protocol to the EU Treaty on Article 40.3.3 of the Irish Constitution (No. 17), but it has not been made in respect of the Charter.

The Charter records existing rights which already bind all Member States when implementing EU law. Under a binding Charter the ECJ will be able to interpret the rights recorded in the Charter as it always has done. The Charter does not change that or make it easier.

As the purpose of the Protocol is to set out in explicit, legally binding terms how the Charter applies in relation to the laws and practices of the United Kingdom, the language proposed by the Committee is neither appropriate or necessary. Different Protocols use different wording depending on their content, purpose and relationship to other treaty provisions.

Paragraph 59: We accept this was the aim of the new articles sought by the UK in the draft Treaty of 5th October 2007. However, the decision on whether an existing measure becomes "inoperable" would be taken by QMV and, moreover, without the participation of the UK, and could lead to the loss of the benefit for the UK of the

existing measure. We accept that the UK retains the final right to choose, but it seems us that the risk of losing the benefit of an existing measure, because of a choice not to participate in its amendment, by virtue of a decision in which the UK cannot take part, must put at least some pressure on the UK to opt in. We also note the new possibility for the Council to decide by QMV that the UK should bear the direct financial consequences necessarily and unavoidably incurred if the UK ceases to participate in a measure. This must import some measure of financial risk, not present before, into a decision not to opt in and we question whether it is in the UK's interests to be exposed to such risk.

We made clear that the UK should always have the right to choose whether or not to participate in JHA co-operation, and we have maintained that absolute right.

We agree with the Committee that existing measures in JHA bring benefit to the UK. Indeed, so will most new measures, as well as further developments of existing measures. It is strongly in the UK's interest to participate in JHA cooperation. Such cooperation includes crucial data sharing across the EU for crime and counter-terrorism purposes, instruments on asylum, biometrics and migration, and legislation on civil law and measures to tackle cross border crime. In all of these UK interests are deeply engaged. The Government intends to participate to the maximum extent consistent with the UK national interest. There are of course constraints, in particular the fact that our legal systems differ in some significant aspects from those of a majority of EU member states, and our geography.

These new opt-in provisions should be set in that context. Existing measures are in the UK interest, as the Government and Committee both agree. Most measures building on those will probably continue to be so and we will negotiate strongly to ensure that. But for the first time the new provisions provide explicitly that the opt-in protocol applies to any measures amending existing measures as well as to all new proposals.

This, coupled with the further extension of the Protocol to Schengen building measures, means that the UK's opt-in – a decision solely for the UK - applies explicitly to every single possible measure in Justice and Home Affairs. It's a major change from previous Treaties and the failed Constitutional Treaty.

When assessing whether or not to opt-in to a proposal, the Government will take into account the existing legislation, what the Commission intend to achieve by an amendment, the positions of other member states and the European Parliament, and reach a judgment on the balance of advantage and risk of being in or out.

In the event that the UK decides not to opt-in to a particular amendment, the existing measure - whether in Title IV or VI — would continue to apply to the UK unamended, as the Committee has rightly concluded. The only exception to this is when running two parallel systems would not work.

The test for this is that the Council would have to determine that the UK running an old version of the system would make the amended system "inoperable" – for example if the UK decided to pull out of a shared IT network. Only then does any question arise of the measure ceasing to apply to the UK. "Inoperable" is a high and substantial objective test. It

would also be justiciable in the ECJ. And in such circumstances, the UK is very unlikely to want to prevent other Member States from operating such systems.

The decision-making system has been carefully structured to ensure that the consequences of any decision not to opt-in — ie whether other member states or the Commission consider that the underlying system will indeed be rendered inoperable by UK non-participation - are known before the UK takes a final decision. So the Government can assess not only the worth of the existing system, but also the balance of advantage and risk of the amended one. Other member states, who value our participation in JHA cooperation, may also wish to consider whether changes can be made to the amended system to enable our participation.

At the IGC there was general agreement that it was necessary to provide some objective, tightly defined, transparent process for resolving such practical issues if they arose. The relevant provisions cover the *direct* financial consequences, if any which are "necessarily and unavoidably" incurred as a result of the UK ceasing to participate in existing measures. As the Prime Minister made clear in his post-European Council Statement in the House in October "there is a fair, objective and robust system for consequential changes, but no financial or other penalties."

These provisions guarantee the UK's freedom of choice in relation to amending measures and address legitimate practical concerns held by other Member States about the operation of the opt-in. We made it clear that the UK should always have the right to choose whether or not to participate in JHA co-operation; we have maintained that absolute right. The Government considers that this is a reasonable, effective and fair system of resolving the potential issues that could arise from the UK having a free choice of whether to participate or not, when other member states do not have the same discretion. The provisions have been introduced because of the complete extension of the opt-in to all JHA measures, a major change from previous treaties and from the failed Constitutional Treaty.

Paragraph 61: We accept that Declaration 39 does not itself trigger legal consequences but find it difficult to see how it can be 'helpful' to the UK in the way the Minister describes. As far as we are aware, Article 96 EC has not previously been cited in provisions relating to the opt-in. We consider that, by being party to the proposed declaration, the UK may have weakened its position, since it will no longer be able convincingly to argue that Article 96 EC should not apply at all in circumstances where the UK decides not to opt-in. As Article 96 EC provides for directives adopted by QMV and binding on the UK to "eliminate the distortion in question" caused by a UK decision not to opt-in, we raise the question of whether some new and possibly unquantifiable risk may have been introduced.

Declaration 39 (now 26) promotes a full Council discussion of the implications of a Member State's non-participation in a JHA measure. This discussion will of course include the UK, and will ensure that we and others are able to act on the basis of a full exchange of views and information about possible implications and effects. This is indeed helpful for the UK: we will know any consequences of our non-participation, and they will form part of our assessment as to whether to opt in.

Following that discussion — and a UK decision not to opt-in — other member states will have a choice: to continue with the measure with the UK opted-out, to abandon the measure, or to amend it so as to persuade the UK to opt-in. All three would be acceptable outcomes to the UK.

The Commission's powers set out in Article 96 of the Treaty of the European Community already exist. Member States are already able to ask the Commission to examine a situation in the light of Article 96. The second paragraph of the declaration therefore changes nothing from the present situation.

Paragraph 64: We do not understand why the UK did not interpret the red line on protection of the UK's position in a firmer form by insisting on a provision which would have preserved the effect of existing EU measures in relation to the UK, in circumstances where the UK decides not to opt in to an amending or repealing measure. This would have ensured that the UK would keep what it now holds and would more effectively have protected the UK's interests. It would have been open to the UK to keep its existing EU measures in their present form indefinitely as an alternative to opting in to a measure which would be subject to the enforcement powers of the Commission and the jurisdiction of the ECJ.

Paragraph 65: We note, in this context, that Denmark's position is preserved by an amendment to the Protocol (Danish Article 2) on the position of Denmark providing that existing EU measures in the field of police and judicial cooperation will continue to apply to Denmark "unchanged" in their present form even if they are subsequently amended or replaced under the Reform Treaty. We accept that the position of Denmark is not wholly comparable to that of the UK, but we do not understand why the UK did not press for a provision along these lines in conjunction with the right to opt in.

It is the case that where the UK decides not to opt-in to a measure that amends, or repeals and replaces a Title IV measure, the existing legislation will continue to apply to the UK, unamended, indefinitely, except where that would render the whole system inoperable. See the explanation given in response to Paragraph 59, above.

For Title VI measures, the Committee is right that opting into an amending or new measure will bring the usual full Commission and ECJ powers. The effect of ECJ jurisdiction in each instrument will be part of the assessment of the Government before each opt-in decision. But under the new provisions on transitional arrangements, ECJ jurisdiction and Commission powers will not apply to existing Title VI measures for a period of five years after entry into force of the Treaty. During that period the Commission, Council and Parliament will seek to put this legislation on the new legal bases (see Declaration 50). Each time a measures is amended and put onto the new Title IV legal base, the UK will have the choice whether or not to opt in. And six months before the end of that five year period, the UK will have the right to choose whether to accept ECJ jurisdiction for any remaining Title VI measures, or to opt out en bloc from the remaining measures. If we choose to opt out, we will then have the right to apply to opt back in, on a case by case basis. We have ensured that ECJ jurisdiction cannot be imposed upon the UK without us choosing it. We can therefore consider the consequences of the Commission and ECJ powers on a case by case basis.

The Government does not agree that it would have been possible for the UK to keep existing measures intact indefinitely, while the rest of the EU moved on. By definition, these are collaborative systems, shared and operated between member states. It is strongly in the UK's interest to play a full role in their development, not left a backmarker in ageing systems of rapidly decreasing value to the UK.

Denmark

Denmark's position with regard to JHA is entirely different to that of the UK. The Danish Protocol functions under very different terms. Denmark is unable to participate in any Title IV JHA measures. If the Reform Treaty enters into force, Danish participation in all new, amending or replaced measures will cease, save their participation in Schengen.

Such a position was not acceptable to, or in the interests of, the UK. Nor, indeed does it now appear acceptable to the Danish Government, who have proposed a referendum on whether to give up their protocol, and move exactly to the UK's system of opt-ins. That is because the UK's Protocol is designed to ensure that we may continue to participate in vital JHA co-operation in future, while giving us a right to choose, instrument by instrument.

It is against that context — the rapid cessation of JHA cooperation with Denmark under the Reform Treaty, and their wish to move to the UK system — that existing Title VI measures continue unamended for Denmark.

Paragraph 66: The Government describes its 'red-line' in this area as the "protection of the UK's common law system and our police and judicial processes". The issues of voting procedure (i.e. the move from unanimity to QMV), the enforcement powers of the Commission and the compulsory interpretative jurisdiction of the ECJ are, in our view, central to such protection. Under the system to be established by the Reform Treaty, a Member State will lose the ability finally to determine its own law to the extent that measures are adopted at Union level. Such measures will become the subject of the Commission's powers to require changes in domestic law and will be subject to the interpretative jurisdiction of the ECJ. The ECJ will become, thereby, the conclusive arbiter of the meaning of Union measures and, by extension, of national law passed to implement such measures.

The UK will only be subject to ECJ jurisdiction and Commission powers on infraction where we choose to opt-in. Our opt-in will apply to all JHA measures. The effect of ECJ jurisdiction in each instrument will be part of the assessment of the Government before each opt-in decision. ECJ jurisdiction is an important element of assuring the uniform application of Community law in every member state. Overall, the UK has benefited from this, in many areas, not least in the operation of the single market.

Paragraph 67: The 'opt-in' arrangements are only a means to ensure protection in the sense that the UK may choose not to opt in, which protection will be lost each time a decision to opt-in is taken. Once a decision to opt-in is taken, it now seems clear, on the evidence we have taken, that there is no right to opt-out, if the resulting measure is not thought satisfactory. The only remedy, which is not available in all cases, is the 'emergency brake', which was also proposed in the same areas in the previous constitutional treaty. It is important, therefore, that the consequences of any decision

whether or not to opt in is clearly understood and open to full parliamentary scrutiny and approval and is kept free from any new external pressures and constraints.

As set out above, the Government will assess carefully the overall substantive and procedural context each time it decides whether or not to opt in. The decision has to be taken within three months of publication of each proposal. The Government will keep Parliament informed, as now, of opt-in decisions.

Under our existing opt-in arrangements for asylum, migration and civil justice there is no option to revoke a decision to opt-in. The Government believes that these arrangements work well. The Government also believes that an option to revoke the UK opt-in would be unworkable in practice. Member States would have no reason to take UK views seriously in negotiations if we could remove ourselves from a measure at any time. This would serve to diminish the UK's influence in the JHA arena and, in the longer term, would have serious consequences for the UK's participation in JHA co-operation as we would be unable to shape any legislation. We would increasingly be forced to opt-out as we would be unable to secure any JHA legislation that was beneficial to the UK. If we have serious concerns about a proposal, we will not opt in.

While the emergency brake may not cover all measures, it does cover such areas as criminal procedure and definitions of offences, where differences in common law are most apparent, and where 'fundamental aspects' are more likely to come into play.

Paragraph 68: We accept that provision is made for the UK to exercise a right to 'opt-in' in relation to measures which amend or replace existing EU measures, to measures which amend existing Title IV EC measures and to those which build upon the Schengen *acquis*.

The Government welcomes the Committee's acknowledgement that the existing JHA opt-in has been extended to cover these areas, and further, to those currently adopted under Title VI. The extension of the opt-in constitutes major, specific and beneficial differences for the UK and Ireland from previous treaties, and from the failed Constitutional Treaty. As we explain above, this extension ensures "protection of the UK's Common law system, and our police and judicial processes", as the White Paper noted was our objective.

Paragraph 69: We note the detailed explanations which have been provided on the operation of the proposed transitional arrangements, but we raise the question of whether these may have the unintended effect of exposing the UK to new and unpredictable consequences and risk if it decides not to opt in to any transposed or amended measure.

The consequences of not opting-in to any measure are clearly set out and the processes are well defined. As detailed above, the Government will be in a position to take an opt-in decision knowing what the circumstances are, and in particular whether the existing measure will be rendered inoperable. The relevant provisions cover the legal consequences, which are circumscribed and strictly limited, and the *direct* financial consequences, if any, which are "necessarily and unavoidably" incurred as a result of the UK ceasing to participate in existing measures. No other consequences are listed in our Protocol, nor are legally possible. As the Prime Minister made clear in his post-European Council Statement

in the House in October "there is a fair, objective and robust system for consequential changes, but no financial or other penalties."

Paragraph 70: The 'opt-in' decision under these proposals will become one which may lead to serious consequences for the UK through the transfer of jurisdiction on important measures dealing with civil and criminal justice. It will therefore be important that the arguments for and against opting in are the subject of the closest scrutiny by Parliament and for the accountability of Ministers to the House.

The Government is committed to allowing full and effective scrutiny of European legislation by Parliament.

Conclusion

Paragraph 71. In this report, we make a number of detail detailed observations on aspects of the Reform Treaty, notably on the 'redlines' identified by the Government as preconditions for agreement, and on the less than transparent way in which the IGC has been prepared and conducted.

Paragraph 72. We remain concerned that the provisions on the role of national parliaments are still cast in terms in which a legal obligation can be inferred, despite the undertakings given by Ministers; and we repeat that, given its constitution at constitutional significance, this is not an issue where any ambiguity is acceptable.

Paragraph 73. We express doubts on the effectiveness of the Protocol on the Charter of Fundamental Rights and do not consider that it guarantees that the Charter can have no effect on the law of the United Kingdom when it is combined with consideration of the implementation of Union law.

Paragraph 74. We draw attention to the provisions relating to the 'opt-in' on amendments to existing EU measures, where we consider that a stronger position could have been achieved.

Paragraph 75. We are concerned that the interpretation of the red line to "protect UK civil and criminal justice" as only requiring control of the decision to opt in or not does not recognise the loss of protection that will occur every time jurisdiction is transferred from UK courts to jurisdiction by the European Court of on Justice and the Commission.

Paragraph 76. Having drawn these matters and our recommendations to the attention of the House we now consider that the matters raised should be debated on the Floor of the House before the Treaty is signed and we therefore hold the document under scrutiny.

The Government is confident that the UK's red lines have been secured in a way that protects the United Kingdom in important areas of national sovereignty. In addition, the Reform Treaty will place no obligation on national parliaments.

Foreign and Commonwealth Office, 10 December 2007