



HOUSE OF LORDS

European Union Committee

26th Report of Session 2003-04

Government Responses

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The European Union Committee

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GOVERNMENT RESPONSES FOR SESSION 2003-04

1. The Government is expected to respond in writing to all reports from the Committee (other than purely formal reports) within two months of publication.
2. The Committee makes all Government responses available to the House and publishes them as required.
3. This report accordingly makes available, for the information of the House, those Government responses to our reports as listed on the Contents page of this Report.

Government Responses

47th REPORT (Session 2002–03): EUROPEAN UNION WASTE MANAGEMENT POLICY

The Department for Environment, Food and Rural Affairs' Response

INTRODUCTION

The Government is acutely aware of the vital importance of EU waste management policy and its implications for our own approach to waste management. The Committee's report has been published at a particularly interesting time in the development of EU policy, with work on a Thematic Strategy on waste now underway as part of the 6th Environmental Action Programme, as well as forthcoming Directives including Batteries and Biowaste Directives.

The following response comments on each of the conclusions and recommendations made in the Committee's report. It reflects the progress that continues to be made in developing a sustainable waste management system in the UK as part of our own strategic approach to waste management, and how we plan to take work forward to aid the development of EU policy.

The Government's wider aim, set out in the Framework for Sustainable Consumption and Production, is to promote the sustainable use of natural resources, and reduce the effects of waste on the environment. This cannot be done in isolation from Europe, we must work together, learning lessons from past experience and from each other, to move towards a sustainable waste management system.

CO-ORDINATION OF GOVERNMENT AND THE NEED FOR A STRATEGIC APPROACH

(i) The Government do not provide convincing evidence of a strategic approach to EU waste policy, although they appear to have had some success in developing implementation. Currently it appears that the Government's position is essentially reactive. Without a clear idea of how EU policy should develop we believe that the Government are at a severe disadvantage in representing the interests of the UK during negotiations.

The Committee's report comes at particularly interesting time in terms of EU waste policy. In May 2003 the Commission adopted the Communication "*Towards a thematic strategy on the prevention and recycling of waste.*" In the Communication, the Commission set out a wide range of suggestions and ideas for the future development of waste policy in the EC.

The UK Government responded to the Communication towards the end of last year. Far from lacking a clear idea of how EU waste policy should develop, one of the response's key messages is the need for a clear vision of the EU's main goals on waste, something lacking at the moment.

The response draws on the strategic approach to waste in the UK and recommends that the Strategy is underpinned by a set of guiding principles forming the underlying basis for action. The principles put forward are familiar, but no less important for that fact, and the Government has used this opportunity to remind the Commission of them.

The response also highlights the vital links between this strategy, the other thematic strategies being developed in parallel, and other EU initiatives relating to waste. Key amongst these are the thematic strategies on the sustainable use of natural resources, and soil, and other work on Integrated Product Policy and Integrated Pollution Prevention and Control. The response restates these links and emphasises the importance of integrated working to ensure the coherence of EU policies under the sustainable development umbrella.

In the extended annex to the response, the Government sets out detailed commentary on the Communication, including suggestions and examples of UK experience.

The Government recognises the importance of this work in developing future EU waste management policy, and sees a vital opportunity to exert influence in ensuring that the UK's best interests are met at this level. The Communication response is the first stage of our involvement in the development of this Strategy. The Government intends to be actively involved, through membership of appropriate advisory committees and

expert working groups, and is taking care to coordinate such efforts across the different policy interests. The response can be found at: <http://www.defra.gov.uk/environment/waste/thematicstrat/index.htm>

The strategic approach in the UK response to the Communication, and to domestic waste policy, is reflected in our approach to individual negotiations at the EU level.

(ii) We believe that the current split of responsibility between departments without a clear strategic lead results in a lack of accountability and direction. Also, industry expects the Government to speak with one voice. A single waste policy unit could provide strategic leadership on policy development and a single source of information for stakeholders. As Defra is currently responsible for overall waste policy, it would seem sensible for such a unit to be based within this Department and report to the Secretary of State for Environment, Food and Rural Affairs. We therefore recommend that an inter-departmental group on waste policy, reporting to the Environment Secretary, should be set up as soon as possible.

The strategic lead for waste policy in England and for UK-wide co-ordination lies with the Department for Environment, Food and Rural Affairs (Defra), with the Department of Trade and Industry (DTI) leading on some producer responsibility initiatives. The Government is currently considering options for improving the co-ordination of inter-departmental responsibilities for waste policy in response to the Strategy Unit's report, "Waste Not Want Not". The review, being undertaken by the Cabinet Office, is expected to conclude shortly.

(iii) The current placing of consultations and general information on disparate websites is confusing to stakeholders and the public. We therefore recommend that the inter-departmental group is backed by a single government website containing all matters relating to waste management, together with links to European Commission and other relevant sites. Whilst we look to Defra to take the lead in setting up and maintaining this website, we would expect it to have due regard to the responsibilities of DTI, other relevant departments and the devolved administrations.

(iv) In the interests of transparency, all Explanatory Memoranda on relevant EU documents sent to Parliament should also be placed on this website.

Defra agrees that there is scope for improving the accessibility and clarity of information about waste policy supplied on the internet. Defra has recently begun to overhaul the waste section of its website to coincide with the need to publish online information concerning the Local Authority Support Unit of the Waste Implementation Programme.

As a result of this overhaul waste information will be more user friendly. The new web map has not yet been finalised but it is envisaged that the site will become a definitive source of advice and information on waste, and a channel for consultation and communication between Defra, local authorities and other stakeholders. Defra have noted the comments of the Committee, including on Explanatory Memoranda, and will consider these when finalising website plans.

(v) We believe that better communication between the Government and local authorities can similarly be assisted by the creation of a single point of information and consultation on waste policy.

The Government is committed to providing a high quality service to local authorities, including the best possible communication arrangements and access to expertise. Given the broad range and complexity of the issues which fall under the umbrella of "waste policy", provision of that high-quality service will necessarily involve a number of organisations, individuals and lines of communication.

We are looking at how best to streamline and simplify the communications interface between central Government and local authorities. This will include an overhaul of Defra's waste management website, to enhance the role it already plays as a point of contact and information on waste issues.

Regulatory Impact Assessment

(vi) The UK has significant experience in preparing regulatory impact assessments and should act to champion the process in the EU institutions.

The government has been working with the European Commission, European Parliament, Council of Ministers and other Member States for some time on promoting the better regulation agenda. The main focus of this work has been on the value of impact assessment for policy proposals.

The UK took a leading role in the Mandelkern group of Member State experts on better regulation, which produced its final report in November 2001. One of the report's recommendations was that Regulatory Impact Assessment should be an integral part of the policy making process at EU and national levels.

This recommendation was taken forward by the Commission when it produced its Action Plan on Better Regulation in June 2002. Later that year it produced a set of guidelines for its officials on its new two stage impact assessment process covering the economic, social and environmental impacts of proposals. The Commission's new system was heavily influenced by the UK, although it is not an identical system.

We continue to work with the Commission to monitor the production and quality of its impact assessments, and to be as helpful as possible in the exchange of relevant information. We are also working with the European Parliament and Council of Ministers to encourage and inform debate about use of impact assessments for their amendments, as outlined in the recently ratified Inter-institutional Agreement on Better Lawmaking.

(vii) Regulatory impact assessments by the Government should show how responsibilities will be divided between local authorities, central government and other agencies; the percentages of the overall cost represented by this breakdown; from which budget lines local authorities are expected to meet their shares; and whether extra money is likely to be provided.

Departments are required to consider the impact of policy proposals on business, charities and the voluntary sector using the RIA process. At present the trigger to start work on the RIA is a potential impact on the private sector, although once the RIA is undertaken it should also identify and assess impacts on a wide range of stakeholders, including the public sector. However, the purpose of an RIA is to identify and analyse the impacts of policy proposals, and the funding streams for local authority costs would be for separate discussion. It is already the case that, where legislation imposes new requirements on local authorities which give rise to additional costs, the department sponsoring the legislation must quantify those costs and ensure that adequate new funding is provided to cover them.

TECHNICAL ADAPTATION COMMITTEES

(viii) The Government should not agree to framework legislation without a full understanding of the practical implications. Where significant detail is to be delegated to technical adaptation committees this should be made explicit in Explanatory Memoranda and regulatory impact assessments made available to Parliament.

(ix) We note that the Environment Agency is involved in technical adaptation committee negotiations in some cases and fully endorse this arrangement. However, to improve transparency it should be made clear which committees the UK has an active role in and from which department UK representatives on the committees are drawn.

The Government agrees that it is important that a full assessment of the implications of framework legislation is considered before it is agreed. It is right that technical issues, such as the final waste acceptance criteria under the Landfill Directive, should be delegated to the technical adaptation committee. Clearly some technical issues can have more impact than others, and the Government agrees that as far as possible impacts and implications should be identified beforehand and made clear in relevant Explanatory Memoranda and regulatory impact assessments.

The Select Committee refers to technical adaptation committees (TAC). In fact there is only one TAC for waste issues which is established by Article 18 of the Waste Framework Directive (75/442/EEC as amended). This committee is referred to in a number of daughter directives to the Framework Directive, and meets to consider specific technical issues under those Directives. The UK Government plays an active part in the technical adaptation committee. Representation at the TAC is geared to the relevant Directive and issue under discussion. Defra will normally be present at all TAC meetings irrespective of the Directive under discussion. DTI can also be represented, particularly if matters under the ELV or WEEE Directives are under discussion. In addition the Environment Agency can and does play a role in support of Government Departments at the TAC. The Agency's role is to offer technical advice, and not to represent UK Government.

(x) As a result of the Council's decision to delegate a crucial part of the legislation to the Commission, and because the technical adaptation committee first met after Member States had begun the process of transposition, crucial details affecting the operation of the Landfill Directive were not agreed before the deadline for full implementation. The Government were thus in a position of having signed up to legislation without knowing the practical implications; while landfill operators were faced with significant uncertainty and confusion about what the law required.

It is an accepted part of how the European Community operates that detailed technical issues are dealt with by Commission led procedures. In the particular case of detailed waste acceptance criteria, the Council decided that this was not a political matter and could be dealt with by the Commission using the technical adaptation committee procedure. It is wrong to assume that the Landfill Directive agreed by Council did not contain waste acceptance procedures. Annex II of the original Directive sets out general principles for acceptance of waste at landfills, general procedures for testing and interim guidelines. However, the Council decided that more detailed procedures were required if the overall objective of the Directive was to be met. While the Commission were very slow in coming forward with a proposal and were only able to do so as a result of the work of a modelling group, chaired by the UK, this was not a fault of the procedures themselves. It should also be noted that the work of the modelling group was closely observed by a stakeholders group in the UK (known as the Annex II Committee), who were able to question directly the Chair of the modelling group (who represented the Environment Agency on the Annex II Committee).

In the event, the Technical Adaptation Committee was unable to issue an opinion, because of unexpected changes to a proposal discussed at Working Group, and the decision was passed back to Council. As a result, the proposal was subject to Parliamentary scrutiny and an Explanatory Memorandum (12468/02) was submitted to the Houses of Parliament in October 2002. It was not selected for debate. Council agreed a revised proposal (by unanimity) on 19 December 2002 and this was published in the Official Journal on 16 January 2003 as Council Decision 2003/33. The Decision allowed only 18 months for transposition into national law (rather than the more usual two years) as this has to be achieved by 16 July 2004. The consultation on the amending England and Wales regulations is now closed and the outcome to this consultation should be made known in February. Transposition should be completed well before the July deadline.

(xi) In relation to the WEEE Directive, it is regrettable that, as we report, so much remains to be settled. It is impossible for those affected by the Directive to run their businesses without timely decisions on these matters.

The Government agrees that there is much still to be settled at EU level on the WEEE Directive. It accepts that some businesses may find it difficult to plan without more certainty about some aspects of the Directive. The Government is pursuing outstanding issues with the Commission and other Member States, to provide greater clarity and guidance for stakeholders, including businesses, and for the purposes of planning for UK implementation.

There are a number of important issues which remain to be resolved by the Technical Adaptation Committee (TAC). Key among these is the need to provide guidance on the scope of the Directive. The Directive provides for Member States to interpret its scope. The UK has pursued with other Member States the importance of having a harmonizing agreement to help interpretation of the Directive's scope, in order to provide guidance for manufacturers and others. These discussions have proved difficult and progress has been slower than hoped.

The Government has maintained a commitment to transparency in both the negotiation of the WEEE Directive and its planning for implementation. The Government has involved stakeholders throughout the negotiations to keep them informed of developments, and to allow them to put forward their views. Numerous stakeholder meetings were held to discuss potential effects on sectors affected by the Directive, and the Government hosted a series of workshops around the UK to raise awareness of the Directive and explain the likely implications, especially targeting smaller businesses.

The UK was the first Member State to publish a consultation paper for its national implementation planning, within six weeks of the WEEE Directive being published. Last autumn the Government published a second consultation paper, which puts forward the Government's preferred implementation options. It takes account of responses to the first consultation and the results of the Government's own thinking about the most cost-effective way of achieving the environmental objectives of the Directive at least cost to producers, and it aims to provide stakeholders with a clear indication of the Government's preferred policy intentions. The

Government intends to issue a third consultation, on draft Regulations and draft Guidance, in late Spring 2004. It is working towards the objective of transposing the WEEE Directive by the deadline of 13 August.

The Government is continuing to raise awareness of the WEEE Directive by holding a further series of large workshops in 8 UK regions. These have so far been well attended. In addition, Government officials hold numerous meetings to discuss implications of the Directive with particular sectors, and speak at a large number of conferences to reach as large an audience as possible. Further, the Government has worked together with Envirowise to produce two guidance booklets specifically aimed at UK manufacturers to explain the implications of the WEEE Directive and to help them prepare.

(xii) We are glad that the DTI have made a start in opening up the committee system by placing informal minutes of the WEEE Directive committee on their website and by explicitly asking for comments by interested parties. We urge the Government to extend this practice to all technical advisory committees. Details of the UK representatives on the committees should in any event be made available.

The DTI will continue to place informal minutes of the TAC WEEE Directive discussions, including details of UK representation, on its website. The Government is considering extending this practice to all technical advisory committees, and will respond separately to the Committee on this point in the near future.

THE ROLE OF THE ENVIRONMENT AGENCY

(xiii) The Environment Agency wishes, not unreasonably, to be involved continuously in negotiations in Brussels. For this it needs the ability to be proactive rather than just responding to requests from Government departments for information. We believe that this is crucial to enhancing the UK's ability to influence proposals at an early stage. We wish to see the provisions in the recently agreed concordat working towards this end.

Defra agrees that the Agency's involvement in negotiations on European legislation needs to be continuous from the outset of proposals. The Concordat between Defra and the Agency on Working Better Together on International Activities provides the basis for effective joint working on international activities between Defra and the Agency, in particular to ensure that the Agency's expertise can contribute to the development of policy, and especially to European negotiations. Defra is already working closely with the Agency to ensure the latter's involvement.

(xiv) The Government should therefore acknowledge that it has a duty to listen to and take into account the advice of the Agency, as the statutory regulator, and should be prepared to justify its own decisions. The Agency, for its part, must recognise that ultimately it is the Government who have to take responsibility for policy decisions.

The Government agrees that it has a duty to listen to the Agency's advice, and to that end Defra has regular and frequent meetings at all levels, from Ministerial level to the working level, to discuss and take account of the Agency's advice.

(xv) We consider it essential that on waste matters where DTI is the lead department the Environment Agency should be listened to and involved in negotiations on exactly the same basis as it should be where Defra is in the lead. We recommend that the DTI should draw up a concordat with the Agency similar to the one negotiated with Defra. Both concordats should recognise the distinct functions of Government departments, the Agency and industry.

As noted in DTI's evidence to the Committee, the concordat between the Agency and Defra on working together on international activities (paragraph 2.40) recognises that there are areas which impact on the Agency's operations where other Departments lead. DTI therefore fully supports the concordat and will observe its provisions where applicable. Given DTI's particular responsibilities however, the Government agrees that this should be formally confirmed and will be discussing with the Agency the form this should take.

(xvi) The Government should recognise that the Environment Agency will need additional staff, with appropriate specialist skills, to carry out its responsibilities effectively. We recommend that the Government should as a matter of priority consider how the Agency can be provided with the resources and expertise not only to carry out its increasing regulatory functions in regard to waste, but also to enable it to be proactive in the early stages of policy development.

The Government recognises that the Environment Agency should be provided with the resources it needs to carry out its functions. The Agency has continued to receive significant grant-in-aid from the Department. This has increased from £103.7 million in 1999–2000 to a budgeted £126.1 million in 2003–04. The Government's contribution to the Agency's waste expenditure has increased from £34.3 million in 2000–01 to a budgeted £43.2 million in 2003–04.⁶

The Agency's Corporate Strategy, *Making it Happen*, sets out how the Agency will deliver the Government's statutory objectives and priorities, including those for waste. These are reviewed annually as part of the corporate planning process and progress is reported through the Agency's Annual Report and Accounts.

The Government recognises the importance of ensuring appropriate liaison between the Agency and the Department on implementation issues during the development of policy. Resources for this can be considered as part of the corporate planning process.

DATA COLLECTION

(xvii) The UK should not wait for EU initiatives on data collection but should seek to develop and improve its own baseline data as quickly as possible.

The Government agrees that consistent, reliable data on waste are vital for developing policy and monitoring. A lack of information on specific waste streams, their growth rates, composition, life cycles and impact is hampering the development of an effective waste strategy for household and other waste streams, and the ability to effectively measure and monitor progress.

We are continuing to work with the Environment Agency and others to improve the range and reliability of data available to meet both national and EU needs. For example, the Environment Agency is undertaking a further survey of industrial and commercial waste. The Department is also closely involved in a project to develop a new national municipal wastes database, *WasteDataFlow*, co-ordinated and managed by the Chartered Institution of Wastes Management Environmental Body. This is due to come on line in April of this year although full implementation is expected to run through into 2005.

In addition, a new data team within the Waste Implementation Programme is responsible for developing and delivering a three year data strategy. The team's remit covers the data needs of all stakeholders across all waste streams, not just the Municipal Waste stream. Its aim is to provide comprehensive, joined-up quantitative waste data, produced efficiently and regularly, which will provide a sound evidence base for effective waste management policy formulation, planning and investment decision making. It will also facilitate EC reporting requirements.

A three phase work programme involving the Environment Agency and other stakeholders is in progress. The first phase, which has been completed, comprised a review of data needs and current provision and the development of an aspirational outline strategy. The second phase is now underway. This will include gaining detailed feedback on, and buy-in to the outline strategy from stakeholders, and the development of a detailed strategy and implementation programme to deliver the required data. The third phase will implement the strategy on a staged basis.

Letter from the Chairman to Mr Elliot Morley MP, Parliamentary Under-secretary of State, Defra

Thank you for the Government Response to the EU Select Committee's report on EU Waste Management Policy.⁷ You may be aware that the report is due to be debated in the House of Lords on Tuesday 22 June by way of an unstarred question. In advance of that debate, it would be most helpful if you could answer one or two outstanding queries.

⁶ Figures taken from EA Corporate Plan for 2003–04.

⁷ European Union Committee, 47th Report (2002–03): *European Union Waste Management Policy* (HL 194).

Your response says that the Government are considering options for improving the co-ordination of inter-departmental responsibilities for waste policy, in particular via a review being undertaken by the Cabinet Office. Do you know when the Cabinet Office review will be concluded?

Would it also be possible to update the Committee on developments regarding the waste section of the Defra website? In particular, has any further thought been given as to whether or not to place Explanatory Memoranda on relevant EU documents on the site? What steps are you taking to utilise the web in improving communications between central and local government?

You stated in your response that you would provide further information regarding the Government's view on technical adaptation committees in a separate communication to the Committee. Do you know when this is likely to arrive?

The Committee stresses again the importance of ensuring that only appropriate parts of EU legislation are delegated to "comitology" committees. Do the Government plan to improve the transparency of technical adaptation (and advisory) committees by making clear which committees the UK has an active role in and from which department UK representatives on the committees are drawn?

What is the Government's reaction to the Committee's conclusions on the definitions used in EU waste legislation? Do you think that overlaps and inconsistencies between Directives should be reviewed by the Commission? Do you think that the Commission should better explain how new proposals on waste matters interact with existing Community legislation? What role are the Government playing in the extended impact assessment process, which has been initiated by the Commission for the Strategy on Natural Resources?

I would be most grateful for your reaction to the above questions and apologise for the short space of time you are left with to issue a response in advance of the debate.

10 June 2004

Letter from Elliot Morley MP, Defra, to the Chairman

Thank you for your letter of 10 June following up the Government's Response to the EU Select Committee's report on EU Waste Management Policy.

In its report, the Committee recommended a single inter-departmental waste policy unit to provide strategic leadership on policy development and a single source of information for stakeholders.

The Strategy Unit report "Waste not, Want not" previously recommended that a review should be undertaken to assess the merits of focusing all waste policy in one Department.

This review is currently being undertaken by the Cabinet Office and is expected to conclude shortly.

Similarly, the Committee recommended a single Government website for waste policy issues. No decision will be taken on this matter until the outcome of the Cabinet Office review into an inter-departmental waste policy unit is known. However, I am aware that in the meantime, a group has been set up within Defra to consider the waste section of our website, with an eye to improving the information displayed on it.

Steps have already been taken to enhance the role the website plays as a point of contact and information on waste issues for local authorities, with the recent launch of the Waste Implementation Programme's section of the website.

To address your points on Technical Adaptation Committees, the Government agrees it is important that as full an assessment as possible of the implications of framework legislation is considered before it is agreed by Member States. But it is appropriate that some technical issues, such as the final waste acceptance criteria under the Landfill Directive, should be delegated to the technical adaptation committee.

The issue of comitology procedures will be affected by the new Constitutional Treaty, and we will need to wait and see the outcome of those negotiations. I agree that there are benefits to moving towards greater transparency.

The Government did not respond to the Committee on their conclusions on the definitions used in EU waste legislation, as these appeared in recommendations to the Commission. However, these issues have been looked at by the Government when preparing its response to the EU communication "Towards a Thematic Strategy on the prevention and recycling of waste". The Government have welcomed the development of the Thematic Strategy and are keen to be further involved in its development. However, we are seeking to use this opportunity to reflect on existing measures—an EU wide Waste Strategy should not necessarily require a raft of new policies and may suggest modifications to existing policies.

The Government are also liaising closely with the Commission on extended impact assessments on several Thematic Strategies, under the EU's 6th Environmental Action Programme.

17 June 2004

5th REPORT: FIGHTING ILLEGAL IMMIGRATION: SHOULD CARRIERS CARRY THE BURDEN?

The Home Office's Response

I refer to the House of Lords Report on the draft Directive: "Fighting illegal immigration: should carriers carry the burden?" and welcome the opportunity to respond formally on the Government's position with regard to this initiative. Chapter 3 (paragraphs 36–50) of the Report records a number of conclusions and recommendations and I should like to address these in turn.

The Committee has questioned how the initiative can be effective in combating illegal immigration, organised crime and threats to national security (paragraphs 36,37). The Government considers that the provision of advance passenger information (API) provides control authorities with a valuable additional resource to support a thorough and rigorous screening of inbound passengers to identify those who present a known immigration or security threat. The ability to assess passenger information before arrival enables control authorities to be proactive rather than reacting solely at the point of arrival. Advance passenger information would also be of considerable assistance in identifying facilitators, of any nationality, involved in illegal migration.

API also enables control authorities to identify passengers travelling on documents known to be improperly or fraudulently obtained at the point of check in. Having knowledge of such passengers in advance of travel provides control authorities with an opportunity to take appropriate intervention action. The additional passenger data enhances carrier and border security and helps to ensure that all passengers carry valid identity documents.

The Government welcomes the Committee's recognition of the benefits of being able to deny boarding to inadmissible passengers. In the UK context, the Government has legislated for an Authority to Carry (ATC) scheme, which would allow the Immigration Service to refuse authority to carriers to board certain high-risk passengers. The Government considers that the current text of the draft Directive (7595/04) will permit Member States to introduce such a measure by requiring that the data should be communicated by the end of the check-in period. The UK introduced primary legislation supporting an ATC scheme in the Nationality, Immigration and Asylum Act 2002.

The Government also considers that, in circumstances where there are no clear grounds to deny boarding, access to passenger information in advance of travel will improve intervention and planning at the immigration control primary line and in counter terrorism, national security and law enforcement operations conducted by the relevant Government Agency at UK ports. For example, it will be possible to identify persons of interest on arrival in the UK. It will help facilitate the identification of passengers who destroy or dispose of their documents en route and enable their point of origin or transit to be established. Information held at present in a flight manifest does not contain the full biographic details (eg name, date of birth) of a passenger or details pertaining to the travel document used by the passenger to travel to the UK. Collection of API before a passenger travels to the UK will provide a source of information which may help determine, by a process of elimination, the identity of those passengers who subsequently arrive undocumented. There are significant benefits for the Immigration Service in terms of the administration of these passengers, particularly in respect of arranging the removal of a person who has no right to remain in the UK.

We note the Committee's concern that an adequate case for the need of the proposal should be made (paragraph 37). The Government's decision to support the proposal was based jointly on the significant benefits which API could deliver in the fight against illegal immigration and the fact that the UK Immigration Service's experience and expertise in this area could be usefully shared with our EU partners. In supporting the proposal, the Government made it clear that we considered further modifications could be made to the text to improve its effectiveness. Accordingly, we have continued to negotiate to attempt a satisfactory final text to safeguard the UK's interests and to enhance the effectiveness of the proposal.

The UK is currently engaged in the development of a programme of change for a modernised integrated secure border and API is an essential element of this initiative. The programme is a medium to long term cross-agency initiative supported by the Home Office, HM Customs and Excise, the Intelligence Agencies, the Police Service, UKvisas, UK Passport agency and the Department of Work and Pensions. We consider that elements of the programme could be reflected in the draft Directive to deliver greater benefits, particularly in the area of the purpose for which the information collected may be used.

The initiative aims to modernise and integrate the management of passenger information including biometrics to expedite the movement of legitimate passengers while helping to safeguard the UK against serious and organised crime, terrorism and illegal immigration. Our aim is to combine existing carrier systems with advanced information technology to allow the border agencies, working together, to “export the border” from the UK, assessing passengers in advance of arrival, filtering out known threats and creating new opportunities to share information and intelligence between border control, law enforcement and intelligence agencies in the UK and overseas. It would provide a more effective and flexible control appropriate to the perceived risk, faster passenger processing and a means of sharing and obtaining relevant border information through compatible systems across government.

The Committee feels that the draft Directive would be a disproportionate imposition on carriers, particularly in respect of EU nationals, and would not help to counter identity theft or document forgery (paragraph 38). The Government does not share this view. Whilst we agree that EU nationals cannot be considered illegal immigrants, EU documents are regularly targeted for abuse on the basis that they confer the greatest free movement entitlements. The Government considers that this type of document abuse can be combated by receiving API on all nationalities to enable the competent authorities to determine whether a passenger is or is not an EU citizen and entitled to the free movement provisions. We consider that this task rests with the control authorities and we cannot rely on carriers to undertake border control functions. We believe, therefore, that the requirement for API on all arriving passengers is proportionate to the objective to combat illegal immigration. In implementing any requirement for API, we shall maintain close liaison with legal advisors to ensure that any proposals are compliant with the relevant provisions of the Data Protection Act 1998 and of the EU Data Protection Directive 95/46/EC. On a practical level, the Government considers that a single check-in procedure would be preferred by carriers and to date our discussions with the industry have confirmed this.

The Government notes the Committee’s concerns that the application of the Directive to the borderless Schengen would be disproportionate to its objective (Paragraph 39). The Directive applies to flights entering the territories of Member States from outside the EU. The scope of the Directive, therefore, does not apply to journeys between EU states. In the UK context, however, the information gathering powers available to the immigration authorities do not differentiate between passengers on the basis of nationality, intention or port of origin. In developing our Authority to Carry proposals, it is anticipated that the Immigration Service will require API on all international arrivals, including passengers in intra-EU routes.

The Government shares the Committee’s concerns over the requirement for carriers to notify control authorities when a passenger does not embark from a Member State territory in accordance with their return ticket (paragraph 40). Not only do we view this measure to be impracticable and unworkable but we also consider that the obligation would be inconsistent with the data processing requirements relating to the retention of information stipulated by the Directive. The Committee will be reassured to know that this requirement has been removed from the Directive.

The Report records the Committee’s concerns over the procedural and resource implications for carriers (paragraphs 41, 42). Specifically, the Committee considers that the proposal would cause serious delays and disruption for passengers and concludes that a proper assessment of the implications of increased check-in times is necessary. The Government recognises that check-in is an extremely time sensitive process and acknowledge that there will be implications for carriers, passengers and airport authorities, but, in implementing the requirements of the Directive, the UK authorities will seek to minimise these by developing processes which complement existing check-in procedures and which are interoperable with existing carrier systems and technical infrastructure. Based on recent estimates, we believe that approximately 70 per cent of documents are machine-readable and we consider that the use of OCR document readers wherever possible to collect the information automatically, coupled with a maximum 6-second speed response time, will go toward our shared aim of minimising disruption. Additionally, we consider that, in the context of a modern integrated border, API may contribute to more efficient processing of passengers through the immigration control on arrival.

The Committee has also concluded that an RIA on the Directive is essential. The Government had previously considered that production of an RIA was not necessary on the basis that no new regulations would need to be introduced. In implementing the requirements of the Directive, the Immigration Service would rely upon existing powers conferred by Section 18 of the Immigration and Asylum Act 1999 and The Immigration (Passenger Information) Order 2000, for which an RIA was produced in respect of the latter instrument. Following publication of the Committee’s report, the Government has now reviewed its position and an RIA has been produced and is annexed to this response.

The Government notes the Committee's dislike of a minimum penalty and that the sanction should relate to the journey rather than the passenger (paragraph 43). In assessing the compatibility of the sanctions with our domestic provisions, we have interpreted Article 4.1 (a) to provide for a sliding scale of sanctions with no minimum charge and a maximum of no less than €5,000. Our criminal sanctions provide for no minimum fine but a maximum of no more than £5,000. We consider that Article 4.1(a) is compatible with our criminal sanctions provided that the lower limit of the maximum charge in the Directive (ie €5,000) remains less than £5,000. In implementing the provisions of Article 4.1, the Government will take account of the need for any sanctions to provide sufficient incentive to ensure that carriers comply with their obligations and for those sanctions to be proportionate. The Committee may wish to note that Article 41(c), which provides for a lump sum for an infringement, has been removed from the most recent text 7595/04.

The Committee expressed that Article 4(2) which requires Member States to impose severe sanctions on carriers who fail to meet their obligations, be deleted (paragraph 44). UK legislation currently allows sanctions to be used against carriers who fail to comply with a request for passenger information without reasonable excuse. The UK supports the general approach taken by the Directive, as the reliability of passenger information is key to pre-screening and this Directive provides carriers with a strong incentive to provide accurate and complete information. However, the Committee will be reassured to learn that the requirement has now been removed.

The Committee is concerned that the Directive contains no provision for remedies for aggrieved passengers, in the event of passengers being denied boarding unjustifiably (paragraph 45). The Directive does not expressly require Member States authorities to operate a board/don't board procedure. In the absence of such a requirement, I would respectfully suggest that it would not be appropriate for the Directive to include remedial provisions. However, the Government intends to develop an Authority to Carry Scheme which will include a facility for passengers to be denied boarding and we recognise the importance of providing a robust and timely avenue of redress. In view of this, the Government is developing a resolution mechanism by which passengers can review decisions with the control authorities. It is anticipated that this mechanism will include a round the clock telephone enquiry line, which will provide the means for immediate resolution wherever possible.

The Committee considers that the information processing provisions of the Directive are largely compatible with the principles in domestic and international data protection legislation but raises concerns over the proportionality of the measure (paragraph 46). Proportionality is inextricably linked to the purpose for which the data is collected. As I have previously mentioned, the Government considers that it is necessary and justifiable to require API on all passengers travelling to the United Kingdom for the purpose of identifying known immigration and security threats. It is not anticipated, therefore, that data collection and processing will be excessive in such instances and it is not the Government's view that the proportionality test will be infringed. Furthermore, the greatest of care will be taken in the processing of such data with a view to ensuring correct and accurate usage to prevent such infringement. In developing domestic procedures, the Government will seek clear confirmation on compliance with data protection principles including proportionality.

The Committee has requested that it be provided with ample time to scrutinise fully an EC/EU Decision or international agreement in the field of API (paragraph 47). The Government will make every effort to ensure that the Committee has adequate time for scrutiny in this area given the importance of the subject and its implications.

The Government shares the Committee's view that we participate fully in negotiations in order to seek to remove some of the more objectionable features (paragraph 48). This is something we have been doing from the start as we would not agree to any text that did not safeguard the UK's interests. The Government is already a full participant in key committee discussions and has ensured that the viewpoint of the UK and our concerns are accurately conveyed to the Presidency and other Member States. The Government has done its best to amend the text in the light of these concerns and as had some impact on improving the texts from the original.

The Government is in complete agreement with the Committee that the original proposal contained substantial flaws which needed to be addressed (paragraph 49). Since the inception of the Directive, we have worked hard to ensure that a more balanced text is produced that addresses many of the concerns raised by a number of parties. The latest text 7595/04 resolves the Government's major concerns, particularly in the area of data processing. We believe that the latest version will enable us to share data with other law enforcement agencies, as we do at present, and to utilise that data for important statutory purposes, both of which are key elements of our multi-agency programme of change. As I have previously mentioned, the latest text no longer includes measures in respect of notification of the non-use of return tickets or requirements for severe sanctions in the case of serious infringement by carriers, both of which the Committee considered to be objectionable features.

The Government shares the view of the Committee that the proposal has important implications for carriers, passengers and border control authorities and welcomes the Committee's recommendation that the report be debated in the House of Lords (paragraph 50). I understand that the debate has been scheduled for Tuesday 20 April.

The latest text was agreed at the JHA Council on 30 March. However, as it is still subject to parliamentary scrutiny all we could accept was a General Approach, it therefore still remains open to us to return to Council with any concerns of substance.

I hope this response is helpful to the Committee. The Government will keep the Committee informed of any progress on this proposal and will deposit any further revised text as appropriate.

1 April 2004

Annex B

**Regulatory Impact Assessment
Title of Provision**

**THE DRAFT COUNCIL DIRECTIVE ON THE OBLIGATION OF CARRIERS TO COMMUNICATE
PASSENGER DATA**

Regulatory Impact Assessment on the Directive to establish an obligation on carriers to transmit (by the end of check-in) information—at the request of authorities responsible for carrying out checks on persons at external borders—concerning the passengers they will carry to an authorised border point through which such persons will enter the territory of the EU.

PURPOSE AND INTENDED EFFECT OF THE MEASURE

Objective

The draft Directive seeks to improve border controls and combat illegal immigration by the transmission of advance passenger data by carriers to the competent national authorities of Member States. The information required from a passenger comprises:

- the number and type of travel document used
- nationality
- full names
- the date of birth
- the border crossing point of entry into the territory of the Member States
- code of transport
- departure and arrival time of the transportation
- total number of passengers carried on that transport
- the initial point of embarkation

BACKGROUND

The obligation on carriers to transmit passenger data in advance of departure already exists in UK law. Under paragraph 27(2) of Schedule 2 to the Immigration Act 1971, the Secretary of State may require captains of ships or aircraft arriving the UK to provide immigration officers with a passenger list showing names, nationality or citizenship of passengers arriving on board the ship or aircraft, and particulars of members of the crew of the ship or aircraft. These powers were extended to through trains arriving in the UK by virtue of the Channel Tunnel (International Arrangements) Order 1993 and the Channel Tunnel (Miscellaneous Provisions) Order 1994.

Section 18 of the Immigration and Asylum Act 1999 provides a power to require carriers to supply such “passenger information” as may be requested by an immigration officer. Under the Channel Tunnel (International Arrangements) (Amendment) Order 2000, this power is extended to through trains and shuttle trains travelling through the Channel Tunnel. The Immigration (Passenger Information) Order 2000 specifies the information which an Immigration Officer may require from the owners or agents of ships or aircraft which

have arrived, or are expected to arrive, in the UK or which have left, or are expected to leave, the United Kingdom. The Order is divided into two parts:

Part I specifies information relating to a passenger as given or shown by the passenger's passport or other travel document. Part I information, which broadly corresponds to the list of data elements specified in the Draft Council Directive, is not routinely collected by all carriers however they do have access to the information through interaction with passengers at check-in. Carriers have a duty to examine travel documents to establish that passengers are adequately documented for their journey to the UK. Part I information is commonly referred to as Advance Passenger Information (API).

Part II information relates to data which carriers may hold in their reservation systems and includes information relating to travel itinerary, ticket details including date and place of issue and method of payment and details of travelling companions appearing on a passenger's reservation. Part II information, or Passenger Name Record (PNR) information, may be drawn upon for intelligence purposes and enables more effective targeting of offenders, racketeers and facilitators. The Draft Council Directive does not cover PNR information.

Access to passenger information from carriers in advance of arrival is fundamental to changes proposed for the on entry control, in particular, the ability to operate flexibly and target resources effectively. Provision of the name, date of birth, nationality and document number of passengers enables the screening of passengers in advance of arrival and may facilitate expedited clearance on arrival.

RISK ASSESSMENT

The United Kingdom has traditionally operated a universal challenge "on-entry" control as the primary means of regulating the flow of people entering the UK. The ability to do so is supported by the comparative lack of land borders. This is in contrast to some other European countries who commit less resource to policing their land borders (especially in an EU/Schengen context), and greater resource to "after-entry" control and detection.

Passenger arrivals at UK ports of entry are on the increase. In the year 2001 passenger arrival figures were just short of 90 million and a year on year increase of 5 per cent is predicted. As passenger numbers grow and larger craft come into service, queues in arrival halls will grow. Where they threaten to outstrip limited port building capacity, incoming services will suffer delays and may have to be restricted.

These statistics, plus the imminent advent of aircraft carrying as many as 600 passengers, represent considerable pressures on the immigration control in the future. With the total of those refused and removed standing at around 0.30 per cent of the number of arriving passengers subject to immigration control, it is recognised that the resources invested in processing arriving passengers, the vast majority of whom are bona fide, is disproportionate to the overall threat to the control. Increasing passenger numbers coupled with the unchanged solution can only lead to a significant reduction in effectiveness over time. Decreased ability to apply appropriate scrutiny and border control measures will exacerbate existing problems of immigration abuse for the UK. Continuing to adopt a universal challenge approach in the face of rising passenger arrival figures will diminish the efficiency of the immigration control operation.

Currently passengers arrive unannounced. There is little information on which to form an advance view of the risk they pose, thus preventing effective and efficient allocation of resources, and limiting the ability to coordinate an appropriate and timely response. Once an inadmissible passenger is on board a service, that person cannot be prevented from setting foot in the UK and becoming either a charge on public funds or a threat to UK interests. Flexibility is seen as a means of redressing this imbalance and of achieving staff efficiencies by diverting resources from low risk areas of traffic to potentially more productive areas such as the identification of offenders, the disruption of facilitators, prosecution of traffickers and removal of persons with no permission to remain.

The UK is currently addressing the need to provide a more effective and flexible control appropriate to the perceived risk with faster passenger processing by developing an advance passenger processing system. Advance passenger information provided by carriers will be a key element of this process. The UK Immigration Service (UKIS) in co-operation with other government agencies is working on a medium- to long-term cross-agency programme of change which will modernise and integrate the management of passenger information, including biometrics, to expedite the movement of legitimate passengers while helping to safeguard the UK against serious and organised crime, terrorism and illegal immigration. The aim is to combine existing carrier information systems with advanced information technology to allow the border agencies, working together, to "export the border" from the UK, assessing passengers in advance of arrival, filtering out known threats and creating new opportunities to share information and intelligence between border control, law enforcement and intelligence agencies in the UK and overseas.

OPTIONS

Option 1: Continue to use the Passenger Information Order (2000) as present

Under current legislation, the Secretary of State may require captains of ships or aircraft arriving in the UK to provide immigration officers with a passenger list showing names, nationality or citizenship of passengers arriving on board, and particulars of members of the crew of the ship or aircraft. Subsequent legislation extended this to trains arriving in the UK.

Section 18 of the Immigration and Asylum Act 1999 provides Immigration Officers with a power to request passenger information. The Immigration (Passenger Information) Order 2000 specifies the precise information required. Implementation of these powers has been on a targeted basis, but the UK therefore already has legislation in place to collect the information outlined in the Directive.

With this option the power can continue to be used on a targeted basis with minimal additional impact on carriers. However, in the absence of the IT infrastructure enabling transmission and receipt of passenger information, this option will not achieve optimum efficiency nor will it fully address the challenges currently facing the UK immigration control.

Option 2: Implement the Directive immediate once adopted

All persons coming into the UK from outside the EU external border would have their information transmitted to the UK border authorities. Carriers would need to install the necessary technology in airports abroad to facilitate the collection and communication of the passenger information. Additionally, the UK border authorities would need to install the necessary equipment to receive and assess this passenger information. The rapid introduction of the necessary infrastructure may result in technology being installed which may not deliver the full benefits of API. To deliver an effective and efficient border control this information ideally should be linked to an intervention system such as an Authority to Carry (ATC) scheme and an analytical process to inform the immigration control of perceived risks, but this is not possible in the immediate future.

For these reasons requiring carriers to provide detailed API on all flights following the adoption of this Directive is not considered a viable option. However there is a need to provide a more effective and flexible border control appropriate to the perceived risk with faster passenger processing for which API is essential.

Option 3: Collect advance passenger information as part of an advance passenger processing solution

UKIS in conjunction with other Government departments is seeking to develop a medium- to long-term cross-agency programme of change which will modernise and integrate the management of passenger information, including biometrics, to expedite the movement of legitimate passengers while helping to safeguard the UK against serious and organised crime, terrorism and illegal immigration. The aim is to combine existing carrier information systems with advanced information technology to allow the border agencies, working together, to “export the border” from the UK, assessing passengers in advance of arrival, filtering out known threats and creating new opportunities to share information and intelligence between border control, law enforcement and intelligence agencies in UK and overseas. Advance passenger information is a fundamental element of the processes envisaged, which include an ATC scheme for which provisions exist in the Nationality, Immigration and Asylum Act 2002. As part of this programme the Government is considering a project to test the collection and analysis of API from a small number of locations. This will help inform the development process of a modernised and integrated border control.

BUSINESS SECTORS AFFECTED

The Directive affects air carriers only. There are currently in the region of 90 Carriers who fly to the UK.

BENEFIT/COSTS ANALYSIS

Option 1, the current position, has a zero net cost effect at present. Option 2 costs are difficult to estimate as no technical solution has been finalised and the technical solution adopted could have further cost implications should it lead to the delay in departure of aircraft. Although costs for option are given below they are indicative costs based on initial estimates. As this is not considered a viable option at present and more detailed costings have not therefore been undertaken. Option 3 can not be costed at present as the e-Borders programme is still being developed. Option 3 will be subject to a separate RIA.

 OPTION 2 COSTS

<i>Costs to Carriers</i>	<i>Cost</i>
Set up costs	£4m
Annual running costs	£1m
Cost through delays	£0 to £6m

Costs to the Public sector

Costs involved in receiving and analysing the API data would exceed the costs of transmitting the data. No firm costs can be provided at this stage, as there is no proposal for the widespread introduction of such a solution at present.

OPTION 2 COST BENEFITS

There are no direct quantifiable cost benefits to carriers from Option 2. In terms of benefits to the public sector there are limited potential benefits through such as the establishment of a platform for the development of the wider e-Borders programme and improved management of arrivals controls (although not as great as that envisaged by e-Borders). There are also benefits through better management information and improvement in meeting SLA queuing times but again not as great as with e-Borders. Given the very broad assumptions made on this option it is not possible to cost these benefits to any acceptable level of accuracy.

OTHER COSTS

The costs and benefits in this RIA represent costs to UK carriers in relation to flights from outside the EU into the UK. A small number of UK based carriers operate flights from outside of the EU into other EU member states post enlargement. These are few and costs arising from these additional flights are estimated to be no more than 1 per cent of the above costs.

EQUALITY AND FAIRNESS

The requirement to provide Advance Passenger Information will apply only to air carriers operating flights to the participating Member States that depart from airports outside the external EU border. It will not apply to flight routes from one Member State to another. The arrangements will apply to all passengers travelling on affected flight routes irrespective of their race or nationality. This includes EU nationals and EU family members who are non-EU country nationals.

CONSULTATION WITH SMALL BUSINESS: THE SMALL FIRMS' IMPACT TEST

A full SFIT has not been undertaken. The Directive places the requirement to communicate passenger data on carriers. It is anticipated that the main impact will fall on the main carriers. The extent to which the obligations to provide the required information may be passed on by the carriers to travel agents, over 95 per cent of whom are small firms, business and individual travellers, is unclear at present.

The SBS views the direct impact as bearing on the airlines, and therefore don't envisage a significant or complex direct impact on small firms. However, depending on the extent and mode of implementation, there may be indirect administrative, and therefore time and cost, impacts on travel agents or other small firms in the travel industry to provide the required information. This may also be reflected in some travel delays to small business travellers travelling to the EU.

COMPETITION ASSESSMENT

The Directive will affect air carriers involved in transporting passengers from outside the external EU border into Member States which have implemented the Directive. UK nationals would be affected when they travel by an air carrier from a port outside the EU external border to an EU Member State which has implemented the Directive.

It is not anticipated that the Directive would have a significant impact on competition between air carriers and other methods of entry to the UK. This view is reached on the basis that the costs, for air carriers, would not be expected to apply disproportionately or be of sufficient size to result in an air carrier eliminating a particular route. There would be a possibility that sea carriers, to which the Directive does not apply, may benefit from the knock on effects of the Directive on air carriers, but the exclusion of intra EU flights makes any competitive advantage to sea carriers slight. Furthermore the convenience and speed of air travel is likely to limit any perceived benefit to a sea carrier if they wished to operate a scheduled ferry service outside the European Economic Area to the UK.

IMPLEMENTATION

In implementing e-Borders processes, the UK government will require carriers to provide advance passenger information. A separate full RIA will be produced to assess the impact of e-Borders on UK businesses.

SANCTIONS

The Directive contains a choice of two sanctions that are triggered where carriers have either failed to transmit data or have transmitted incomplete and false data. Member States must take the necessary measures to ensure that sanctions are dissuasive, effective and proportionate. Member States may choose between either a maximum amount of not less than €5,000 or a minimum amount of €3,000 per journey (or the equivalent national currency at the rate of exchange published in the Official Journal), for which passenger data was not communicated or was communicated incorrectly.

The Directive does not prevent Member States from adopting or retaining other sanctions where the obligations under the Directive have been very seriously infringed. These may include immobilisation; seizure and confiscation of the means of transport; or temporary suspension or withdrawal of a carrier's operating licence.

Consultation

Within Government

Cabinet Office
Department of Trade and Industry
Department for Transport

PUBLIC CONSULTATION

Through their participation in IATA/CAWG, a number of carriers are aware of the UK's proposals for the development of an e-Borders Programme in which the provision of Advance Passenger Information (API) by carriers is key.

Carriers have raised concerns over elements of the Directive with the Department for Transport.

In addition, the UK Immigration Service ran a series of e-Borders workshops between April and October 2003 to which 93 carriers and organisations representing carriers' interests were invited. Thirty nine carriers attended the workshops at which an overview of the e-Borders programme's proposals was given, including an outline of how an Authority to Carry (ATC) scheme, using API as its basis, might work in practice.

SUMMARY AND RECOMMENDATION

Whilst there are benefits from advance passenger information, this needs to be linked to a process that can effectively analyse that data and ensure that the full potential to government and carriers is realised. The Government is considering in more detail how the benefits associated with API can fully realised in operating a modernised flexible border control. A separate RIA will be published following that consideration. The Government does not intend to seek to introduce an API requirement of carriers into the UK independent of the development of an advance passenger processing system.

6th REPORT: THE FUTURE ROLE OF THE EUROPEAN COURT OF JUSTICE

The Foreign and Commonwealth Office's Response

1. BASIC ROLE OF THE COURT

Article I–28(1) of the draft Treaty would be unlikely to bring about any change in the Court's role. But the different language versions of that Article should be brought more clearly into line with Article 220 of the EC Treaty and with each other (paragraph 25).

The Court already has a constitutional character. However, the constitutional dimension of the draft Treaty and the incorporation of the Charter may lead to more challenges on constitutional/fundamental rights grounds. The Court would more clearly take on the mantle of a Constitutional Court for the Union (paragraph 31).

We see no significance in the differences of language between the draft I–28.1 and TEC Art 220. The jurist-linguist process, carried out after political agreement of the Treaty, will provide the opportunity to ensure that different language versions are consistent with each other.

The important question with regard to whether the Court of Justice will have a constitutional character under the Constitutional Treaty is whether the Treaty will greatly change its jurisdiction and role. In fact the Court's jurisdiction and role will remain essentially the same as under the European Community Treaty although the scope of the Constitutional Treaty itself will, of course, be different. Under the Constitutional Treaty, the Court of Justice will give the authoritative interpretation of Union law and will ensure that the Union's institutions and the Member States will respect the provisions of the Treaty, as it does currently in relation to the European Community Treaty. As now, it will examine the way the Union's institutions exercise their competences and will measure their performance against the yardstick of human rights.

2. ARTICLE I–10

We welcome the fact that Article I–10(1) makes clear that primacy only applies to the Constitution and to Union law that has been adopted in the exercise of the competences assigned to the Union's institutions. There remains some uncertainty as to the scope of application of the principle (paragraph 51).

The declaration which it is proposed to attach to Article I–10 may not be as helpful as it is intended. It presupposes that there is currently no uncertainty as to the meaning and extent of the doctrine of primacy. It does not address the issue of the formal collapse of the three pillars. More clarity is needed to address these two concerns (paragraph 53).

We are clear as to the current meaning of primacy and that the declaration on Article I-10 would clarify that it is not intended to expand the meaning of primacy beyond its meaning under existing ECJ case-law. While the scope of the Constitutional Treaty will be different from that of the European Community Treaty, ECJ jurisdiction will remain mostly excluded in respect of CFSP and excluded to the extent of Article III–283 in respect of the area of Freedom, Security and Justice.

3. KOMPETENZ KOMPETENZ

Part I of the draft Treaty provides for the classification and division of competences set out in the Treaty. The critical question is which court, the Court or national courts, will finally decide whether a matter falls within Union competence. This is not just a drafting question but an issue touching upon the fundamental nature of the Union and its relationship with the Member States (paragraph 76).

A strong argument can be made that the effective functioning of the Union requires the Court to be the ultimate arbiter of the extent of the Union's competences and of the validity of its acts. But if the Court is the ultimate arbiter on the extent of the Union's competences it follows that the Court also has the final say in defining the extent of Member States' powers. It is this side of the coin which some find unacceptable (paragraphs 76–8).

The draft Treaty does not resolve the question of *Kompetenz-Kompetenz*. However, the draft Treaty reaffirms and strengthens the position of the national courts by seeking to define the division of competences and by restating, explicitly, the principle of conferral (paragraph 80).

In practice *Kompetenz-Kompetenz* issues may be no more likely to arise in future than in the past. Were a problem to arise, the Community Courts and national courts would and should seek to work together in a spirit of mutual respect and co-operation (paragraph 81).

We do not dismiss the possibility of the argument being advanced that Parliament did not intend, by the European Communities Act, the final definition of the Union's powers to be determined by the Court. The Government should set out their view on the *Kompetenz-Kompetenz* question (paragraph 89).

The Member States have in previous treaties and also in Article I-28(1) of the current draft Treaty decided to confer on the Court of Justice the function of ensuring respect for the law in the interpretation and application of the Treaties. Its role of interpretation includes interpreting the extent of the Union's competences. We agree with the argument quoted above from paragraphs 76-8 of the Report, that this role is necessary for the effective functioning of the Union. It is clear however from Article I-9(2) of the Constitutional Treaty that competences not conferred upon the Union by the Treaty remain with the Member States.

Under Article III-274, the Court, as now, has jurisdiction to give preliminary rulings concerning the interpretation of the Constitution and the validity and interpretation of acts of the Union's institutions where a question is referred to it from national courts. Where such a question is raised in a national court against whose decisions there is no judicial remedy in national law, that court must refer it to the Court of Justice.

We agree also with the verdict of paragraph 81. We have commented previously, in a letter from the Foreign Secretary to the Head of the European Scrutiny Committee on the House of Commons of 5 February 2004, on our understanding of the "Kompetenz Kompetenz" issue. We said there that the controversy arose in the context of the particular constitutional situation in Germany, as interpreted by the German Constitutional Court. The UK's position is different. The effect of Treaties upon UK domestic law is decided by Parliament. We will consider how to set this view out to citizens of the UK, although publication of this Response will go some way to achieving this.

*A judgment of Lord Justice Laws last year reconciled the primacy rule—which is currently given effect by Article 2(4) of the European Communities Act 1972—with the constitutional principle that Parliament is supreme and cannot bind itself or its successors. The judgment came in the case of *McWhirter and Gouriet v Secretary of State for Foreign and Commonwealth Affairs* (2003) about the Nice Treaty.*

He said:

"... the Treaty of Nice ... like any other treaty ... cannot change the domestic law of the United Kingdom unless and until it is incorporated into that law by Parliament (by the 2002 Act) ... In my judgement, it is of the first importance to have in mind that it is fully open to Parliament to repeal or amend the 2002 Act, just as it may repeal or amend the European Communities Act 1972. That is the ultimate guarantee of constitutionality which is in place here."

4. UK SUPREME COURT

The scope for the new Supreme Court for the United Kingdom to adjudicate on the reach of Union law may need to be considered further and possibly defined in the legislation establishing the new court (paragraph 91).

The Supreme Court will have the jurisdiction presently exercised by the House of Lords. EU matters do not come before the House of Lords as "EU matters", but as issues raised in cases under the general jurisdiction of the House. That will not change when that jurisdiction is transferred.

5. CFSP

Conferring jurisdiction on the Court in relation to Common Foreign and Security Policy (CFSP) is controversial. The arguments for restricting the Court's jurisdiction over CFSP matters are essentially arguments against giving the EU competence in this field (paragraphs 100–1).

Article III-282 would maintain the present anomalous position. The Government is invited to reflect on the problems to which this could give rise, bearing in mind the need to safeguard the fundamental rights of the individual (paragraph 103).

The second paragraph of Article III-282 should be deleted (paragraph 106).

The Government is asked to confirm that the Court will have the power to monitor compliance with Article III-209 (paragraph 109).

The Court's jurisdiction in relation to Article I-15(2) needs to be clarified (paragraph 114).

The Government sees no basis for changing the overall current position under which the ECJ does not have jurisdiction over CSFP. CFSP is, and will remain, a distinct area of activity subject to separate and distinct procedures. However as noted below, the Court will have the jurisdiction to rule on proceedings to review the legality of restrictive measures against natural and legal persons adopted on the basis of the CFSP chapter. This

is in addition to the Court's jurisdiction in relation to restrictive measures adopted under Article III-224 and any rights of redress that individuals have before national courts.

The Committee suggested that the second paragraph of Article III-282 should be deleted or amended, questioning whether the second paragraph led to a narrowing of the current jurisdiction on restrictive measures. The text of Article III-282 has in fact been revised during the technical discussions in the IGC to correct discrepancies between the different language versions. The revised text is available in the Library of both Houses and reads:

Article III-282 (new)

The Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part II concerning the common foreign and security policy.

However, the Court of Justice shall have jurisdiction to monitor compliance with Article III-209 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-270(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons, adopted by the Council on the basis of Article III-193, and brought in accordance with the conditions laid down in Article III-270(4) of Chapter II of Title V.

The Government can confirm that the Court will have jurisdiction to monitor the compliance with Art III-209 (just as it currently has jurisdiction in relation to Article 47 of the Treaty on European Union). This is expressly confirmed in paragraph 2 of Article III-282.

The Committee commented that the Court's jurisdiction in relation to Article I-15(2) needs to be clarified. The Government agrees with the view of Professor Koeck, contained in the Committee's report, that Article I-15 needs to be read in conjunction with the CFSP provisions elsewhere in the Treaty. Article I-15 can only be implemented by the provisions of Art I-39 and I-40 and the provisions of Chapter II of Title V, which list the specific provisions for CFSP and are explicitly excluded from the Court jurisdiction.

6. JUSTICE AND HOME AFFAIRS

The Court should have jurisdiction over all EU justice and home affairs matters, including co-operation in relation to criminal law and procedure. The Court should be entitled to measure the legality of action, whether that of the Union or of Member States and their authorities when implementing Union legislation, against the norms contained in the Charter (paragraph 123).

The intention and effect of the final clause of Article III-283 remains unclear. The purported exclusion of the Court's jurisdiction is neither meaningful nor desirable. The Court's jurisdiction should extend to all action taken in implementation or purported implementation of Union law (paragraph 127).

Whilst the Government supports greater EU action to safeguard collective security, it remains of the view that the ECJ should not be given the competence to review measures taken by Member States relating to police and law enforcement operations, or to the exercise by a Member State of its responsibility to maintain law and order or its security. The Constitution reaffirms that the maintenance of law and order and the safeguarding of its security is the responsibility of individual Member States; a position that is already enshrined in the existing Treaties.

As Part II Article 51 of the draft Treaty makes clear, the provisions of the Charter of Fundamental Rights are "addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". The ECJ will examine the conformity of the action taken by these addressees with relevant Charter provisions in respect of the areas for which the ECJ will have jurisdiction.

7. EFFECTIVE REMEDY

The current Article 230(4) presents a serious obstacle to the individual seeking to challenge a Union measure directly. There is a clear need for change (paragraph 142).

Article III-270(4) is an improvement but it remains unsatisfactory. The text put forward by Lord Maclennan of Rogart during the Convention is preferable. We urge the Government to promote this text in the continuing IGC (paragraph 151).

Article I-28 is a poor substitute for amending the standing rule in Article III-270(4) as suggested above. We invite the Government to identify what extra benefits Article I-28 would give the citizen and to say how it would propose to implement the Article in the United Kingdom (paragraph 154).

The issue of widening individual access to the ECJ was extensively discussed in the Convention and a range of views were canvassed. In addressing the ECJ Discussion Circle, the then President of the ECJ noted that “the Court considers the current system, which is based on the principle of subsidiarity in that the national courts in particular are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights, including fundamental rights”. The UK Government strongly endorses this view of the fundamental role played by national courts in providing legal remedies at the local level. It also underlines the need to ensure that the workload of the ECJ is kept within manageable proportions. We consider that the increase in individuals’ access to the ECJ set out in Article III-270(4) represents a balanced, and wholly sufficient, reflection of the Convention’s deliberations.

The UK Government strongly welcomes the inclusion of the wording of the second sub-paragraph of Article 28(1). It provides explicit recognition of the fundamental role which national courts currently play in applying and enforcing Community law and ensuring that there is access to legal remedies at the local level. The enforcement of Union law by national courts will, as now, be secured by the implementation of the Constitutional Treaty in domestic legislation.

7 June 2004

Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration and on judicial co-operation in civil matters

THE HIGH CONTRACTING PARTIES,

DESIRING to settle certain questions relating to the United Kingdom and Ireland,

HAVING REGARD to the Protocol on the application of certain aspects of Article (ex Article) III-14 of the Treaty establishing the European Community to the United Kingdom and to Ireland Constitution to the United Kingdom and Ireland,

HAVE AGREED UPON the following provisions which shall be annexed to the Treaty establishing the European Community and to the Treaty on European Union a Constitution for Europe:

Article 1

Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to ~~Title IV of the Treaty establishing the European Community~~ Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-161 or Article III-164 of the Constitution, insofar as these Articles relate to the areas covered by those Sections. ~~By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2).~~ The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland, shall be necessary for decisions of the Council which must be adopted unanimously.

For the purposes of this Article, a qualified majority shall be defined as a majority of the members of the Council representing the participating Member States, comprising at least three fifths of the population of the participating Member States.¹

Article 2

In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of ~~Title IV of the Treaty establishing the European Community~~ Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or of Article III-161 or Article III-164 of the Constitution, insofar as these Articles relate to the areas covered by those Sections, no measure adopted pursuant to ~~that Title~~ those Sections or Articles, no provision of any international agreement concluded by the ~~Community~~ Union pursuant to ~~that Title~~ those Sections or Articles, and no decision of the Court of Justice of the Union interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such

¹ The Working Party of IGC Legal Experts considers that this paragraph would also require a transitional provision on the definition of a qualified majority before 1 November 2009 which, in accordance with the Working Party’s legal-technical approach, should appear in a single “Protocol on transitional provisions” (see on page 33 of this addendum the IGC’s Legal Adviser’s text which illustrates this approach). However, transferring this transitional provision to the “Protocol on transitional provisions”, which has been approved by all other delegations, raises issues of political opportuneness for the delegations of Spain and Poland. In accordance with the Working Party’s approach, the transfer will be made if those issues of political opportuneness have been resolved.

provision, measure or decision shall in any way affect the *acquis* communautaire or the *acquis* of the Union nor form part of Community Union law as they apply to the United Kingdom or Ireland.

Article 3

1. The United Kingdom or Ireland may notify the ~~President of the~~ Council in writing, within three months after a proposal ~~or initiative~~ has been presented to the Council pursuant to ~~Title IV of the Treaty establishing the European Community~~ Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-164 of the Constitution, insofar as this Article relates to the areas covered by those Sections, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so. ~~By way of derogation from Article 205(2) of the Treaty establishing the European Community, a qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in the said Article 205(2).~~ The unanimity of the members of the Council, with the exception of a member which has not made such a notification, shall be necessary for decisions of the Council which must be adopted unanimously. A measure adopted under this paragraph shall be binding upon all Member States which took part in its adoption.

The European regulations or decisions adopted pursuant to Article III-161 of the Constitution shall lay down the conditions for the participation of the United Kingdom and Ireland in the evaluations concerning the areas covered by Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution.

For the purposes of this Article, a qualified majority shall be defined as a majority of the members of the Council representing the participating Member States, comprising at least three fifths of the population of the participating Member States.²

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland. In that case Article 2 applies.

Article 4

The United Kingdom or Ireland may at any time after the adoption of a measure ~~by the Council~~ pursuant to ~~Title IV of the Treaty establishing the European Community~~ Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-164 of the Constitution, insofar as this Article relates to the areas covered by those Sections, notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article ~~41(3) of the Treaty establishing the European Community~~ III-326(1) of the Constitution shall apply *mutatis mutandis*.

Article 5

A Member State which is not bound by a measure adopted pursuant to ~~Title IV of the Treaty establishing the European Community~~ Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-164 of the Constitution, insofar as this Article relates to the areas covered by those Sections, shall bear no financial consequences of that measure other than administrative costs entailed for the institutions, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Article 6

Where, in cases referred to in this Protocol, the United Kingdom or Ireland is bound by a measure adopted ~~by the Council~~ pursuant to ~~Title IV of the Treaty establishing the European Community~~ Section 2 or Section 3 of Chapter IV of Title III of Part III of the Constitution or to Article III-161 or Article III-164 of the Constitution, insofar as these Articles relate to the areas covered by those Sections, the relevant provisions of ~~that Treaty~~ the Constitution, ~~including Article 68,~~ shall apply to that State in relation to that measure.

Article 7

Articles 3 and 4 shall be without prejudice to the Protocol ~~integrating~~ on the Schengen *acquis* integrated into the framework of the European Union.

Article 8

Ireland may notify the ~~President of the~~ Council in writing that it no longer wishes to be covered by the terms of this Protocol. In that case, the ~~normal treaty~~ provisions of the Constitution will apply to Ireland.

² Same comment as in the footnote on page 66.

**Protocol
on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland
as regards economic and monetary union**

THE HIGH CONTRACTING PARTIES,

RECOGNISING that the United Kingdom shall not be obliged or committed to ~~move to the third stage of economic and monetary union~~ adopt the euro without a separate decision to do so by its government and parliament,

Given that on 16 October 1996 and 30 October 1997 the United Kingdom government notified the Council of its intention not to participate in the third stage of economic and monetary union, under the terms of paragraph 1 of the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, annexed to the Treaty establishing the European Community,

NOTING the practice of the government of the United Kingdom to fund its borrowing requirement by the sale of debt to the private sector,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty establishing the ~~European Community~~ a Constitution for Europe:

Article 1

~~1. The United Kingdom shall notify the Council whether it intends to move to the third stage before the Council makes its assessment under Article 121(2) of this Treaty.~~

Unless the United Kingdom notifies the Council that it intends to ~~move to the third stage~~ adopt the euro, it shall be under no obligation to do so.

~~If no date is set for the beginning of the third stage under Article 121(3) of this Treaty, the United Kingdom may notify its intention to move to the third stage before 1 January 1998.~~

Article 2

~~2. In view of the notice given to the Council by the United Kingdom government on 16 October 1996 and 30 October 1997, Paragraphs Articles 3 to 9-8 and 10 shall have effect if apply to the United Kingdom notifies the Council that it does not intend to move to the third stage.~~

~~3. The United Kingdom shall not be included among the majority of Member States which fulfil the necessary conditions referred to in the second indent of Article 121(2) and the first indent of Article 121(3) of this Treaty.~~

Article 3

~~4. The United Kingdom shall retain its powers in the field of monetary policy according to national law.~~

Article 4

~~5. Articles I-29(2), with the exception of the first and last sentences thereof, I-29(5), 4III-69(2), 104III-76(1), (9) and (11), 105III-77(1) to (5), 106III-78, 108III-80, 109III-81, 110III-82, 123(4) and (5) III-83, 111, III-90, III-92(3), III-228 and 112III-289a(1) and (2)(b) of this Treaty the Constitution shall not apply to the United Kingdom. The same applies to Article III-71(2) as regards the adoption of the parts of the broad economic policy guidelines which concern the euro area generally.~~

In these provisions referred to in the first paragraph, references to the ~~Community~~ Union or the Member States shall not include the United Kingdom and references to national central banks shall not include the Bank of England.

Article 5

~~6. Articles 116(4) and 119 and 120 of this Treaty shall continue to apply to the United Kingdom. The United Kingdom shall endeavour to avoid an excessive government deficit. Articles 114III-86(4) and 124III-94 of the Constitution shall apply to the United Kingdom as if it had a derogation. Articles 119III-95 and 120III-96 of this Treaty the Constitution shall continue to apply to the United Kingdom.~~

Article 6

~~7. The voting rights of the United Kingdom shall be suspended in respect of acts for the adoption of by the Council of the measures referred to in the Articles listed in paragraph 5 Article 4. For this purpose the weighted votes of the United Kingdom shall be excluded from any calculation of a qualified majority under the second subparagraph of Article 122(3) III-91(54) of this Treaty the Constitution shall apply.~~

The United Kingdom shall also have no right to participate in the appointment of the President, the Vice-President and the other members of the Executive Board of the ~~ECB~~ European Central Bank under Article ~~122(3) III-289a(2)(b) and 123(1) of this Treaty~~ the Constitution.

Article 7

~~8. Articles 3, 4, 6, 7, 9(2), 10(1), (2) and (3), 11(2), 12(1), 14, 16, 18 to 20, 22, 23, 26, 27, 30 to 34, 50 and 52 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (“the Statute”) shall not apply to the United Kingdom.~~

In those Articles, references to the ~~Community~~ Union or the Member States shall not include the United Kingdom and references to national central banks or shareholders shall not include the Bank of England.

References in Articles 10(3) and 30(2) of the Statute to “subscribed capital of the ~~ECB~~ European Central Bank” shall not include capital subscribed by the Bank of England.

Article 8

~~9. Article 123(3) III-93 of this Treaty the Constitution and Articles 44 to 48 of the Statute shall have effect, whether or not there is any Member State with a derogation, subject to the following amendments:~~

- (a) References in Article 44 of the Statute to the tasks of the ~~ECB~~ European Central Bank and the ~~EMI~~ European Monetary Institute shall include those tasks that still need to be performed ~~in the third stage~~ after the introduction of the euro owing to ~~any~~ the decision of the United Kingdom not to ~~move to that stage~~ adopt the euro.
- (b) In addition to the tasks referred to in Article 47 of the Statute the ~~ECB~~ European Central Bank shall also give advice in relation to and contribute to the preparation of any European Regulation or any European decision of the Council with regard to the United Kingdom taken in accordance with ~~paragraphs~~ Articles-1-09(a) and 109(c).
- (c) The Bank of England shall pay up its subscription to the capital of the ~~ECB~~ European Central Bank as a contribution to its operational costs on the same basis as national central banks of Member States with a derogation.

Article 9

~~10. If The United Kingdom does not move to the third stage, it may change its notification~~ may notify the Council at any time of its intention to adopt the euro ~~after the beginning of that stage~~. In that event:

- (a) The United Kingdom shall have the right to ~~move to the third stage~~ adopt the euro provided only that it satisfies the necessary conditions. The Council, acting at the request of the United Kingdom and under the conditions and in accordance with the procedure laid down in Article ~~122(2) III-92(1) and (2) of this Treaty~~ the Constitution, shall decide whether it fulfils the necessary conditions.
- (b) The Bank of England shall pay up its subscribed capital, transfer to the ~~ECB~~ European Central Bank foreign reserve assets and contribute to its reserves on the same basis as the national central bank of a Member State whose derogation has been abrogated.
- (c) The Council, acting under the conditions and in accordance with the procedure laid down in Article ~~123(5) III-92(3) of this Treaty~~ the Constitution, shall take all other necessary decisions to enable the United Kingdom to ~~move to the third stage~~ adopt the euro.

If the United Kingdom ~~moves to the third stage~~ adopts the euro pursuant to the provisions of this ~~Protocol~~ Article, ~~paragraphs 3 to 9~~ Articles 3 to 8 shall cease to have effect.

Article 10

~~11. Notwithstanding Articles 101 and 116(3) of this Treaty III-73 of the Constitution and Article 21.1 of the Statute, the Government of the United Kingdom may maintain its “ways and means” facility with the Bank of England if and so long as the United Kingdom does not move to the third stage~~ adopt the euro.

CONFERENCE
OF THE REPRESENTATIVES
OF THE GOVERNMENTS
OF THE MEMBER STATES

Brussels, 8 December 2003

CIG 50/03
ADD 1 COR 1 (en)

CORRIGENDUM 1 (concerns only the EN version)

Subject: 2003 IGC
— Annexes I and II to the EC Treaty, Protocols drawn up by the Convention and Protocols annexed to the EU Treaty and to the EC and EAEC Treaties
(*following editorial and legal adjustments by the Working Party of IGC Legal Experts*)³

On page 232, in the text of Article 10 of the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland as regards economic and monetary union, the words “does not” which appear in strike-through are to be reinstated. Consequently, the text should read as follows :

Article 10

~~11. Notwithstanding Articles 101 and 116(3) of this Treaty~~ III-73 of the Constitution and Article 21.1 of the Statute, the Government of the United Kingdom may maintain its “ways and means” facility with the Bank of England if and so long as the United Kingdom does not ~~move to the third stage~~ adopt the euro.

**Letter from Dr Denis MacShane MP, Minister for Europe, The Foreign and Commonwealth Office,
to the Chairman**

Thank you for your letter of 21 May and for the questions it asked on the Presidency’s latest proposals. We welcome your views and the careful research that has gone into your questions. Of course, as you know, nothing is agreed until everything is agreed, and these Presidency proposals may be subject to further negotiation and amendment, and will also be followed by further Presidency proposals relating, for example, to the scope of QMV.

As well as replying to the Committee’s questions, I attach a signed copy of the Government Response to your Committee’s 6th Report, as I understand that the Committee would prefer this to the e-mailed version which we sent last month.

Annex 1

The Committee asks what was the point of the Declaration on gender equality and domestic violence, Article III-2—its background and its practical effect. Annex 1 of CIG 76/04 includes a Declaration relating to Article III-2 referring to domestic violence. This Declaration was proposed by the Spanish following the 4 May focal points meeting and was welcomed by us and other Member States. It is an undertaking by Member States to consider the implications for combating domestic violence in formulating EU policy. It will not confer any competence on the EU.

Annex 3

The Committee asks whether the Government is saying that primacy would apply to matters in the second and third pillar but only to the extent to which the Court has jurisdiction. The proposed Declaration in relation to Article I-5a confirms that the provisions of that article reflect existing ECJ case-law, and in any event such case-law concerning primacy could only apply to those aspects of the Treaty in respect of which the Court of Justice would have jurisdiction. ECJ jurisdiction will remain mostly excluded in respect of CFSP by Article III-282, and excluded to the extent of Article III-283 in respect of the area of Freedom, Security and Justice.

³ For a presentation of the proceedings of the Working Party of Legal Experts, see the report by its Chairman in CIG 51/03.

Annex 6

The Committee objects to the use of the term “flesh out” in Article I-23. We agree that the term is inelegant. We will seek to ensure this wording is re-examined by the *juristes linguistes*.

Annex 7

The Government agrees with the Committee that the Presidency of the Political and Security Committee should be a permanent position. We believe that this will be an important step forward in enhancing the efficiency and coherence of the EU’s growing external relations and CFSP business. The PSC Presidency will be working to the “EU Foreign Minister” who will in turn be accountable to the Council of Ministers. The Government believes it would be appropriate for the “EU Foreign Minister” to nominate his representative to chair the PSC. To do otherwise risks setting up competing positions between the PSC Presidency and the “EU Foreign Minister” as chair of the FAC. Member States will be able to hold the PSC Presidency to account through the “EU Foreign Minister”.

Annex 13

Rather than placing greater constraint around national economies, the proposed amendment is intended to meet the UK’s concerns that responsibility for co-ordinating economic policies should clearly rest with Member States, in accordance with the detailed provisions set out in Part III of the draft Constitutional Treaty. As under Article 99 of the current Treaty establishing the European Communities, the broad economic policy guidelines will continue to be the principal tool for economic policy co-ordination.

As set out in the White Paper (Cmd 5934), the Government will oppose any proposals which might undermine the central role of Member States in determining their economic policies.

Annex 15

We note the Committee’s recommendation. As your letter noted, the Committee also made this recommendation in their 42nd Report of the 2002–03 session, which has been the subject of separate correspondence with HM Treasury, including a formal Government Response issued on 16 January 2004.

Annex 18 (CIG 73/04)

The Committee asks the Government’s position on the new Article III-76.12. The Government considers it right that the Council should retain its central role in implementing an excessive deficit procedure.

Annex 18 (CIG 76/04)

We welcome the clarification that Eurojust should only propose the initiation of prosecutions. Article III-174.2 does not have implications for Article III-175. While Article III-175 calls for an EPP to be created out of Eurojust, this would be subject to unanimity.

Annex 19

Article III-91.2 provides for certain Treaty provisions not to apply to Member States which are outside the euro area. It is not concerned with relations between the eurogroup and the ECB.

Annex 20

As the Committee will know from the covering note to CIG 73/04, the document makes no new proposals on a number of issues connected with the scope of QMV. The draft Articles in Annex 20 therefore simply repeat those of the Italian Presidency. The Irish Presidency is expected to issue new proposals before the European Council. Nonetheless, we welcome the clarification in this repeated draft Article III-158, and the proposed Presidency amendments to Article III-171, that measures in the field of criminal judicial co-operation shall take into account the different legal traditions and systems of the Member States. Our position remains as set out in the Government’s White Paper (Cmd 5934) and we will consider proposals that meet those objectives.

Annex 21 (CIG 73/04)

The Committee asks what role Parliament would have in relation to any extension of the EPP's powers under Article III-175. Where the new Treaty would require a decision by Member State governments, these would have to be made in accordance with respective constitutional rules. In the UK's case, it will be for Parliament, when examining legislation designed to give effect to the draft Treaty, to decide what procedure the Government would need to follow in such cases.

Annex 21 (CIG 76/04)

The Committee is concerned at the wording of revised Article III-2a. The draft Article III-2a on social protection mirrors the objectives of the Union in Part I-3.3. This ensures consistency between parts I and III of the Treaty and we do not believe it extends EU competence.

Annex 22 (CIG 73/04)

The Government is content that this reference is adequate. The original draft of what is now Article III-170 already omitted the reference to the internal market. The amended text, which forms what is currently under negotiation, is an improvement because it omits the words "*inter alia*" from paragraph 2, so preventing action going beyond the list of activities set out therein and providing certainty that would otherwise have been absent. Furthermore, we will retain special arrangements under the Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration and on judicial co-operation in civil matters, which will be replicated as a Protocol to the new Treaty.

Annex 24 (CIG 73/04)

The Committee asks for clarification on permanent structured co-operation, in particular on the provisions for suspending Member States.

The Government has been involved in the evolution of the concept of permanent structured co-operation from the draft Convention text through to the current draft Treaty text. We are grateful that the Committee welcomes this evolution, in particular the emphasis in the Treaty protocol on the capabilities focus of the structured co-operation group.

The Committee will note that the draft Treaty (Article III-213, paragraph 6) provides that, with a few exceptions, decision making in the Council under structured co-operation will be by unanimity. One of the exemptions is that QMV amongst participating Member States will apply to decisions to admit new members, following consultation with the "EU Foreign Minister". This seems to us an inclusive approach, in that it precludes the possibility of an existing member of structured co-operation blocking the admission of another Member State.

We have also accepted that QMV makes sense as the decision-making mechanism for suspending a Member State from structured co-operation. We want structured co-operation to be a meaningful grouping in terms of capability commitments. If a state is failing to meet those commitments it should be possible to suspend it from the group. Providing for such a decision to be taken by QMV among the Member States taking part in structured co-operation makes it easier to achieve. We think this is useful if the sustained achievement of real capability improvements is going to be at the heart of structured co-operation.

Annex 24 (CIG 76/04)

The Committee asks the reason for the new paragraph in Article III-134 proposed in Annex 24. It has been included simply to reflect a similar clause in current Treaty Article 71.2 TEC.

Annex 25 (CIG 73/04)

The Government welcomes the Committee's support for its position opposing the amendment to Article III-201, which would introduce QMV on any proposal from the "European Foreign Minister".

Annex 25 (CIG 76/04)

The Committee asks, with regard to Article III-149.3, why there is a need for specific EU laws to establish specific programmes to implement the framework programme and whether they would introduce rigidities and excessive Commission involvement. The Government believes that the current proposed Article III-149.3 would not be more rigid than existing provisions or introduce greater Commission involvement. The current Article 166 TEC (which establishes the Research and Development framework programme) lays down that the framework programme shall be implemented through specific programmes. These specific programmes will be adopted by the Council after consultation with the European Parliament and the Economic and Social Committee, as would be the case under Article III-149.3.

The Committee also asks with regard to this annex whether there was a danger of an EU space policy (Article III-155) affecting security and defence issues. The Treaty provides (Article I-40.4) that European decisions on implementation of the common security and defence policy will be taken by unanimity. The Treaty further provides (Article III-201.4) that the exemptions from unanimity for some aspects of CFSP decision-making shall not apply to “decisions having military or defence implications”. So any evolution of EU space policy affecting security and defence would require the agreement of all Member States.

Annex 26 (CIG 76/04)

The Committee welcomes the removal of III-157 and asked whether it meant energy would remain wholly a Member State competence. The Union already has considerable competence in energy under the existing EU Treaties. It has previously brought forward a number of Directives in this area under different legal headings—including transport and the environment. Throughout the IGC, we have consistently made it clear that the Government will not sign up to any proposal which is inconsistent with UK energy interests.

We can accept the deletion of III-157 as it would meet our concerns about the original text of the Chapter, particularly in relation to exploitation of our natural resources. However, we were also content with the previous Presidency text, as included in the Irish Presidency document CIG 73/04. We will continue to work closely with other Member States—as we have throughout the IGC—until there is a formal, agreed outcome.

Annex 28

The Government’s position on retaining unanimity for areas of vital national interest, including social security, is clear and remains as set out in the White Paper (Cmd 5934).

Annex 29 (CIG 73/04)

The Presidency did not address Article III-62.2 in CIG 76/04 as this document was restricted to those texts on which, in its opinion, there was already “a likelihood of broad consensus in the context of an overall agreement”.

Along with a number of other issues that had also appeared in the earlier document CIG 73/04, taxation (including Article III-62.2), did not fall into this category, and was instead identified in Part II of CIG 75/04 as an issue on which the Presidency considered that “it would be appropriate for Ministers to have a collective discussion before it proceeds to propose new texts.”

The Government’s position on unanimity for tax matters is clear and remains as set out in its White Paper (Cmd 5934).

Annex 29 (CIG 76/04)

The Irish Presidency has carried over the Italian Presidency’s original proposal, which was strongly supported by a number of Member States, to include tourism as a supporting competence in the draft Treaty. The Government believes that tourism is largely a matter for individual Member States. However, we can accept the inclusion of tourism as an area for supporting action. There is already work being undertaken by the Commission’s Tourism Unit in facilitating debate and best practice exchange between Governments and tourism operators across the EU.

Annex 32 (CIG 76/04)

The Government believes that the Presidency proposal in this annex, on services of general interest, is acceptable and in particular welcomes the clear statement that this article does not prejudice Member States' competence in this area.

Annexes 38 and 39

We agree that Article IV-7b covers few measures not covered by IV-7a. It could be used however to change certain types of measure permitted under an article, eg from a framework law to a law (changing non-binding to binding measures may be caught by the prohibition on increasing competences); or to insert references to national law; or to provide that a legislative act is not adopted on the basis of a Commission proposal but on the basis of, eg a proposal from the European Foreign Minister; or to remove a derogation (see, eg Article III-135).

It will be for Parliament, when examining legislation designed to give effect to the draft Treaty, to decide what procedure the Government should follow when approving European decisions under IV-7b. We will consider what procedure we will propose to Parliament.

Annex 41

The Committee asks whether our UK Protocols would be included in the new Treaty. These Protocols are under no threat, and have undergone the necessary technical updating—the proposed texts are attached.

Annex 44

The Committee asks whether we were content with QMV for ECHR accession. The Government will take a view on the merits of alternatives for EU accession to the ECHR in the light of the overall IGC package on human rights.

Annex 46

The Committee asks what difference it made putting the animal welfare wording (of III-5a) in the Treaty text instead of a Protocol. Whilst moving these provisions from a Protocol into an Article changes nothing in legal terms, it does raise the profile of animal welfare by fully incorporating strong, clear animal welfare provisions in the main body of the Treaty.

The actual text of Article III-5a, although based on a Protocol annexed to the Treaty of Amsterdam, does contain some changes. It extends the scope of the original Protocol by including the Union's research and technological development and space policies in the areas where the Union and Member States shall pay full regard to the welfare of animals.

Annex 47

The Presidency's proposal for the addition of a new paragraph to Article III-47 would allow the Council of Ministers, acting by unanimity on the basis of a proposal from the Commission, to confirm the compatibility with the Constitutional Treaty of legislation by Member States taxing investments or capital in third countries more restrictively than equivalent investments in an EU Member State. Such tax measures would need to be justified by one of the EU's objectives and be compatible with the functioning of the internal market.

The impact of this provision would depend upon the nature and content of the specific measures (if any) that were proposed by the Commission for the Council to consider.

Annex 48

The new paragraph 3 of Article III-224 is linked to the accompanying declaration. It is intended to ensure that decisions subjecting individuals or entities to sanctions measures are based on clear criteria, tailor-made for each measure. This has been proposed by the Irish Presidency in order to meet concerns of some Member States that the rights of individuals affected by such restrictive measures are protected by ensuring that there can be an effective judicial review of such decisions.

Annex 49

Like the Committee, the Government welcomes the amendments to articles III-324 to 328. In particular, we welcome clarification that a decision to launch enhanced co-operation within the framework of the common foreign and security policy should be taken by unanimity in the Council.

Annex 50 (CIG 73/04)

The Committee asks whether the revised text was a step backwards, capping the fines the Court can impose and introducing a 2-stage procedure. As we are in favour of streamlining fines procedures—as a means of ensuring effective enforcement—we prefer the original text of this paragraph.

Annex 50 (CIG 76/04)

The Committee welcomes the amendments to the Treaty provisions (I-42 and III-231) on the Solidarity Clause and noted their view that implementation is by unanimity where there are defence implications. The Government agrees. Article III-231.1 provides for a European decision to be adopted on implementation of the solidarity clause. As noted above, Article I-40.4 provides the European decisions on ESDP are by unanimity.

I hope that the Committee finds this reply helpful. Once again, I am grateful for their continued close scrutiny of the IGC process.

7 June 2004

Letter from the Chairman to Dr Denis MacShane MP

Thank you for your letter of 7 June enclosing a copy of the Government's Response. This was considered by Sub-Committee E at its meeting on 9 June. As you will be aware the Committee's Report was debated on Friday 21 May. On a number of questions neither the Response nor the Government's interventions in the debate are particularly forthcoming. This is most disappointing and the Committee would therefore be grateful if you could provide a full response to the questions set out below.

Article 1-5(a)—the doctrine of primacy

The Government say that they are clear as to the current meaning of primacy. Unfortunately the Response does not address the two areas of uncertainty identified in the Committee's Report. The first is the question whether the primacy of Community law only applies in relation to Community measures having direct effect. The issue, you will recall, is discussed at paragraphs 35 and 36 of the Report. What do the Government believe to be the law on this point? Is primacy restricted to measures having direct effect? Secondly, the Government does not fully address the issue raised in paragraphs 37–39 of the Committee's Report relating to the application of primacy in the Second and Third Pillars. Your letter of 7 June goes little further in helping the Committee understand the Government's view of Article I-5(a). To what extent in the Government's view does the doctrine of primacy apply to matters in the Second and Third Pillars? The Committee would be grateful if you would give a fuller and clear explanation of the Government's understanding of the position.

CFSP

We note that the Government do not see any need to extend the Court's jurisdiction so as to cover CFSP matters, as recommended by the Committee. It would be left to national courts, insofar as they have jurisdiction over a matter, to rule on the legality of any action under the CFSP. As Baroness Crawley acknowledged in the debate on 21 May, there may be discrepancies and inconsistency between the courts in the different Member States "but no more than exists at present where two or more countries adopt a foreign policy". This is hardly a compelling argument for denying to individuals the opportunity to have an authoritative ruling from the Union's most senior court in the sort of circumstances described in paragraph 103 of our Report and for the development of a coherent foreign policy subject to the rule of law.

As regards the problems raised by the text of Article III–282, the Government argue that the problem has been solved by the clarification of the text of that Article. You will recall that this was raised by Lord Lester in the debate on 21 May. It is by no means clear what the proposed amendment to Article III–282 seeks to achieve and whether by implication it is arguable that the ECJ has no jurisdiction to review restrictive measures adopted under Article III–224(1). The position, we believe, still needs clarification. Otherwise the effect may be to deprive individuals of a possibility which they have at present (as described in para 105 of the Report). Further uncertainty has been added by the addition of a paragraph 3 to Article III–224, though we note the background to this provision as explained in your letter of 7 June.

Finally, as regards the Court’s jurisdiction over Member States’ obligations to support the CFSP (Article I–15(2)) the Government do not consider the matter needs to be clarified. The Government agree with the argumentation put forward by Professor Koeck (set out in paragraph 111 of the Report). We note the Government’s confidence that the ECJ would regard the exclusion of Articles 1–15 from the list in Article III–282 as devoid of any consequences whatsoever.

JUSTICE AND HOME AFFAIRS

The Government resist any extension of the jurisdiction of the Court over police and law enforcement operations, matters which they consider are the responsibility of individual Member States. The Response does not comment on the certainties raised by the final words of Article III–283, “where such action is a matter of national law”. What is the Government’s understanding of the purpose and meaning of these words?

EFFECTIVE REMEDY

The Government do not accept the recommendations of the Committee on the standing rule. The changes made as a result of the Convention’s deliberations are described as “a balanced, and wholly sufficient reflection of the Convention’s deliberations”. But it does not seem that the Government’s interpretation of the discussions in the Convention is universally held. We would draw your attention to intervention made by Lord MacLennan of Rogart during the debate on 21 May.

Was the Government aware that there were contrary views within the Court of Justice? In this context you may recall earlier evidence given by Advocate General Jacobs to this Committee (*The Future Status of the EU Charter of Fundamental Rights*, 6th Report 2002–03).

Lord MacLennan also referred to the question of the potential costs involved in granting greater access to the Community Courts. What research have the Government undertaken on the question of the costs? It would be helpful if the Government could make available to the Committee the figures as to the likely costs on which the Government based its arguments before the Convention. How far do such figures take account of the costs involved in using the domestic courts as a filter?

As regards the new Article I–28 the Government strongly welcome the inclusion of this provision. The Committee invited the Government to identify what extra benefits Article I–28 would give the citizen and to say how it would propose to implement the Article in the United Kingdom. The Government’s Response says that the Article provides explicit recognition of the fundamental role which national courts currently play in applying and enforcing Community law. Can you therefore confirm that there would be no extra benefits and no need to amend our law to give effect to Article I–28 of the Treaty?

10 June 2004

8th REPORT: THE ROME II REGULATION

The Department for Constitutional Affairs’ Response

ARTICLE 1

1. The Government agrees that for the reason given by the Committee the reference to auditors’ liability in Article 1(2)(d) should be limited to the liability of auditors to the company and its members.
2. The Government agrees that the reference to trusts in Article 1(2)(e) should be clarified, so that torts, such as fraud, arising in the context of constructive or resulting trusts are not excluded from the scope of Rome II.

ARTICLE 2

3. The Government agrees that in order to comply with Article 65 of the EC Treaty the scope of Rome II should be restricted to those cases where there is a proper cross-border EU dimension and should not cover disputes where all or most of the relevant elements are situated outside the EU.

ARTICLE 3

4. In response to the Committee's recommendation that there should be a definition of damage the Government considers that it would be useful to specify that in cases of personal injury and damage to property the relevant country should be that where the injury was sustained or the property was damaged. The Government considers that the distinction between "damage" and "indirect consequential damage" is in principle satisfactory and needs no further elaboration in this provision, although it accepts that there will be some instances, such as cases where all the damage is purely economic, in which there may inevitably be some difficulty in applying the distinction.

Special rules

5. For the reasons given by the Committee the Government agrees that there should be as few special rules as possible.

ARTICLE 4

6. The Government agrees that no sufficient justification has been made out for a special rule on product liability cases where the general rules in Article 3 would operate satisfactorily.

ARTICLE 5

7. The Government agrees that the special rule for unfair competition cases is also unnecessary and would inevitably give rise to difficult problems of classification.

ARTICLE 6

8. This provision, which deals with violations of privacy and rights relating to the personality, such as defamation actions, needs to be read in conjunction with the general rules in Article 3. It clearly has important implications for the press and broadcasting media and in the Government's view the particular importance of freedom of expression in this context, together with the rights to respect for private and family life, justifies the creation of special provisions separate from the general rules in Article 3. This is consistent with the position taken by the Committee.

9. A significant problem with the present text is that it envisages the potential application of many national defamation laws in cases where a publication has been distributed internationally and the claimant alleges that his reputation has been harmed in several countries. In such cases, where the claimant sues the defendant in the Member State where the latter is domiciled, the laws of all those countries where harm is alleged to have occurred would be applicable to the claim. This prospect would impose an unreasonable burden on the media, particularly in view of the tight timetables that they have to work under; they would have to satisfy themselves that a particular story complied with all these different laws. The difficulty of discharging this burden could well result in a newspaper "pulling" a story altogether; such an outcome would represent a "chilling" of freedom of expression and would be of great concern to the Government, as well as to the media themselves. It is clear that the Committee itself was aware of this danger.

10. In the light of this problem the Government has recently agreed to put forward a solution for cases in this area. It has two limbs. The first is that the applicable law should generally be the law of the country where the editorial decision was taken to publish or broadcast the material in question. The second is that, in cases where the claimant limits his claim to damage occurring in the particular Member State in which he has brought his claim, the applicable law should be the law of that Member State. These proposals have been inspired by the decision of the Court of Justice in *Shevill v Presse Alliance SA* (Case C-68/93 [1995] I-415) on jurisdiction in defamation cases under Article 5(3) of the 1968 Brussels Convention.

11. The first limb of this proposal would have the important benefits of certainty and simplicity and should avoid the danger that freedom of expression might be “chilled” either for the reason given in paragraph 9 or because a court in a Member State would have to apply the oppressive defamation laws of a non-EU country. It would appear to be a more appropriate rule than one which focused on a publisher’s place of legal establishment or domicile in that it would be less open to potential abuse by publishers moving that place to a country (not necessarily within the EU) with inadequate legal protections for individuals’ rights to reputation and privacy. A rule of this kind was in principle favoured by the Committee.

12. However the Government accepts that, on its own, this first limb would be open to the criticism that it would create an imbalance between claimant and defendant with the former always having to argue and win his case according to laws determined solely by the defendant’s place of editorial control. It would also be inflexible and would in some cases fail to identify an applicable law with an adequate connection to the particular circumstances of the alleged wrong. It is clear from paragraph 129 of its report that the Committee was aware that criticisms of this kind might be levelled at such a rule on its own.

13. The proposed second limb should allay these concerns about the specific interests of claimants and the broader interests of justice. It would create a rule based on the law of the place of damage to reputation, but one which would only operate where a claim is confined to damage suffered in a particular Member State. It would give claimants an opportunity to vindicate their reputation and obtain damages in a court and under a law which are familiar to them. Although a rule of this kind was not considered by the Committee, the Government believes that it should be acceptable to it; in particular it would address a concern of the Committee’s, namely the risk for the media that a pure “country of origin” solution would in effect export our defamation law, including our law on damages in this field, to other Member States.

14. The Government’s final position as regards Article 6(1) will depend on the view taken by the Member States of the propositions just made and the reduction in the instrument’s scope of application so that it lawfully complies with Article 65 (see paragraph 3 above). If these, or broadly equivalent propositions, are agreed, then Article 6(1) should be of much reduced importance because it will only be in very rare cases that the law of a non-Member State will be applicable in this area. If a solution of the kind proposed by the United Kingdom is rejected, then this provision will remain significant and the Government will wish to continue to press for the amendment of Article 6(1) so that it more effectively and explicitly protects freedom of expression.

ARTICLE 7

15. The Government agrees with the Committee that there is no justification for a special rule for violations of the environment and that it should be deleted for the reasons given by the Committee. The Government also agrees that, if it is to remain, its scope of application might usefully be clarified by reference to the Environmental Liability Directive.

ARTICLE 8

16. The Government remains to be convinced that it should press for the exclusion of intellectual property rights from the scope of Rome II. The main problem with the present provision is the uncertainty as to whether passing-off actions would fall within the scope of this rule or within Article 5 (unfair competition). This would be resolved if, as the Government proposes, the latter provision is deleted, with the result that such actions would be covered by Article 8. The Government would however not oppose the exclusion of such rights if that was generally agreed by the Member States.

17. Because of the territorial nature of intellectual property rights the Government accepts that in principle a special rule is appropriate in this context. The drafting of the current rule with its reference to “the law of the country for which protection is sought” is not entirely satisfactory and would be improved by a reference to the law of the country where the right subsists.

ARTICLE 9

18. The Government agrees that this provision (non-contractual obligations other than tort and delict) should be deleted for all the cogent reasons given by the Committee.

ARTICLE 12

19. The Government agrees that paragraph 1 of this provision should be deleted for the reasons given by the Committee. No adequate justification for it has been demonstrated and it would seem likely simply to create uncertainty.

ARTICLE 14

20. The Government agrees that this provision which makes provision for direct rights of action against insurers should be deleted for the reasons given by the Committee.

ARTICLE 23

21. The Government agrees that some redrafting of Article 23 is desirable to safeguard the e-Commerce Directive, in particular in order to preserve the protection given by that instrument to certain intermediaries, such as internet service providers.

ARTICLE 24

22. The Government fully shares the Committee's concerns about this provision which should have no place in an instrument designed to codify choice of law rules. It should be deleted entirely and a different way found to resolve the potential problem which it is intended to address, namely the possible application of the laws of certain third countries relating to damages which could result in the courts of Member States being required to make excessive awards in some cases.

**Letter from Lord Filkin, Parliamentary Under-Secretary of State,
Department for Constitutional Affairs to the Chairman**

THE EUROPEAN UNION COMMITTEE'S REPORT ON ROME II

I am writing in response to the Committee's Report on this draft Regulation, in particular the conclusions and recommendations set out in Chapter 5. I would like to begin by thanking the Committee for its careful and thorough inquiry into this instrument; this has been of great assistance to the Government in the development of its policy and negotiating strategy.

I propose to deal in the body of this letter with the important preliminary issues raised by the Committee, namely whether there are sufficient *vires* for this instrument, whether there is any practical need for it, whether the Protocol on Subsidiarity and Proportionality has been properly complied with, and the Government's reasons for opting in under our Protocol on Title IV measures. I propose to deal in an annex attached to this letter with all the other detailed recommendations made by the Committee which relate to the provisions of the instrument itself.

Vires

The Committee has raised two *vires* issues; the first is whether the Commission has shown a convincing case of "necessity" within the meaning of Article 65 of the EC Treaty for the proposal as a whole; and the second is whether the instrument can properly have a universal scope of application as currently proposed in Article 2 of the draft instrument.

On the first issue the Government's view is that, although the matter is not entirely free from doubt, particularly in the absence of relevant jurisprudence from the European Court of Justice, there is, on balance, sufficient justification for the proper use of Article 65 of the EC Treaty as a treaty base for this proposed instrument.

This provision requires that measures adopted thereunder must be "necessary for the proper functioning of the internal market". It also refers to measures which promote "the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction". This reference therefore envisages in general terms an instrument of the kind which is currently proposed and suggests that the requirement of "necessity" should be interpreted in the wider context of Article 65 as a whole and given a degree of flexibility in its application.

However the justification for the use of Article 65 for this project turns on the increased predictability and legal certainty which this instrument aims to achieve. In the absence of uniform Community conflict rules in the area of tort and delict the courts of the Member States apply their own national conflict rules in order to determine the applicable substantive law. Because these rules differ from one Member State to another the outcome of the litigation may be different depending on which court is hearing the case. This creates the potential for legal uncertainty and hence situations where it can be difficult, time-consuming and costly for businesses within the internal market to determine their rights and obligations and to predict the outcome of tort litigation. This situation also reflects the fact that the Brussels I Regulation establishes alternative grounds of jurisdiction and that the substantive law in this area is only harmonised to a limited extent within the EU. In the light of this the Government now accepts that the internal market requirement in Article 65 is in principle satisfied in relation to this project.

The extent to which the Regulation will realise the benefits of increased predictability and legal certainty is unclear at the moment and will obviously depend on the outcome of the negotiations in Brussels. The Government will continue to press for a result which we believe will maximise these benefits and so reduce the costs of access to justice both for businesses and individuals involved in cross-border tort litigation within the EU.

The second treaty base issue relates to the instrument's universal scope of application. Here the Committee has expressed "the most serious doubts" that such an unlimited scope properly complies with the internal market focus of Article 65. The Government shares that concern; choice of law issues arising in disputes where all or most of the relevant elements are situated outside the EU should fall outside the scope of the Regulation. We continue to press in negotiations for that scope to be limited to cases where there is a proper cross-border EU dimension; discussions are continuing in Brussels on how precisely that should be achieved.

The practical need for this instrument

The Government accepts that there is no evidence of significant problems with our present national law in this area. However we believe that the proposed instrument has one significant potential benefit, namely an increased predictability of outcome for those cases which fall within its scope. It should mean that for such cases the same substantive law of tort is applied wherever the dispute is litigated within the EU. This greater legal certainty should flow from the repeal of the different conflict laws of the Member States in this area and their replacement by a unified set of rules applicable throughout the EU.

The Protocol on Subsidiarity and Proportionality

The Government agrees with the Committee's criticism of the Commission that its failure to produce a consultation paper was a breach of Article 9 of this Protocol. Such a paper should have fully exposed the complex issues at stake in this area. It would have usefully assisted in the development of policy in this technical area of the law.

The United Kingdom's opt-in under the Protocol on Title IV measures

The Committee is critical of the Government's decision to opt in to the negotiations on this dossier. Decisions of this kind sometimes involve difficult matters of political judgement and I believe I can do no more than state the three reasons behind our decision in this case. The first relates to the potential benefits of increased legal certainty of outcome in this area to which I have already referred. The second was that it was immediately clear from the reactions of the other Member States that there was general enthusiasm for this project; in some form it is highly likely to be adopted in due course. The only way in which the UK would be able to exert any significant influence on the finally agreed text would be to opt in and negotiate for an instrument which would be most favourable from our national perspective. And finally, the Government's general position on the use of the Protocol in relation to civil law measures is that the UK should in principle participate fully in Title IV negotiations in order to demonstrate our firm commitment to co-operation in this area. Our judgement was that this was not a proposal which was clearly not in the national interest; we continue to believe that it should be possible to resolve the problems with the current text through negotiation.

7 June 2004

9th REPORT: THE WORKING TIME DIRECTIVE: A RESPONSE TO THE EUROPEAN COMMISSION'S REVIEW

The Department of Health's Response

Thank you for sending copies of the Select Committee Report on the European Working Time Directive, which was published on 8 April. We commend the Committee on undertaking such a thorough inquiry.

We should like to take this opportunity to comment on some of your conclusions and recommendations:

HEALTH AND SAFETY

The Government agrees with the Committee's conclusion, from the evidence provided, that there is no clear causal link between working long hours and detrimental effects on workers' health and safety.

COMPETITIVENESS, FLEXIBILITY AND EFFICIENCY

As we have stated previously, the Government is committed to retaining the flexibility that the opt out provides, as well as tackling the long hours culture.

The problem with working long hours is with workplace culture, which we want to change, and not with the lack of laws. To facilitate this change, we are at the planning and awareness-raising stage of a project, the objectives of which are:

- To gain some understanding of how working time is organised and managed in UK workplaces.
- To identify good practice in managing change to address the long hours culture within a number of UK regional areas and cross-section of business sectors.
- To capture and disseminate the learning from the project including developing recommendations that can be distributed among the private and public sector for tackling a long hours workplace culture.

WORK/LIFE BALANCE

We welcome the report's acknowledgement of Government progress in promoting the growth in flexible working opportunities and work life balance. We agree that promoting the growth of flexible working opportunities in the UK is a complex matter, and one "which involve(s) factors quite outside the original purpose and scope of the Directive".

Legislation

The Government is committed to reviewing the impact of the flexible working law but has no plans to extend the provisions of the law until after the review in 2006. Currently, the law provides eligible parents of children under 6 and disabled children under 18 with a legal right to apply to work flexibly. An issue that the review will consider, and one which the Prime Minister has indicated should be a priority, is extending the law to wider groups of carers, such as carers of elderly or sick relatives.

In April, Patricia Hewitt announced that the DTI was opening up a debate with parents and employers about the whole issue of choice and how to balance work and family life. The results will inform the review of the flexible working legislation, which begins in 2006. Ministers will be attending a series of roundtables, currently being organised by officials to talk directly to parents and employers about their experiences. Roundtables are to be held across the English Regions and Scotland.

Best Practice

Over the last three years DTI has encouraging business and individuals alike to adopt best practice in flexible working and work—life balance. Central to this was the DTI's Challenge Fund. Through the publication of their case studies, companies that were funded shared the lessons they had learnt and the evidence of the benefits they had accrued by implementing best practice arrangements with other organisations and businesses.

Overall the campaign provided financial assistance to just under 450 employers (representing 1.2 million employees) with around £10.5 million funding (averaging of £27,000 per project). The Challenge fund has now ended. However, the DTI is continuing its financial commitment to the spread of best practice in this area. Access to best business practice, and financial support to implement best practice, will now be provided the DTI's Business Support products.

The Working Time Directive is designed to protect the health and safety of workers. The purpose of the flexible working legislation the Government has brought forward and the best practice it has promoted, is to provide greater flexibility and choice in the workplace and boost businesses competitive edge. We see no benefit in grouping, and attempting to deliver, these two objectives under this one Directive.

APPLICATION OF THE OPT-OUT

The Government is determined that opt out should not be abused. It must be truly voluntary to be legal under existing UK law. However, we are looking at suggestions for improving operation of Working Time law, including concerns over perceived misuse of the opt out. To this effect our response to the Commission's communication stated that we are open to the option of making changes to the Directive itself if the evidence suggests this would address problem areas. These might include:

- (a) Making it a requirement for opt out agreements to be in writing, and making it unlawful to include an opt out in a worker's contract of employment;
- (b) Making opt out agreements time limited. This would provide an automatic review point and so help raise awareness among workers of their right to change their minds and opt back in. However, it would place a burden on business, particularly small- and medium-sized enterprises, which would need to be assessed in order to check it would not prove disproportionate; or
- (c) Make agreements to opt out include a statement explaining that workers have the right to withdraw consent, subject only to a notice period (which would be set with reference to other notice periods in their contract of employment, such as the notice period required for terminating their employment). This would also raise awareness amongst workers of their right to change their minds and opt back in.
- (d) Allow the opt out to be agreed collectively if agreed between the two sides of industry, as well as individually. This would allow member states who want to have national agreements governing working hours to do so, but without placing a requirement on all member states to take this approach.

Some of the Committee's suggestions are already covered above. However, we are happy to consider the remaining recommendations, including the provision of additional enforcement and a publicity awareness campaign for the Working Time Regulations.

REFERENCE PERIODS

The Government agrees that the Commission should give further consideration to the possibility of permitting longer reference periods where appropriate. However, we would caution that extension of the reference period will not remove the need for the opt out.

SECTORAL VARIATION

It is the Government's opinion that permitting only specific sectors to opt out of the working time limit would cause confusion. For example, in many cases certain workers could fall into either of two sectors. This issue has arisen before; in sectors such as transport, which were excluded from working time law for some years, workers on the margins encountered difficulties in establishing which rules applied to them.

AUTONOMOUS WORKERS

We agree that businesses, and particularly small businesses, suffer from the lack of clarity on the meaning of the "autonomous workers" who are not subject to the 48-hour week. This lack of clarity arises from the European working time directive itself, which have been transposed directly into the UK Working Time regulations. The low level of collective agreements means UK businesses do not have agreed definitions of the

concept of autonomous workers, and so they have found it difficult to decide what the definition means in practice for them. We intend to review how other Member States, including the Netherlands, have characterised such workers in their national legislation to see if we can introduce a clearer definition in the UK.

BURDENS ON SMALL ORGANISATIONS

We presume that in your recommendation “that the Government and the Commission should both take due account of the suggestion that organisations employing fewer than 20 employees might be exempted from the requirements of the Directive, so long as their employees themselves have the right to opt-in to a maximum 48 hour working week if they wish to do so”, you mean only the requirement under Article 6, the maximum weekly working time limit, and not all the requirements of the Directive.

We are certainly very aware of the impact of the working time limit on SMEs, including smaller businesses with less than 20 employees, and try to ensure they do not suffer from unnecessary legislation. We will naturally give the suggestion of “opting-in” our due consideration. However, any such change would, of course, involve negotiating an amendment to the EC Working Time Directive.

THE SiMAP AND JAEGER JUDGMENTS

We welcome the Committee’s recognition of the difficulties caused to the Health Service by the SiMAP and Jaeger European Court judgments.

The Committee may be interested to note that since the inquiry took place we have made progress in a number of areas. On 19 May the Commission’s Second Stage Consultation paper was published and set out its proposals for dealing with SiMAP/Jaeger.

Five of the Working Time Directive pilots have finished and their learning has been disseminated through, in addition to other methods, the second national Working Time Directive conference on 18 May. At this conference, John Hutton, Minister of State for Health, launched “A Compendium of Solutions to Implementing the Working Time Directive for Doctors in Training from August 2004”, which was endorsed by the Department of Health in conjunction with the British Medical Association, NHS Confederation, and Academy of Medical Royal Colleges. This provides advice and assistance to Trusts that are finding compliance difficult.

There has been a good deal of interest in the “Hospital at Night” model, which considers the best way to care for patients at night. On 4 May, representatives from 115 acute trusts in England, over three-quarters of the total, came to a masterclass to learn about the model from the pilot sites themselves. A resource pack to enable Trusts to introduce the model has been published and is being distributed widely.

A report into achieving compliance in paediatric services, a specialty with particular difficulties, has also been published and contains a number of good practice examples.

Latest information shows that, at 31 March, nearly 95 per cent of doctors in training now actively work for 56 hours or less on average per week. This group would therefore have been compliant with the Working Time Directive hours limits of an average of 58 per week before the SiMAP and Jaeger judgments fundamentally changed this position.

In order to reduce the hours of work of doctors in training whilst maintaining and expanding NHS service provision we have significantly increased the numbers of both medical and non-medical staff. As at September 2003 over 7,000 more doctors in training, almost 7,300 more consultants and 67,500 more nurses worked in the NHS than in 1997. This expansion will continue: 6,030 students entered medical school in England in autumn 2003, an increase of 2,281 places (60 per cent) since 1997.

Interim solutions

The Committee asked the government to indicate as a matter of urgency how they propose to deal with the problem of doctors’ working time and compensatory rest from the extension of the Directive to doctors in training in August 2004 until such a time as a satisfactory solution can be found.

The NHS continues to work towards the August deadline—and some Trusts have already achieved compliance—but we are aware that a small number of specialities and certain types of organisation face very significant challenges. The Modernisation Agency is providing support to Strategic Health Authorities (SHAs) and Trusts, specifically by sharing best practice. SHAs themselves are also actively performance managing compliance with their respective Trusts.

We recognise that implementing long-term solutions to the Working Time Directive by 1 August may not be possible in all Trusts. As a result, the Working Time Directive compendium of solutions document incorporates advice and assistance for organisations that are finding compliance difficult whilst they are looking to introduce longer-term solutions. Alterations to current rotas and working patterns have proved

useful for achieving compliance in a number of the pilots and can be introduced relatively quickly. Managing the night time workload more effectively also has the potential to allow dramatic reductions in working hours and there is a great deal of help, based around the work of the Hospital at Night sites as discussed above, available for those Trusts considering this.

Extension of Pilot Schemes

The Committee hoped that it would be possible to extend pilot schemes to other UK hospitals. Learning from the 20 working time directive pilot sites has been disseminated to Trusts throughout the course of the projects via the Modernisation Agency and Department of Health websites, a number of conferences, and the monthly "Calling time . . ." bulletin. The "Hospital at Night" project findings are being made available to all trusts in the country and as indicated above, have been the subject of intense dissemination and discussion within the NHS.

The Opt Out

Whilst it is possible for individual doctors to opt out of the hours limits of the Working Time Directive, given the voluntary nature of the agreement and the fact that it is open to individuals who "opt out" to change their minds at any time, a sustainable solution to the SiMAP and Jaeger issues is needed to help the NHS to plan services.

Impact of the Directive on Medical Training

The interests of patients and the NHS are paramount and we agree that we must maintain high medical training standards. We welcome the interest and involvement of doctors in training and all other stakeholders in discussions about future changes to medical education.

We are currently considering whether it is possible to eliminate wasted time within training and to identify levels of independent practice that do not require such specialised training. Of course training would have to be of an appropriate standard for the duties doctors would be asked to undertake working at that level.

The "Modernising Medical Careers" programme supports Working Time Directive implementation and implementing these in tandem will ensure Trusts look critically at how service is delivered and the way the workforce is organised. Through Modernising Medical Careers training for doctors will become more focused, with an emphasis on quality rather than quantity.

Action at the European level

The Committee encouraged the Government to continue their efforts with other Member States to convince the Commission that the serious practical implications of the Jaeger judgment for all Member States demand rapid and effective remedial action through an amendment of the Directive and drew attention to the particular difficulties of complying with the SiMAP judgment in the UK.

Officials in both the Department of Health and the Department of Trade and Industry are continuing to work closely on this issue and to lobby other Member States to fully consider the effect of SiMAP and Jaeger on the NHS and health services more generally.

The UK Government responded to the recent European Commission Communication on Working Time Directive at the end of March (a copy of which is available in the House of Lords Library) and used this opportunity to suggest ways in which the impact of these judgments can be mitigated.

The Commission's Second stage consultation paper on working time was published on 19 May and the European social partners are encouraged to reach agreement on the definition of a third category of time, ie inactive part of on-call time. Failing that, the Commission will propose the insertion of such a definition into the Directive and clarifications regarding compensatory rest. This is a promising proposal for the UK providing the definition of inactive time is satisfactory and limits on the amount of inactive time worked are not too restrictive.

Clarification regarding compensatory rest is welcome, but we would hope that the requirement for immediate compensatory rest would be removed rather than clarified and compensatory rest entitlements would not result from "inactive time".

Although there is still no definitive word on timing, it is likely that the Commission will bring forward legislative proposals around the Summer and we will continue to lobby for the Directive to be amended as early as possible.

At the informal EU Health Council on 12 May, the Secretary of State for Health lobbied a large number of Ministers and we are planning to raise the Working Time Directive at the formal Health Council on 1 to 2 June, following publication of the Commission's Second consultation document.

Collaborative working

The committee urged the government to continue to work closely with representatives of the medical profession and NHS management and we are continuing to develop the way forward in collaboration with them.

This joint working approach has resulted in the recent publication of two key documents. Firstly, as indicated above, the British Medical Association (BMA), Academy of Medical Royal Colleges, NHS Confederation and the Department of Health were joint signatories to the "Compendium of Solutions to Implementing the Working Time Directive for Doctors in Training from August 2004", launched by John Hutton, Minister of State for Health on 18 May.

Secondly, the findings and recommendations from the Hospital at Night project were published in May, as already indicated. The Joint Consultants Committee, the Royal College of Nursing, and the BMA have endorsed this report. The project again demonstrates how powerful collaborative working can be; its success is a result of a positive partnership between the Department of Health, the Modernisation Agency, the British Medical Association and the Royal Colleges.

Compensatory rest

We agree with the Committee that compensatory rest should be taken within a reasonable time. In the light of the Jaeger ruling NHS Trusts are working to implement rotas to ensure, as far as possible, that compensatory rest can be taken immediately.

25 May 2004

11th REPORT: HANDLING EU ASYLUM CLAIMS: NEW APPROACHES EXAMINED

Letter from Caroline Flint MP, Parliamentary Under-Secretary of State, The Home Office, to the Chairman

The Government is grateful to the Committee for its extensive report on this complex and sensitive issue. I welcomed the opportunity to give oral evidence to Sub-Committee F in October last year. And I am pleased that members of the Sub-Committee were able to find the time to see something of the asylum process at first hand during visits to our offices in Croydon and to our Oakington Reception Centre.

A good deal of the Committee's report is devoted to an analysis of the current asylum system. It also comments in detail on the UK's proposals of last spring which were designed to achieve better management of international migration issues, including asylum. It is perhaps worth stressing once again that, as I made clear in my oral evidence to the Sub-Committee—and, more recently, at the meeting of the Justice and Home Affairs Council in Luxembourg on 8 June—the ideas in our paper were just that: ideas; they were never intended as a rigid blueprint and were designed to provoke a debate.

Following discussion of our proposals at the Brussels and Thessaloniki European Councils last spring, and in the light of the European Commission's interim report of 3 June 2003 (COM (2003)315 final), we decided not to pursue our ideas for transit processing centres or zones of protection. While we do not agree with the Committee's assertion that aspects of our proposals "were misconceived", we do acknowledge that there was little support for transit processing centres in particular and we have taken account of that in the further development of our policy.

As the Committee's report acknowledges, in its Communication of June 2003 the Commission endorsed the UK's analysis of the problem but was cautious on the possible solutions. The Thessaloniki European Council therefore invited the Commission to prepare, by June 2004, a more detailed report, taking account of the UK's ideas and the Council discussions. The Commission has just published this further Communication ("Commission proposal on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: Improving access to durable solutions"—COM(2004) final of 4 June 2004). The Government is now looking forward to discussing the Commission's ideas for EU Regional Protection Frameworks and an EU Resettlement Scheme with them and with Member States over the coming months.

I attach a detailed response to the Committee's various recommendations. As you will see, we entirely agree that it makes sense to decide asylum applications quickly and we confirm that we will continue to look at ways to improve the efficiency of the removal process.

29 June 2004

The Home Office's Response

PARAGRAPH 125

The 1951 Convention regime has stood the test of time. There is no viable alternative to it as the principal international instrument of protection for those at risk of persecution (paragraph 47).

PARAGRAPH 126

The single most important factor generating asylum claims is conflict in source countries. The best way of reducing them would be through the United Nations and its Member States putting in place better mechanisms to prevent and stop conflicts (paragraph 48).

The UK remains committed to the 1951 Refugee Convention. We also support the UNHCR's "Convention Plus" proposals which aim to improve refugee protection worldwide and to facilitate the resolution of refugee problems through multilateral special agreements.

To the extent that the statement in paragraph 126 refers to asylum claims from genuine refugees, we agree that Europe has received large numbers of asylum seekers from conflict areas (eg the Balkans, Somalia, The Sudan). And we agree that conflict prevention in such regions is one way of alleviating conditions that force people to leave their homes and seek asylum. The UK already plays an active part in conflict prevention work both bilaterally and through international organisations.

However, conflict prevention would not, in itself, solve the problem of asylum seeking. As the high number of asylum applications from Zimbabwe and Iraq illustrate, political unrest and human rights abuses are other factors that cause people to flee their country of origin. There are additional factors which cause genuine refugees to move on from their first country of asylum to seek protection elsewhere, and factors which cause those with no protection needs to misuse the asylum system. All of these areas need to be addressed.

Further, there is significant evidence that a large proportion of asylum seekers are in fact economic migrants who are not fleeing persecution, and this cannot be ignored. It is the duty of a responsible government to ensure that the asylum system is not abused by those seeking economic betterment. In its second report on Asylum Applications the Home Affairs Committee concluded that about half of asylum claimants can justifiably be regarded as economic migrants.⁴ In 2002 this would amount to over 42,000 claims. Therefore it is clear that the government is justified in taking steps to reduce unfounded asylum claims and improve border security.

PARAGRAPH 127

There is no doubt that the asylum system is exploited by some people whose motivation is primarily economic, but it is important not to exaggerate the level of abuse. In particular, it needs to be borne in mind that most asylum seekers come from countries where there is serious conflict and that nearly half of those who apply for asylum in the United Kingdom are recognised as refugees or granted some other form of legal status. The Government should do more to correct misleading stories in the media (paragraph 49).

The Government takes very seriously its duty to present the public with the facts on immigration and asylum as clearly and objectively as possible. We are particularly concerned about negative media portrayal of asylum seekers and refugees, particularly where articles are misleading, inaccurate, or misrepresentative. Reporting of this nature can often reinforce mythologies that are built around asylum seekers and refugees. These mythologies and inaccuracies, if unchallenged, can be exploited by far-right extremists to encourage suspicion, distrust or (at the extreme level) hatred towards asylum seekers and refugees. This in turn can lead to tensions in some communities, particularly where dispersal has seen the introduction of new groups of asylum seekers and refugees to an area.

A sub-group of the National Refugee Integration Forum has been set up to look at the issue of Positive Images of asylum seekers and refugees. The Forum and its sub-groups are a partnership of agencies that work together to take forward delivery of the National Refugee Integration Strategy. The Positive Images sub-group was

⁴ Second report from the Home Affairs Committee session 2003–04 (HC 218), paragraph 72.

formed to look at how to present more positive images of refugees and asylum seekers to the wider public. Membership of the sub-group is drawn from central and local government, the voluntary and private sectors, researchers, refugee media groups and refugees themselves; many members have specific experience of working with a variety of media. The sub-group is looking to develop a partnership approach that actively engages refugees and host communities, Government, local government and the media.

The challenge is to tackle the widespread negative perception of refugees and asylum seekers and to ensure that the public receives a more balanced coverage of refugee issues. For example, the media can help the public understand more about the very real dangers that cause people to uproot their lives and seek sanctuary in countries such as the UK. The general public could be given opportunities to find out more about the contribution that many ordinary refugees are making to life in the UK, be it economic, social or cultural.

PARAGRAPH 128

We strongly endorse the Commission's view that any new approaches should be consistent with the 10 premises identified in its Communication (paragraph 60).

The Government broadly endorses the 10 basic premises laid out by the Commission which are meant to underpin any new approach. However, whilst the Commission views the exploration of new approaches to asylum as complementary to the on-going approach adopted at Tampere, it is the Government's view that future work must focus on concrete outcomes and ensure that value is added to national efforts.

PARAGRAPH 129

Internationally agreed guidelines on what constitutes "effective protection" would be useful in ensuring that the concept is interpreted in a consistent and meaningful way even though they cannot cover every situation. Such guidelines should recognise the need for a link between the applicant and the third country where his or her application would be processed, although we believe that UNHCR's view that removal to a third country should not take place unless the person concerned had already been offered effective protection there goes too far. However, as the Committee has noted in the context of its scrutiny of the draft Asylum Procedures Directive, guidelines must not be applied automatically and in effect replace the individual consideration of cases (paragraph 68).

We agree that it would be helpful to have internationally agreed guidelines on what constitutes "effective protection" and the minimum standards that states should offer to third country nationals seeking protection in their territories. To this end we are co-financing a study on "effective protection", facilitated through the IGC (Intergovernmental Consultations on Asylum, Refugee and Migration Policies). We have also noted that in its recent Communication "On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin—Improving access to durable solutions" (COM(2004) final, dated 4.6.2004), the European Commission also recommends "the identification of the indicators of protection capacity as a means of reaching agreed targets of effective protection".

On individual consideration we agree that when a person seeks protection in the UK we will need to consider on the individual facts of their case whether they meet the criteria laid down in legislation for removing them to a third country to have their asylum claimed determined there. This consideration need not, however, involve any consideration of the merits of that individual's asylum claim.

PARAGRAPH 130

The fact that Member States have had great difficulty despite four years of negotiations in agreeing even minimum standards on asylum procedures demonstrates that the establishment of common EU rules establishing a high level of protection is unlikely to be achievable in the near future (paragraph 81).

The UK welcomes the UNHCR's input into the debate on EU asylum policy. There are elements in their paper with which we could agree: co-operation on return, for example, would be welcome. But, as the Committee recognises, this proposal presupposes a single asylum procedure conducted by new EU institutions, and this goes much further than the minimum standards we have so far been negotiating. Significant progress has been made regarding the setting of minimum standards across the EU; the package of measures envisaged at the Tampere European Council in 1999 has been agreed.

PARAGRAPH 131

The 1951 Convention does not in principle prohibit the transfer of responsibility for the processing of asylum claims to third countries. However, such transfer must not take place unless the third country offers “effective protection” (paragraph 82).

We agree that the 1951 Convention does not prohibit transfer of responsibility for the processing of asylum claims in third countries. The Dublin arrangements are an established precedent for this. However there is much debate about the meaning of “effective protection”, and in our view we must be satisfied that a person will not be refouled contrary to the Convention from that third country before transferring responsibility.

PARAGRAPH 132

We have seen no adequate justification for a radical transfer of responsibility for processing asylum claims from Member States to the EU. The UNHCR has not fully thought through the question of which organisation or State would be held accountable under its proposal for the processing of asylum applications (paragraph 84).

PARAGRAPH 133

If “fast track” reception centres were established, detention under specific safeguards would be unavoidable (paragraph 85).

PARAGRAPH 134

The UNHCR proposals would require the establishment of new procedures and would incur significant additional costs for uncertain benefits, since at the end of the process the applicants, whether successful or unsuccessful, would have to be moved again. There is a danger that EU Reception Centres could become new Sangattes, magnets for people smugglers and traffickers (paragraph 86).

PARAGRAPH 138

The concept of regional protection areas remains unclear. Sending asylum applicants to such areas for their claims to be processed would be equally, if not more, objectionable to the processing of asylum applications in centres within or in areas bordering the EU. It would shift the burden unduly to third (often poorer) countries without necessarily ensuring effective protection. Moreover, as the Commons Home Affairs Committee has noted, “it is essential that the existence of a protection zone does not become a reason for a refusal of an asylum application received in the UK” (paragraph 93).

PARAGRAPH 140

The new proposals do not provide the safeguards contained in national law. The UNHCR proposals, while envisaging the processing of applications within the EU, presuppose the existence of a common system of asylum rules across the Union. This is premature and, bearing in mind the difficulty Member States have found in agreeing even minimum standards, unrealistic (paragraph 97).

PARAGRAPH 141

A similar gap exists with regard to which country would assume responsibility for the asylum seekers. The United Kingdom proposals are silent in this respect, and the UNHCR’s assume that it would be the EU rather than the Member States, but such a transfer of responsibility would not be justified. The lack of clarity on this issue risks leaving the asylum seekers in a legal vacuum (paragraph 98).

PARAGRAPH 142

The proposals have significant procedural and cost implications, as transfer of applicants from EU Member States to EU or third country reception centres would require another procedure to decide on such transfer as well as the transfer itself. To this would be added the cost of running the centres (paragraph 99).

PARAGRAPH 143

The Government's proposals for regional protection areas are vague: it seems unlikely that they would guarantee effective protection or provide durable solutions (paragraph 100).

PARAGRAPH 153

The International Organization for Migration (IOM) provides a useful function to Governments and we accept that its role in organising voluntary returns is an appropriate one. If extra-territorial asylum processing centres were set up (which we do not recommend) we would see no objection to IOM's role in organising voluntary returns from them—also on behalf of Governments. It would, however, be desirable for IOM, in undertaking this work as an agent of Governments, to acknowledge formally that it is subject to international human rights obligations (paragraph 124).

In spring 2003 the UK tabled proposals at the European Council that were designed to achieve better management of the asylum system globally. An important objective of these proposals was the provision of more effective and equitable protection for genuine refugees. In its initial response (“Towards more accessible, equitable and managed asylum systems”—COM(2003)315 final of 3.06.2003), the European Commission endorsed the UK's analysis of the problem, recommending a stage-by-stage approach to elaborate possible solutions. Subsequent debate in the Council showed that there was considerable interest from other Member States, third countries and relevant international organisations in aspects of the UK's proposals—in particular on protection in regions of origin—but little support for other aspects such as transit processing centres or zones of protection. The Council noted the UK's proposals and invited the European Commission to present a comprehensive report, by June 2004, suggesting measures to ensure a more orderly and managed entry into the EU of persons in need of international protection and to enhance the protection capacity in the regions of origin.

Since then we have developed our own ideas, in the light of that response. As we have made clear on a number of occasions, we are no longer pursuing our earlier ideas for zones of protection. Rather, we are seeking to develop migration partnerships with certain countries in the regions of origin of major asylum-generating countries where we would seek to help them to better process their refugee caseloads. We see these arrangements as modern partnerships, based on equality, where the two parties recognise that their migration issues are of common concern and need to be tackled together.

As mandated by the Thessaloniki European Council, the European Commission has now come forward with proposals for EU Regional Protection Programmes (contained in its Communication of 4.06.2004: “On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: Improving access to durable solutions”—COM(2004)410 final). The Government welcomes this Communication and supports the broad purpose of the Commission's outline proposal. We now look forward to engaging in constructive discussions with the Commission and Member States as these ideas are considered in more detail over the coming months.

PARAGRAPH 135

Rather than attempting to create EU processing centres, it would be preferable to devote resources to strengthening the processing systems in Member States and striving to reach high minimum standards at EU level (paragraph 88).

The Government agrees that the creation of EU processing centres would present significant legal and practical difficulties. We regard the processing of asylum claims a function that Member States should continue to perform on a national basis. With the agreement of the Directives proposed at the Tampere European Council minimum standards have been set in place across the EU.

PARAGRAPH 136

Protected entry procedures might be of use in countries other than the applicant's country of origin but they cannot address comprehensively the issue of asylum flows (paragraph 89).

The Government agrees that protected entry procedures are an unsatisfactory tool for the management of migration flows. The UK will in certain very tightly prescribed circumstances accept applications made by persons still abroad. However, our focus remains on processes for dealing with applications made in the UK and on the development of resettlement programmes, which we regard as a more promising option than protected entry.

PARAGRAPH 137

Resettlement can contribute to the effective management of asylum flows. By accepting in their territory individuals granted refugee status, EU countries not only help refugees settle in a positive manner but also alleviate the burden on countries hosting large numbers of refugees. We recognise that resettlement is only one part of a comprehensive asylum policy, but welcome EU efforts to set up resettlement schemes (paragraph 90).

The UK's resettlement scheme—the Gateway Protection Programme—is new. The first persons arrived in March 2004. The programme is designed to form part of a balanced immigration and asylum strategy in which clamping down on abuse of the asylum system is complemented by opening up legal routes so that protection can be offered when it is needed. We welcome the possible development of an EU-wide resettlement scheme as a potential vehicle for offering international protection to a larger number of refugees. It is essential that such a scheme does not adversely affect existing resettlement schemes run by individual states. We would also want to ensure that an EU scheme adds value to existing schemes.

PARAGRAPH 139

More thought needs to be given by both the Government and the EU to how "protection in the region" can address the management of asylum flows to the EU. Any efforts in this area must be part of a general strategy of conflict prevention and resolution in refugee producing areas with the aim of achieving security and stability (paragraph 95).

Conflict, as the Committee recognise in paragraph 48 of the report, is an important factor generating asylum claims. An important challenge in addressing conflict is ensuring a coherent response, both nationally and internationally. In 2000, the Government set up two cross-Whitehall Conflict Prevention Pools to bring together development, diplomatic and defence interests and to improve the coherence of contributions to peacekeeping, conflict prevention and conflict management. In 2001, an EU programme for the prevention of violent conflict was adopted at the European Council meeting in Goteborg. This aims at strengthening the EU's capacity for coherent early warning, analysis and response; and promoting greater co-ordination in the use of EU instruments to tackle the root causes of conflict. Earlier this year, the EU established a Peace Facility for Africa. The Government supported this, in line with the G-8 Africa Joint Action Plan and the Prime Minister's commitment to African peacekeeping.

PARAGRAPH 144

Rather than developing proposals for processing centres or regional protection areas, it would be preferable to devote resources to strengthening and accelerating asylum procedures in Member States and to securing high minimum standards at EU level. Greater resources must be invested to strengthen the processing systems in countries of first asylum and to promote resettlement programmes. However, these efforts must not prejudice the capacity of EU Member States to consider fully asylum claims that are submitted in their territory (paragraph 101).

PARAGRAPH 145

We are in no doubt that the quality of initial decision-making is the single most important component of an effective asylum system (paragraph 108).

We are not pursuing proposals for regional protection areas or centres. As we have mentioned earlier, we are seeking to assist countries in regions of origin to develop their own abilities to host refugee populations and provide asylum. We have also, as stated above, recently established the UK Gateway resettlement programme.

We agree with the recommendation that it makes sense to decide asylum applications quickly. Indeed, the

Government has developed fast track processes at Oakington as the report recognises, and more recently at Harmondsworth. These initiatives are in addition to the Government's goal of deciding 75 per cent of initial applications within two months.

The Committee's concerns about the quality of initial decision-making echo those made recently by the Home Affairs Committee and the Constitutional Affairs Committee. The Government accepts the Committee's analysis of what constitutes a "good decision". As the Committee has kindly acknowledged in its Report, there has been a concerted drive to improve quality further in recent years. The measures taken include setting a specific target for decision quality, introducing quality assurance systems involving both internal and external assessment, enhanced initial and refresher training and use of language testing. We will be publishing performance data in due course in relation to decision quality but the early indications are that the target is being met and that quality continues to improve. The Government very much agrees with the Committee's view that the changes that have been made should be allowed to work through the system. As the asylum backlog falls to levels not seen for more than a decade, we believe that there is a real opportunity to get right on top of the asylum caseload by the end of the year and to focus on producing high quality decisions quickly.

However, we are not complacent and we recognise that we need to build on the progress that has been made to ensure that the highest standards are consistently achieved. A more demanding quality target has been set for 2005–06 that will require 85 per cent of the criteria assessed on asylum decisions to be fully effective or better (as compared with 80 per cent currently). So, we will be working hard in 2004–05 to build up to this new higher standard during the year. To help us achieve this important objective, we have drawn up a comprehensive action plan and we also accept the need to strengthen the confidence that external stakeholders have in the initial decision-making process. That is why detailed discussions with UNHCR are underway to explore how they might work with us to provide additional external assessment of the quality of decisions.

This is not to say that the Government accepts that there is a simple and direct correlation between the outcome of an appeal and the quality of the initial decision. There is not, as other factors may affect the outcome of an appeal. For example, information put before the adjudicator that was not made available at the initial decision-making stage, or a change in the circumstances of the applicant or the situation in the country of origin or caselaw between decision and appeal. That is why we need a fair and fast asylum process. The Government's view is that it is the duty of all those involved in the asylum process—applicant and representative as well as initial decision-maker and adjudicator—to strive towards a just and speedy outcome.

PARAGRAPH 146

If the high rate of successful appeals continues, consideration should be given to establishing an independent body responsible for initial decisions. In her evidence to us the Minister resisted this suggestion on the ground that Ministers must retain ultimate responsibility for the decisions taken. We do not agree with that. Ministers must retain overall responsibility for asylum policy, including the provision of an effective determination system, but we do not believe that it necessarily follows that they must be responsible for individual decisions (paragraph 110).

The Government does not accept that there is a case for establishing an independent body responsible for initial decisions. We consider decision-making on individual asylum claims to be a core element of the asylum system. It is a function for which the Government should be both responsible and accountable. The current arrangement does not prevent decisions being taken impartially, objectively and on their individual merits. As set out elsewhere in the Government's response to this report, we have taken and are taking a variety of measures to improve further the quality of decision-making, including the involvement of external bodies to offer independent scrutiny of our work.

PARAGRAPH 147

Undue restrictions on legal aid and access to qualified legal representation are likely to lead to unfairness and more poor decisions (paragraph 111).

The Government agrees that access to good quality legal advice is important. That is why we have introduced a series of measures to help control costs and improve standards in publicly funded asylum work. We believe that, taken together, these measures will bring asylum legal aid under effective control and cut out unnecessary expenditure. Costs will be limited, and targeted at the most deserving cases. Quality representation will be recognised and rewarded by the new accreditation scheme, and wasteful duplication of cases will be ended.

Due to concerns that some solicitors were over-claiming and that the quality of legal work was variable, we introduced an independently assessed accreditation scheme for solicitors working on publicly funded asylum cases which will become compulsory by April 2005.

We limited costs by introducing maximum fees and by imposing thresholds on the advice available for each asylum seeker at the initial stage of their claim. The threshold of five hours for initial advice can only be exceeded with the authority of the Legal Services Commission (LSC). In addition, no legal aid work can be undertaken in asylum appeal cases without prior approval from the LSC.

We have also introduced a single file number for each asylum seeker, in order to avoid duplication of costs, and have removed funding for the attendance of a representative at IND interviews in the majority of cases. This is because the Government believes that in the majority of cases this is unnecessary, of no benefit to the client and a waste of public funds. We believe that the preparation of a good statement and material evidence in support of an asylum claim is a more effective legal service than attendance at the IND interview. We believe that there is enough flexibility at the initial and appeal stages to allow a legal representative to address a client's vulnerability, illness or ability to answer questions at the IND interview.

We will review the effects of all changes to processes and procedures to assess that they are effective and are not unfair to applicants with a genuine claim. Following the recent contract awards LSC is confident that there are currently sufficient publicly funded legal suppliers to meet identified needs. Over 90 per cent of existing contractors applied to have their contracts renewed and the remainder of work was more than adequately covered by existing contractors expanding their workload, or by new organisations applying for contracts.

PARAGRAPH 148

Accelerated procedures in the country of application are preferable to extra-territorial solutions, as they avoid most of the difficulties associated with the latter. It is reasonable for the United Kingdom and other EU Member States to respond to large increases in applications by developing such procedures, particularly for applications likely to prove unfounded, provided cases are considered individually and the requirements of the 1951 Convention continue to be met (paragraph 113).

We agree with the recommendation that it makes sense to decide asylum applications quickly. Indeed, the Government has developed fast track processes at Oakington as the report recognises, and more recently at Harmondsworth. We also welcome the view that fast track processes are a key tool in tackling large volumes of applications in a fast but fair way.

PARAGRAPH 149

We recommend that the Government support the creation of an independent documentation centre, open to all parties to the asylum process. The responsibilities of such centre would include the collection, analysis and dissemination of credible and trustworthy country of origin information for use in the refugee determination process. In preparing its analyses and responding to questions, the centre should be required to draw exclusively on verifiable material in the public domain, to use a clear methodology, and to employ methods of citation and corroboration of sources consistent with the highest evidentiary standards (paragraph 116).

The Government recognises that accurate, balanced country information is the cornerstone of an effective asylum system. Rather than establishing an independent documentation centre, it was decided to build upon existing arrangements and introduce rigorous, systematic and expert external scrutiny to ensure the quality and accuracy of the country information products used in the asylum process. Accordingly, the Government decided to include provision in Nationality Immigration and Asylum Act 2002 to establish an independent Advisory Panel on Country Information. UNHCR has cited the creation of the Advisory Panel as an example of good practice in having an independent oversight mechanism in the production of country information materials.

The Panel's work so far has demonstrated that it is fulfilling this function in a robust and effective manner. The Home Office has already shown its determination to respond positively to the Panel's recommendations by the quick action taken in response to feedback from the Panel's consultation exercise.

Feedback from the Panel highlighted some concerns about the country information produced by the Home Office. But none of these compromise the fundamental integrity of the Reports or would have affected any decisions made on individual asylum applications. We have already introduced measures to improve the

country reports based on feedback from the Panel and will be looking to respond positively to their further recommendations. We are confident that with the assistance of the Panel, we can ensure that Home Office country information material meets the very highest standard.

PARAGRAPH 150

It would be desirable if in time an independent documentation centre could be managed on an EU, if not UNHCR, basis, which would ensure that decision taken throughout the EU were based on the same country information. Such an arrangement would also reduce duplication (paragraph 117).

UNHCR published a paper in February 2004 entitled “*Country of Origin Information: Towards Enhanced International Co-operation*” as part of a project funded with support from the European Commission. In that paper UNHCR state that they favour the establishment of a European documentation centre for the collection, dissemination, and evaluation of country information. The Government sees potential benefits in co-operating further internationally and with our European partners on country of origin information and looks forward to exploring these issues further over time.

PARAGRAPH 151

Prompt removal or voluntary departure of failed asylum seekers is likely to be the most effective deterrent to further unfounded applications. Failing to remove unsuccessful asylum seekers casts doubt on the efficacy of the whole system and weakens public confidence in it (paragraph 118).

We agree with this statement. The Government is committed to removing those who have no right to be in the United Kingdom. A number of initiatives have already been introduced in order to ensure the prompt removal of those asylum seekers whose applications have been refused and who have exhausted all appeal rights. These include the introduction of the non-suspensive appeals procedure (NSA); the development of the Harmondsworth Fast Track procedure; new legislative powers to counter illegal working; development of alternative sources of information and intelligence through the use of Police and Prison records; and liaison with the Department of Work and Pensions (DWP) and local authorities with the potential to identify immigration offenders and failed asylum seekers. We are also opening up new travel routes and overcoming barriers to return to prioritised countries. We will continue to look at new ways to improve the efficiency of the removal process to achieve our target of removing a greater proportion of asylum seekers in 2004–05 than in 2003–04, and are confident in our ability to meet this target.

There are a number of reasons why some unsuccessful asylum seekers are not removed. The removal of a person is complex and several factors have to be taken into account before removal can take place. These include assessing the individual circumstances of a person’s return and overcoming any barriers to removal, such as documentation issues and a lack of co-operation from the country to which we are returning the individual.

In the Asylum and Immigration (treatment of claimants etc) Bill that is currently before Parliament we are proposing penalties of up to two years imprisonment, a fine, or both, for those who destroy their documents or refuse to co-operate with re-documentation.

PARAGRAPH 152

We urge the Government to develop its voluntary return programme energetically (paragraph 121).

We are pleased by the success of our voluntary returns programme. In 2002, 895 persons chose to return to their country of origin as compared to 50 in 1999 when the programme began. We are always looking to improve the programmes and to increase take-up. Our main programme is a generic voluntary returns programme (Voluntary Assisted Return and Reintegration Programme) which provides up to £500 worth of in-kind reintegration assistance, in addition to flights. There are also two special programmes for Afghans, one which gives Afghan returnees a cash grant of £600 to aid in reintegration, and the other to allow Afghans with status in the UK the opportunity of a return flight to Afghanistan to assess the situation on the ground and plan for return. Together with IOM and other voluntary sector partners we publicise the schemes widely, including directly to communities, in reception centres and at the time of asylum decision making. In the future we hope to develop special programmes for Iraq and further improve communication with potential returnees.

12th REPORT: EU DEVELOPMENT AID IN TRANSITION**The Department for International Development's Response****Memorandum from the Secretary of State for International Development**

INTRODUCTION

The Government welcomes the report of the House of Lords European Union Committee on "EU Development Aid in Transition" (HL Paper 75) published on 29 April 2004 and notes with appreciation the Committee's comments that the Government can take some credit for helping to bring about the changes in EC aid delivery that have been achieved so far.

The report made a wide-ranging series of conclusions and recommendations. This response addresses the key issues raised by the Committee.

1. *The Committee was impressed by the comprehensiveness of the latest Annual Report covering aid activities in 2002 (paragraph 83).*

The Government agrees with the Committee's comments. However, in future Annual Reports, the Government would like to see a more strategic and analytical document with less descriptive accounts of actions achieved. In particular more information about measuring the effectiveness of EC aid overall and EC's performance in achieving its strategic objectives, especially the Millennium Development Goals (MDGs), is called for. The Government has also asked the Commission to clearly link the Annual Report to other EC management tools—establishing objectives and priorities—enabling others to more easily assess the organisation's performance.

2. *It is our view that, taken overall, significant improvements in aid management and organizational effectiveness have been achieved, and the Commission is to be commended for its efforts (paragraph 84).*

3. *There is, however, more to be done if the EU's aid is to match the best. Mainly, this is a matter of intensifying and carrying to completion the reforms that are currently in train (paragraph 85).*

4. *We urge the Commission to take all necessary steps to bring the reform programme to full fruition so that EU aid can be made still more effective (paragraph 90).*

The Government agrees with the Committee's comments. The Commission should build on the many, important achievements made in the current reform programme to continue to improve the efficiency and effectiveness of EC aid. Being the world's third largest provider of overseas development assistance, EC must continuously strive to deliver the best possible programmes and also to make a concrete contribution towards achieving the Millennium Development Goals. The Government has asked the Commission to undertake a thorough assessment of its reform programme, due for completion this year, as a means to establish lessons learnt and identify needs for continued reforms.

5. *We regard it as essential that faster progress is made in achieving coordination across the EU between the various aid programmes in aid-receiving countries (paragraph 86).*

The Government agrees with the Committee's comments. However, the EU should promote coordination that is consistent with other broadly-based harmonisation initiatives in place. It should only adopt standardised approaches to aid policy and programmes that are consistent with supporting partner country-led initiatives for harmonisation, as encouraged in the Rome Declaration of the OECD's Development Assistance Committee (DAC). At the General Affairs and External Relations Council (GAERC) in April 2004, EU Development Ministers agreed to set up a special group of development experts to agree a set of detailed measures to be introduced in time for the May 2005 OECD DAC High Level Forum on aid harmonisation.

6. *Coherence is lacking between the EU's development and other policies; this is a failure of policy making. Prime examples are failure to reform the Common Agricultural Policy and the failed world trade negotiations (paragraph 87).*

The Government agrees with the Committee's comments. EU does not always pursue a coherent approach towards developing countries, as some of its policies promote their interests and others do not. This is often true for the common agriculture and trade policies. However, the Everything But Arms (EBA) initiative is a welcome policy to promote trade with the least developed countries as a means to stimulate their development and growth. EU must develop a coherent policy framework towards developing countries such that efforts to reduce poverty are not undermined elsewhere. The new Treaty and the next Commission offer opportunities to embody this principle. Promoting better policy coherence in the next generation of country strategies for EC aid will also be important.

7. *In general terms, we think a simplification of the External Actions part of the Budget in the Future Financial Perspective is to be greatly welcomed (paragraph 88).*

The Government strongly agrees with the Committee's view. While short on detail, the Commission's Financial Perspectives Communication proposes a sharp reduction in the number of budget lines and a new organisation of external spending along six overarching policy instruments.⁵ This proposed rationalisation is to be welcomed and encouraged.

8. *We see merit in the idea of a "Peace and Security" budget, as proposed in the draft Financial Perspective, which would be the responsibility of the External Relations DG and Commissioner (paragraph 95).*

The Government strongly agrees with the Committee's position. The Government has made it clear that overall the Commission's proposals in its Future Financing Communication are unrealistic and unacceptable, especially in the context of the Commission calling for restraint in member state's domestic spending. There is a lack of prioritisation, with only lip service paid to the concepts of "strategic focus" and "simplification". However, in the area of external relations the Commission's proposals are a good basis for improving EC aid effectiveness especially through the proposal for clearly delineated instruments. The proposal to create an Economic Cooperation and Development instrument, focussed on poverty reduction, separate from the Peace and Security instrument will act in a mutually reinforcing fashion to improve this effectiveness by clarifying different objectives, decision making processes and means of support. Structurally, it would seem logical that responsibility for the Peace and Security instrument rest with the External Relations DG and Commissioner or its successor.

9. *We agree that for political and strategic reasons the "near abroad" countries need help and that the Commission is well placed to provide this support on behalf of Member States. However, we have sympathy with the Secretary of State's view that a larger proportion of EU ODA should go to low-income countries. We would make three suggestions:*

- *The Commission and Member States should consider the scope for increasing the volume of loans to these countries from the European Investment Bank so as to free up grant assistance for the low income countries. If the EIB is to play a larger role in these countries in place of EU grant aid, it may need to extend its reach beyond its traditional emphasis on private investment and public infrastructure and utilities to investment in the social sectors.*
- *The Commission should concentrate grant assistance to these countries on governance and on poverty reduction.*
- *It should review the 2000 development policy statement so as to ensure, in the words of DfID's and the FCO's written submission to the Committee, "its continued relevance and to clarify its role in guiding the future direction of EU aid", so that it encompasses the objective of assisting the "near abroad" as well as poorer countries (paragraph 89).*

The Government shares the concerns of the Committee that EC grant assistance should be focussed on the poorest countries. The Government has a Public Service Agreement target to work for agreement to increase the proportion of EC overseas development assistance (ODA) to low income countries to 70 per cent. As part

⁵ Communication "Building our common future, Policy changes and Budgetary means of the Enlarged Union 2007-13", 10 February 2004.

of this mandate, the Chancellor of the Exchequer, in his letter to EU Finance Ministers in May 2003 setting out the UK's aim to improve the effectiveness of EC external assistance, argued that the instruments of EC's external assistance, loans and grants, should be used where they are most effectively and cost-efficiently deployed. The Government is now considering how to take this initiative forward and the Committee's views will be taken into account as part of this process. We expect that the 2000 development policy statement will be reviewed in 2005.

10. *We see considerable benefit in unifying the policy and programming functions in a single development DG. On balance, we feel that EuropeAid is working well as a separate agency, and that it would be best to leave it as it is. At the same time, it should be more closely linked than it is at present to the policy and programming functions (paragraph 91).*

11. *We suggest that the outgoing Commission should prepare a blue-print, or blue-prints, for a revised structure for the incoming Commission-taking into account above all the need for efficiency and effectiveness, but also the move towards a strengthened CFSP (paragraph 92).*

The Government agrees that structures are very important for improving the efficiency and effectiveness of EC aid and that the next Commission should seek to establish the most optimal solution in this regard. The Government believes that there is considerable benefit in unifying the development project cycle (policy, programming and implementation). The UK experience shows that, bringing together all aspects of development assistance provides enormous benefits in terms of coherence, reduced transaction costs and improved implementation. The Government welcomes the Committee's recommendation (paragraph 43) that EC's development programmes ought to be managed by a single Development Commissioner. It is the prerogative of the next Commission President to decide the structure of the incoming Commission. The President's decision will most likely be informed by ideas and options presented by the current Commission.

12. *In the EDF's "mid-term review", which is due later this year, the government should put its EU partners on notice that it will be looking for the Commission to develop a new strategy that will treat all developing countries that wish to have a partnership relationship with the EU on a common basis. This would not necessarily mean that all ACP countries would receive less aid than at present: there may be good reasons for some of them to continue to receive preferential treatment. But there would at least be common criteria for allocating aid across the globe. In addition, other elements that are particularly valued in the EU/ACP relationship should remain and be extended to other countries: political dialogue and "reciprocal accountability", conditionality in relation to human rights and governance; and the greater predictability of aid flows (paragraph 93).*

13. *If it were not for the extra cost to the United Kingdom, the advantages of budgetisation in our view would clearly outweigh any disadvantages. We believe the government should weigh these carefully, including the extra cost, before reaching a decision on the current Commission proposal. Whether or not budgetisation goes ahead, we believe there is a strong case for a separate chapter in the budget for development assistance to maintain the poverty focus currently aimed at by the EDF (paragraph 94).*

As the Committee notes, there are particularly positive features in the ACP/EU relationship that are not in existence within other development relationships the EU has with Asia and elsewhere, such as: (i) higher allocation of resources to low-income countries; (ii) best practise approaches and instruments eg giving partners voice through consultative strategies, the poverty focus and the political relationship with the ACP; (iii) support for local priorities and Poverty Reduction Strategy Papers; and (iv) multi-annual budgeting. There is also the strengthened political and trade relationships enshrined in the Cotonou Treaty. Finally, the EDF provides support to the least developed Overseas Territories, the interests of which the Government has an obligation to protect. The extra cost to the UK is therefore not the sole disadvantage to budgetisation.

We have been encouraging the EC to apply global resource allocation criteria universally across all development instruments. The January orientation debate of the General Affairs and External Relations Council concluded that the EC should "... present proposals on extending the use of standard, objective and transparent resource allocation criteria [such as those used in the EDF] based on need and performance to all EC external assistance. The particular difficulties faced by countries in crisis or in conflict must be borne in mind." DFID analysis shows that if global resource allocation criteria were applied to EC aid there would be a reallocation of aid from Middle East and North Africa, and Europe mainly to Asia. The ACP as a region would receive about its current allocation.

14. *We believe it is essential that development policy is not downgraded and made subservient to the CFSP. While fully accepting that a successful development policy will bolster the EU's foreign policy objectives, we would prefer to see development described as an important element in its foreign policy—rather than as an instrument of it (paragraph 96).*

The Government agrees that development policy should not be made subservient to the Common Foreign and Security Policy (CFSP). As we stated in our written evidence to the Committee, development is a prerequisite for a safer and secure world. So development and wider foreign policy can and should be complementary and mutually supporting. We believe that development policy has its own distinct objectives, and would agree that it should not be described as an instrument of foreign policy. We would prefer to stress the need for all policy areas to be coherent, in line with the draft Constitutional Treaty.

15. *We share BOND's concerns with the draft Constitutional Treaty, as we understand does the government. We recommend:*

- (a) *that the current differentiation between developing and non-developing countries in the Treaty is retained by using the wording in the latest version of the Treaty;*
- (b) *and that development co-operation and development policy, whilst in support of CFSP, do have distinct and autonomous objectives (paragraph 97).*

The Government has successfully pressed for these points in the Constitutional Treaty negotiations.

16. *We recommend that the Government works with other like-minded Member States to ensure that enlargement does not lead to a disproportionate share of EU aid going to the "near-abroad", and that the Commission takes full advantage of the benefits that enlargement may be able to bring to development co-operation (paragraph 98).*

The Government shares the Committee's concerns and will continue to work with all its EU partners to protect and enhance the low-income focus of EC aid allocations. We also look forward to the new Member States becoming active development partners in Europe promoting the same broad objectives as us.

17. *We believe the benefits of EU aid outweigh the possible advantages of "repatriating" it to national aid budgets. Until its quality and speed of delivery further improves, the Government and other Member States should be wary of any large increases. But we think it would be neither desirable nor feasible for EU aid to be cut back. The Government should continue to give priority to supporting the reform programme and ensuring that it produces its full potential. The Government can take some credit for helping to bring about the changes that have been achieved so far. It is inevitable that there will be pressure for the EU aid Budget to be expanded in the future; any increase should be directly linked to further improvements in quality and focussed on the most poor. With continuing vigilance, understanding and (on occasion) pressure from the United Kingdom and like-minded governments, EU aid can improve further (paragraph 99).*

The Government agrees with the Committee that the priority should be to work towards making the best possible use of funds in the EC, in particular by encouraging greater poverty focus and improved overall effectiveness, so as to maximise its benefit. We will continue to work closely with all member states, the Commission, the European Parliament, and civil society to secure further improvements to EU aid delivery.

18. *We make this Report to the House for debate (paragraph 100).*

The Government welcomes the opportunity to debate this in the House.