



House of Commons  
European Scrutiny Committee

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**Eleventh Report of  
Session 2008–09**

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Documents considered by the Committee on 11 March 2009

*Report, together with formal minutes*

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## Notes

### Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

### Abbreviations used in the headnotes and footnotes

EC	(in " <i>Legal base</i> ") Treaty establishing the European Community
EM	Explanatory Memorandum (submitted by the Government to the Committee)
EP	European Parliament
EU	(in " <i>Legal base</i> ") Treaty on European Union
GAERC	General Affairs and External Relations Council
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
RIA	Regulatory Impact Assessment
SEM	Supplementary Explanatory Memorandum

### Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

### Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is in the House of Commons Vote Bundle on Mondays and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": [www.parliament.uk/escom](http://www.parliament.uk/escom). The website also contains the Committee's Reports.

Letters sent by Ministers to the Committee about documents are available for the public to inspect; anyone wishing to do so should contact the staff of the Committee ("Contacts" below).

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# 1 Financial Management

(30280) 17606/1/08 COM(08) 859	Commission Communication concerning the revision of the Multiannual Financial Framework (2007–2013) Draft Decision amending the Interinstitutional Agreement of 17 May 2006 on budgetary discipline and sound financial management as regards the Multiannual Financial Framework
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<i>Legal base</i>	Article 272 EC; QMV; the special role of the European Parliament in relation to the adoption of the Budget is set out in Article 272
<i>Department</i>	HM Treasury
<i>Basis of consideration</i>	Minister's letter of 10 March 2009
<i>Previous Committee Report</i>	HC 19–iii (2008–09), chapter 6 (14 January 2009) and HC 19–viii (2008–09), chapter 7 (25 February 2009)
<i>To be discussed in Council</i>	16 March 2009 (General Affairs and External Relations Council) or 19–20 March 2009 (European Council)
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Not cleared; further information requested

## Background

1.1 In the context of the Commission's Communication, *A European Economic Recovery Plan*,<sup>1</sup> the Government told us that:

- the Commission proposes revising the 2007–2013 Financial Framework<sup>2</sup> (which sets overall expenditure ceilings for the budget) for the purposes of mobilising €5.00 billion (£4.10 billion) for trans-European energy interconnections and broadband infrastructure; and
- it should be noted that the ECOFIN Council comments for the European Council of 11–12 December 2008 specifically referred to considering the Commission's plan "within the existing" ceilings and headings of the Financial Framework.<sup>3</sup>

1.2 In December 2008 the Commission proposed in this document the revision of the 2007–2013 Financial Framework to which we had been alerted. The revision was to be achieved by amendment to the Inter-Institutional Agreement of 17 May 2006 on budgetary discipline and sound financial management, which set the current Financial Framework.<sup>4</sup> The draft Decision would allow a €5.00 billion (£4.10 billion) increase to the Heading 1a

1 (30213) 16097/08: see HC 19–i (2008–09), chapter 4 (10 December 2008) and *HC Deb*, 20 January 2009, cols. 626–53.

2 In previous budgetary periods the Financial Framework was known as the Financial Perspective and is still often referred to as such.

3 (30213) 16097/08: *op. cit.*

4 See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:139:0001:0017:EN:PDF>.

(Competitiveness for Growth and Employment) ceiling for 2009 and 2010, with a corresponding €5.00 billion (£4.10 billion) reduction to the Heading 2 (Preservation and Management of Natural Resources) ceiling for 2008 and 2009.

1.3 When we considered this document, in January 2009, we:

- noted that the Government was keen, as a strong believer and advocate of budget discipline and sound financial management, to avoid any further revision of the 2007–2013 Financial Framework, an important tool for budget discipline;
- noted that it would work with like-minded Member States to ensure that the Commission explored all other possibilities for additional resources to be met from within the existing Financial Framework through, in the first instance, appropriate redeployment, reprioritisation, and re-profiling; and
- asked to hear about progress in securing that objective.

1.4 When we considered the document again, in February 2009, we heard that:

- the Netherlands, Germany, Sweden, Denmark, Austria and France had expressed concerns with the proposal to revise the Financial Framework;
- as well as calling on the Commission to propose reprioritisation and redeployment of existing resources within both Headings 1a and 2, the Government and the like-minded Member States were opposed to use of the 2008 unallocated budget margin and to any increase in the overall Financial Framework ceiling;
- in the light of this the Commission had revised its proposal, limiting the overall increase of commitment appropriations under Heading 1a to €3.50 billion (£2.91 billion), but proposing an additional €1.50 billion (£1.25 billion) of expenditure for infrastructure projects under Heading 2, to make the total up to €5.00 billion (£4.15 billion);
- the Government objected to this revised proposal as it still drew on the 2008 margin to finance the package; and
- it would continue to take a proactive part in discussions with the Commission and other Member States.

We applauded the Government's continued efforts to ensure recourse to revision of the Financial Framework was avoided and asked to hear about further progress to that end. Meanwhile the document remained under scrutiny.<sup>5</sup>

### **The Minister's letter**

1.5 The Economic Secretary to the Treasury (Ian Pearson) writes to tell us that since he last wrote discussion of the Commission's proposal has continued at official and ministerial level. He says that:

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5 See headnote.

- at the General Affairs and External Relations Council on 23 February 2009 there was general consensus that the Commission’s preferred option — to utilise the 2008 budget margin — was not acceptable;
- at that meeting the Government set out a broad alternative approach to draw on the redeployment of existing resources and future year margins which was supported by Sweden and Austria and opposed by Poland, Ireland and Greece and on which France, the Netherlands and Germany called for more detailed work to be done before a decision could be reached;
- the Presidency therefore had no formal mandate at this stage to discuss the source of financing with the European Parliament;
- on 4 March 2009 the Presidency issued a list of questions to guide another COREPER discussion — most Member States supported maintaining the €5.00 billion reference amount and the idea of spreading the budgetary commitments over three years rather than two was broadly supported; and
- a compromise proposal from the Presidency is expected shortly and the Government will continue to work for a financing solution that avoids any Financial Framework revision, or at least limits it to an absolute minimum.

1.6 The Minister continues that:

- the financing package is on the agenda for the General Affairs and External Relations Council on 16 March 2009;
- if agreement is not reached then, the Presidency will seek to reach agreement in time for the Spring European Council on 19–20 March 2009; and
- as a number of compromise packages could be presented during both of these Councils and decisions might have to be made rapidly, the Government may need, regrettably, to override scrutiny in the interests of securing a favourable negotiating outcome.

## Conclusion

1.7 We are grateful to the Minister for his further account of where matters stand on this proposal. We note that:

- although there has been some progress towards obtaining a more satisfactory outcome on this matter, the Government is attempting to secure more; and
- fast moving negotiations in the run-up to the European Council may require a Government decision on a compromise before scrutiny is complete, in order to secure a favourable outcome.

1.8 As the Minister says, it would be regrettable if the Government had to agree to a decision on this matter whilst the document is still under scrutiny. Nevertheless we do not feel able to clear the document from scrutiny yet. But given the circumstances the Government may, if it deems it necessary and in accordance with paragraph (3) (b) of

the Scrutiny Reserve Resolution, agree to a compromise on this matter. We shall, of course, want a prompt account of developments on the document, when we shall again consider whether then to clear it from scrutiny.

## 2 Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings

(30410) 5208/09 —	Draft Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings
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Legal base	Articles 31(1)(c) and 34(2)(b) EU; unanimity, consultation.
Deposited in Parliament	5 February 2009
Department	Ministry of Justice
Basis of consideration	EM of 18 February 2009
Previous Committee Report	None
To be discussed in Council	To be adopted at the JHA Council, 4–5 June 2009
Committee's assessment	Politically and legally important
Committee's decision	Not cleared; further information requested

### Background

2.1 A conflict of jurisdiction arises in criminal cases where more than one Member State has, and wishes to exercise, jurisdiction to prosecute conduct which constitutes a criminal offence. Where criminal jurisdiction is exercised on a territorial basis, such conflicts are minimised, but it has been a feature of Framework Decisions that they require rules of jurisdiction to be made on other than a territorial basis, such as nationality or place of residence of a victim, with the result that conflicts may become more frequent. Where there are such conflicts of jurisdiction, there is also the risk that prosecutions may be commenced in respect of an offence which has been dealt with elsewhere, thus offending established rules against double jeopardy, or *ne bis in idem*.

2.2 The principle of *ne bis in idem* is incorporated into EU law through Articles 54–58 of the Convention Implementing the Schengen Agreement. It does not, however, prevent conflicts of jurisdiction where parallel prosecutions are ongoing in two or more Member States; *ne bis in idem* only comes into play to prevent a second prosecution in one Member State if a prosecution on the same or a similar set of facts has been concluded in another Member State.

2.3 To address this concern, the Commission published a Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings in December 2005.

2.4 The Green Paper recommended the creation of a mechanism for allocating criminal jurisdiction, so that all prosecutions could be concentrated in one territorial jurisdiction. Such a system would require exchange of information between prosecuting authorities and the discretion to desist from instituting a prosecution (or withdraw one already under way) on the sole ground that the same case is being prosecuted in another Member State. The Green Paper recognised that this latter feature may pose a problem for those Member States which have no discretion in relation to the decision to prosecute.

2.5 A three-stage procedure for the allocation of criminal jurisdiction was envisaged. First, the Commission proposed that a rule be adopted at EU level whereby, in any case with significant links to another Member State, a national prosecuting authority would be obliged to inform the prosecuting authority in the other Member States of its intention to prosecute. The other Member State would then be given a deadline within which to express interest in commencing a prosecution. Following the elapse of the deadline with no expressions of interest the first Member State would be free (apart from in exceptional cases) to continue with the prosecution. Where two or more Member States had an interest in commencing a prosecution, a second stage would involve discussions between the authorities concerned leading to one Member State pursuing the proceedings and others desisting from instituting proceedings or bringing them to a close. The third suggested stage addressed the case where the authorities concerned could not reach agreement. Here, the Green Paper suggested a “structured dialogue” with the involvement of a body at EU level, such as Eurojust, acting as mediator. The Green Paper also suggested a further possible stage of empowering a body at EU level (such as the European Court of Justice) to decide on the most appropriate jurisdiction, but acknowledged that this additional step would be very difficult to realise within the Treaty framework.

2.6 The Commission recommended that consultation between Member States over jurisdiction should be conducted in the absence of the defendant. It acknowledged, however, that the defendant would have to be informed of the main reasons for a decision on jurisdiction at the latest at the time an indictment is presented to a court. This decision could then be open to review by the national courts on the basis of national legal doctrine such as abuse of process, although the question of interpretation of EU-wide rules on the procedural mechanism and criteria for allocation of jurisdiction could only be referred to the European Court of Justice under Article 35 EU.

## Previous Consideration

2.7 We considered the Green Paper on 22 February 2006.

2.8 We concluded as follows:

- The need for a formal mechanism for allocating jurisdiction was far from demonstrated in the Green Paper: there was no evidence that such a mechanism brought any advantage, which was not already secured by voluntary cooperation through Eurojust.
- We viewed with particular concern the suggestion that the European Court of Justice might be empowered to make a binding ruling determining which Member State should be allowed to prosecute (thereby affecting the discretion vested in

national prosecution authorities and, in the UK, undermining the accountability of the Law Officers).

- The Green Paper had not fully considered the implications for defendants of delays while conflicts of jurisdiction were resolved. These would be aggravated by the lengthy delays which would necessarily arise from preliminary references to the European Court of Justice; such a system would also be likely to give rise to challenge under the ECHR, notably under Article 6.

2.9 Our Conclusions were echoed by the formal consultation response of the Government to the Green Paper, in which the UK concluded that the current mechanisms for managing conflicts of jurisdiction, and in particular the role played by Eurojust, had proved sufficient; that the response had registered concern among relevant authorities that the introduction of formal procedures to inform, consult and participate in a possible binding dispute resolution mechanism could lengthen proceedings, which could have ECHR implications; and that such procedures would remove the flexibility which was needed to accommodate the differences in Member States' legal systems.

2.10 Given that a proposal in this field has been resurrected, it is worth noting in more detail two of the comments in the UK's response to the Green Paper:

- In the UK's experience, "in the rare events where a positive conflict of jurisdiction arises, the mechanisms in place operate satisfactorily, and that jurisdiction is and can be resolved by discussion. Of the very few cases referred to Eurojust, negotiation has resulted in acceptable solutions for the states involved." (Page 1; emphasis added.)
- "Early consultation and face-to-face discussion with interested parties to resolve "overlapping jurisdiction" (there is not always a conflict) should be encouraged. A binding duty should not be proposed unless existing arrangements based on co-operation are failing. No evidence is shown of such failure." (Page 3; emphasis added.)

2.11 No further action has been taken on the Commission's Green Paper until now.

## The Draft Framework Decision

2.12 A proposal for a Framework Decision addressing the risk of parallel prosecutions was made on the initiative of the Czech Republic, Poland, the Slovak Republic and Sweden. The Government's Explanatory Memorandum states that this proposal was inspired in part by the Commission's Green Paper. The intention of the Presidency is that the Framework Decision should be adopted in the JHA Council on 4–5 June 2009.

2.13 The recitals affirm that the Framework Decision should not override domestic arrangements (where, for example, the Member State has an obligation to prosecute). Articles 1–4 establish the general principles of the proposal. Article 1 requires a Member State to notify another when it becomes aware of a case that presents "a significant link" with that State and "it is possible that" parallel criminal proceedings are taking place in that State. By virtue of Article 3 each Member State is required to designate a single authority to act as a notifying and reporting authority.

2.14 Articles 5–11 deal with the detailed mechanism of notification. Article 5 would introduce a formal and mandatory notification procedure, i.e. an obligation on Member States to notify another Member State as soon as practicable following the discovery of facts which demonstrate a significant link to that Member State. There is a threshold for the obligation to notify of a custodial sentence of more than one year, but which might not be applicable in all cases. A link becomes significant “where the conduct or its substantial part which gives rise to the criminal offence took place in the territory of another Member State”. The decision as to whether a link is “significant” shall be taken on a case by case basis with reference to the common criteria listed in Article 15. The written record of the notification set out in Article 7 replicates procedures already contained in other mutual recognition instruments. Articles 8–11 set out the detail of the notification procedure and list the mandatory elements to be contained in the notification form. Article 10 requires a national authority to respond to a notification within a maximum of 30 days of receipt. If a responding authority fails to comply, the notifying authority may take “any measures it considers appropriate in order to bring the matter to the attention of the responding State”, including notification to Eurojust.

2.15 Articles 12–13 cover the “direct consultations” mechanism, which applies once the relevant authorities have contacted each other via the notification procedure. This chapter is closely connected to the subsequent chapter since the aim of the direct consultations is to agree and determine the “best placed jurisdiction”.

2.16 Articles 14–17 concern the determination of the best placed jurisdiction. Article 15 sets out a non-exhaustive list of criteria that must be considered by Member States in making their decision. Paragraph 1 contains a general presumption in favour of conducting proceedings in the jurisdiction of the Member State where most of the criminality has occurred. In the alternative, paragraph 2 lists significant factors which may favour a different jurisdiction, including nationality or residence of the defendant, the interests of the victims, location of evidence, protection of vulnerable witnesses and residence of key witnesses, stage of proceedings reached and “economy” of proceedings. Article 16 permits a national authority at any time to refer the determination of the best placed jurisdiction to Eurojust; if after 10 months of the entry into direct consultations no agreement has been reached, the case shall be referred to Eurojust.

### **The Government’s view**

2.17 In his Explanatory Memorandum of 18 February 2009 submitted on behalf of the Office for Criminal Justice Reform, Parliamentary Under-Secretary of State at the Ministry of Justice (Lord Bach) makes the following comments on the Framework Decision.

2.18 With reference to Article 1 the Minister comments that its scope is too broad, since it could be interpreted as requiring a formal notification in all cases presenting a cross-border dimension. However, the Minister adds that this may not be the intention of the drafters and that the Government will work with partners to refine the wording. The Minister comments that Article 3 appears to require that each Member State has to designate a single authority to act as a notifying and a responding authority, which the Government considers overly burdensome.

2.19 Article 5 appears to the Minister to be unduly bureaucratic if its effect were to set up too prescriptive a mechanism of notification. However, the minister also points out that the obligation to notify “as soon as practicable” does not appear taxing; relying on the concept of ‘practicable’ would preserve prosecutorial discretion. The Minister explains that the trigger for notification, i.e. the “significant link” contained in Article 6, is a subjective criterion, which would allow flexibility to Member States in deciding whether a notification is required. The Minister explains that the Government will reflect further on whether subjective or objective criteria would be more appropriate. The mandatory elements in the notification form (Articles 8–11) are described by the Minister as a “very detailed mechanism”, which could be “unduly bureaucratic and prescriptive” and the Minister indicates that the Government will therefore “express its preference for a more flexible, direct communication mechanism of general information exchange”.

2.20 In relation to chapter 3, direct consultations, the Minister’s concerns lie mainly with their relationship to Eurojust and the possibility of overlap between this proposal and the Eurojust Decision. The Minister also states that the Government will wish to encourage direct communication, without any need for recourse to a central authority.

2.21 The Minister further explains that the criteria for determination of the best placed jurisdiction under this Framework Decision might interfere with the guidelines applied by Eurojust when making a recommendation in a dispute over jurisdiction;<sup>6</sup> that formal procedures to inform, consult and participate in a resolution mechanism might carry the risk of lengthening proceedings or making them more bureaucratic; and that subsequent delays have implications for fairness to the accused and may render the proceedings liable to ECHR challenges (as well as preliminary references to the European Court of Justice). The Minister states that the Government will work with partners “as far as possible to minimise those possibilities, without compromising the current efficiency of existing procedures”.

2.22 Finally, the Minister confirms that an inflexible mechanism requiring notification in all cases would impose an additional burden on prosecutors as well as other authorities with significant financial implications.

## Further Developments

2.23 The proposal was discussed in the JHA Council on 26–27 February. Lord Bach reported to the House<sup>7</sup> that “[m]inisters reached a broad consensus on presidency conclusions to steer negotiations on the proposed framework decision [...] in particular focusing the instrument on preventing situations where the same person is subject to parallel proceedings in different member states, and establishing flexible mechanisms for communication”. A revised version of the proposal has been drafted which is reported to limit the scope and obligations of the draft Framework Decision.

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6 Annex IV to the annual report of Eurojust 2004 sets out a list of criteria to help authorities decide which jurisdiction is best placed to prosecute.

7 *HC Deb*, House of Lords, 5 March 2009, col. WS66

## Conclusion

2.24 We thank the Minister for his thorough Explanatory Memorandum.

2.25 The proposal for a Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings is problematic, and we do not at this stage share the Government's acceptance that such legislation is needed.

2.26 Principal among our concerns is the absence within the EM of any evidence justifying the need for this Framework Decision. Without this, we are of the view that an unnecessary additional layer of bureaucracy and source of delay will be added to the many prosecutions of cases in the national jurisdiction that have a cross-border element, cases which are currently resolved satisfactorily through informal contact between investigators and prosecutors (often generated as a result of carrying out mutual legal assistance requests). We are also concerned to know why Eurojust is not well placed to deal with conflicts of jurisdiction which cannot be resolved through informal channels.

2.27 We therefore ask the Minister to deposit to the Committee the most recent revision of the draft Framework Decision with an Explanatory Memorandum explaining the amendments. We would be grateful if the EM could also address the following:

2.28 What is the evidence of parallel prosecutions leading to injustices in EU Member States over the last two years that supersedes the UK's response in 2006 to the Commission Green Paper that these were 'rare events' amounting to 'very few cases'?

2.29 Similarly, what is the evidence that would cast doubt on the conclusion in the UK's 2006 response that the rare cases in which a positive conflict of jurisdiction arose could be satisfactorily resolved by 'face-to-face discussion', or exceptionally by negotiations through Eurojust?

2.30 What effect would the proposal have on national discretion whether or not to prosecute?

2.31 The absence of provisions in the proposal concerning the right of a defendant to be informed of a determination of jurisdiction and judicial oversight of such determinations.

2.32 How the revised proposal answers the concerns set out in the Government's EM, namely: that it would be overly burdensome for each State to have to designate a single authority; that the mandatory elements of notification are too prescriptive, the Government preferring a more flexible direct communication mechanism without any recourse to a central authority; that the proposal overlaps with the mandate of Eurojust and that the criteria for determination of jurisdiction could interfere with the criteria applied by Eurojust; and that the proposal risks lengthening and thereby affecting the fairness of criminal proceedings, particularly for a defendant in custody, including through an increased incidence of challenges to the courts in Strasbourg and Luxembourg.

2.33 We shall hold the document under scrutiny pending the Minister's reply.

### 3 Deforestation and climate change

(30047)  
14473/08  
+ ADDs 1–3  
COM(08) 645

Commission Communication: *Addressing the challenges of deforestation and forest degradation to tackle climate change and biodiversity loss*

<i>Legal base</i>	—
<i>Document originated</i>	17 October 2008
<i>Deposited in Parliament</i>	22 October 2008
<i>Department</i>	Energy and Climate Change
<i>Basis of consideration</i>	EM of 26 February 2009
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	See para 3.13 below
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared, but relevant to the debate recommended on proposed climate change agreement

#### Background

3.1 According to the Commission, forests deliver a multitude of economic and social benefits, together with major environmental benefits related to biodiversity and climate change. However, it notes that they are under threat from deforestation and degradation,<sup>8</sup> with these losses accounting for some 20% of global emissions of carbon dioxide, and it points out that reducing these will be essential if the Community's aim of limiting global warming to 2°C is to be achieved. It notes that deforestation has a central place in the UN climate negotiations, and that the Copenhagen conference at the end of this year will provide a unique opportunity to tackle the challenge this presents — which it suggests will in turn require a number of Community policies to be reinforced. In particular, it says that a new instrument (the Global Forest Carbon Mechanism) should be established to generate sufficient funding to tackle deforestation and forest degradation, accompanied by the inclusion of deforestation in carbon markets. Consequently, without intending to give definitive answers to the many issues which arise, it has sought in this Communication to set out the main lines of a Community response, and to set in train a series of initial actions to provide the foundations of a viable global approach to this problem.

8 "Degradation" is defined by the FAO as the "long term reduction of the overall supply of benefits from the forest, which includes carbon, wood, biodiversity, and other goods and services".

## The current document

### *The challenges of deforestation*

3.2 The Commission points out that the world has lost over 3% of its forest cover between 1990 and 2005, equivalent to 13 million hectares, of which 96% has occurred in tropical regions, adding that the loss of tropical forests must be the prime focus of action because of their impact on climate and the biodiversity they contain. It notes that the causes are diverse, complex and vary according to the geographical locations involved, but that the most important tends to be changes in land use, where profitable alternatives provide incentives to deforestation. It adds that, although infrastructure development is a factor, the most important underlying cause is poor governance, linked to poorly enforced land use policies and uncertain land tenure regimes.

3.3 The Commission says that deforestation has a number of particular adverse consequences. As regards climate, it notes that emissions of carbon dioxide are generated from decomposition of biomass and burning, emissions from soil, reductions in the amount of energy reflected from the earth's surface, and changes in the interaction between forests and the chemistry and hydrology of the atmosphere; that, since tropical forests host about half of all terrestrial species and play a central role in the functioning of the biosphere, it will give rise to a significant biodiversity loss; that it will increase poverty because of the ecosystem services which forests provide and because many of the world's poor depend on them for their livelihoods; and that it has an adverse impact on human health, due to increases in air pollution and the spread of insect-borne diseases.

### *Addressing the challenges of deforestation*

3.4 The Commission says that the cut in global emissions needed to meet the aim of limiting temperature rises to 2°C will be impossible to achieve without substantial action to combat deforestation, and that the UN negotiations should aim to halt the loss of global forest cover by 2030 at the latest, and to reduce gross tropical deforestation by at least 50% by 2020, compared with current levels. It goes on to identify specific areas of action as being the strengthening of forest governance and institutions; a recognition of the importance of economic factors as a driver, requiring a policy which rewards the value of the services provided by forests; and the need to focus on demand and the responsibility of consumers. These would be underpinned by the provision of high quality information in order to guide policy decisions and monitor implementation.

### *Contribution of Community policies*

3.5 The Commission notes that many internal and external Community policies have indirect impacts in this area, and that a number of these — notably trade, energy, agriculture, food security, and development cooperation — can play a significant role, given that the Community is a major consumer of timber and timber products from around the world. It suggests that measures which can directly promote sustainable forest management include action through the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan, which ensures that exports from participating countries are covered by a license attesting that the timber has been produced legally; a related proposal that

Community operators should be obliged to minimise the risk of illegally harvested products entering their supply chain; participation in international fora, such as the International Tropical Timber Organisation; green procurement policies, eco-labelling; and developing sustainability criteria for wood and other biomass used to generate renewable energy. In addition, initiatives such as the Global Monitoring for Environment and Security (GMES) enable monitoring land use changes to be monitored.

3.6 As regards Community policies related to non-timber products, the Commission notes that there is a tension between deforestation and increasing food production, and that the latter should be increased without further deforestation, for example by increasing yields and stepping up sustainable production in developing countries. It says that a similar consideration applies to the development of biofuels, with guidance being prepared under the Convention on Biological Diversity. More generally, the Commission notes that it is committed to assessing the impact of future Community and international policy initiatives on deforestation, ensuring that future reviews and assessments of trade and agricultural agreements include a specific analysis of their impact on deforestation; studying the impact of Community consumption of imported food and non-food commodities which are likely to contribute to deforestation; doubling support for international agricultural research in order to improve productivity; and supporting developing countries in their efforts to attain the Millennium Development Goals.

3.7 The Commission also addresses the question of the significant additional funding which it says will be needed in order to tackle deforestation successfully. It suggests that an estimated €15 to 25 billion a year would be needed to halve deforestation by 2020, that developed countries will need to allocate considerable resources to help tackle deforestation in developing countries, and that this will need to come from both public and private sources. It adds that funding will only be effective if developing countries are first provided with the assistance needed to build capacity and strengthen institutions, if work is carried out to resolve remaining technical issues, if performance can be assessed and rewarded against agreed baselines and if existing and proven aid delivery practices are used and the principles of sound management followed. The Commission suggests that the amount of funding provided to developing countries should depend upon the level of mitigating actions they undertake, and that a major portion of this could come from the proceeds of auctioning allowances within the Emissions Trading Scheme, with a proposed amendment<sup>9</sup> to that Scheme having suggested that at least 20% of those proceeds should be used to support climate objectives. More specifically, it says that, if 5% of this revenue were to be earmarked for this purpose, €1.5–2.5 billion could be raised in 2020. This funding would be complemented by development assistance from the Community and Member States to improve governance, and by private funding.

### *Deforestation in the UNFCCC context*

3.8 The Commission says that the Community should aim to establish an internationally supported incentive scheme to reduce deforestation and forest degradation in developing countries as part of the future UNFCCC global agreement for the period 2013–2020, and that such a scheme should be open to all developing countries which ratify the agreement

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9 (29402) 5862/08: see HC 16–xiii (2007–08), chapter 4 (27 February 2008).

and are able to contribute to its objectives through a commitment to take national mitigation action to reduce emissions from these sources.

3.9 It advocates a two-track approach, involving first the establishment of a Global Forest Carbon Mechanism, which would support capacity-building activities in developing countries, involve nationwide implementation covering the whole forestry sector, aim to secure eco-benefits to the greatest possible degree, enable the results to be assessed, monitored and accounted for by independent verification, and require effective forest governance systems to be in place. In the longer-term, the Commission suggests that the case for including deforestation in carbon markets should be examined, on the basis of an international agreement with ambitious emission reduction commitments and the creation of a new sectoral market mechanism, but it cautions that the inclusion of forestry credits in the Emissions Trading Scheme should only be considered after 2020 and following a thorough review.

### The Government's view

3.10 In her Explanatory Memorandum of 26 February 2009, the Parliamentary Under Secretary of State at the Department for Energy and Climate Change (Joan Ruddock) says that tackling deforestation is vital to addressing climate change and the future climate change agreement as well as contributing to wider environment and development agendas, and notes that there is likely to be a large funding gap. She goes on to say that the UK's views differ from those of the Commission in two respects.

3.11 On the suggestion that the proposed Global Forest Carbon Mechanism would pay for forest credits largely from the proceeds of auctioning allowances within the Community's Emissions Trading Scheme, she says that the Government is in principle opposed to hypothecation as an inefficient means of determining public expenditure priorities. It is therefore considering innovative sources of financing which will maximise leverage from the private sector, in conjunction with demands for financing for low carbon technology and adaptation.

3.12 Likewise, she says that the UK would like to see consideration of market credits earlier than 2020, commenting that a review published in October 2008 has advocated an approach under which carbon market finance starts to grow in 2013 onwards, and that this would produce a more positive outcome than that suggested by the Commission. The UK would therefore like to see full consideration of carbon market access, based on conditions dependent on understanding the relationship with the carbon price; understanding the price impacts on other market mechanisms which are still under negotiation; and long term responsibility for the forests.

3.13 Finally, the Minister notes that the Commission intends that the approach outlined in this Communication should form part of the Community's position in relation to the climate change conference in Copenhagen, on which it had recently put forward a further Communication,<sup>10</sup> for discussion at the European Council on 19–20 March.

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<sup>10</sup> (30412) 5892/09: see HC 19–ix (2008–09), chapter 1 (4 March 2009).

## Conclusion

3.14 It is clear that the issue of deforestation is of considerable significance in the context of wider climate change developments, and, for that reason, we are drawing this Communication to the attention of the House. However, the Commission has made it clear that it does not see this document as providing a definitive answer to the various issues which arise in this area, and that its principal purpose is to set out the main lines of a Community response. In view of this, we do not think it necessary to withhold clearance, but we do regard the document as relevant to the debate which we have recently recommended should take place in European Committee A on the Communication setting out wider Community objectives for the Copenhagen conference at the end of this year.

## 4 Development Assistance and Governance

(27791) 12572/06 COM(06) 421 + ADDs 1 & 3	Commission Communication: <i>Governance in the European Consensus on Development — Towards a harmonised approach within the European Union</i> Commission Staff Working Documents
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<i>Legal base</i>	—
<i>Department</i>	International Development
<i>Basis of consideration</i>	Minister's letter of 27 February 2009
<i>Previous Committee Report</i>	HC 16–v (2007–08), chapter 9 (5 December 2007) and HC 34–xxxvii (2005–06), chapter 39 (11 October 2006)
<i>Discussed in Council</i>	16 October 2006 General Affairs and External Relations Council
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared (reported to the House on 11 October 2006); further information requested and provided

## Background

4.1 As the Commission noted in its introduction to this Communication, poverty reduction and the Millennium Development Goals (MDGs)<sup>11</sup> will not be achieved without decisive progress in the areas of economic, social, environmental and political governance; with the European Consensus on Development setting out the EU's approach and

<sup>11</sup> UN millennium development goals to be achieved by 2015 — the eradication of extreme poverty and hunger, achievement of universal primary education, promotion of gender equality and female empowerment, reduction of child mortality, improvement of maternal health, combat of HIV/Aids, malaria and other diseases, environmental sustainability and a global partnership for development.

contribution, “identifying good governance, democracy and respect for human rights as integral to the process of sustainable development and as major objectives of EU development policy”.

4.2 Accordingly, the Communication proposed that the Community and Member States agree principles and actions for EU dialogue and cooperation with developing countries on governance, with the objective of gradually developing “a coherent common approach to promoting all aspects of democratic governance”.

4.3 The document is summarised fully in our previous Reports<sup>12</sup> In brief, the first section describes what the Commission means by governance, why governance is important for the achievement of the MDGs and how the Commission believes EU development cooperation can be used to improve governance in developing countries.

4.4 The second section proposed a “Governance Initiative” for the 78 ACP countries which would be used to allocate €3 billion of funds from the 10th EDF. €2.7 billion of this amount, called the “Governance Incentive Tranche”, or GIT, was to be linked to the EC’s Country Strategy Papers for EDF 10 (which sets the framework for EC development assistance to the ACP countries). The remaining €300 million would target regional support, with a particular focus on the African Union (AU) and the APRM.<sup>13</sup>

4.5 The Conclusions consisted of four proposed principles to guide EU work on governance — that improving governance is a means to achieving the MDGs and that a broad approach to governance is needed based on dialogue and country ownership — and complementary actions based on regular dialogue between the EU and the partner country about governance issues and financial support for governance-related activities via the Governance Initiative. A “Governance Profile” mechanism would help the Commission assess the quality of governance in each ACP country and provide the basis for dialogue with the government to identify benchmarks and targets for improvements in governance, and thus help determine the allocation of the €2.7 billion under the GIT.

4.6 In his Explanatory Memorandum of 5 October 2006, the then Parliamentary Under-Secretary of State at the Department for International Development (Mr Gareth Thomas) commented fully on the Communication.<sup>14</sup> He said that the UK was committed to supporting good governance as stated in a recent White Paper “Making Governance Work for the Poor”. He welcomed the policy shift away from unilateral EC analysis and programming and towards a common European understanding of governance trends and reform priorities, which recognised that it was neither realistic nor desirable to impose standardised approaches. He supported the emphasis on poverty reduction as the overriding objective of EU development policy, with good governance as a key complementary objective, and also welcomed the use of the EDF 10 programming process to encourage improved governance in ACP countries.

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12 See headnote.

13 Under the auspices of the African Union, prominent Africans are nominated by member countries and appointed by their respective Heads of State to the APRM (African Peer Review Mechanism) review panel, to promote policies, standards and practices in favour of political stability, economic growth, sustainable development, human rights and regional integration.

14 See headnote: HC 34–xxxvii (2005–06), chapter 39 (11 October 2006).

4.7 The Committee likewise agreed that governance, broadly defined, was central to development; and that the approach proposed in the Communication appeared to be soundly-based. We cleared the Communication, but asked the Minister to write in Spring 2007, when the Governance Profile exercise to which he referred had been completed and presented to the Council, with his observations thereon. For reasons that were not entirely clear, the Minister did not write to us until 12 September 2007, and his letter was not received by us until two months later, on 27 November 2007.

4.8 He reported that the Conclusions agreed in October 2006<sup>15</sup> fully reflected his aspirations, including highlighting the importance of ensuring the programming of the GIT took account of differing country circumstances and a requirement for the Commission to undertake a joint review with Member States of the process and to provide the Council with a report in 2008.

4.9 We looked forward to hearing more from the Minister when the review had been completed, with his further observations thereon.<sup>16</sup>

### The Minister's letter of 27 February 2009

4.10 In his letter, the Parliamentary Secretary at Department for International Development (Mr Ivan Lewis) explains that in March 2008 the Communication commissioned an independent review of the GIT supported by a Joint Commission/Member States reference group, including the UK, which was received in November 2008 and whose findings and conclusions are set out in the Commission Staff Working Paper "Supporting Democratic Governance through the Governance Initiative: A Review and the Way Forward" sent to the Council of Ministers in January 2009 (and is attached to the Minister's letter).<sup>17</sup>

4.11 The Minister is "pleased to report" a "comprehensive and insightful" review, whose "findings and conclusions form an excellent basis for our dialogue and cooperation with the Commission on how the Governance Incentive can be further improved to support democratic governance". The review "clearly emphasises the UK view that ultimately improvements in governance are driven by partner countries' own commitment to reform", this point was, the Minister says, "again reiterated by the Commission and Member States at the EU Development Ministers' Informal Meeting in Prague on 29–30 January 2009 which my colleague Gareth Thomas attended."

4.12 The Minister summarises the main findings and recommendations of the review thus:

"I. Governance Profiles (GPs) generally provide a relevant and accurate analysis and, therefore, are a useful diagnostic tool. However, they do not adequately assess the underlying causes of weak governance, the links between informal institutions and local incentives, nor provide sufficient focus on dimensions of fragility and security. In addition, Member States, including the UK, require more timely consultation in

15 Set out on pages 10–14 of the full General Affairs and External Relations Council Conclusions of 16–17 October 2006; see [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/91351.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/91351.pdf)

16 See headnote: HC 16–v (2007–08), chapter 9 (5 December 2007).

17 And is also available at <http://register.consilium.europa.eu/pdf/en/09/st05/st05504.en09.pdf>

order to provide meaningful input to ensure that GPs are based on shared analysis. The review recommended that the EC and Member States should compile a comprehensive manual on how to prepare and update GPs to give better guidance to EC Delegations.

“II. The Review highlighted that in most cases, the Governance Incentive process has resulted in better integration of governance into cooperation strategies. For example, in the case of Democratic Republic of Congo, the incentive tranche process has contributed to more consistent programming between the Commission, bilateral and other donors. But in other countries, such as Sierra Leone, this integration is less visible.

“III. Governance Action Plans (GAPs) are usually relevant to the problems identified in the GP and are viewed as a constructive basis for reform. However, the Review found that the quality of GAPs is variable, and do not always reflect key documents, most importantly pre-existing government owned governance reform plans, such as contained in Poverty Reduction Strategy papers (PRSPs). The review also suggests, as the UK has done previously, there should be better involvement of in-country civil society and development partners.

“IV. The Review indicates GIT allocation process is not sufficiently transparent. The incentive nature of the financial allocation is also questioned given that the financial significance of the governance incentive tranche is modest. The conclusion on the incentive nature of the Initiative is still tentative as the Annual Operational Review (AOR) in 2009 and Mid Term Review (MTR) in 2010 of EDF 10th have not been completed. In the future, this may mean that there is more expectation that Member States consider the appropriateness of providing additional bilateral resources through their own aid programmes or to the Commission, in the light of the analysis.

“V. The Review states that GIT process has the potential to inform the EU political dialogue on key governance issues. It points to emerging evidence of the GIT leading to deeper commitment by Africa, Caribbean and Pacific (ACP) countries to governance reforms in different areas. For Africa in particular, it has contributed to an enhanced Africa/EU dialogue on governance issues in the framework of the Joint Strategy and Action Plan for 2008–2010. The review suggests it would be opportune to develop a further standard methodology for regular assessment of Government commitments and the incorporation of results of this exercise into political dialogue.

“VI. In summary, the Governance Incentive (the process, the instruments and the tools) is innovative and well adapted to the EU policy approach to supporting democratic governance. But as the review indicates, further improvements are required if its potential is to be maximised.”

4.13 The Minister fully supports the findings, conclusions and recommendations, and says that he will “work with the Commission to ensure that the Governance Initiative process further develops its contribution to a comprehensive approach to aid effectiveness, donor coordination and harmonisation of Member States’ policies, strategies and programmes to support democratic governance.” He agrees that “the tools available, particularly the Governance Profile, offer an opportunity to move beyond “information sharing” and

engage in joint analysis and response in areas of governance, within donor-wide coordinating mechanisms where these exist.”

4.14 He goes on to say that, as noted by the Commission, “there are already some constructive working relationships across the EU at expert level.” The UK “regularly shares its expert knowledge and experience with the EC on political and governance analyses at both central and country level”, and will continue to:

- work jointly with the EC to fine-tune existing tools such as the GP, prepare guidelines on methodology and process of preparing GPs at the country levels for EC Delegations and discuss ways of integrating governance within the 10th EDF methodology for the MTR;
- discuss with the EC the option of expanding joint work to regions other than the ACP countries; and
- work closely with the Commission on the impact assessment of the Governance Initiative and the lessons learnt from the implementation of the existing European Neighbourhood Partnership Governance Facility.<sup>18</sup>

## Conclusion

4.15 **The importance of the link between development and governance is illustrated by the Commission’s experience under the Cotonou Agreement (of which the EDF is the financing vehicle), which we consider in the context of Guinea elsewhere in this Report. As we note there, it is difficult to see that an intensive exercise in linking development and governance — particularly in the enhanced political dialogue process embodied in Article 96 of the Agreement — has yet to bear significant fruit;<sup>19</sup> all that it would appear to have done thus far is to demonstrate, as the Minister puts it, “that ultimately improvements in governance are driven by partner countries’ own commitment to reform”.**

4.16 **We also note there our disappointment that the Minister for Europe seems uninterested in whether or not the 2010 review of the Agreement will address the effectiveness of this much-trumpeted and resource-intensive component of the 2005 revision, and have accordingly asked her to write to us either now, or when it is available, about the proposed process and timetable for the 2010 revision, and to explain why she has not pressed for a proper assessment of the effectiveness of the Article 96 process, and how it might be modified, if it is not part of that process and timetable.**

4.17 **We hope that her DFID counterpart will take a more proactive stance with regard to the related Mid-Term Review of the 10<sup>th</sup> EDF, and the Governance Incentive. As he indicates, this exercise is still very much a work-in-progress. Nonetheless, as he also**

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18 See [http://ec.europa.eu/world/enp/faq\\_en.htm](http://ec.europa.eu/world/enp/faq_en.htm) for details of the European Neighbourhood Policy, including the European Neighbourhood Partnership Governance Facility, which will provide additional EC support, on top of the EC funding amounts already allocated, for those countries who have made most progress in implementing the agreed reform agenda set out in their ENP Action Plan..

19 See chapters 7 and 8 of this Report.

indicates, the Review points up the potential of the GIT process to inform EU political dialogue on key governance issues, including the assessment of government commitments and the incorporation of the results of this exercise into political dialogue — dialogue which is, as we note above, central to the Cotonou Agreement. We look to him to ensure that these issues are covered, and subsequent further developments reported on, when he or any colleague or successor submits an Explanatory Memorandum on the 10<sup>th</sup> EDF Mid-Term Review.

4.18 In the meantime we are reporting this latest information to the House, given the widespread interest in development and governance issues.

## 5 Vehicle type approval

(29713) 10099/08 + ADDs 1–2 COM(08) 316	Draft Regulation concerning type-approval requirements for the general safety of motor vehicles
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<i>Legal base</i>	Article 95 EC; co-decision; QMV
<i>Department</i>	Transport
<i>Basis of consideration</i>	SEM of 3 March 2009
<i>Previous Committee Report</i>	HC 16–xxv (2007–08), chapter 4 (25 June 2008) and HC 19–iv (2008–09), chapter 8 (21 January 2009)
<i>To be discussed in Council</i>	Not known
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared

### Background

5.1 Design and construction standards for motor vehicles in the Community are governed by a framework Directive, at present 70/156/EEC and from 29 April 2009, 2007/46/EC, which updates and repeals the 1970 Directive. The objective is to achieve a single market through harmonised safety and environmental standards, using the concept of type approval. Type approval involves testing prototypes and it ensures that manufacturers are able to produce products in conformity with the type approval. Various aspects of type approval are implemented in Regulations made under the framework Directive.

5.2 A Commission initiative, CARS 21 (Competitive Automotive Regulatory System for the 21st Century), focused on simplification and eliminating unnecessary burdens on industry and recommended in 2006, in its final report,<sup>20</sup> that to simplify the regulatory

20 See <http://ec.europa.eu/enterprise/automotive/pagesbackground/competitiveness/cars21finalreport.pdf>.

system 38 Directives should be replaced by equivalent UN-ECE (United Nations Economic Commission for Europe) Regulations.<sup>21</sup>

5.3 This draft Regulation addresses some of the CARS 21 issues through the repeal and consolidation of approximately 50 Directives. It concerns type approval requirements for the general safety of motor vehicles and environmental impacts of tyres, seeking to simplify the existing Community regulatory structure and introduce certain advanced vehicle safety features and new measures for tyres. And it sets timetables for implementation of the various requirements.

5.4 When we considered this proposal, in June 2008, we said that any simplification of the vehicle type approval process would be useful and to that extent the draft Regulation was welcome. But we noted both various preliminary reservations the Government had outlined to us and the Government's intentions as to further consideration of the policy implications, a public consultation and an impact assessment. So we asked, before considering the proposal further, to hear the outcome of the further consideration, the consultation and the assessment.

5.5 In January 2009 we considered further information from the Government. However we decided that we still needed additional information before concluding our consideration of the document and asked, first, to hear the outcome of the public consultation we had been advised of and to see any resultant revised impact assessment. We asked also for clarification of apparent discrepancies between:

- the Government's latest general support for the draft Regulation and its earlier wish for details on technical standards and the process of simplification and its doubt that the proposal would achieve the simplification it was intended to deliver;
- the latest comment on wet grip limits and the Government's previous observation that there would be no increased safety benefit from the introduction in the draft Regulation of the proposed requirement about these limits; and
- its latest views on lane departure warning systems and advanced emergency braking systems and the different reservations the Government had expressed previously.

And we recalled two further points drawn to our attention when we first considered this proposal, and asked for information on these:

- given that the definition of categories of tyres had omitted a category of vehicle, N1 — goods vehicles of less than 3.5 tonnes gross mass, covered by the existing legislation — the Government would be seeking to have this omission addressed; and
- as reference in the draft Regulation to the design of vehicles intended for the carriage of dangerous goods might not be appropriate, because comparable measures for these vehicles already existed in other Community law, the

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21 (28368) 5746/07 + ADDs 1–2: see HC 41–xviii (2006–07), chapter 13 (25 April 2007).

Government would be seeking clarification from the Commission regarding this issue.

Again the document remained under scrutiny.<sup>22</sup>

## The Government's further view

5.6 In his Supplementary Explanatory Memorandum of 3 March 2009, the Parliamentary Under-Secretary of State, Department for Transport (Jim Fitzpatrick), now tells us that the Czech Presidency has pursued a vigorous programme of working group meetings to enable a first reading agreement to be achieved with the European Parliament. A European Parliament plenary vote on the resultant package is scheduled for its 9–12 March 2009 session and a Council vote is expected to follow shortly after.

5.7 On the first reading package the Minister says:

- regulatory simplification — the text clarifies that manufacturers may demonstrate compliance with component and system requirements using the relevant UN-ECE Regulations and that use also of the proposed General Safety Regulation will not be required;
- tyre noise — the package retains the noise limit values proposed by the Commission but with the addition of derogations for certain types of tyres — reinforced/extra load tyres for passenger cars, all snow tyres and special use tyres for light/medium and for heavy commercial vehicles (tyres for mixed on and off-road use, for example, on trucks serving construction sites). The derogation for passenger car tyres is non-cumulative, meaning an extra load snow tyre gets the same derogation as a snow tyre or as an extra load tyre. Robust definitions of the derogated tyre types, based on their physical and/or performance characteristics, rather than their “intended” use, will be adopted by comitology<sup>23</sup> to prevent abuse of the derogations;
- tyre wet grip limits — the limits proposed by the Commission have been retained without modification. These are based on existing requirements contained in a UN-ECE Regulation that were agreed following extensive negotiations between European governments and the tyre industry;
- tyre rolling resistance — the Commission’s proposed rolling resistance limit values have been retained with the addition of a 1kg/tonne derogation for all snow tyres;
- tyre implementation dates — tyre requirements will be applied to new tyres based on their dates of manufacture instead of the date on which they are placed on the market, as proposed originally by the Commission. This will reduce difficulties

<sup>22</sup> See headnote.

<sup>23</sup> Comitology is the system of committees which oversees the exercise by the Commission of powers delegated to it by the Council and the European Parliament. Comitology committees are made up of representatives of the Member States and chaired by the Commission. There are three types of procedure (advisory, management and regulatory), an important difference between which is the degree of involvement and power of Member States’ representatives. So-called “regulatory procedure with scrutiny”, introduced in July 2006, gives a scrutiny role to the European Parliament in most applications of comitology.

with running down stocks of tyres manufactured prior to the implementation dates. The package allows 30 months from these dates for remaining stocks of older, non-compliant tyres to be sold-off, but gives the Commission powers to reduce this period for some or all types of tyre, if a cost effectiveness analysis supports this;

- tyre pressure monitoring systems — the package clarifies that the aim of these systems is to reduce fuel consumption and carbon dioxide emissions as well as to detect safety-critical deflation (punctures) and states that the systems should be accurate, but that technical specifications should be technology-neutral and allow for a cost-effective approach. (Officials have been involved in discussion on specifications for tyre pressure monitoring systems at recent UN-ECE meetings, seeking accurate systems that maximise carbon dioxide reductions);
- gear shift indicators — these did not form a part of the Commission’s original proposal, but the package requires their fitment on new cars from the same dates as tyre pressure monitoring systems;
- electronic stability control — the package requires new types of cars and vans to be fitted with electronic stability control one year earlier than the original Commission proposal, from October 2011 instead of October 2012. For heavy duty vehicles the electronic stability control implementation dates shall be those specified in the corresponding UN-ECE Regulation;
- advanced emergency braking system — to acknowledge that an advanced emergency braking system may not be cost-effective for all types of heavy commercial vehicles, for example, those engaged in slow moving stop-start operations such as refuse vehicles and inner-city buses, the package gives the Commission powers to adopt derogations for such vehicles on cost-effectiveness grounds. The requirements in the Commission’s proposal, that advanced emergency braking systems voluntarily fitted to cars and vans should comply with the standards required for heavy vehicles, has been deleted because heavy duty standards are unlikely to be appropriate for lighter vehicles. (The Government will engage in UN-ECE discussions to ensure the technical standards for these systems are feasible and appropriate bearing in mind cost and lead time considerations); and
- lane departure warning system — the package gives the Commission powers to adopt derogations on cost-effectiveness grounds for vehicles engaged in slow moving stop-start operations.

5.8 The Minister tells us that the Government’s public consultation ran for four weeks, closing on 4 February 2009, saying that a reduced timescale was necessary to deliver responses which could be considered within the timeframe in which negotiations were being conducted. He attaches to his new Explanatory Memorandum a summary of the consultation responses and the Government’s views on them.<sup>24</sup> He notes that overall, the

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24 See the attachment on the Cabinet Office website for Explanatory Memoranda — <http://europeanmemorandum.cabinetoffice.gov.uk/>.

tyre industry was not supportive of the noise or rolling resistance limit values in the original proposal, but that the proposed first reading deal package does take into account some of their concerns, including derogations for certain types of tyre for noise and rolling resistance and a long sell-off period for old tyres. The Minister says also that respondents raised a number of questions and comments about the costs and benefits which do not affect the Government's overall assessment of the costs and benefits of the proposal. It will, however, address these points in the final impact assessment when the proposed Regulation is transposed into UK law.

5.9 The Minister comments on the first reading deal that, overall, the Government believes it is a good package, which secures the key safety and environmental benefits of the Commission's proposal, whilst providing flexibility for industry in areas such as limit values for specialised tyres and derogations from advanced safety requirements for low-speed vehicles and that the Government will continue to work with the Commission and industry to ensure that the Regulation does provide the expected regulatory simplification. On the details of the package the Minister says that:

- in relation to tyre noise, the derogated tyre types account for a very small proportion of tyre sales, less than five per cent, and the derogations will therefore not significantly reduce the environmental benefits of the proposal. They will, however, provide welcome flexibility to industry for products, which by their fundamental nature, are noisier than normal tyres;
- the Government is pleased that the European Parliament opposed any relaxation of the tyre rolling resistance limit values proposed by the Commission, which the Government supports and which will help mitigate potential increases in fuel consumption of heavy trucks associated with the standard in the draft Regulation on emissions from heavy duty vehicles (Euro VI);<sup>25</sup>
- the 30 month period to sell off remaining stocks of older non-compliant tyres is acceptable to the Government;
- the Government supports mandatory fitment of gear shift indicators to cars, which have the potential to deliver carbon dioxide savings by improving driving style at minimal cost and for the introduction of which industry has already planned;
- the Government supports the requirement to fit electronic stability control to new types of cars and vans one year earlier than in the original Commission proposal, since the dates and requirements are well established and known to industry; and
- the Government will engage in UN-ECE discussions to ensure the technical standards for advanced emergency braking systems are feasible and appropriate bearing in mind cost and lead time considerations.

5.10 The Minister then turns to the clarifications we sought in our last report on this document. He says, in relation to the apparent discrepancy between the Government's general support for the draft Regulation and its earlier wish for details on technical

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25 (29317) 5127/08 + ADDs 1–2: see HC 16–xi (2007–08), chapter 4 (6 February 2008) and HC 16–xxvi (2007–08), chapter 1 (2 July 2008) and *Gen Co Deb*, European Committee, 15 July 2008, cols. 3–20.

standards and the process of simplification and its doubt that the proposal would achieve the simplification it is intended to deliver, that:

- technical standards for electronic stability control systems have now been finalised and those for tyre pressure monitoring systems are in an advanced state of development;
- the Government's impact assessment, attached to the Government's earlier Supplementary Explanatory Memorandum, takes account of these standards in estimating costs and benefits;
- technical standards for advanced emergency braking systems and lane departure warning systems have not yet been developed and it is clear that the draft Regulation will be adopted in advance of these standards — the Government can support this approach, but will engage in the development of these standards to ensure requirements are technically feasible and cost effective;
- on simplification the first reading package, in clarifying that vehicle manufacturers will be able to type-approve, where appropriate, directly to the relevant UN-ECE Regulations, ensures that, in replacing Community Directives with UN-ECE Regulations, as recommended by the CARS 21 initiative, the draft Regulation will not introduce an additional layer of type approval; and
- whilst repealing current Community Directives and replacing them with the equivalent UN-ECE Regulations is a welcome tidying up of existing legislation, and does deliver the CARS21 recommendation, the reduction in administrative burden on manufacturers is relatively small.

5.11 On the apparent discrepancy between the Government's latest comments on wet grip limits and its previous observation that there would be no increased safety benefit from the proposed requirement about these limits the Minister says that:

- this is an issue of the intent of the proposed limit values — the limits were not intended to improve the wet grip performance of existing tyres; and
- they are aimed at ensuring that current wet grip performance is maintained, by requiring UN-ECE Regulation 117 limits, as manufacturers improve noise and rolling resistance performance — the Government supports this safeguard.

5.12 In relation to the apparent discrepancy between the latest Government views on lane departure warning systems and advanced emergency braking systems and the different reservations the Government expressed previously the Minister says that:

- the Government's concern that standards designed with heavy vehicles in mind would not be applicable to light duty vehicles has now been resolved — the first reading package no longer requires systems voluntarily fitted to light duty vehicles to meet standards designed for heavy vehicles; and
- the Government believes that its concerns regarding the Commission's cost effectiveness assessment will be adequately addressed by the requirement in the first reading package that the Commission conduct a cost benefit analysis

considering the application of these systems to the different types of vehicle within categories M2, M3, N2 and N3<sup>26</sup> and adopt derogations where fitting such systems is not cost-effective.

5.13 As for addressing the omission of tyres for N1 vehicles, goods vehicles of less than 3.5 tonnes gross mass, from the tyre categories the Minister says that these tyres are included, in the first reading package, in the C2 tyre category, which is intended for light/medium commercial vehicles. And in relation to the appropriateness of the reference in the draft Regulation to the design of vehicles intended for the carriage of dangerous goods, the Minister says this has been addressed in the first reading package, which clarifies that the specific safety requirements for these vehicles shall be those set out in the relevant UN-ECE Regulation and which are the same requirements are already in the Dangerous Goods Transport Framework Directive, Council Directive 94/55/EC, as amended.

## Conclusion

**5.14 We are grateful to the Minister for his account of where matters now stand in the negotiations on this proposal and the Government's view of the proposed first reading package, for the summary of the outcome of the Government's public consultation and for the clarifications we had sought previously. We have no further questions to ask and now clear the document.**

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<sup>26</sup> Class M are vehicles for carrying passengers, Class N for carrying goods and Class O for trailers. A suffix 1, 2, 3 etc is linked to the size of vehicle — for example, M1 up to 8 passengers or N1 up to 3.5tonnes.

## 6 Rare diseases

(a) (30171) 15775/08 COM(08) 679	Commission Communication — <i>Rare Diseases: Europe's challenges</i>
+ ADDs 1–2	Commission staff working documents: impact assessment and summary of assessment
(b) (30172) 15776/08 COM(08) 726	Draft Council Recommendation on European action in the field of rare diseases
+ ADDs 1–2	Commission staff working documents: impact assessment and summary of assessment

<i>Legal base</i>	(a) — (b) Article 152(4) EC; co-decision; QMV
<i>Department</i>	Health
<i>Basis of consideration</i>	Minister's letters of 19 January and 3 March 2009
<i>Previous Committee Report</i>	HC 19–i (2008–09), chapter 9 (10 December 2008)
<i>To be discussed in Council</i>	June 2009
<i>Committee's assessment</i>	(Both) Legally and politically important
<i>Committee's decision</i>	(Both) Cleared; but further information awaited

### Previous scrutiny of the documents

6.1 When we considered these documents in December, we noted that the Commission's Communication argued for a new Community strategy on rare diseases (such as some diseases of the auto-immune system) because of the difficulties of providing patients with quick and easy access to medical services with the necessary knowledge, expertise and equipment. Document (a) also pointed to the difficulties of organising and financing top-quality research. So the Commission proposed a strategy based on improving the classification of rare diseases and the dissemination of information about them; a common approach by Member States to work on rare diseases; and European cooperation to improve access to high quality care.

6.2 The Commission also proposed a draft Recommendation (document (b)) with the aim of helping and inspiring Member States to adopt the common approach the Commission advocates in the Communication.

6.3 In her Explanatory Memorandum of 25 November 2008, the Minister of State at the Department of Health (Dawn Primarolo) told us that decisions on health priorities and funding must remain with Member States because countries' needs and health systems differ. The Government would support some parts of the proposed Recommendation but

resist others. Moreover, the Minister questioned whether all the provisions of the draft Recommendation complied with the requirement in Article 152(5) of the EC Treaty that Community action on public health must fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care.

6.4 We shared the Minister's doubts about compliance with Article 152(5) and questioned whether it was necessary or desirable to make such detailed recommendations on some of the matters covered in document (b). We asked the Minister to tell us whether other Member States and the Council's Legal Service shared the Government's doubts; and for progress reports on the negotiations.

### The Minister's letter of 19 January 2009

6.5 In her letter of 19 January in response to our request for further information, the Minister said that the Government's concerns were shared by some other Member States and were discussed in December in both the Health Council and the Working Group of officials. The Commission offered to amend the original proposal to take account of Member States' concerns. The revised draft of the Recommendation was expected shortly.

### The Minister's letter of 3 March 2009

6.6 On 3 March, the Minister wrote to us again. She enclosed with her letter a copy of the Presidency's revised draft of the Recommendation. In her view, the Presidency's draft addresses the Government's concerns. For example, it omits wording which in the original draft was over-prescriptive and excessively detailed. The Presidency is expected to circulate a further draft — which is unlikely to differ in substance from the Presidency's current text — and to ask the Health Council to approve it at its meeting in June. The Minister would be happy to send us the new draft when it is circulated.

## Conclusion

**6.7 We are grateful to the Minister for sending us the Presidency's revised draft of the Recommendation and her assessment of it. The revised draft supersedes documents (a) and (b) and so we clear them from scrutiny.**

**6.8 We agree with the Minister that the revised draft removes the objectionable features of the original draft. Crucially, whereas the original contained frequent statements about what Member States "should" do, the revised draft does not tell Member States what to do but, rather, invites them to consider action or to aim to achieve certain outcomes. In our view, the revised draft complies with the terms of Article 152(5) of the EC Treaty.**

**6.9 We note that the Presidency is expected to circulate a further draft. We ask the Minister to deposit it for scrutiny as soon as it is circulated and to provide an Explanatory Memorandum on it in the usual way.**

## 7 Breach of Cotonou Agreement by Republic of Guinea

(a) (26227) 16041/04 COM(04) 804	Draft Council Decision concluding consultations with Guinea under Article 96 of the Cotonou Agreement
(b) (29544) 7499/08 COM(08) 138	Draft Council Decision amending Decision 2005/321/EC concluding the consultation procedure with the Republic of Guinea under Article 96 of the Cotonou Agreement

<i>Legal base</i>	Articles 9 and 96 of the Cotonou Agreement; QMV
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	Minister's letter of 28 November 2008 and 5 March 2009
<i>Previous Committee Report</i>	(a) HC 38–iv (2004–05), chapter 13 (19 January 2005) and HC 34–xiv (2005–06), chapter 18 (11 January 2006) (b) HC 19–i (2008–09), chapter 16 (10 December 2008); HC 16–xx (2007–08), chapter 13 (30 April 2008) and HC 16–xviii (2007–08), chapter 12 (2 April 2008)
<i>Discussed in Council</i>	31 January 2005 and 14 April 2008 General Affairs and External Relations Councils
<i>Committee's assessment</i>	Politically important
<i>Committee's decision</i>	Cleared (reported on 10 December 2008); further information provided and requested

### Background

7.1 The Cotonou Agreement<sup>27</sup> provides the framework for relations between the EU and 77 countries of Africa, the Caribbean and the Pacific (ACP). It is based on five interdependent pillars:

- a comprehensive political dimension;<sup>28</sup>
- participatory approaches;
- a strengthened focus on poverty reduction;
- a new framework for economic and trade cooperation; and

27 See [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm) for full information on the Cotonou Agreement.

28 Reproduced at Annex 1 of this chapter of our report.

— a reform of financial cooperation.

7.2 Article 96 provides for consultations between the EU and an ACP State if the ACP State is considered to be in breach of an “essential element” of the agreement (respect for human rights and fundamental freedoms, as set out in Article 9 of the Agreement). If no remedy is found, “appropriate measures” may be taken including, as a last resort, total or partial suspension of the Agreement.

7.3 On 30 March 2004 the European Union decided to open Article 96 consultations with the Government of Guinea (GOG). This decision (which our predecessors cleared on 17 December 2003) was taken because of the deterioration of democracy and the rule of law, failure to respect human rights and fundamental freedoms and the lack of good economic governance, culminating in the December 2003 presidential elections, held in contentious conditions and without real electoral competition — so much so that the regional African body, ECOWAS, refused to monitor them in order to avoid giving them legitimacy.

### Council Decision 2005/321/EC

7.4 This Council Decision contained a letter from the EU to the GOG, saying that Article 96 consultations were now to be concluded and that the measures specified had been adopted as appropriate within the meaning of Article 96(2)(c) of the Cotonou Agreement. The GOG gave certain undertakings including:

- i) a return to democracy through resumption of dialogue with the traditional opposition and civil society, including revision of the electoral arrangements; and holding local and parliamentary elections based on the new electoral arrangements in June 2005 and June 2007 respectively;
- ii) upholding the Constitution and the law, so guaranteeing respect for human rights and fundamental freedoms, including the rights of political parties to organise, meet, demonstrate and speak in public; launching discussion on a legal framework for liberalisation of the airwaves;
- iii) promoting decentralisation; and
- iv) enhancing macroeconomic management and implementing sectoral reforms.

7.5 Late in 2004, a joint Presidency/Member States/Commission implementation evaluation found some positive first signs; however, as the then Minister for Europe at the Foreign and Commonwealth Office (Mr Denis MacShane) explained, most of the GOG undertakings were to be implemented, and needed to be monitored, over an extended period. So, an enhanced political dialogue would be conducted over a 36-month period, with the EU Presidency and the Commission carrying out bi-annual evaluations. In accordance with Articles 9 and 96 of the Cotonou Agreement, the Commission accordingly proposed, and the 31 January 2005 GAERC adopted, a letter concluding the consultations and beginning this period of enhanced dialogue and monitoring.

7.6 In clearing the Decision on 19 January 2005, the then Committee noted that, while they did not judge the opening of consultations as of sufficient political importance to warrant a substantive Report to the House, they considered that their closure, and the beginning of a

three-year process that would, in many ways, indicate the practicability of the “conditionality” approach enshrined in the Cotonou process — assistance accompanied by, but not in the absence of, democratic progress — warranted a Report to the House.

7.7 They also asked the Minister to inform the Committee of the outcome of each of the periodic evaluations and to give his view on it.<sup>29</sup>

7.8 In January 2006, the then Minister for Europe (Mr Douglas Alexander) informed the Committee that an evaluation report (which was consistent with reporting from the British Embassy in Dakar, which covers Guinea-Bissau) had concluded that the major GOG commitment — to organise free and fair elections — had been met. But the measures in the field of economy and public finances had not been sufficient, and much remained to be done with regard to the fight against corruption, independence of the judiciary and restoration of civilian control over the armed forces; all in all, the political situation in the country remained fragile, and the Government believed that “focused and intensive dialogue between the EU and Guinea-Bissau authorities” should continue.

7.9 While not wishing to labour the point, the then Committee said that it had expected a somewhat fuller report from the Minister — more information on the elections, and how they were judged to be free and fair; and the extent to which progress had been made, or was yet to be made, in the other key areas and why. The Committee noted that these were all areas in which success, or failure, in Guinea Bisseau might well have much wider lessons, or repercussions, and not just for the Cotonou Process but also European Security and Defence Policy; a number of other countries in the region were similarly challenged, against a background in which the inter-relationship between development, security and good governance was now widely acknowledged. The Committee also said that it would also have expected a fuller exposition of the Minister’s views on progress so far than the single sentence at the end of his letter, and asked for the next such report to be somewhat more comprehensive and analytical.<sup>30</sup>

## The second Council Decision

7.10 In his Explanatory Memorandum of 26 March 2008, the then Minister for Europe at the Foreign and Commonwealth Office (Mr Jim Murphy) explained that this proposed amendment would extend the Article 96 monitoring period for a further 12 months. He described the proposal as “a safety mechanism in order to prevent a potential legal void if the Council decides to extend the Guinea monitoring period at short notice.” He noted that the ACP Working Group in Brussels on 1 April would make a recommendation “taking into consideration developments on the ground up until 31 March, a report from the joint Commission/Presidency mission to Conakry and views from partners.” He described the Commission’s proposal as “a sensible precaution for now”, and said that he could agree to maintain Article 96 monitoring for a further 12 months; if, he continued, “further discussions planned for 1 April result in a recommendation that Guinea has made sufficient progress to proceed to the next stage (Article 8)”, he would “update” the

29 See headnote: (26227) 16041/04: HC 38–iv (2004–05), chapter 13 (19 January 2005).

30 HC 34–xiv (2005–06), chapter 18 (11 January 2006).

Committee “as necessary.” We had no wish to hold up the proceedings, and therefore cleared the proposed amendment.

7.11 However, the Minister made no mention of the Commission’s own Explanatory Memorandum attached to draft amendment, in which it made clear that the political process in the intervening years had been decidedly mixed, with flawed local elections; the authorisation of private radio stations in August 2006, and a consensus at the end of the year on a framework for parliamentary elections (which seemed to have led the EU to decide to make available envelope A of the 9<sup>th</sup> EDF, some €85.8 million); then more setbacks in 2007, involving strikes, the violent repression of peaceful demonstrations (with between 138 and 183 dead and over 1500 wounded) and the postponement of the June 2007 parliamentary elections several times, with no official date yet fixed. We found it odd, therefore, to see the reason for this extension portrayed as to prevent a legal void; and hard to see a basis upon which a recommendation might be made “that Guinea has made sufficient progress to proceed to the next stage (Article 8)” — whatever that next stage was, about which the Minister said nothing.

7.12 The Committee also noted that it had heard nothing from him or his predecessors about developments since January 2006 and would have found it particularly interesting to have known the basis upon which the decision was made to release EDF9 funds in 2006, and asked the Minister for an explanation.<sup>31</sup>

7.13 In his letter of 25 April 2008, the then Minister for Europe:

- explained the process of transfer to Article 8 dialogue following completion of the review period of procedures under Article 96: political dialogue under Article 8 being the normal state of relations between the EU and the ACP countries, involving intensified dialogue between the two parties if the political situation in an ACP country deteriorates, with the aim of resolving the situation and avoiding initiation of Article 96 consultations; even when Article 96 consultations do take place, political dialogue under Article 8 continues; when the EU decides to end Article 96 consultations, intensified political dialogue under Article 8 continues to monitor progress on the commitments made before the normal state of affairs/dialogue between the EU and the ACP is resumed;
- supported the Council Decision to extend the review period of procedures under Article 96, other improvements notwithstanding, because of the delay in a key requirement of the original Council Decision, viz., setting a date for the parliamentary elections;
- apologised that neither his predecessors nor he had written about the evaluation missions, as requested by the Committee in January 2005, and detailed the findings of four such missions between May 2005 and March 2008 (which are set out in our previous Report);<sup>32</sup> and

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31 Ditto: HC 16–xviii (2007–08), chapter 12 (2 April 2008).

32 See headnote: HC 16–xx (2007–08), chapter 13 (30 April 2008)

— explained that three key reports (EU Heads of Mission report of 23 October 2006, Commissioner Michel’s report of his visit to Guinea of 25 October 2006, and the report by the EU Presidency Special Representative for the Mano River Union of 21 November 2006) had concluded that sufficient progress had nonetheless been made to meet the conditions for implementation of the 9<sup>th</sup> EDF.

7.14 In thanking the then Minister for his comprehensive response, the Committee noted that the Commission itself described the Cotonou Agreement as “a global and exemplary agreement”, within which the political dimension, and particularly respect for human rights and fundamental freedoms, plainly has a central position; hoped that the next twelve months would see the Guinea authorities finally arrange free and fair elections, and thus enable the political dialogue between them and the EU to return to a more normal basis; and asked the then Minister to ensure that we were informed of the outcome of any further evaluations.<sup>33</sup>

### **The Minister’s letter of 28 November 2008**

7.15 In her letter of 28 November 2008, the Minister for Europe (Caroline Flint) informed the Committee that the October 2008 Council/Commission monitoring mission had found little subsequent progress on the reform agenda. President Conté had dismissed the consensus Prime Minister Lansana Kouyaté in May leading to protests and strikes, although these had since died down; the new Prime Minister, Dr Ahmed Tidiane Souré, had done little so far to move Guinea towards legislative elections, which were due under the constitution by December but would not take place on time. A number of reforms and preparations for the elections had been delayed; as a result the GOG claimed the elections could be held before the end of March 2009. On the positive side, the media continued to be free and open and there was good access to international media. Subsequent EU action had included a joint Council/Commission letter to the Prime Minister of Guinea outlining the EU’s continuing concerns and offering increased support to the electoral process; a joint EU/ECOWAS statement expressing concern with the political, social and economic situation in Guinea; and agreement with EU partners that “we should consider carefully the disbursement of 10<sup>th</sup> EDF funding in the light of the current situation.” A further monitoring mission would visit Guinea in February 2009.

7.16 We looked forward to hearing from the Minister after the next monitoring mission. We asked for detailed information on what had been decided with regard to the disbursement of 10<sup>th</sup> EDF funding. We also noted that the achievements of the “focused and intensive dialogue between the EU and Guinea-Bissau authorities”, now a year after the original three year process was extended, remained far from encouraging, particularly with regard to fulfilling the key undertaking given by the Guinea authorities — to arrange free and fair national elections. We therefore asked the Minister for her assessment of the effectiveness of the Article 96 process, at least in the context of Guinea, or more widely if this was possible.

7.17 If this wider assessment was not available, we asked when the Council and the Commission proposed to carry out such an assessment, given that it had now been in

operation for some years, had involved a very large input of human and other resources but, on the surface at least, appeared to have had very limited influence on the subsequent developments in the countries subjected to it.<sup>34</sup>

## **The Minister's letter of 9 March 2009**

7.18 The Minister divides her letter into two parts:

### ***Disbursement of 10<sup>th</sup> EDF***

The Minister says that no decision has yet been taken on the disbursement of the 10<sup>th</sup> EDF:

“Prior to the military coup in Guinea on 23 December 2008 a joint Council and Commission letter was sent to the former Prime Minister of Guinea on 10 November explaining that the disbursement of the 10th EDF would be tied to the holding of elections.

“The UK, however, will not support disbursement of the 10th EDF whilst a military regime remains in de facto charge of the country. This would obviously not affect any humanitarian assistance and the Africa, Caribbean and Pacific (ACP) Working Group in Brussels has agreed that Envelope B could, subject to agreement from member states, be made available to support elections.”

### ***Effectiveness of the Article 96 Process***

With regard to her assessment of the effectiveness of the Article 96 process, both in Guinea and more widely, the Minister says:

“The European Union made clear its condemnation of the coup d’etat in Guinea in December. This was a major internal political development within Guinea and it is clear that Article 96 proceedings alone could not prevent it. However, the influence and leverage that Cotonou buys the EU is far greater than any leverage that the UK might have bilaterally.

“The essential elements of the Cotonou agreement; human rights, rule of law and democracy are vital to development and the achievement of the Millennium Development Goals. Article 96 provides a way to demonstrate the importance attached to these essential elements. This is perhaps most clearly illustrated in the fact that Article 96 has always been used in instances of coup d’etats.

“In the case of Guinea, the Article 96 process has delivered real positive steps including liberalisation of the airwaves, greater political dialogue and the formation of an independent electoral committee. It is notable that these developments have often taken place in the lead up to or even during visits by the EU monitoring mission. However, as you are aware, neither we nor the EU were content with the speed of the reforms and the EU had written to the former Prime Minister in

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34 See headnote: HC19–i (2008–09), chapter 16 (10 December 2008).

November expressing these concerns and notifying him that disbursement of the 10<sup>th</sup> EDF could not take place without progress on elections.

“Article 96 has been invoked on 11 occasions since the coming into force of the Cotonou agreement. There has been wide divergence amongst the circumstances that have led to article 96 consultations and the responses to both the call for consultations and any following appropriate measures. There has been most coherence in respect to coup d’états.

“There is a consensus that Article 96 has been an effective tool in response to coup d’états, which has been confirmed in a 2007 study commissioned by the Commission.<sup>35</sup> Article 96 provides a useful way to engage with ACP states following a coup, and in providing a framework and timetable in which to establish a route to democratisation. It also provides an opportunity for critical feedback to be communicated in the democratisation process through the review processes.

“In cases other than coup d’états it is more difficult to draw firm conclusions as the situations are so varied. However, overall Article 96 has been effective in its role as part of a partnership agreement with the ACP countries, and in providing an opportunity to facilitate intensified political dialogue and frameworks for action to be initiated and implemented in partnership.

“This was demonstrated in Togo (2004) when it was the Togolese government who initiated Article 96 proceedings as they sought a route to normalise relations with the EU. This led to a 22 point framework and timetable that eventually led to a resumption of normal relations.

“Even where outcomes are not as demonstrably effective Article 96 does provide a useful forum for engagement with ACP governments that would not otherwise exist. Also whilst Article 96 is primarily an avenue for negotiation and facilitation, it can play a useful role in conjunction with the EU sanctions procedures in ensuring comprehensive and coherent actions on the part of the EU.

“The UK has played an active part in striving for greater effectiveness of Article 96, both in respect to coup d’états and other breaches of the essential elements. Our views helped shape the amendments to Article 8 and 96 in the 2005 Cotonou revision. We believe that these amendments provide the opportunity for a more effective political dialogue with ACP countries, which is vital for sustainable development and meeting the MDGs. We will continue to work with the EU to improve the effectiveness of the implementation of Article 96 (and Article 8) in the future.

“You also asked whether the Council and Commission proposed to carry out a review of the effectiveness of the Article 96 process. It is not known at present if and when the Council or Commission intends to undertake such a review. The Cotonou agreement is due to be revised in 2010 and this may lead to a further review of Article

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35 Laakso, L. Kivimäki, T. & Seppänen, M. 2007 Evaluation of Coordination and Coherence in the Application of Article 96 of the Cotonou Partnership Agreement. (Studies in European Development Co-operation Evaluation — initiated by EU-HES)

96 either formally in a commissioned study, or informally through debates in the ACP working group.”

## Conclusion

7.19 The Cotonou Agreement is clear: respect for human rights, democratic principles and the rule of law are essential elements of the partnership. On the Agreement website, the Commission characterises the revision of the political components in 2005 as “strengthening the political dimension by placing greater emphasis on effective dialogue and results”. Against the yardstick set out in those last four words, and despite the Minister’s valiant efforts to the contrary, it is difficult to find much persuasive evidence that the Article 96 process has had much significant success in facilitating sustained democratic development. After over five years engagement in Guinea, the country would seem to be no nearer than it was then to a functioning democratic and law-based society. We consider the consequences of the latest setback in a separate chapter of this report.<sup>36</sup>

7.20 In the meantime, we find it disheartening that, despite there being only a limited academic study thus far, the Minister seems uninterested in whether or not the 2010 review of the Agreement will address the effectiveness of a much-trumpeted and resource-intensive component of the 2005 revision. We accordingly ask her to write to us either now, or when it is available, about the proposed process and timetable for the 2010 revision, and to explain why she has not pressed for a proper assessment of the effectiveness of Article 96 process, and how it might be modified, if it is not part of that process and timetable.

## Annex 1: The political dimension of the Cotonou Agreement

### *“Emphasis on the key role of political dialogue*

Dialogue should allow ACP and EC to address all issues of mutual concern and to ensure consistency and increased impact of development cooperation.

It will be conducted in a flexible manner: within and outside the institutional framework, at national, regional or ACP level.

### *Peace-building policies, conflict prevention and resolution*

Dialogue and cooperation strategies will address peace-building policies and conflict prevention. The partnership will focus in particular on regional initiatives and the strengthening of local capacities.

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<sup>36</sup> See (30466): 6543/09 at chapter 8 of this Report.

### Essential Elements

Respect for human rights, democratic principles and the rule of law are essential elements of the partnership.

A new procedure has been drawn up to deal with violations. It puts more emphasis on the responsibility of the State concerned and allows for greater flexibility in the consultation process. In cases of special urgency — serious violations of one of the essential elements — measures will be taken immediately and the other party notified.

### Good governance

Commitment to good governance as a fundamental and positive element of the partnership, a subject for regular dialogue and an area for active Community support.

The EC and the ACP have also agreed on a new specific procedure to be launched in serious cases of corruption. This is a real innovation, both in the EC-ACP context and in international relations. It is not confined to EC activities. It will be applied in cases of corruption involving EDF money and more widely, in any country where the EC is financially involved and where corruption constitutes an obstacle to development. This is a very important aspect, as public finance constitutes a whole, regardless of the source of finance; corruption involving other sources of financing therefore indirectly affects EDF funding. The EC and the ACP States are together sending a clear and positive signal to European taxpayers and investors, and legitimate beneficiaries of aid.”

## 8 Further breach of Cotonou Agreement by Republic of Guinea

(30446)  
6543/09  
COM(09) 76

Commission Communication on opening consultations with Guinea under Article 96 of the Cotonou Agreement

<i>Legal base</i>	Articles 9 and 96 of the Cotonou Agreement; QMV
<i>Department</i>	Foreign and Commonwealth Office
<i>Basis of consideration</i>	EM of 4 March 2009
<i>Previous Committee Report</i>	None; but see (26227) 16041/04 and (29544) 7499/08: HC 19–x (2008–09), chapter 7 (11 March 2009)
<i>Discussed in Council</i>	31 January 2005 and 14 April 2008 General Affairs and External Relations Councils
<i>Committee’s assessment</i>	Politically important
<i>Committee’s decision</i>	Cleared; further information requested

## Background

8.1 The Cotonou Agreement<sup>37</sup> provides the framework for relations between the EU and 77 countries of Africa, the Caribbean and the Pacific (ACP). It is based on five interdependent pillars:

- a comprehensive political dimension;
- participatory approaches;
- a strengthened focus on poverty reduction;
- a new framework for economic and trade cooperation; and
- a reform of financial cooperation.

8.2 Article 96 provides for consultations between the EU and an ACP State if the ACP State is considered to be in breach of an “essential element” of the agreement (respect for human rights and fundamental freedoms, as set out in Article 9 of the Agreement). If no remedy is found, “appropriate measures” may be taken including, as a last resort, total or partial suspension of the Agreement.

8.3 On 30 March 2004 the EU decided to open Article 96 consultations with the Government of Guinea (GOG). This decision (which our predecessors cleared on 17 December 2003) was taken because of the deterioration of democracy and the rule of law, failure to respect human rights and fundamental freedoms and the lack of good economic governance, culminating in the December 2003 presidential elections, held in contentious conditions and without real electoral competition — so much so that the regional African body, ECOWAS, refused to monitor them in order to avoid giving them legitimacy.

8.4 Subsequent developments are set out in our consideration of two subsequent Council Decisions, which in 2005 began and in 2008 further extended a process of extended political dialogue and progress monitoring. At the beginning of this process, the GOG gave certain undertakings including:

- i) a return to democracy through resumption of dialogue with the traditional opposition and civil society, including revision of the electoral arrangements; and holding local and parliamentary elections based on the new electoral arrangements in June 2005 and June 2007 respectively;
- ii) upholding the Constitution and the law, so guaranteeing respect for human rights and fundamental freedoms, including the rights of political parties to organise, meet, demonstrate and speak in public; launching discussion on a legal framework for liberalisation of the airwaves;
- iii) promoting decentralisation; and
- iv) enhancing macroeconomic management and implementing sectoral reforms.

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37 See [http://ec.europa.eu/development/geographical/cotonouintro\\_en.cfm](http://ec.europa.eu/development/geographical/cotonouintro_en.cfm) for full information on the Cotonou Agreement.

8.5 The 12-month extension resulted from decidedly mixed political progress in the intervening years. Then, last December, the Minister for Europe reported that the reform agenda continued to be stalled, particularly with regard to fulfilling the key undertaking given by the Guinea authorities — to arrange free and fair parliamentary elections — and noted that the next monitoring mission would be in February 2009.<sup>38</sup>

## The Commission Communication

8.6 In her Explanatory Memorandum of 4 March 2009, the Minister for Europe at the Foreign and Commonwealth Office (Caroline Flint) explains that the Communication concerns opening consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement following the military coup d'état of 23 December 2008.

8.7 The Minister says that:

- a bloodless military coup took place then following the death of President Conté after a long illness, when a military junta calling itself the National Council for Democracy and Development (CNDD) seized power and its leader, Captain Moussa Dadis Camara, declared himself President of Guinea;
- the CNDD has suspended the Constitution, dissolved the National Assembly and banned all political and trade union activity;
- the coup has received widespread popular support in Guinea. Following 24 years of President Conte's rule many sought change. In justifying its actions the CNDD has promised to root out corruption, update the Constitution and manage elections before the end of 2010;
- the coup has however been strongly condemned by the majority of the international community;
- the EU Presidency issued a statement on 23 December immediately calling on all parties to respect the Guinean Constitution in the interests of the people and country in order to ensure a peaceful transition and the rapid organisation of free and transparent elections;
- on 31 December the UK supported a further EU Presidency statement which condemned all seizure of power by force and called for:
  - presidential and legislative elections in Guinea by June 2009;
  - a civilian interim government to be set up and led by a civilian Prime Minister exercising full executive power;
  - the CNDD to become more representative of society, acting as an advisory body only, and to disband at the elections;
  - CNDD members not to stand in elections; and

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<sup>38</sup> See headnote: (26227) 16041/04 and (29544) 7499/08, at chapter 7 of this Report.

- teams already in place at the Ministry and National Independent Electoral Committee responsible for arranging elections to remain in their positions.
- the EU also expressed its support for the positions of the African Union (AU) and Economic Community of West African States (ECOWAS), both of whom have suspended Guinea from their memberships.

8.8 The Communication outlines the results of the 14–16 January 2009 EU Monitoring Mission. It recalls that, before the coup, the EU had been monitoring Guinea’s progress against a number of benchmarks agreed by the previous regime during Article 96 consultations concluded in 2005. The 14–16 January mission met with senior figures in the interim government and CNDD, including the self-declared President, as well as with members of political parties, trade unions, civil society, and the Independent National Electoral Commission. It reported mixed progress on the EU’s calls of 31 December: an end-June date for elections did not look promising but the prospects for elections by the end of 2009 were better; the junta had appointed Mr Kabiné Komara, a civilian international banker, as the new interim Prime Minister on 30 December; however, as Mr Komara’s selection of Ministers for the transitional government comprised one third military personnel, many in key dossiers and members of the CNDD, the CNDD continued to hold the reins of power. The Mission reported its belief that international engagement could result in changes. However, the Prime Minister seemed weak and lacking influence on many of the “transition parameters”. The slow registration of voters was worrying and reflected a lack of capacity. Political parties and unions remained banned.

8.9 The monitoring mission recommended:

- opening new Article 96 consultations with Guinea before the end March 2009
- pressing for a roadmap for elections during continued reinforced dialogue
- incorporating in the consultations certain consensual benchmarks such as:
  - creating an international contact group on Guinea including the EU, AU, ECOWAS and UN;
  - reinforcing EU and member states’ technical and financial assistance to the electoral process and to evaluate the Independent Electoral Commission’s capacities;
  - ensuring macroeconomics respect the good governance criteria and coherence with the benchmarks of the Poverty Reduction and Growth Facility.

8.10 The Commission is now proposing that the Commission and the Council send a joint letter inviting the Republic of Guinea to hold consultations under Article 96 of the Cotonou Agreement, and asks the Council to agree a draft letter attached in an Annex.

## The Government's view

8.11 In her Explanatory Memorandum, the Minister describes the military coup as a serious breach of the essential elements of the Cotonou Agreement:

“Cotonou had Article 96 put in it to deal with just these sorts of cases and there is no alternative for the EU other than to open new Article 96 consultations as a matter of urgency if it wants the Cotonou provisions to be taken seriously.”

8.12 The Minister says that:

- the draft letter has been discussed by partners at the African, Caribbean and Pacific (ACP) Working Group in Brussels and amendments agreed;
- the letter will now be jointly addressed to the President of the CNDD as well as to the Prime Minister of the Transitional Government; and
- the UK asked that language on elections is put at the forefront of the list for the transition road map, which needs to be detailed and specific, and that language is also included pointing out that updating the legal framework should not delay elections.

8.13 The Minister expects the Communication “to go to the General Affairs and External Relations Council on 16 March.” She supports the recommended response:

“Article 96 consultations will allow the EU to put pressure on the Guinean leadership to restore constitutional order and ensure a peaceful democratic transition. The EU has made its position clear, which we support, that elections should take place this year. Notwithstanding the Article 96 talks the EU should make it clear that it stands ready to help fund the elections to a significant degree.”

8.14 Looking ahead, the Minister says that the EU is a member of the International Contact Group for Guinea (ICG-G) which was set up during the AU Summit in February and includes, among others, members from the AU, ECOWAS, EU and UN; and the transition road map the Commission proposes to discuss with the Guinean authorities during Article 96 consultations reflects the position of the ICG-G.

## Conclusion

**8.15 The Committee has taken a particular interest in the Article 96 process in Guinea Bissau because the undertakings given by the GOG were all in areas in which success, or failure, might well have much wider lessons, or repercussions, not just for the Cotonou Process but also European Security and Defence Policy; a number of other countries in the region are similarly challenged, against a background in which the inter-relationship between development, security and good governance was now widely acknowledged.**

8.16 As we have noted elsewhere, the Cotonou Agreement is clear: respect for human rights, democratic principles and the rule of law are essential elements of the partnership, with the Commission characterising the revision of the political components in 2005 as “strengthening the political dimension by placing greater

emphasis on effective dialogue and results”; against the yardstick set out in those last four words, it is difficult to find much persuasive evidence that the Article 96 process has, to use the Ministers words, led to the Cotonou provisions being taken seriously — after over 5 years of Article 96 engagement, Guinea would seem to be no nearer than it was then to a functioning democratic and law-based society.<sup>39</sup>

8.17 Time alone will tell whether the apparently wider process now being established will be any more successful. In the fullness of time, we assume that, as before, a Council Decision will be forthcoming on concluding these consultations, with the adoption of further benchmarks and monitoring. However, before then, we should like a report from the Minister, before the summer recess, on what has been agreed and what progress has been made; we should particularly like to know if elections are put at the forefront of a detailed and specific transition road map (and pointing out that updating the legal framework should not delay elections) and how many of the mission’s recommendations have been implemented.

8.18 We now clear the document.

## 9 Common Frame of Reference

(28847) 12269/07 COM(07) 447	Second Commission Progress Report on the Common Frame of Reference
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<i>Legal base</i>	—
<i>Department</i>	Ministry of Justice
<i>Basis of consideration</i>	Minister’s letter of 28 February 2009
<i>Previous Committee Report</i>	HC 41–xxxvi (2006–07), chapter 13 (24 October 2007)
<i>To be discussed in Council</i>	n/a
<i>Committee’s assessment</i>	Legally and politically important
<i>Committee’s decision</i>	Cleared (decision reported on 24 October 2007).

### Background

9.1 The Common Frame of Reference (“CFR”) project explores ways of studying private law throughout the EU either as means to providing a so-called ‘tool-box’ for the drafting and interpretation of legislation or as a way of harmonising private law throughout the EU, mainly in the area of contract law. The project can be traced back to the early 1980s when the Commission on European Contract Law (also referred to as the “Lando Commission”) was set up and received funding from the Legal Services of the European Commission.

39 See (26227) 16041/04 and (29544) 7499/08 at chapter 7 of this Report.

This group published the Principles of European Contract Law (“PECL”), a set of general contract law rules in three parts, between 1995 and 2003.<sup>40</sup> The PECL were based on comparative and evaluative studies of the contract laws of the EU Member States and of other national and international contract law systems.

9.2 In 1998 another group of academics was established, the Study Group on a European Civil Code (“Study Group”). This group set out to draft the Principles of European Law (“PEL”). It employed the same comparative methodology as the Lando Commission, but the scope of the PEL was designed to be much broader than that of the PECL. Apart from rules for the general law of contract, the PEL were also supposed to cover the law relating to specific types of contracts (sales, leases etc), extra-contractual obligations (tort, unjustified enrichment, *negotiorum gestio*) and fundamental issues regarding the law on assets other than immovable assets (transfer of title, security for credit etc.). The results have been published in eight volumes since 2006<sup>41</sup> and work on the PEL is scheduled to be completed in 2009.

9.3 In February 2003 and October 2004, the European Commission published two further documents promoting improvements in the coherence of the EC consumer *acquis* and outlining the elaboration of a Common Frame of Reference (“CFR”).<sup>42</sup> In May 2005 the “Joint Network on European Private Law” (also called “CoPECL Network of Excellence”) was established, following the grant of substantial funding by the European Commission under the Sixth Framework Programme for research and technological development. The Joint Network undertook to deliver a draft proposal for a CFR by 2007. It comprises several universities, institutions and other organizations from all over Europe.

9.4 The “Interim Outline Edition” of the Draft Common Frame of Reference (“DCFR”) was published in December 2007 and is the result of the work of two of the academic groups that are members of the Joint Network. The final version of the DCFR is currently scheduled for publication in March 2009.

## The purpose of the DCFR

9.5 There remains uncertainty about the ultimate purposes of the final CFR. The project was originally initiated by a group of academics but it has been funded partly by the European Commission and was recently endorsed by the European Parliament. The European Commission in particular never clarified its approach to the possible uses of the project. On the one hand, the CFR is meant to be a “toolbox” for the revision and the improvement of the consumer law *acquis*, setting forth the general principles of contract law, establishing a common legal terminology and providing some model rules. On the other hand, the CFR might also serve as a blueprint for a future European contract law that

40 O Lando and H Beale (eds), *Principles of European Contract Law: Parts I and II, Combined and Revised*. Prepared by the European Commission on Contract Law (2000); O Lando et al (eds), *Principles of European Contract Law: Part III* (2003). A full version of the PECL is available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/](http://frontpage.cbs.dk/law/commission_on_european_contract_law/)

41 See, for example, *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts* (PEL CAFDC), prepared by M Hesselink et al (2006); *Principles of European Law: Sales* (PEL S), prepared by E Hondius et al (2008).

42 European Commission, Communication to the European Parliament and the Council — A more coherent European Contract Law: An Action Plan, COM(2003) 68, OJ 2003 C 63/1; European Commission, Communication to the European Parliament and the Council — European Contract Law and the revision of the *acquis*: the way forward, COM(2004) 651 final.

could be enacted in the form of an “Optional Instrument”, an additional contract law regime that would be placed at the disposal of the parties. The tension between these twin aims has never been resolved by the Commission or by the authors of the DCFR.

9.6 In scope and content the interim version of the DCFR, as published in 2007, clearly goes beyond a “toolbox” for a revision of the *acquis*, and could serve as the basis for a blueprint of a draft European Civil Code in the area of patrimonial law. Such a Code, however, is not currently advocated by any of the European Institutions or by any Member State, and so does not appear to be a realistic political option.

9.7 Nor does it seem at present as if the CFR will take the form of an instrument harmonizing in Europe the whole field of contract law. The Commission in particular appears to have retracted from its earlier more ambitious position.<sup>43</sup> The Commission’s more modest recent position appears to be shared by the Council of Ministers. It defined its position on four fundamental aspects of the CFR at the meeting of the Justice and Home Affairs Council of 18 April 2008:<sup>44</sup>

- a) Purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers;
- b) Content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources;
- c) Scope of the Common Frame of Reference: general contract law including consumer contract law; and
- d) Legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.

### The structure of the DCFR

9.8 The DCFR is divided into ten Books. Very broadly speaking, its basic structure follows that of the main Continental civil codes, which are divided into a first general part and a second part which contains the specific provisions. Book I contains a small number of “General Provisions” on the scope of application and the interpretation of the DCFR. It also provides some definitions and refers to the long list of definitions in Annex I to the DCFR. Books II and III contain those rules that will mostly be relevant for the CFR. They deal with general rules of contract law (e.g. formation and breach), but also with rules that are relevant for other kinds of obligations (e.g. set-off and limitation periods). Books IV-X deal with the law relating to specific types of contracts, *negotiorum gestio*, tort, unjust enrichment, ownership in movables, proprietary security rights and trusts. The ‘Interim Online Edition’ does not yet contain the last three Books and still has gaps in the Book on specific contracts.

43 See the statements of Commissioner M Kuneva in the European Parliament debate of 1 September 2008.

44 Council of the European Union, Press Release: 2863rd Council meeting, Justice and Home Affairs, Luxembourg, 18 April 2008, 8379/08 (Presse 96), p 18.

9.9 When we cleared the Commission’s second progress report on the CFR project in October 2007, we requested that the Minister keep the Committee informed of relevant further developments. Following publication of the interim DCFR the Government commissioned a report from Professor Simon Whittaker of Oxford University to provide a critical assessment of the content and possible roles of the DCFR. The Parliamentary Under-Secretary of State at the Ministry of Justice (Lord Bach) wrote on 10 December 2008, attaching a copy of Professor Whittaker’s report in its entirety.

9.10 Professor Whittaker’s report focuses on the usefulness of the DCFR as a means for improving the content and quality of EC legislation, and tries to assess its likely effect on the development of ‘European contract law’ and to explain how such a development would relate to and affect English contract law. Amongst the report’s observations the following may be mentioned:

- The coverage of the subject-matter of the DCFR is very broad and goes well beyond the topics necessary to regulate contracts in general and consumer contracts.
- The DCFR does not appear to be consistent in its use of the term “principle”, nor in its approach to how “principles” relate to rules.
- The DCFR was not designed and is not suitable to be used as either a “tool-box” or an “optional instrument” because of its complexity and interpretative uncertainty.
- As a compromise between different legal traditions and systems the DCFR necessarily deviates from English contract law in a number of respects. These include the English doctrine of conversation and the parole evidence rules for which the DCFR contains no equivalent provisions, the relatively broad scope in the DCFR of the doctrine of mistake and for the conferral of contractual rights on third parties, the general availability of the remedy of specific performance, and the broad scope of the principle of “good faith and fair dealing” throughout the DCFR.

9.11 Although we cleared the document some time ago, we decided that the contents of the Report merited a further full report to the House and to ask the Minister to clarify the Government’s position in relation to a number of issues raised by the Professor’s study.

### **The Minister’s Letter**

9.12 The Minister has now written again and in his letter of 28 February 2009 replies to the Committee’s questions as follows:

“At the European Scrutiny Committee meeting on 28 January, a number of questions were raised on the Common Frame of Reference. I shall attempt to respond to these. The Committee has asked whether the Government agrees with Professor Whittaker’s assessment that the DCFR is more suitable as a basis for the codification of private law throughout the EU than as a toolbox for legislators and courts. The Government agrees that the DCFR resembles a code for private law but we have always made it clear that we do not endorse the development of a European code of contract law. The DCFR is exceedingly complex and inflexible and, as Professor Whittaker’s analysis highlights, its coverage goes beyond the mere regulation of general and consumer contract, the latter of which has, in essence, been

the basis of the CFR project. Although it contains some matters that could be significant between contracting parties, it also contains other matters that bear no direct relationship to contracts or contract law. Professor Whittaker’s analysis endorses the Government’s view that the DCFR is not suitable as a toolbox for EC legislators. The CFR, or political CFR, yet to be created by the Commission, will hopefully take a very different form and be more akin to the toolbox approach sought from it.

“The Committee has also asked whether the Government favours narrowing the scope of the CFR to serve as the basis for recasting the Community acquis in specific areas of law such as EC Consumer law. To respond to this question, the CFR (or political CFR) needs first to be distinguished from the DCFR. The UK, like the majority of other Member States, considers that any political CFR should be a non-binding toolbox. The European Commission is considering which parts of the DCFR will be useful in forming the political CFR. The Commission has, however, given an assurance that it will be consulting widely on what should be included.

“The Council has of course previously considered the purpose, content and scope of the CFR and reached some general conclusions in 2008. These relate to the:

“Purpose of the CFR: the Council has agreed that this should be a tool for better lawmaking targeted at Community lawmakers.

“Content of the CFR: the CFR should consist of three linked elements: definitions, general principles and model rules forming an inter-related whole to be derived from a variety of sources not just the academic DCFR. The content of the CFR should fully respect national legal traditions.

- Scope of the CFR: the CFR should include general contract law, including consumer contract law, with the possibility of including further special contracts later.
- The legal effect of the CFR: the CFR should be a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process. The Council and the European Parliament should be involved in the process of creating the CFR.

“Given the proposed scope of the political CFR set by the Council, it is reasonable to assume that those parts of the DCFR that are predominantly about contract law, will be the first on the Commission’s list of useful subjects. However, the DCFR is a complex and tightly-knit document. It will be difficult to extract those parts wanted and find a coherent text that will provide appropriate guidelines to legislators. There will be a considerable amount of work to do to turn a putative private law code, that is the DCFR, into a toolbox or set of non-binding guidelines for legislators.

“The Committee has asked for my (the Government’s) views on the legal basis for a harmonising instrument of limited scope, in particular whether Article 95 of the EC Treaty would be the most appropriate legal base and that following the Tobacco Advertising case that any legislation on this basis would have to contribute to

eliminating obstacles to free movement, or to removing appreciable distortions of competitions.

“The Government’s expectation is that the political CFR will not be a measure that will require legality in terms of a formal Treaty basis, although it remains the Government’s intention to keep this under review. We anticipate that the CFR may take the form of an inter-Institutional agreement but precisely what form this will be is not yet clear. This type of “soft law” agreement, however, normally involves the consensus of the Council, Commission and the European Parliament and has been devised as an informal means of improving law making within the Community.”

## Conclusion

**9.13 We thank the Minister for his detailed reply to the our questions in relation to Professor Whittaker’s report. We note the Government’s consistent opposition to the development of a European code of contract law and to any foreseeable EU legislation which could give full legal effect to the Common Frame of Reference.**

**9.14 We ask the Minister to keep us informed of all further developments, in particular in the event that the Government should decide to review or rethink its present position concerning the appropriate function and legal status of the Common Frame of Reference, but have no further questions at this stage.**

## 10 Documents not raising questions of sufficient legal or political importance to warrant a substantive report to the House

### Department for Environment, Food and Rural Affairs

(30289) Commission Communication: *Towards a coherent strategy for a*  
17489/08 *European Agricultural Research Agenda.*  
+ ADD 1  
COM(08) 862

### Office for National Statistics

(30428) Commission Report on the implementation of Regulation (EC) No.  
6233/09 450/2003 of the European Parliament and of the Council of 27  
COM(09) 33 February 2003 concerning the labour cost index (LCI).

### Department for Transport

(30448) Draft Decision of the Council and the representatives of the  
6621/09 Governments of the Member States of the European Union, meeting  
COM(09) 62 within the Council on the signature and provisional application of the  
Air Transport Agreement between the European Community and its  
Member States and Canada.  
Draft Decision of the Council and the representatives of the  
Governments of the Member States of the European Union, meeting  
within the Council on the conclusion of the Air Transport Agreement  
between the European Community and its Member States and  
Canada.

### Department for Work and Pensions

(30450) Amended Draft Directive on the protection of workers from the risks  
6688/09 related to exposure to asbestos at work (codified version).  
COM(09) 71

# Formal minutes

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**Wednesday 11 March 2009**

Members present:

Michael Connarty, in the Chair

Mr William Cash	Kelvin Hopkins
Mr James Clappison	Mr Bob Laxton
Jim Dobbin	Angus Robertson
Mr Greg Hands	Mr Anthony Steen
Mr David Heathcoat-Amory	

## **1. Scrutiny of Documents**

Draft Report, proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 10 read and agreed to.

*Resolved*, That the Report, be the Eleventh Report of the Committee to the House.

*Ordered*, That the Chairman make the Report to the House.

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[Adjourned till Wednesday 18 March at 2.30pm.]

## Standing order and membership

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

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

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

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

### Current membership

Michael Connarty MP (*Labour, Linlithgow and East Falkirk*) (Chairman)  
 Mr Adrian Bailey MP (*Labour/Co-op, West Bromwich West*)  
 Mr David S. Borrow MP (*Labour, South Ribble*)  
 Mr William Cash MP (*Conservative, Stone*)  
 Mr James Clappison MP (*Conservative, Hertsmere*)  
 Ms Katy Clark MP (*Labour, North Ayrshire and Arran*)  
 Jim Dobbin MP (*Labour, Heywood and Middleton*)  
 Mr Greg Hands MP (*Conservative, Hammersmith and Fulham*)  
 Mr David Heathcoat-Amory MP (*Conservative, Wells*)  
 Keith Hill MP (*Labour, Streatham*)  
 Kelvin Hopkins MP (*Labour, Luton North*)  
 Mr Lindsay Hoyle MP (*Labour, Chorley*)  
 Mr Bob Laxton MP (*Labour, Derby North*)  
 Angus Robertson MP (*SNP, Moray*)  
 Mr Anthony Steen MP (*Conservative, Totnes*)  
 Richard Younger-Ross MP (*Liberal Democrat, Teignbridge*)