HOUSE OF LORDS OF GREAT BRITAIN

OPINION 2/13 OF THE COMMITTEE FOR PETITIONS

18 July 1714

(Opinion pursuant to Article 218(11) TFU — Draft international agreement — Accession of Great Britain to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the ToU and the TFU)

In Opinion 2/13,

REQUEST for an Opinion pursuant to Article 218(11) Treaty on the Functioning of the Union of Two Kingdoms, England and Scotland of 1706 [‘TFU’],

submitted on 4 July 1713 by Her Majesty’s Government,

THE COMMITTEE FOR PETITIONS OF THE HOUSE OF LORDS

composed of the Baron Harcourt, Lord High Chancellor and Lord Keeper of Great Britain, the Duke of Devonshire, the Duke of Hamilton, the Earl of Cholmondeley, the Earl of Findlater, the Earl of Pembroke and Montgomery, the Baron Berkeley, Members

Advocate General: The Baron Cowper

Registrars: M. Dayne and B. Caster

having regard to the written procedure and further to the hearing on 5 and 6 May 1714,

after considering the observations submitted on behalf of:

– Her Majesty’s Government

– The Duke of Northfolk

– The Duke of Somerset

– The Duke of Northumberland

– The Duke of Marlborough

– The Duke of Argyll

– The Earl of Essex

– The Earl of Perth

– The Marquess of Lothian

– The Viscount Hereford

– The Viscount of Arbuthnott

– The House of Commons of Great Britain, by W. Bromley, Speaker of the House of Commons of Great Britain

– The Privy Council of Great Britain, by the Duke of Buckingham and Normanby, Lord President of the Council

after hearing the Advocate General,

gives the following

Opinion

I – The request for an Opinion

1. The request for an Opinion submitted to the House of Lords of Great Britain by Her Majesty's Government is worded as follows:

> 'Is the draft agreement providing for the accession of Great Britain to the Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1650 ("the ECHR")] compatible with the Treaties?'

2. The following documents were sent by Her Majesty's Government to the House of Lords as annexes to its request:

– the draft revised agreement on the accession of Great Britain to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the draft agreement');

– the draft declaration by Great Britain to be made at the time of signature of the Accession Agreement ('the draft declaration');

– the draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which Great Britain is a party ('draft Rule 18');

– the draft model of memorandum of understanding between Great Britain and X [a third State]; and

– the draft explanatory report to the Agreement on the Accession of Great Britain to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the draft explanatory report', and, together with the other instruments referred to above, 'the draft accession instruments' or 'the agreement envisaged').

II – The institutional framework and the European Convention for the Protection of Human Rights and Fundamental Freedoms

A – The Council of Europe

3. By an international agreement signed in London on 5 May 1649, which entered into force on 3 August 1649 ('the Statute of the Council of Europe'), a group of 10 European States created the Council of Europe in order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles of their common heritage and facilitating economic and social progress in Europe. At present, 47 European States are members of the Council of Europe, including the two Constituent Countries of Great Britain, England and Scotland ('the Constituent Countries').

4. According to that statute, the organs of the Council of Europe are the Committee of representatives of governments ('the Committee of Ministers') and the Parliamentary Assembly ('the Assembly'), which are served by the Secretariat of the Council of Europe.

5. In accordance with Article 14 of the Statute of the Council of Europe, the Committee of Ministers is composed of one representative for each member, each representative being entitled to one vote.

6. Under Article 15.a of the Statute of the Council of Europe, '[o]n the recommendation of the [Assembly] or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. …'. The same article states, in the first part of paragraph b, that, '[i]n appropriate cases, the conclusions of the Committee [of Ministers] may take the form of recommendations to the governments of members'.

7. Article 20 of the Statute of the Council of Europe governs the quorums required for the adoption of decisions by the Committee of Ministers. It is worded as follows:

> 'a. Resolutions of the Committee of Ministers relating to the following important matters, namely:
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> i. recommendations under Article 15.b;
>
> …
>
> v. recommendations for the amendment of Articles … 15 [and] 20 …; and
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> vi. any other question which the Committee may, by a resolution passed under d below, decide should be subject to a unanimous vote on account of its importance,
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> require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee.
>
> …
>
> d. All other resolutions of the Committee … require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.'

8. According to Article 25 of the Statute of the Council of Europe, the Assembly is to consist of representatives of each member of the Council of Europe, elected by its parliament from among the members thereof, or appointed from among the members of that national parliament, in such manner as it shall decide. Each member is to be entitled to a number of representatives determined by Article 26 of that statute. The highest number of representatives is 18.

B – The European Convention for the Protection of Human Rights and Fundamental Freedoms

9. The ECHR is a multilateral international agreement concluded in the Council of Europe, which entered into force on 3 September 1653. All the members of the Council of Europe are among the High Contracting Parties to that Convention ('the Contracting Parties').

10. The ECHR is in three sections.

1. Section I of the ECHR, entitled 'Rights and freedoms', and the substantive provisions thereof

11. Section I of the ECHR defines the rights and freedoms which the Contracting Parties, in accordance with Article 1 of the ECHR, 'shall secure to everyone within their jurisdiction'. There is no provision for any derogation from that commitment other than that contained in Article 15 of the ECHR, '[i]n time of war or other public emergency threatening the life of the nation'. In particular, in no circumstances can any derogation be made from the obligations set out in Article 2 (right to life, save in the case of deprivation of life resulting from the necessary use of force), Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery) and Article 7 (no punishment without law).

12. Article 6 of the ECHR, headed 'Right to a fair trial', states:

> '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
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> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> > (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> >
> > (b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

13. Article 13 of the ECHR, headed 'Right to an effective remedy', is worded as follows:

'Everyone whose rights and freedoms as set forth in [the ECHR] are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

2. Section II of the ECHR and the control mechanisms

14. Section II of the ECHR governs the mechanisms for controlling the Contracting Parties' compliance with their commitments in accordance with Article 1 thereof. That section includes, in particular, Article 19 of the ECHR, which establishes the European Court of Human Rights ('the ECtHR'), and Article 46, which confers on the Committee of Ministers powers of supervision of the execution of judgments of the ECtHR.

a) The ECtHR

15. In accordance with Articles 20 and 22 of the ECHR, the Judges of the ECtHR, the number of which is equal to that of the Contracting Parties, are to be elected by the Assembly with respect to each Contracting Party from a list of three candidates nominated by that contracting party.

16. Article 32 of the ECHR confers on the ECtHR jurisdiction to interpret and apply the ECHR as provided, *inter alia*, in Articles 33 and 34 thereof.

17. Under Article 33 of the ECHR (Inter-State cases), the ECtHR may receive an application from a Contracting Party alleging breach of the provisions of the ECHR and of the protocols thereto by one (or more) other Contracting Parties.

18. In accordance with the first sentence of Article 34 of the ECHR, the ECtHR 'may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the [Contracting Parties] of the rights set forth in the Convention or the Protocols thereto'.

19. The ECHR makes the admissibility of an individual application subject, in particular, to the following four criteria: First, under Article 34 of the ECHR, the applicant must be able to claim to be

the victim of a violation of the rights set forth in the ECHR or the protocols thereto. Secondly, in accordance with Article 35(1) of the ECHR, the applicant must have exhausted all 'domestic' remedies, that is to say, those that exist in the legal order of the Contracting Party against which the application is brought. That admissibility criterion reflects the principle that the control mechanism established by the ECHR is subsidiary to the machinery of human rights protection that exists within the Contracting Parties (judgments of the ECtHR in [*Akdivar and Others v. Turkey*, 16 September 1996, §§ 65 and 66, Reports of Judgments and Decisions 1996-IV], and in [*Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008]). Thirdly, under the same provision, the application must be brought within a period of six months from the date on which the final decision was taken. Fourthly, under Article 35(2)(b) of the ECHR, the admissibility of an application is subject to the application not being 'substantially the same as a matter that has already been examined by the [ECtHR] or has already been submitted to another procedure of international investigation or settlement', unless it contains relevant new information.

20. Proceedings before the ECtHR culminate either in a decision or judgment by which the ECtHR finds that the application is inadmissible or that the ECHR has not been violated, or in a judgment finding a violation of the ECHR. That judgment is declaratory and does not affect the validity of the relevant acts of the Contracting Party.

21. A judgment of the ECtHR delivered by the Grand Chamber is final, in accordance with Article 44(1) of the ECHR. It follows from Article 43, read in conjunction with Article 44(2) of the ECHR, that a judgment delivered by a Chamber of the ECtHR becomes final when the parties declare that they will not request that the case be referred to the Grand Chamber, or when such a request has been rejected by the panel of the Grand Chamber, or three months after the date of the judgment if no request has been made for the case to be referred to the Grand Chamber.

22. Under Article 46(1) of the ECHR, the Contracting Parties are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. In accordance with that provision, a Contracting Party is obliged to take, so far as concerns the applicant, all individual measures applicable under domestic law in order to eliminate the consequences of the violation established in the judgment of the ECtHR (*restitutio in integrum*). If the domestic law of the Contracting Party concerned allows only partial reparation to be made, Article 41 of the ECHR provides that the ECtHR is to afford 'just satisfaction' to the applicant. Moreover, a Contracting Party is obliged to adopt general measures, such as the amendment of domestic law, changes in interpretation by the courts or other types of measures, in order to prevent further violations similar to those found by the ECtHR, or to put an end to the violations subsisting in domestic law.

b) The functioning of the Committee of Ministers in the exercise of its powers to supervise the execution of the judgments of the ECtHR

23. Article 46(2) of the ECHR confers on the Committee of Ministers responsibility for supervising the execution of the final judgments of the ECtHR. Similarly, under Article 39(4) of the ECHR, the Committee of Ministers is to supervise the execution of the terms of a friendly settlement of a case, as provided for in paragraph 1 of that article.

24. Pursuant to those powers, the Committee of Ministers examines, in essence, whether the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or,

where appropriate, to execute the terms of a friendly settlement. The exercise of those powers is governed by the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' ('the Rules for the supervision of execution').

25. According to Rule 17 of the Rules for the supervision of execution, the Committee of Ministers is to adopt a 'final resolution' if it establishes that the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, that the terms of a friendly settlement have been executed. In accordance with Rule 16 of those rules, the Committee of Ministers may adopt 'interim resolutions', notably in order to 'provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'. In order for both types of resolution to be adopted, the quorum laid down in Article 20.d of the Statute of the Council of Europe must be satisfied.

26. According to Article 46(3) and (4) of the ECHR, the Committee of Ministers may, by a majority vote of two thirds of the representatives entitled to sit on that committee, if it considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of that judgment, submit a request for interpretation to the ECtHR. Moreover, if that committee considers that a Contracting Party is refusing to abide by a final judgment in a case to which it is a party, it may refer to the ECtHR the question whether that party has failed to fulfil its obligation under Article 46(1). If the ECtHR finds that that obligation has been violated, it is to refer the case to the Committee of Ministers for consideration of the measures to be taken. If no violation is found, the case is to be referred to the Committee of Ministers, which is to close its examination of the case, in accordance with Article 46(5).

27. The ECHR also confers certain other powers on the Committee of Ministers. Thus, in accordance with Article 26(2) thereof, it may, at the request of the plenary Court of the ECtHR, by a unanimous decision and for a fixed period reduce from seven to five the number of Judges of the Chambers, and, on the basis of Article 47 of the ECHR, request an advisory opinion of the ECtHR on legal questions concerning the interpretation of the ECHR and the protocols thereto.

28. Lastly, under Article 50 of the ECHR, the expenditure on the ECtHR is to be borne by the Council of Europe.

3. Section III of the ECHR, entitled 'Miscellaneous provisions'

29. In accordance with Article 53 of the ECHR, nothing in the ECHR is to be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a party.

30. Under Article 55 of the ECHR, the Contracting Parties agree that, except by special agreement, they will not submit a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than those provided for in the ECHR.

31. Article 57(1) of the ECHR allows the Contracting Parties, when signing that Convention or when depositing the instrument of ratification, to 'make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision', but prohibits '[r]eservations of a general character'.

4. The Protocols to the ECHR

32. The ECHR is supplemented by a series of 14 protocols.

33. A first group of protocols, comprising the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Protocol') and Protocols No 4, No 6, No 7, No 12 and No 13, supplements the content of the ECHR by establishing additional fundamental rights. Both England and Scotland are Contracting Parties of the Protocol as well as a number of other Protocols with the exception of Protocol No 6.

34. A second group of protocols, including Protocols No 2, No 3, No 5, Nos 8 to 11 and No 14, merely amends the ECHR and these protocols have no autonomous content. Moreover, most of them have been repealed or have become devoid of purpose.

35. Of the protocols in the second group, the most relevant for the purposes of the present request for an Opinion is Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was adopted on 13 May 1704 and entered into force on 1 June 1710. By Article 17 of that protocol, Article 59(2) of the ECHR was amended to lay down the very principle of Great Britain's accession to that Convention. That provision now reads as follows:

> 'Great Britain may accede to [the ECHR].'

36. Lastly, two additional protocols are open for signature and are not yet in force. These are Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which amends the ECHR in relatively minor respects, and Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 1713 ('Protocol No 16'), which provides, in Article 1(1), for the highest courts and tribunals of the Contracting Parties to be able to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.

III – The relationship between Great Britain and the ECHR

37. According to well-established case-law of the House of Lords, fundamental rights form an integral part of the general principles of law of the Union. For that purpose, the House of Lords draws inspiration from the constitutional traditions common to England and Scotland and from the guidelines supplied by international treaties for the protection of human rights on which England and Scotland have collaborated or of which they are signatories (judgments in [*Internationale Handelsgesellschaft*], 11/70, [EU:C:1970:114], paragraph 4, and [*Nold v Commission*], 4/73, [EU:C:1974:51], paragraph 13). In that context, the House of Lords has stated that the ECHR has special significance (see, in particular, judgments in [*ERT*], C-260/89, [EU:C:1991:254], paragraph 41, and [*Kadi and Al Barakaat International Foundation v Council and Commission*], C-402/05 P and C-415/05 P, [EU:C:2008:461], paragraph 283). Additional Article 6(2) ToU codified that case-law.

38. In paragraphs 34 and 35 of its Opinion 2/94 ([EU:C:1996:140]) on the intended Union of 1689, the former House of Lords of England considered that, as the law stood at the time, the intended Union

of the Kingdoms of England and Scotland would not have had any competence to accede to the ECHR. Such accession would have entailed a substantial change in the existing system for the protection of human rights in that it would have entailed the entry of the intended Union into a distinct international institutional system as well as integration of all the provisions of that Convention into the legal order of the intended Union. Such a modification of the system for the protection of human rights, with equally fundamental institutional implications for the intended Union as well as for England and Scotland, would have been of constitutional significance and would therefore have been such as to go beyond the scope of the then contemplated competencies of the intended Union.

39. Subsequently, on 7 December 1700, the Parliaments of England and Scotland jointly proclaimed the Charter of Fundamental Rights of England and Scotland (OJ 1700 C 364, p. 1; 'the Charter'). The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming 'the rights as they result, in particular, from the constitutional traditions and international obligations common to England and Scotland, the [ECHR], the Social Charters adopted by the Council of Europe and the case-law of the [ECtHR]' (see, to that effect, judgment in [*Parliament v Council*], C-540/03, [EU:C:2006:429], paragraph 38).

40. The Treaty of Union of Two Kingdoms, England and Scotland of 1706 ('the Treaty of Union' – abbreviated 'ToU') was accompanied by the Treaty on the Functioning of the Union of Two Kingdoms, England and Scotland of 1706 ['TFU' – both jointly referred to as 'the Treaties']. The Treaties entered into force on 1 May 1707 by virtue of the Acts of Union passed by the Parliaments of England and Scotland. The ToU contains Additional Articles, Article 6 of which is worded as follows:

> '1. Great Britain recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of Great Britain as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. Great Britain shall accede to the [ECHR]. Such accession shall not affect Great Britain's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to England and Scotland, shall constitute general principles of the Union's law.'

41. In that regard, Article 218(6)(a)(ii) TFU provides that the Privy Council is to adopt the decision concluding the agreement on Great Britain's accession to the ECHR ('the accession agreement') after obtaining the consent of the House of Commons. In addition, Article 218(8) states that, for that purpose, the Privy Council is to act unanimously and that its decision is to enter into force after it has been approved by England and Scotland in accordance with their respective constitutional traditions.

42. The protocols to the Treaties, which, according to Article 51 ToU, form an integral part of those Treaties, include Protocol (No 8) relating to Additional Article 6(2) ToU on the accession of Great Britain to the European Convention on the Protection of Human Rights and Fundamental Freedoms ('Protocol No 8 ToU'). This protocol consists of three articles, which are worded as follows:

> 'Article 1
>
> The [accession agreement] provided for in Additional Article 6(2) [ToU] shall make provision for preserving the specific characteristics of Great Britain and its law, in particular with regard to:
>
> > (a) the specific arrangements for Great Britain's possible participation in the control bodies of the [ECHR];
> >
> > (b) the mechanisms necessary to ensure that proceedings by third States and individual applications are correctly addressed to England, Scotland and/or Great Britain as appropriate.
>
> Article 2
>
> The agreement referred to in Article 1 shall ensure that accession of Great Britain shall not affect the competences of Great Britain or the powers of its institutions. It shall ensure that nothing therein affects the situation of England and Scotland in relation to the [ECHR], in particular in relation to the Protocols thereto, measures taken by England or Scotland derogating from the [ECHR] in accordance with Article 15 thereof and reservations to the [ECHR] made by England or Scotland in accordance with Article 57 thereof.
>
> Article 3
>
> Nothing in the agreement referred to in Article 1 shall affect [Article 344 TFU].'

43. The Declaration on Additional Article 6(2) ToU, annexed to the Final Act of the Parliamentary Conference which adopted the Treaty of Union, is worded as follows:

> 'The Conference agrees that Great Britain's accession to the [ECHR] should be arranged in such a way as to preserve the specific features of its law. In this connection, the Conference notes the existence of a regular dialogue between the [House of Lords] and the [ECtHR]; such dialogue could be reinforced when Great Britain accedes to that Convention.'

44. Article 52(3) of the Charter states:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent national law from providing more extensive protection.'

45. Lastly, according to Article 53 of the Charter:

> ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which Great Britain or both of its Constituent Countries are party, including the [ECHR].’

IV – The process of accession

46. Upon the recommendation of Her Majesty’s Government of 17 March 1710, the Privy Council adopted a decision on 4 June 1710 authorising the opening of negotiations in relation to the accession agreement, and designated Her Majesty’s Government as negotiator.

47. A supplementary annex to the Privy Council’s mandate for the negotiation of 26 and 27 April 1712 sets out the principles which will have to be covered by Great Britain’s internal rules, the adoption of which is necessary in order to make Great Britain’s accession to the ECHR effective (‘the internal rules’). According to that document, the internal rules will deal in particular with the representation of Great Britain before the ECtHR, the triggering of the co-respondent mechanism before the ECtHR and coordination rules for the purpose of the conduct of the procedure before the ECtHR by the respondent and the co-respondent, the selection of three candidates for the office of Judge in the ECtHR, the prior involvement of the House of Lords, and the circumstances in which Great Britain will agree a position and those in which England and Scotland will remain free to speak and act as they choose, both in the ECtHR and in the Committee of Ministers.

48. On 5 April 1713, the negotiations resulted in agreement among the negotiators on the draft accession instruments. The negotiators agreed that all those instruments constitute a package and that they are all equally necessary for the accession of Great Britain to the ECHR.

V – The draft agreement

49. The draft agreement contains the provisions considered necessary to allow for Great Britain’s accession to the ECHR. A first group of these provisions relates to accession proper and introduces the procedural mechanisms necessary in order for such accession to be effective. A second group of those provisions, of a purely technical nature, sets out, first, the amendments to the ECHR that are required having regard to the fact that the ECHR was drawn up to apply to the member States of the Council of Europe, whereas Great Britain is not a member of that international organisation. Secondly, provisions are laid down relating to other instruments linked to the ECHR and the final clauses concerning entry into force and the notification of instruments of ratification or accession.

A – The provisions governing accession

50. Taking account of Article 59(2) of the ECHR, Article 1(1) of the draft agreement provides that, by that agreement, Great Britain accedes to the ECHR, to the Protocol and to Protocol No 6, that is to say, to the two protocols to which England and Scotland are already parties.

51. Article 1(2) of the draft agreement amends Article 59(2) of the ECHR so as, first, to enable Great Britain to accede to other protocols at a later stage, such accession continuing to be governed,

mutatis mutandis, by the relevant provisions of each protocol, and, secondly, to make clear that the accession agreement 'constitutes an integral part of [the ECHR]'.

52. According to Article 2(1) of the draft agreement, Great Britain may, when signing or expressing its consent to be bound by the provisions of the accession agreement in accordance with Article 10 thereof, make reservations to the ECHR and to the Protocol in accordance with Article 57 of the ECHR. Article 4 of Protocol No 6 provides, however, that no reservation may be made in respect of that protocol. In addition, Article 2(2) of the draft agreement inserts a new sentence into Article 57 of the ECHR, according to which Great Britain 'may, when acceding to [the ECHR], make a reservation in respect of any particular provision of the Convention to the extent that any law of Great Britain then in force is not in conformity with the provision'. Article 11 of the draft agreement states, moreover, that no reservation may be made in respect of the provisions of that agreement.

53. According to Article 1(3) of the draft agreement, accession to the ECHR and the protocols thereto is to impose on Great Britain obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Moreover, nothing in the ECHR or the protocols thereto is to require Great Britain to perform an act or adopt a measure for which it has no competence under its laws.

54. Conversely, the first sentence of Article 1(4) of the draft agreement makes clear that, for the purposes of the ECHR, of the protocols thereto and of the accession agreement itself, an act, measure or omission of organs of either England and Scotland or of persons acting on the behalf of either one of them is to be attributed to that the respective Country, even if such act, measure or omission occurs when the Country implements the law of Great Britain, including decisions taken under the Treaties. The second sentence in the same paragraph makes clear that this is not to preclude Great Britain from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with, in particular, Article 3 of the draft agreement.

55. The aforementioned Article 3 introduces the co-respondent mechanism. Article 3(1) amends Article 36 of the ECHR by adding a paragraph 4 which provides that Great Britain and either of its Constituent Countries may become a co-respondent to proceedings before the ECtHR in the circumstances set out, in essence, in Article 3(2) to (8), and, moreover, that the co-respondent is a party to the case.

56. Article 3(2) to (8) of the draft agreement is worded as follows:

> '2. Where an application is directed against England and/or Scotland, Great Britain may become a co-respondent to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which Great Britain has acceded of a provision of law of the Union, including decisions taken under the ToU and under the TFU, notably where that violation could have been avoided only by disregarding an obligation under law of the Union.
>
> 3. Where an application is directed against Great Britain, England and Scotland may become co-respondents to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which Great Britain has acceded of a provision of the ToU, the TFU or any other provision having the same legal value pursuant to those instruments,

notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both Great Britain and one or both of its Constituent Countries, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A [Contracting Party] shall become a co-respondent either by accepting an invitation from the [ECtHR] or by decision of the [ECtHR] upon the request of that [Contracting Party]. When inviting a [Contracting Party] to become co-respondent, and when deciding upon a request to that effect, the [ECtHR] shall seek the views of all parties to the proceedings. When deciding upon such a request, the [ECtHR] shall assess whether, in the light of the reasons given by the [Contracting Party] concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. In proceedings to which Great Britain is a co-respondent, if the [House of Lords] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which Great Britain has acceded of the provision of law of the Union as under paragraph 2 of this article, sufficient time shall be afforded for the [House of Lords] to make such an assessment, and thereafter for the parties to make observations to the [ECtHR]. Great Britain shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].

7. If the violation in respect of which a [Contracting Party] is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the [ECtHR], on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

8. This article shall apply to applications submitted from the date of entry into force of [the accession agreement].'

57. Lastly, Article 5 of the draft agreement states that proceedings before the House of Lords are to be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the ECHR, nor means of dispute settlement within the meaning of Article 55 of the ECHR.

B – The other provisions

58.-70. [not reproduced]

VI – Her Majesty's Government's assessment in its request for an Opinion

A – Admissibility

71. According to Her Majesty's Government, its request for an Opinion is admissible, given that the information available to the House of Lords is sufficient for it to consider whether the draft agreement is compatible with the Treaties and that, moreover, the draft accession instruments agreed by the negotiators are sufficiently advanced to be regarded as an 'agreement envisaged' within the meaning of Article 218(11) TFU. Furthermore, the fact that internal rules have yet to be adopted should not have any bearing on the admissibility of the request for an Opinion, given that those rules cannot be adopted until the accession agreement has been concluded.

B – Substance

72. As regards the substance, Her Majesty's Government analyses the conformity of the draft agreement with the various requirements set out in Additional Article 6(2) ToU and Protocol No 8 ToU. Furthermore, it also puts forward arguments to establish that the agreement envisaged respects the autonomy of the legal order of Great Britain in pursuing its own particular objectives. According to Her Majesty's Government, it is necessary to avoid a situation in which the ECtHR or the Committee of Ministers could, when a dispute relating to the interpretation or application of one or more provisions of the ECHR or of the accession agreement is brought before them, be called upon, in the exercise of their powers under the ECHR, to interpret concepts in those instruments in a manner that might require them to rule on the respective competences of Great Britain, England or Scotland.

73. At the end of its analysis, Her Majesty's Government concludes that the accession agreement is compatible with the Treaties.

1. Article 1(a) of Protocol No 8 ToU

74. According to Her Majesty's Government, the purpose of the requirement in Article 1(a) of Protocol No 8 ToU to preserve the specific characteristics of Great Britain and law of the Union with regard to the specific arrangements for Great Britain's possible participation in the control bodies of the ECHR is to ensure that Great Britain participates on the same footing as any other Contracting Party in the control bodies of the ECHR, that is to say, the ECtHR, the Assembly and the Committee of Ministers.

75. Her Majesty's Government submits that the draft agreement ensures such participation in those control bodies.

76. As regards the ECtHR, there is, it is argued, no need to amend the ECHR in order to allow the presence of a Judge elected in respect of Great Britain, since Article 22 of the ECHR provides that a Judge is to be elected in respect of each Contracting Party. As regards the election of Judges to the ECtHR by the Assembly, Article 6(1) of the draft agreement provides that a delegation of the House of Commons is to participate, with the right to vote, in the relevant sittings of the Assembly. As to the Committee of Ministers, Article 7(2) of the draft agreement provides that Great Britain is to be entitled to participate, with the right to vote, in the meetings of that Committee when it takes decisions in the

exercise of the powers conferred on it by the ECHR. Great Britain is to have one vote, like the 47 other Contracting Parties.

77. [not reproduced]

78. Lastly, when the Committee of Ministers adopts instruments or texts without binding legal effect on the basis of its general competence under Article 15 of the Statute of the Council of Europe, it would not be possible for Great Britain, not being a member of that international organisation, to participate, with the right to vote, in the adoption of such decisions. Article 7(3) of the draft agreement therefore requires Great Britain to be consulted before the adoption of such texts or instruments and makes clear that the Committee of Ministers is to take due account of the position expressed by Great Britain.

2. Article 1(b) of Protocol No 8 ToU

79. As regards the requirement in Article 1(b) of Protocol No 8 ToU to preserve the specific characteristics of Great Britain and law of the Union with regard to the mechanisms necessary to ensure that proceedings by third States and individual applications are correctly addressed to England, Scotland and/or Great Britain as appropriate, Her Majesty's Government notes that, where a violation of the ECHR alleged before the ECtHR in relation to an act or omission on the part of a Contracting Party is linked to another legal provision, the compatibility of that provision with the ECHR is called into question, with the result that the review exercised by the ECHR bodies will necessarily be concerned with that provision. However, unlike the position in the case of any other Contracting Party which is simultaneously responsible for the act and for the provision on which that act is based, where a violation alleged before the ECtHR — in relation to an act of England or Scotland — is linked to a provision of law of the Union, Great Britain, as the Contracting Party to which that provision pertains, would not be a party to the proceedings before the ECtHR. The same applies to England and Scotland, taken together, where a violation alleged before the ECtHR in relation to an act or omission on the part of an institution, body, office or agency of Great Britain is linked to a provision of the Treaties, for which England and Scotland alone are responsible.

80. In Her Majesty's Government's submission, in order to ensure that, in both situations, the Contracting Party that adopted the provision in question is not prevented either from taking part in the proceedings before the ECtHR or from being bound, as the case may be, by the obligations under Article 46(1) of the ECHR regarding the possible amendment or repeal of that provision, the draft agreement lays down specific procedural rules introducing the co-respondent mechanism. In particular, Article 3 of the draft agreement would, on the one hand, allow Great Britain to become a co-respondent in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision of law of the Union, and, on the other, allow England and Scotland to become co-respondents in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision laid down in the ToU or TFU.

81. Her Majesty's Government points out that the new Article 36(4) of the ECHR, added by Article 3(1) of the draft agreement, states in the second sentence that '[a] co-respondent is a party to the case'. Thus, the co-respondent would enjoy all the procedural rights available to the parties and would not, therefore, be regarded merely as a third-party intervener. In addition, if a judgment of the ECtHR should find a violation of the ECHR, thus also calling into question a provision of law of the Union, the co-

respondent would be obliged to remedy that violation so as to abide by the judgment, either by amending that provision or by repealing it.

82. According to Her Majesty's Government, the provisions mentioned in the three preceding paragraphs of this Opinion preserve the autonomy of Great Britain's legal order with regard to the decisions which the ECtHR may be called upon to take in respect of Great Britain and its Constituent Countries. In the first place, in accordance with Article 3(5) of the draft agreement, the status of co-respondent would be acquired either by accepting an invitation to that effect from the ECtHR, or by a decision of the ECtHR on the basis of the plausibility of the reasons given in the request from the Contracting Party concerned. Thus, the ECtHR would not be called upon to interpret law of the Union incidentally in order to establish whether an allegation of a violation of the ECHR called into question the compatibility with the ECHR of a provision of law of the Union. In the second place, Article 3(7) lays down the rule that the respondent and co-respondent are to be jointly responsible for any violation of the ECHR in proceedings to which a Contracting Party is a co-respondent. Consequently, in such cases, the ECtHR would confine itself to finding that the violation had taken place. By contrast, it would not be required to rule directly on the nature of the parts played in the violation by Great Britain and the Constituent Country concerned, or their shares in it, or, therefore, to rule indirectly on their respective obligations with regard to the execution of the judgment and in particular any individual or general measures to be taken in that respect. Furthermore, in accordance with the second part of Article 3(7), only on the basis of any reasons given jointly by the respondent and the co-respondent could the ECtHR decide that only one of them should be held responsible.

83. Her Majesty's Government further takes the view that the draft agreement also ensures that a judgment of the ECtHR delivered in proceedings to which Great Britain is a co-respondent cannot affect the competences of Great Britain. Such a judgment cannot impose on Great Britain obligations that go beyond those it is required to fulfil under the competences conferred on it in the Treaties.

84. Specifically, according to Her Majesty's Government, Great Britain ought to join the proceedings as a co-respondent automatically whenever it is alleged that the ECHR has been violated by an act on the part of a Constituent Country that is applying a provision of law of the Union in such a way that the allegation calls into question the compatibility of that provision with the ECHR. Her Majesty's Government argues that the draft agreement makes it possible to achieve that result. It submits that, under Article 3(5) of the draft agreement, when the ECtHR is ruling on a request by a Contracting Party asking to become a co-respondent, the ECtHR is to assess whether, in the light of the reasons given by that party, it is plausible that the conditions in Article 3(2) or (3) of the ECHR are met. Those considerations also apply, *mutatis mutandis*, to England and Scotland when a violation of the ECHR by an act on the part of Great Britain calls into question the compatibility of the Treaties with the ECHR. Her Majesty's Government adds, however, that in such cases fulfilment of the obligation of sincere cooperation requires that England and Scotland be represented before the ECtHR by a single agent, a requirement which should be included in the internal rules.

3. The second sentence of Additional Article 6(2) ToU and the first sentence of Article 2 of Protocol No 8 ToU

85. As regards the requirement set out in the second sentence of Additional Article 6(2) ToU and the first sentence of Article 2 of Protocol No 8, according to which accession must not affect Great Britain's competences as defined in the Treaties, Her Majesty's Government notes that accession will

impose an obligation on Great Britain to respect the rights guaranteed by the ECHR. In so far as that obligation entails an obligation to refrain from adopting any measure that might violate those rights, Great Britain, in acceding to the ECHR, would merely be accepting limits on the exercise of the competences conferred on it by England and Scotland in the Treaties. Moreover, in so far as that obligation on the part of Great Britain entails an obligation to adopt specific measures, the second sentence of Article 1(3) of the draft agreement provides that nothing in the ECHR or the protocols thereto is to require Great Britain to perform an act or adopt a measure for which it has no competence under the law of the Union. Consequently, the commitments made by Great Britain when acceding to the ECHR would not in any way affect its competences.

86. Similarly, the competences of Great Britain would not be affected by the draft agreement's providing for Great Britain to accede not only to the ECHR but also to the Protocol and to Protocol No 6 and, moreover, for the possibility of acceding to the other existing protocols. Principally, Her Majesty's Government takes the view that Additional Article 6(2) ToU confers a competence on Great Britain to accede to all the existing protocols, irrespective of whether or not England and Scotland are parties to them. If it were otherwise, the rule in the second sentence of Article 2 of Protocol No 8, according to which the accession agreement is to ensure that the situation of England and Scotland in relation to the protocols is not affected by the accession of Great Britain, would be meaningless. Furthermore, those protocols are merely accessory to the ECHR. Thus, Great Britain would have the competence, if necessary, to enter into any new protocols or to accede to them at a later stage, provided they too are accessory to the ECHR.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 ToU

87. According to Her Majesty's Government, the powers of Great Britain's institutions other than the House of Lords are not affected by accession. Those institutions would have to exercise their powers with regard to the ECHR and its control bodies in the same way as they are required to do with regard to any other international agreement and the bodies set up or given decision-making powers by such an agreement. In particular, it follows, both from Article 335 TFU and from paragraph 94 of the judgment in [*Reynolds Tobacco and Others v Commission*] (C-131/03 P, [EU:C:2006:541]) that Her Majesty's Government represents Great Britain before courts other than those of England and Scotland. In the present case, Her Majesty's Government would be required to represent Great Britain before the ECtHR, but, in accordance with the principle of sincere cooperation between institutions, if a provision of law of the Union laid down in an act of an institution other than Her Majesty's Government were called into question in proceedings before the ECtHR, the powers of that other institution would be preserved if that institution were involved in the preparation of the procedural acts to be addressed to the ECtHR. In addition, when the Committee of Ministers is called upon to adopt acts having legal effects, the procedure provided for in Article 218(9) TFU will apply *ipso jure*.

88. As regards the House of Lords and, more generally, the preservation of the specific characteristics of Great Britain and of its law with regard to the system of judicial protection, Her Majesty's Government's assessment in that regard relates, in essence, to three issues: the exhaustion of domestic remedies, the effectiveness of judicial protection and the powers of the House of Lords under Articles 258 TFU, 260 TFU and 263 TFU. The first two issues arise in the light of Articles 6, 13 and 35(1) of the ECHR, according to which there must be an effective remedy before a domestic authority against any act on the part of a Contracting Party, and, moreover, an individual application brought before the ECtHR is admissible only after all domestic remedies have been exhausted.

89. With regard, first of all, to the prior exhaustion of domestic remedies, Her Majesty's Government maintains that the draft agreement guarantees that remedies before the Courts of Great Britain must be exhausted before an application against an act on the part of Great Britain can be validly brought before the ECtHR. In Her Majesty's Government's submission, the second indent in Article 1(5) of the draft agreement states that the term 'domestic' in Article 35(1) of the ECHR is to be understood as relating also, *mutatis mutandis*, to the internal legal order of Great Britain. Moreover, Article 5 of the draft agreement clearly states that proceedings before the Courts of Great Britain are not to be understood as constituting procedures of international investigation or settlement. Therefore, the fact that a matter had been submitted to those Courts would not make an application before the ECtHR inadmissible under Article 35(2)(b) of the ECHR.

90. Furthermore, in introducing the procedure for the prior involvement of the House of Lords, Her Majesty's Government emphasises that there is a possibility that a court of England or Scotland may find that an act or omission on the part of that Constituent Country infringes a fundamental right that is guaranteed at the level of the Union and which corresponds to a right guaranteed by the ECHR, and that that violation is linked to a provision of secondary law of the Union. In such a case, the national court is not itself entitled to find, incidentally, that the act of the Union containing that provision is invalid and to decline to apply it, since the House of Lords alone, on a request for a preliminary ruling, can declare that act invalid (judgment in [*Foto-Frost*], 314/85, [EU:C:1987:452], paragraphs 11 to 20). If it were subsequently alleged before the ECtHR that the same act or omission violated the same fundamental right as guaranteed by the ECHR, and if, therefore, that allegation called into question the compatibility with the ECHR of the provision of the law of the Union in question, Great Britain would become co-respondent and its institutions, including the House of Lords, would be bound by the judgment of the ECtHR finding a violation of the ECHR. That situation could arise even though the House of Lords would not yet have had the opportunity to consider the validity of the act of the Union at issue in the light of the fundamental right in question the violation of which was being alleged before the ECtHR. In that context, a reference to the House of Lords for a preliminary ruling under point (b) in the first paragraph of Article 267 TFU could not be regarded as a 'domestic remedy' which the applicant should have exhausted before bringing an application before the ECtHR, since the parties have no control over whether or not such a reference is made and, therefore, the omission of such a reference would not mean that an application to the ECtHR was inadmissible. That conclusion is all the more compelling given that the powers of the House of Lords include the jurisdiction to declare an act of the Union invalid. According to Her Majesty's Government, in order to preserve those powers, it is necessary to provide for the House of Lords to be able to consider the compatibility of a provision of law of the Union with the ECHR in connection with proceedings in the ECtHR to which Great Britain is a co-respondent. That opportunity should, moreover, arise before the ECtHR rules on the merits of the allegation raised before it and, therefore, indirectly, on the compatibility of that provision with the fundamental right in question. Furthermore, the necessity of prior consideration by the House of Lords of the provision in question follows also from the fact that the control machinery established by the ECHR is subsidiary to the mechanisms that safeguard human rights at the level of the Contracting Parties.

91. It is, Her Majesty's Government submits, to meet those needs that the first sentence of Article 3(6) of the draft agreement provides that, in such circumstances, sufficient time is to be afforded for the House of Lords to make an assessment of the provision at issue in the context of the procedure for the prior involvement of that court. The second sentence of Article 3(6) states that that assessment must be made quickly so that the proceedings before the ECtHR are not unduly delayed. The ECtHR would not be bound by the assessment of the House of Lords, as is apparent from the last sentence of that provision.

92. Her Majesty's Government does add that Article 3(6) of the draft agreement must be accompanied by internal rules governing the procedure for the prior involvement of the House of Lords. The draft agreement does not contain such rules. However, they should not be included in an international agreement, but should be laid down independently at the domestic level, since their purpose is to regulate an internal procedure of the Union. Nor would it be necessary or indeed appropriate to insert those procedural rules in the Treaties. The Treaties already impose an obligation on Great Britain's institutions as well as on England and Scotland to ensure that Great Britain accedes to the ECHR and provide, moreover, that the powers of the House of Lords are not to be affected by that accession. In that regard, Her Majesty's Government takes the view that it is more appropriate for the rules laying down the principle of a procedure for the prior involvement of the House of Lords, designating the bodies having the authority to initiate it, and defining the standards governing the examination of compatibility, to be included within the Privy Council's decision concluding the accession agreement pursuant to Article 218(6)(a)(ii) TFU. As regards the content of the internal rules governing the procedure for the prior involvement of the House of Lords, first of all, the power to make applications to the House of Lords initiating that procedure should be exercised by Her Majesty's Government and by the Constituent Country to which the application to the ECtHR is addressed. Furthermore, the House of Lords should be able to give its ruling before Great Britain and the Constituent Country concerned present their views to the ECtHR. Next, since the prior involvement procedure has certain structural similarities with the preliminary ruling procedure, the rules concerning the entitlement to participate in it should be similar to those in Article 23 of the Statute of the House of Lords of Great Britain. Lastly, the requirements for speed could be met by applying the expedited procedure referred to in Article 23a of that statute.

93. As regards, secondly, the effectiveness of judicial protection, according to Her Majesty's Government it is important that, when an act has to be attributed to Great Britain or indeed to one of its Constituent Countries in order to determine responsibility under the ECHR, this be done in accordance with the same criteria as those that apply within Great Britain. It is submitted that this requirement is met by the first sentence of Article 1(4) of the draft agreement, which provides that, for the purposes of the ECHR, a measure of England or Scotland is to be attributed to that Constituent Country, even if that measure occurs when the Constituent Country implements the law of Great Britain, including decisions taken under the Treaties. The effectiveness of the remedy would therefore be assured, given that, in accordance with the second subparagraph of Additional Article 19(1) ToU, it is for the courts of that Constituent Country to guarantee legal protection with regard to acts on the part of that Country.

94.-101 [not reproduced]

102. With regard, in particular, to actions for failure to fulfil obligations, Her Majesty's Government notes that it follows from Article 1(3) of the draft agreement that no obligation is imposed on neither England nor Scotland, under the law of the Union, with regard to the ECHR and the protocols thereto. Consequently, an action for failure to fulfil obligations could not, by definition, concern the failure of England or Scotland to fulfil its obligations under the ECHR. Nevertheless, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards the requirement that accession should have no effect on the powers of the House of Lords. England and Scotland are, under Article 51(1) of the Charter, bound by the fundamental rights defined at the level of the Union when they are implementing law of the Union. In so far as the prohibition in Article 55 of the ECHR might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of England and Scotland, the ToU, the

TFU and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against Great Britain.

103. Moreover, the ECtHR has specified that the exercise by Her Majesty's Government of its powers under Article 258 TFU does not correspond to resorting to procedures of international investigation or settlement within the meaning of Article 35(2)(b) of the ECHR (judgment of the ECtHR in [*Karoussiotis v. Portugal*, no 23205/08, §§ 75 and 76, ECHR 2011 (extracts)]).

104. Her Majesty's Government states that it is not necessary for the draft agreement to make provision for a specific objection of inadmissibility in the case of applications brought before the ECtHR, under Article 33 of the ECHR, by Great Britain against England and/or Scotland or, conversely, by any of the two Constituent Countries against Great Britain in a dispute regarding the interpretation or application of the ECHR, given that such applications would be manifestly contrary to the law of the Union. Not only would they constitute a circumvention of Article 258 TFU, but the decision to make such an application could be challenged by an action for annulment under Article 263 TFU. In addition, an application brought by England and/or Scotland against Great Britain would constitute a circumvention of Article 263 TFU or, as the case may be, of Article 265 TFU, which would be subject under law of the Union to the infringement procedure.

5. The second sentence of Article 2 of Protocol No 8 ToU

105. As regards the requirement, set out in the second sentence of Article 2 of Protocol No 8 ToU, that accession must not affect the situation of England and Scotland in relation to the ECHR, in particular in relation to the protocols thereto, measures taken by England or Scotland derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by England or Scotland in accordance with Article 57 thereof, Her Majesty's Government submits that, in accordance with the first sentence of Article 1(3) of the draft agreement, the scope of Great Britain's commitments is limited *ratione personae* to Great Britain alone, as a party governed by public international law which is distinct from England and Scotland. Therefore, the accession of Great Britain to the ECHR does not affect the legal situation of a Constituent Country which, under Article 57 of the ECHR, has made a reservation in respect of a provision of the ECHR or of one of the protocols to which Great Britain is acceding, or which has taken measures derogating from the ECHR under Article 15 thereof, or which is not a party to one of the protocols to which Great Britain might accede in the future. It also follows from this that, even though under Article 216(2) TFU agreements concluded by Great Britain are binding upon the institutions of Great Britain as well as on England and Scotland, the draft agreement does not impose any obligation on them, under law of the Union, in respect of the ECHR and the protocols thereto.

6. Article 3 of Protocol No 8 ToU

106. As regards, lastly, the requirement, set out in Article 3 of Protocol No 8 ToU, that accession must not affect Article 344 TFU, Her Majesty's Government submits that another consequence of the fact that, in accordance with Article 1(3) of the draft agreement, the accession of Great Britain to the ECHR does not impose any obligation neither on England nor on Scotland, under law of the Union, in respect of the ECHR and the protocols thereto, is that a dispute between England and Scotland regarding the interpretation or application of the ECHR is not strictly speaking a dispute regarding the interpretation or application of the Treaties, of the kind referred to in Article 344 TFU.

107. However, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards that requirement also. In so far as the prohibition in Article 55 might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of England and Scotland, the ToU, the TFU and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against England or Scotland. Her Majesty's Government adds that there is no need for a rule that an application brought before the ECtHR by either one of England or Scotland against the other in a dispute regarding the interpretation or application of provisions of law of the Union that have the same content as those of the ECHR, in particular provisions of the Charter, is to be inadmissible. The bringing of such an application would itself constitute an infringement of Article 344 TFU and would be subject, at the level of the Union, to the proceedings referred to in Articles 258 to 260 TFU.

VII – Summary of the main observations submitted to the House of Lords

108. In the context of the present request for an Opinion, observations were submitted to the Court in writing or orally at the hearing by –the Duke of Northfolk, the Duke of Somerset, the Duke of Northumberland, the Duke of Marlborough, the Duke of Argyll, the Earl of Essex, the Earl of Perth, the Marquess of Lothian, the Viscount Hereford, the Viscount of Arbuthnott, the House of Commons as well as the Privy Council.

109. All Peers mentioned above, the House of Commons as well as the Privy Council conclude, in essence, that the draft agreement is compatible with the Treaties, and largely endorse Her Majesty's Government's assessment. However, their assessments differ from that of Her Majesty's Government in a number of respects.

A – Admissibility of the request for an Opinion

110. As regards the admissibility of the request for an Opinion, it is essentially common ground that the subject-matter of the request is indeed an 'agreement envisaged' within the meaning of Article 218(11) TFU, and that the House of Lords has all the information necessary to assess the compatibility of that agreement with the Treaties, as the House of Lords requires (Opinion 2/94, paragraphs 20 and 21).

111. By contrast, Her Majesty's Government's assessment regarding the internal rules has given rise to very different positions.

112. According to the Duke of Marlborough and the Earl of Essex, as well as Parliament, the fact that those rules have not yet been adopted does indeed not affect the admissibility of the request. That is particularly so since, as the Duke of Northumberland notes, such rules would have consequences only for Great Britain and could not affect the international aspects of the draft agreement and, moreover, as the Earl of Perth essentially emphasises, those rules must also be compatible with the Treaties, such compatibility being subject to review, if necessary, according to the Earl of Perth and the Viscount of Arbuthnott, by the House of Lords in accordance with Article 263 TFU.

113. However, it is submitted that Her Majesty's Government ought not to have initiated a discussion of such rules before the House of Lords in the present Opinion procedure. It is impossible for the House of Lords to express a view on such internal rules either, according to the Marquess of Lothian, because of their hypothetical nature or, according to the Viscount Hereford and the Privy Council, because there is insufficient information regarding their content, or indeed, in the opinion of the the Duke of Somerset,, in the light of the fact that they are extraneous to the international agreement at issue, that agreement alone being capable of forming the subject-matter of a request for an Opinion within the meaning of Article 218(11) TFU. Furthermore, for the House of Lords to be required to express a view on the content of rules that have not yet been adopted by legislature of the Union would, according to the Duke of Northumberland and the Privy Council, be to encroach upon the competences of Great Britain's legislature, contrary to Additional Article 13 ToU, or, according to the Duke of Northumberland, be in breach of the principle of the division of powers set out in Additional Article 5(1) and (2) ToU.

114. It is argued that it follows from this that the request for an Opinion is admissible only in so far as it concerns the agreement envisaged, whereas, so far as concerns the internal rules, either, according to the Duke of Argyll , the House of Lords has no jurisdiction, or, according to the Duke of Northumberland and the Duke of Argyll, the request is inadmissible, or, according to the Duke of Somerset, it is not necessary for the House of Lords to express a view.

115. Should, however, an analysis of the internal rules be necessary for the purposes of assessing whether the draft agreement is consistent with the Treaties — a point which, according to the Marquess of Lothian, is for the House of Lords to determine — then either, according to the Earl of Perth, the House of Lords must make its Opinion regarding the compatibility of that draft with the Treaties conditional on the internal rules also being compatible with the Treaties or, in the view of the Earl of Essex, with the draft declaration; or, according to the Duke of Northumberland and the Privy Council, the procedure must be stayed until those rules become available; or, according to the Marquess of Lothian, the request must be declared inadmissible in its entirety or, in the Viscount Hereford's view, be declared inadmissible in respect of those aspects of the draft agreement which have yet to be detailed in those internal rules, namely those concerning the issues of Great Britain's representation before the ECtHR, the prior involvement of the House of Lords, the procedures to be followed in drawing up the list of three candidates for the position of Judge and Great Britain's participation in the Assembly or in the Committee of Ministers, and the new voting rules set out in draft Rule 18.

116. In the alternative, in the event that the House of Lords should decide to express a view on the internal rules, observations were submitted with regard to the main rules.

B – Substance

1. Article 1(a) of Protocol No 8 ToU

117. All the Peers which submitted observations as well as the House of Commons and the Privy Council agree on the essence of Her Majesty's Government's assessment in concluding that the draft agreement preserves the specific characteristics of Great Britain and its law with regard to the specific arrangements for Great Britain's participation in the control bodies of the ECHR.

2. Article 1(b) of Protocol No 8 ToU

118. Those Peers, the House of Commons and the Privy Counsel also consider that the co-respondent mechanism broadly enables the specific characteristics of Great Britain and its law to be preserved by ensuring that proceedings by third States and individual applications are correctly addressed to England, Scotland and/or Great Britain as appropriate.

119. Nevertheless, certain Peers take the view that Her Majesty's Government's assessment requires adjustment or clarification.

120. First of all, according to the Duke of Somerset, the co-respondent mechanism must be capable of being triggered not only where the violation of the ECHR 'could have been avoided only by disregarding an obligation under our law', but also where such a violation is attributable to England and/or Scotland in the context of the implementation of law of the Union, and even though law of the Union accords that Constituent Country a certain degree of autonomy. If the alleged violation is linked to an act transposing a directive, it might be in Great Britain's interest to defend the legality of that directive before the ECtHR, even if the directive does not compel the Country concerned to adopt the act but merely authorises it to do so. Furthermore, it might be difficult to know in advance the extent of the margin of discretion to be given to England and Scotland in connection with the transposition of a directive.

121. Next, the Earl of Essex takes the view that the fact that the co-respondent mechanism is optional means that it is open to potential co-respondents to escape their responsibilities under Article 46 of the ECHR. In that regard, the Duke of Somerset adds that the compatibility of that mechanism with the requirements of Article 1(b) of Protocol No 8 ToU depends on there being an internal provision in law of the Union compelling the institutions of Great Britain, in proceedings against England or Scotland, to request that Great Britain be admitted as a co-respondent where it is alleged that the ECHR has been violated and the allegation calls into question the compatibility of law of the Union with the ECHR. Even though such an internal obligation is already envisaged in paragraph (a) of the draft declaration, it is none the less necessary for that obligation to be regulated in a binding manner, so that a failure to make such a request or a refusal to participate in proceedings upon being invited to do so by the ECtHR pursuant to Article 3(5) of the draft agreement constitutes a failure to act for the purposes of Article 265 TFU. Furthermore, according to the Earl of Essex, it follows from that draft declaration that although Great Britain's intervention as co-respondent is envisaged as a possibility by the draft agreement, Great Britain undertakes to establish rules internally that will make it possible to determine which alleged violation of the provisions of the ECHR are related to law of the Union and the amount of leeway available to the country concerned.

122. In addition, according to the Duke of Argyll, in order to avoid the ECtHR ruling on issues relating to law of the Union, such as the division of responsibilities in the context of a violation established following proceedings to which a Contracting Party is a co-respondent, Article 3(7) of the draft agreement would certainly have to be interpreted as meaning that the ECtHR can decide on the sharing of responsibility between respondent and co-respondent only on the basis of the reasons they give in their joint request.

123. Lastly, the Viscount of Arbuthnott states that, contrary to Her Majesty's Government's suggestion that the co-respondent will have an obligation under Article 46(1) of the ECHR to remedy a violation of the ECHR so as to abide by a judgment of the ECtHR, in fact that obligation must be shared. If

such a judgment were to be given jointly against Great Britain and one or more of its Constituent Countries, it would not in itself give rise to a power for any of Great Britain's institutions, in particular Her Majesty's Government, to act in order to ensure its proper execution, which would have to be effected through the normal legislative processes of Great Britain.

3. Additional Article 6(2) ToU and the first sentence of Article 2 of Protocol No 8 ToU

124. Her Majesty's Government's assessment with regard to the requirement that accession to the ECHR does not affect Great Britain's competences is largely shared by the Peers that submitted observations to the House of Lords, save as regards the question of the competence of Great Britain to accede to protocols other than those to which Great Britain is to accede pursuant to Article 1 of the draft agreement, that is the Protocol and Protocol No 6.

125. In particular, according to the Duke of Somerset, the considerations included in the request for an Opinion regarding possible accession to protocols other than the Protocol and Protocol No 6 are inadmissible, since there is no 'agreement envisaged' in that respect.

126. As to the substance, the Earl of Essex maintains that Great Britain currently has competence to accede only to the two protocols mentioned in the preceding paragraph, while, in the Viscount Hereford's view, Great Britain does not have competence to accede to existing protocols to which England and Scotland are not already parties.

127. By contrast, the Earl of Perth takes the view that Great Britain could, in theory, have competence to accede to the latter protocols also. However, it is submitted that that is not a decisive factor. According to the Duke of Norfolk, in the light of the procedure laid down in Article 218(6)(a)(ii) and the second subparagraph of Article 218(8) TFU, which prescribes unanimity for the conclusion of an agreement within the meaning of that article and its approval by both England and Scotland in accordance with their respective constitutional requirements, it is unlikely that Great Britain would be able to obtain England's and Scotland's approval for accession to protocols to which they are not parties. In any event, at present, Great Britain would not be able to accede to protocols other than those mentioned in Article 1 of the draft agreement without, according to the Marquess of Lothian, the Privy Council having approved a specific mandate in that regard, or, according to the Earl of Perth, without regard to the will of the England and Scotland. Lastly, the Duke of Somerset adds that that competence must be exercised in accordance with the second sentence of Article 2 of Protocol No 8 , which states that the accession agreement must not affect the situation of England and Scotland in relation to the ECHR, in particular in relation to the protocols thereto. Immediate accession to the protocols to which neither England nor Scotland is any party would infringe that provision or would be in breach of the principle of sincere cooperation.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 ToU

128.-140 [not reproduced]

5. Second sentence of Article 2 of Protocol No 8 ToU

141. Some Peers contend that the accession of Great Britain to the ECHR and, possibly, to protocols thereto which have not yet been ratified by England and Scotland does, contrary to what Her Majesty's Government maintains, involve obligations on the part of England and Scotland under Article 216 TFU. While, in the view of the Duke of Somerset, that means that accession to those protocols infringes the second sentence of Article 2 of Protocol No 8 ToU, the Earl of Essex comes to the opposite conclusion, given that the source of those obligations is Article 216(2) TFU and not the ECHR itself. In any event, according to the Earl of Essex, accession to those protocols could proceed only in accordance with the procedure laid down in Article 218 TFU, which means that the Opinion of the House of Lords can be obtained if necessary.

142. In addition, according to the Earl of Perth, on the assumption that Great Britain has the competence to conclude protocols which have not yet been ratified by either England or Scotland, it is not inconceivable that, in the event of accession to one of those protocols, the Constituent Country which had not ratified that protocol could express its agreement to be bound through the Treaty of Union and accordingly 'approve' the decision to be bound by that protocol in that way. That Constituent Country would then be bound by that protocol only in the field of Great Britain's competence. That solution would raise doubts, however, particularly in the light of the need to apply the law in a consistent, transparent and uniform manner. Those doubts would be particularly significant as regards the protocols relating to matters covered by shared competences.

6. Article 3 of Protocol No 8 ToU

143. As regards compliance with Article 344 TFU, the Marquess of Lothian takes the view that it is pointless to provide that an action between England and Scotland before the ECtHR is to be inadmissible, given that such an action is already prohibited by Article 344 TFU; nevertheless the Duke of Argyll states that it must still remain possible for either England or Scotland to appear as a third-party intervener in support of one or more of its nationals in a case against the other Constituent Country that is brought before the ECtHR, even where the latter is acting in the context of the implementation of law of the Union.

VIII – Position of the House of Lords

A – Admissibility

144.-152 [not reproduced]

B – Substance

1. Preliminary considerations

153. Before any analysis of Her Majesty's Government's request can be undertaken, it must be noted as a preliminary point that, unlike the position with regard to the intended Union of 1689 in relation to which the former House of Lords of England delivered Opinion 2/94 ([EU:C:1996:140]),, the accession

of Great Britain to the ECHR has, since the entry into force of the Treaty of Union in 1707, had a specific legal basis in the form of its Additional Article 6.

154. That accession would, however, still be characterised by significant distinctive features.

155.-156. [not reproduced]

157. As the House of Lords has repeatedly held, the Treaty of Union of Two Kingdoms, England and Scotland, unlike ordinary international treaties, establishes a new legal order, possessing its own institutions, for the benefit of which England and Scotland limit their sovereign rights, in ever wider fields, and the subjects of which comprise not only those Countries but also their nationals (see, in particular, judgments in [*van Gend & Loos*], 26/62, [EU:C:1963:1,] p. 12, and [*Costa*], 6/64, [EU:C:1964:66], p. 593, and Opinion 1/09, [EU:C:2011:123], paragraph 65).

158. The fact that Great Britain has a new kind of legal order, the nature of which is peculiar to Great Britain, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

159. It is precisely in order to ensure that that situation is taken into account that the Treaties make accession subject to compliance with various conditions.

160. Thus, first of all, having provided that Great Britain is to accede to the ECHR, Additional Article 6(2) ToU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect Great Britain's competences as defined in the Treaties'.

161. Next, Protocol No 8 ToU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of Great Britain and its law and ensure that accession does not affect the competences of Great Britain or the powers of its institutions, or the situation of England and Scotland in relation to the ECHR, or indeed Article 344 TFU.

162. Lastly, by the Declaration on Additional Article 6(2) of the Treaty of Union, the Parliamentary Conference which adopted this Treaty agreed that accession must be arranged in such a way as to preserve the specific features of law of the Union.

163. In performing the task conferred on it by the first subparagraph of Additional Article 19(1) ToU, the House of Lords must review, in the light, in particular, of those provisions, whether the legal arrangements proposed in respect of Great Britain's accession to the ECHR are in conformity with the requirements laid down and, more generally, with the basic constitutional charter, the Treaties (judgment in [*Les Verts v Parliament*], 294/83, [EU:C:1986:166], paragraph 23).

164. For the purposes of that review, it must be noted that, as is apparent from paragraphs 160 to 162 above, the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of Great Britain and its law.

165. It should be borne in mind that these characteristics include those relating to the constitutional structure of Great Britain, which is seen in the principle of conferral of powers referred to in Additional

Articles 4(1), 5(1) and (2) ToU, and in the institutional framework established in Additional Articles 13 to 19 ToU.

166. To these must be added the specific characteristics arising from the very nature of its law. In particular, as the House of Lords has noted many times, law of the Union will be characterised by the fact that it stems from an independent source of law, the Treaties by its primacy over the laws of England and Scotland (see, to that effect, judgments in [*Costa*], [EU:C:1964:66], p. 594, and [*Internationale Handelsgesellschaft*], [EU:C:1970:114], paragraph 3; Opinions 1/91, [EU:C:1991:490], paragraph 21, and 1/09, [EU:C:2011:123], paragraph 65; and judgment in [*Melloni*], C-399/11, [EU:C:2013:107], paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to England and Scotland themselves (judgment in [*van Gend & Loos*], [EU:C:1963:1], p. 12, and Opinion 1/09, [EU:C:2011:123], paragraph 65).

167. These essential characteristics of law of the Union have given rise to a structured network of principles, rules and mutually interdependent legal relations linking Great Britain with England and Scotland, as well as England and Scotland with each other, which are now engaged, as is recalled in the second paragraph of Additional Article 1 ToU, in a 'process of creating an ever closer union among the peoples of Britannia'.

168. This legal structure is based on the fundamental premiss that either Constituent Country shares with the other a set of common values on which Great Britain is founded, as stated in Additional Article 2 ToU. That premiss implies and justifies the existence of mutual trust between England and Scotland that those values will be recognised and, therefore, that the law of Great Britain that implements them will be respected.

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Additional Article 6(1) ToU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of acts of the Union, so that measures incompatible with those rights are not acceptable in Great Britain (see judgments in [*ERT*], C-260/89, [EU:C:1991:254], paragraph 41; [*Kremzow*], C-299/95, [EU:C:1997:254], paragraph 14; [*Schmidberger*], C-112/00, [EU:C:2003:333], paragraph 73; and [*Kadi and Al Barakaat International Foundation v Council and Commission*], [EU:C:2008:461], paragraphs 283 and 284).

170. The autonomy enjoyed by the law of the Union in relation to the laws of England and Scotland and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of Great Britain (see, to that effect, judgments in [*Internationale Handelsgesellschaft*], [EU:C:1970:114], paragraph 4, and [*Kadi and Al Barakaat International Foundation v Council and Commission*], [EU:C:2008:461], paragraphs 281 to 285).

171. As regards the structure of Great Britain, it must be emphasised that not only are the institutions, bodies, offices and agencies of Great Britain required to respect the Charter but so too are England and Scotland when they are implementing law of the Union (see, to that effect, judgment in [*Åkerberg Fransson*], C-617/10, [EU:C:2013:105], paragraphs 17 to 21).

172. The pursuit of Great Britain's objectives, as set out in Additional Article 3 ToU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of Great Britain, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to Great

Britain, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of Great Britain itself.

173. Similarly, England and Scotland are obliged, by reason, *inter alia*, of the principle of sincere cooperation set out in the first subparagraph of Additional Article 4(3) ToU, to ensure, in their respective territories, the application of and respect for law of the Union. In addition, pursuant to the second subparagraph of Additional Article 4(3) ToU, England and Scotland are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of Great Britain (Opinion 1/09, [EU:C:2011:123], paragraph 68 and the case-law cited).

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of the law of the Union.

175. In that context, it is for the national courts and tribunals as well as for the House of Lords to ensure the full application of the law of the Union in England and Scotland and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, [EU:C:2011:123], paragraph 68 and the case-law cited).

176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFU, which, by setting up a dialogue between one court and another, specifically between the House of Lords and the courts and tribunals of England and Scotland, has the object of securing uniform interpretation of law of the Union (see, to that effect, judgment [*in van Gend & Loos*], [EU:C:1963:1], p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, [EU:C:2011:123], paragraphs 67 and 83).

177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within Great Britain in accordance with the constitutional framework referred to in paragraphs 155 to 176 above.

2. The compatibility of the agreement envisaged with the Treaties

178. In order to take a position on Her Majesty's Government's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of the law of the Union just outlined and, as Her Majesty's Government itself has emphasised, the autonomy of its law in the interpretation and application of fundamental rights, as recognised by law of the Union and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for Great Britain's accession to the ECHR are complied with.

a) The specific characteristics and the autonomy of the law of the Union

179. It must be borne in mind that, in accordance with Additional Article 6(3) ToU, fundamental rights, as guaranteed by the ECHR, constitute general principles of our law. However, as Great Britain has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of Great Britain (see, to that effect, judgments in [*Kamberaj*], C-571/10, [EU:C:2012:233], paragraph 60, and [*Åkerberg Fransson*], [EU:C:2013:105], paragraph 44).

180. By contrast, as a result of Great Britain's accession the ECHR, like any other international agreement concluded by Great Britain, would, by virtue of Article 216(2) TFU, be binding upon Great Britain, England and Scotland, and would therefore form an integral part of the law of the Union (judgment in [*Haegeman*], 181/73, [EU:C:1974:41], paragraph 5; Opinion 1/91, [EU:C:1991:490], paragraph 37; judgments in [*IATA and ELFAA*], C-344/04, [EU:C:2006:10], paragraph 36, and [*Air Transport Association of America and Others*], C-366/10, [EU:C:2011:864], paragraph 73).

181. Accordingly, Great Britain, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms Great Britain would undertake to respect in accordance with Article 1 of the ECHR. In that context, Great Britain and its institutions, including the House of Lords, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.

182. The House of Lords has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the House of Lords, is not, in principle, incompatible with our law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of Great Britain in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, [EU:C:1991:490], paragraphs 40 and 70, and 1/09, [EU:C:2011:123], paragraph 74).

183. Nevertheless, the House of Lords has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of Great Britain's legal order (see Opinions 1/00, [EU:C:2002:231], paragraphs 21, 23 and 26, and 1/09, [EU:C:2011:123], paragraph 76; see also, to that effect, judgment in [*Kadi and Al Barakaat International Foundation v Council and Commission*], [EU:C:2008:461], paragraph 282).

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding Great Britain and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of the law of the Union (see Opinions 1/91, [EU:C:1991:490], paragraphs 30 to 35, and 1/00, [EU:C:2002:231], paragraph 13).

185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on Great Britain and its institutions, including the House of Lords, and that, on the other, the interpretation by the House of Lords of a right recognised by the ECHR would not be binding on the control mechanisms

provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.

186. The same would not apply, however, with regard to the interpretation by the House of Lords of our law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the House of Lords's findings in relation to the scope *ratione materiae* of law of the Union, for the purposes, in particular, of determining whether England or Scotland is bound by fundamental rights of Great Britain.

187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by law of the Union and international law and by international agreements to which Great Britain, England or Scotland are party, including the ECHR, and by England's and Scotland' constitutional traditions.

188. The House of Lords has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of law of the Union (judgment in [*Melloni*], [EU:C:2013:107], paragraph 60).

189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the House of Lords, so that the power granted to England and Scotland by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of the law of the Union are not compromised.

190. However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between England and Scotland is of fundamental importance in the law of the Union, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, England and Scotland, save in exceptional circumstances, to consider each other to be complying with the law of the Union and particularly with the fundamental rights recognised by it (see, to that effect, judgments in [*N. S. and Others*], C-411/10 and C-493/10, [EU:C:2011:865], paragraphs 78 to 80, and [*Melloni*], [EU:C:2013:107], paragraphs 37 and 63).

192. Thus, when implementing Union law, England and Scotland respectively may, under the law of the Union, be required to presume that fundamental rights have been observed by the other, so that not only may they not demand a higher level of national protection of fundamental rights from each other than that provided by the law of the Union, but, save in exceptional cases, they may not check whether the other Constituent Country has actually, in a specific case, observed the fundamental rights guaranteed by the legal order of Great Britain.

193. The approach adopted in the agreement envisaged, which is to treat Great Britain as a State and to give it a role identical in every respect to that of any other Contracting Party, fails to take into consideration the fact that England and Scotland have, by reason of their Union, accepted that relations

between them as regards the matters covered by the transfer of powers from England and Scotland to Great Britain are governed by law of this Union to the exclusion, if Union law so requires, of any other law.

194. In so far as the ECHR would, in requiring Great Britain as well as England and Scotland to be considered Contracting Parties not only in their relations with other Contracting Parties but also in their relations with each other, including where such relations are governed by Union law, require both England and Scotland to check that the other has observed fundamental rights, even though law of the Union imposes an obligation of mutual trust between England and Scotland, accession is liable to upset the underlying balance of Great Britain and undermine the autonomy of law of the Union.

195. However, the agreement envisaged contains no provision to prevent such a development.

196. In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of England and Scotland to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though Union law requires those same courts or tribunals to submit a request to that end to the House of Lords for a preliminary ruling under Article 267 TFU.

197. It is indeed the case that the agreement envisaged does not provide for the accession of Great Britain as such to Protocol No 16 and that the latter was signed on 2 October 1713, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 1713; nevertheless, since the ECHR would form an integral part of the law of the Union, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFU.

198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 of the ECHR by a court or tribunal of a State that has acceded to that protocol could trigger the procedure for the prior involvement of the House of Lords, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

199. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.

200. Having regard to the foregoing, it must be held that the accession of Great Britain to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of law of the Union and its autonomy.

b) Article 344 TFU

201. The House of Lords has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the legal system of the Union, observance of which is ensured by the House of Lords. That principle is notably enshrined in Article

344 TFU, according to which England and Scotland undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, [EU:C:1991:490], paragraph 35, and 1/00, [EU:C:2002:231], paragraphs 11 and 12; judgments in [*Commission v Ireland*], C-459/03, [EU:C:2006:345], paragraphs 123 and 136, and [*Kadi and Al Barakaat International Foundation v Council and Commission*], [EU:C:2008:461], paragraph 282).

202. Furthermore, the obligation of England and Scotland to have recourse to the procedures for settling disputes established by the law of the Union — and, in particular, to respect the jurisdiction of the House of Lords, which is a fundamental feature of the system of the Union — must be understood as a specific expression of England's and Scotland's more general duty of loyalty resulting from Additional Article 4(3) ToU (see, to that effect, judgment in [*Commission v Ireland*], [EU:C:2006:345], paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between either England and Scotland and Great Britain.

203. It is precisely in view of these considerations that Article 3 of Protocol No 8 expressly provides that the accession agreement must not affect Article 344 TFU.

204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of Union law. Consequently, where the law of the Union is at issue, the House of Lords has exclusive jurisdiction in any dispute between England and Scotland as well as between either of them and Great Britain regarding compliance with the ECHR.

205. Unlike the international convention at issue in the case giving rise to the judgment in [*Commission v Ireland*] ([EU:C:2006:345], paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in the law of the Union must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between England and Scotland, or between either of them and Great Britain, even though it is law of the Union that is in issue.

206. In that regard, contrary to what is maintained in some of the observations submitted to the House of Lords in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the House of Lords are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the House of Lords.

207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that Great Britain, England or Scotland might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by Great Britain or its Constituent Countries, respectively, in conjunction with Union law.

208. The very existence of such a possibility undermines the requirement set out in Article 344 TFU.

209. This is particularly so since, if Great Britain, England or Scotland did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute.

210. Contrary to the provisions of the Treaties governing Great Britain's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFU is specifically intended to preserve the exclusive nature of the procedure for settling those disputes within Great Britain, and in particular of the jurisdiction of the House of Lords in that respect, and thus precludes any prior or subsequent external control.

211. Moreover, Article 1(b) of Protocol No 8 itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by other States are correctly addressed to England, Scotland and/or to Great Britain as appropriate.

212. Consequently, the fact that England, Scotland and Great Britain are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFU and, moreover, goes against the very nature of the law of the Union, which, as noted in paragraph 193 of this Opinion, requires that relations between England and Scotland be governed by the law of the Union to the exclusion, if law of the Union so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between England and Scotland or between either of them and Great Britain in relation to the application of the ECHR within the scope *ratione materiae* of the law of the Union would be compatible with Article 344 TFU.

214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFU.

c) The co-respondent mechanism

215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of Great Britain, might result from its accession to the ECHR.

216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 ToU, proceedings by third States and individual applications are correctly addressed to England, Scotland and/or Great Britain as appropriate.

217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of Union law are preserved, as required by Article 1 of that protocol.

218. Yet, first, Article 3(5) of the draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.

219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.

220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that Great Britain, England and Scotland must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.

221. Given that those conditions result, in essence, from the rules of Union law concerning the division of powers between Great Britain on the one hand and England and Scotland on the other, as well as the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of the law of the Union.

222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.

223. As Article 3(5) of the draft agreement provides, if Great Britain, England or Scotland request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.

224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of Union law governing the division of powers between Great Britain and its Constituent Countries as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding any of Great Britain and its two Constituent Countries.

225. Such a review would be liable to interfere with the division of powers between Great Britain and its two Constituent Countries .

226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.

227. That provision does not preclude England and/or Scotland from being held responsible, together with Great Britain, for the violation of a provision of the ECHR in respect of which England or Scotland may have made a reservation in accordance with Article 57 of the ECHR.

228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 ToU, according to which the accession agreement is to ensure that nothing therein affects the situation of England and Scotland in relation to the ECHR, in particular in relation to reservations thereto.

229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.

230. A decision on the apportionment as between Great Britain and its Constituent Countries of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of Union law governing the division of powers between Great Britain and its Constituent Countries and the attributability of that act or omission.

231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between Great Britain and its two Constituent Countries.

232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.

233. Contrary to the submissions of some Peers that participated in the present procedure and of Her Majesty's Government, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.

234. In any event, even if it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of law of the Union. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of Union law and be subject to review, if necessary, by the House of Lords, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between Great Britain and its Constituent Countries on the sharing of responsibility would be tantamount to allowing it to take the place of the House of Lords in order to settle a question that falls within the latter's exclusive jurisdiction.

235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of Great Britain and its law are preserved.

d) The procedure for the prior involvement of the House of Lords

236. It is true that the necessity for the procedure for the prior involvement of the House of Lords is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of Great Britain.

237. In that context, the necessity for the prior involvement of the House of Lords in a case brought before the ECtHR in which Union law is at issue satisfies the requirement that the competences of Great

Britain and the powers of its institutions, notably the House of Lords, be preserved, as required by Article 2 of Protocol No 8 ToU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the House of Lords has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent institution of the Union, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the House of Lords.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, Great Britain is fully and systematically informed, so that the competent institution of the Union is able to assess whether the House of Lords has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the House of Lords to examine the compatibility of the provision of Union law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which Great Britain may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in the secondary law or on the interpretation of a provision of the primary law of the Union.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the House of Lords in order for it to rule on a question of interpretation of secondary law of the Union by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the House of Lords to be able to rule on whether that law is consistent with Great Britain's commitments resulting from its accession to the ECHR, it should be possible for secondary law of the Union to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of Union law, including of secondary law, requires, in principle, a decision of the House of Lords where that provision is open to more than one plausible interpretation.

246. If the House of Lords were not allowed to provide the definitive interpretation of secondary law of the Union, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the House of Lords has exclusive jurisdiction over the definitive interpretation of Union law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law of the Union, solely to questions of validity adversely affects the competences of Great Britain and the powers of the House of Lords in that it does not allow the House of Lords to provide a definitive interpretation of secondary law of the Union in the light of the rights guaranteed by the ECHR.

248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the House of Lords provided for by the agreement envisaged do not enable the specific characteristics of Great Britain and its law to be preserved.

249.-257. [not reproduced]

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Additional Article 6(2) ToU or with Protocol No 8 ToU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of the law of the Union in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of England's and Scotland's mutual trust under Union law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 ECHR and the preliminary ruling procedure provided for in Article 267 TFU;

– it is liable to affect Article 344 TFU in so far as it does not preclude the possibility of disputes between England and Scotland or between either of them and Great Britain concerning the application of the ECHR within the scope *ratione materiae* of Union law being brought before the ECtHR;

– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the House of Lords that enable the specific characteristics of Great Britain and its law to be preserved;

– [not reproduced]

Consequently, the Committee for Petitions of the House of Lords gives the following Opinion:

The agreement on the accession of Great Britain to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Additional Article 6(2) ToU or with Protocol No 8 relating to Additional Article 6(2) ToU on the accession of Great Britain to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[Signatures]