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The Treaty of Lisbon: an impact assessment

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References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of written evidence

See paragraphs 1.14–1.15

FOREWORD—What this Report is about

This report assesses the impact of the Treaty of Lisbon. The Government are asking the two Houses of Parliament to enable them to ratify the Treaty by passing the European Union (Amendment) Bill. This report aims to inform the House of the most important aspects of the Treaty, by comparing its provisions with the *status quo*, and assessing their impact on the institutions of the EU, on the Member States in general and on the UK in particular.

Looking at the **general provisions of the Treaties** (Chapter 2), we analyse the effects of the changes to the structure of the EU Treaties, and of the amendments made to the Union's values and objectives. We discuss citizenship under the reformed Treaties, including the introduction of "citizen's initiatives", and the new explicit Union power to introduce measures on social security and social protection linked to rights of movement and residence. We consider the Treaty's statements of the Union's competences, and the distinctions between competences that are the Union's alone, competences that are shared with the Member States, and areas where the Union may act only to support Member State action. We also look at the effect of conferring legal personality on the Union, especially in relation to the Union's ability to make international treaties.

We discuss the **simplified revision procedures and *passerelles*** (Chapter 3), which could be used to alter significantly the provisions on the face of the Treaties. Under the European Union (Amendment) Bill, government agreement to any *passerelle* affecting decision-making procedures will be subject to approval by both the House of Commons and the House of Lords.

When it comes to the **EU institutions** (Chapter 4), we consider the changes which the Lisbon Treaty makes to the European Council, including the creation of a full-time European Council President, in place of a six-monthly rotation among heads of government. The Union will have five senior leaders (the European Council President, the leader of the state holding the Council of Ministers rotating Presidency, the Commission President, the European Parliament President and the High Representative); we examine the relationships between these posts.

In the Council of Ministers, we examine the use of qualified majority voting (QMV) rather than unanimity in more than 40 new areas of decision-making. We analyse the new system for calculating a majority and the consequences for the UK's voting weight. Where QMV is used, if the UK wishes to block legislation it will have to gain the support of three other Member States to form a "blocking minority"; we analyse the impact on the UK's share of a blocking minority. Finally, we consider the provision requiring the Council of Ministers to meet in public when it legislates.

We examine the reduction in the size of the College of Commissioners. Each Member State will not have a Commissioner of its nationality for five years out of every 15; we weigh up the concern that a Member State without a Commissioner will be disadvantaged. We also consider the possibility that European Parliamentary parties will go into European Parliament elections with proposed candidates for Commission President.

Finally in this Chapter we assess the Treaty's overall effects on the balance of influence between the EU institutions.

The Lisbon Treaty gives the **Charter of Fundamental Rights** legally binding status (Chapter 5). We look at whether any of the Charter's rights will create "new" rights in the UK and at the Charter's current role in ensuring fundamental rights protection in the EU. We consider whether the UK's existing labour and social legislation will be affected (a Government "red line"). Having assessed the likelihood of any change in current practice, and having examined the role of the UK Protocol in clarifying how the Charter is to be applied in the UK, we consider the effect of the change in legal status of the Charter, and whether the Title IV "solidarity" rights—including the "right to strike"—create enforceable rights which could be relied upon directly before British courts.

We analyse in detail the changes introduced to the Area of **Freedom, Security and Justice** (FSJ—Chapter 6), the most important of which is the merging of First Pillar FSJ aspects (asylum, immigration, border controls and civil justice) and Third Pillar FSJ matters (police and judicial cooperation in criminal matters) in a new Treaty Title on FSJ. We examine the proposed changes to the legislative procedure, including the extension of QMV decision-making, the jurisdiction of the ECJ and the substantive provisions on competence in this area. In particular, we look at the amendments to the UK's existing opt-in Protocols and the new Protocol on Transitional Provisions and consider whether the UK's ability to protect its common law system and its police and judicial processes—another Government "red line"—will be affected.

The Treaty introduces several innovations in the area of **external affairs and defence** (Chapter 7). It creates an EU High Representative for Foreign Affairs and Security Policy, supported by a European External Action Service. In the area of defence, the Treaty establishes a framework—called Permanent Structured Cooperation—within which Member States can cooperate to improve their military capabilities. There are also specific provisions reflecting the solidarity between the Member States in the face of threats to their security. We examine how far the Treaty changes the fundamental principles of the Common Foreign and Security Policy, and in particular the impact on the independence of UK foreign and defence policy—a third "red line"—and on the role of NATO.

Under **social affairs** (Chapter 8) we consider the impact of the Treaty in the areas of employment, social policy, education, vocational training, youth (including children's rights), sport, culture, public health and consumer protection. We consider the new EU competence in sport and the new emphasis in the Treaty on children's rights. We examine the effectiveness of the "emergency brake" as regards social security measures for migrant workers and their dependants, the last of the Government's "red lines".

In the area of **finance** (Chapter 9), we examine the impact of the Treaty on the EU Budget, the contributions to the CFSP Start-Up Fund, the meetings of Finance Ministers from Eurozone states (the Eurogroup) and trade policy. In the area of the **internal market** (also Chapter 9), we look at the areas of competition, intellectual property, energy markets, services of general interest and tourism. The commitment to "undistorted competition" is no longer in the Treaties but is included in a Protocol; we consider whether this is a significant change. And we look at the impact of the new Title concerning Energy, and the extension of QMV in this area.

As regards **environment, agriculture, fisheries and animal welfare** (Chapter 10), we assess the impact of the move to make the European Parliament and the Council of Ministers equal partners in the legislative process with respect to fisheries, agriculture and all aspects of the EU budget, including agricultural spending. At present, the European Parliament plays a more limited role in policy-making in these areas. We consider whether this change is likely to assist or impede further reform of the common agricultural and fisheries policies.

We analyse the new functions which the Treaty gives to **national parliaments** (Chapter 11). We consider in particular the “yellow card” procedure whereby national parliaments can require reconsideration of EU legislation if it breaches “subsidiarity”, i.e. does things which need not be done at EU level.

This report does not compare the Lisbon Treaty with the now abandoned Constitutional Treaty which, though ratified by some Member States, was rejected by French and Dutch voters in referenda in 2005. It does not comment on the process by which the Lisbon Treaty was produced. It is not a commentary on the European Union (Amendment) Bill; and it does not address the question whether there should be a UK referendum on this Treaty.

Finally, we have heard different views on whether or not the Treaty is beneficial to the UK. This report does not offer an overall assessment, or a view on whether the UK should or should not ratify the Treaty. **That is now a matter for Parliament.**

The Treaty of Lisbon: an impact assessment

CHAPTER 1: INTRODUCTION

- 1.1. This report assesses the impact of the Treaty of Lisbon. The Government are asking the two Houses of Parliament to enable them to ratify the Treaty by passing the European Union (Amendment) Bill. This report aims to inform the House of the most important aspects of the Treaty, by comparing its provisions with the *status quo*, and assessing their impact on the institutions of the EU, on the Member States and on the UK.

A complex document

- 1.2. At present the EU is governed by two principal Treaties:
- The Treaty establishing the European Community (TEC);
 - The Treaty on European Union (TEU).
- 1.3. The Treaty of Lisbon¹ will not constitute a third Treaty. Nor will it replace the two current Treaties with a single Treaty. Rather, it will amend both the existing Treaties. It will also rename one of them: the TEC will become the “Treaty on the Functioning of the European Union” (TFEU, or in some commentaries TOFU). The Lisbon Treaty replaces all references in the TEU and TEC to the “Community” or “European Community” with references to the “Union”.
- 1.4. The Lisbon Treaty has only seven Articles; the first contains amendments to the TEU, and the second contains amendments to the TEC. There are also 11 new Protocols to be annexed to the Treaties; plus a Protocol (to the Lisbon Treaty itself) amending the pre-existing Treaty Protocols. The texts of the Treaties and Protocols have the same legal value. Finally, the Inter-Governmental Conference (IGC) which agreed the Lisbon Treaty also provided for a number of Declarations; these are political acts, but may be relevant to the Treaty’s interpretation.
- 1.5. Many provisions of the current TEU and TEC are changed or moved, or both, by the Lisbon Treaty. Others are deleted; and new provisions are introduced. Appendix 3 to this Report contains a table giving an outline of what the Lisbon Treaty does to the Treaties in structural terms. Once the Lisbon Treaty is in force and the amendments to the TEU and TEC take effect, on 1 January 2009 subject to ratification, the Lisbon Treaty itself will be consigned to history.
- 1.6. The reasons for this complex structure are historical. The now defunct Constitutional Treaty which, though ratified by some Member States, was rejected by French and Dutch voters in referenda in 2005 would have substituted a single consolidated Treaty. David Heathcoat-Amory MP, an opponent of the Constitutional Treaty, admitted that this was a point in its

¹ Until it was signed in Lisbon on 13 December 2007, the Treaty was widely referred to as the Reform Treaty. The Treaty’s own Article 7 refers to it as “the Treaty of Lisbon”.

favour (Q S48). John Palmer² said that the Lisbon Treaty “defies all but the most dedicated specialist and legal experts to understand and interpret it” (Q S3). Sir David Edward³, on the other hand, found the two-Treaty structure “coherent”, with objectives and principles in the TEU and the detail in the TFEU (Q S115).

- 1.7. The Lisbon Treaty also makes consequential amendments to the Euratom Treaty. These are not considered further in this report.
- 1.8. The Lisbon Treaty itself is complicated and inaccessible. This was perhaps unavoidable; but it is unsatisfactory, and has hindered public debate. On 21 January the Government published, at our request, two useful documents: a consolidated text of the EU Treaties as they would be amended by the Lisbon Treaty (Cm 7310); and a table, mapping each article in the consolidated text onto its origins in the current Treaties and the Lisbon Treaty (Cm 7311).
- 1.9. These documents were not available to our witnesses. However, since they are now available, we have as far as possible used their numbering in this report. While we know of no reason to doubt the accuracy of these documents, they are illustrative and do not have legal force⁴. We are grateful to the Government for the considerable work involved in producing these documents. We expect that in the event of completion of the ratification process the EU would produce consolidated texts which can be considered authoritative throughout the EU.

Our inquiry

- 1.10. There are several things which this report does not do. It does not compare the Lisbon Treaty with the now abandoned Constitutional Treaty. It does not comment on the process by which the Lisbon Treaty was produced. It is not a commentary on the bill; and it does not address the question whether there should be a UK referendum on this Treaty.
- 1.11. Finally, this report does not offer an overall assessment, or a view on whether the UK should or should not ratify the Treaty. That is now a matter for Parliament. For simplicity’s sake this report says in many places that the Lisbon Treaty “does” or “will do” this or that; but of course it will do so only if it is ratified by all Member States.
- 1.12. This report is the result of unprecedented collaboration between all seven Sub-Committees and the Select Committee itself. It has involved 80 members of the House, listed in Appendix 1. We have taken evidence both at Westminster and in Brussels, and the evidence is mostly printed in the companion volume to this report. The witnesses who provided it are listed in Appendix 2, and we are grateful to them all. We also thank Oliver Bretz, who gave specialist advice to Sub-Committee B. And we take this opportunity to record our thanks to Dr Christopher Kerse CB, who retired as our Legal Adviser in the course of this inquiry.
- 1.13. To help the reader unfamiliar with EU jargon, there is a glossary in Appendix 6.

² Political director of the European Policy Centre.

³ Honorary Professor at the School of Law, University of Edinburgh; judge at the European Court of Justice 1992–2004.

⁴ As the Foreign Secretary says in the foreword to Cm 7310.

- 1.14. The evidence collected by each Sub-Committee is printed in a separate section with lettered page numbers, as follows:
- A Economic and Financial Affairs and International Trade
 - B Internal Market
 - C Foreign Affairs, Defence and Development Policy
 - D Environment and Agriculture
 - E Law and Institutions—focus on the Area of Freedom, Security and Justice
 - F Home Affairs
 - G Social and Consumer Affairs
 - S Select Committee—focus on the Institutions
- 1.15. References to oral evidence use the same lettering system. So, for example, “Q S1” means Question 1 in the oral evidence collected by the Select Committee, and will be found in the “S” pages.
- 1.16. **We make this report for debate. We suggest that, exceptionally, it might be debated alongside Second Reading of the European Union (Amendment) Bill. We expect a Government response within the usual two months from publication, and ideally in time to inform Report stage of the bill.**

CHAPTER 2: GENERAL PROVISIONS: FOUNDATIONS OF THE UNION

The structure of the Treaties

What is in the amended TEU and TFEU

- 2.1. The TEU provides the basic constitutional and legal framework of the European Union, “setting out the objectives and principles” (Edward Q S115), and providing for the Common Foreign and Security Policy. It includes provisions on:
- the values, aims and objectives of the Union
 - the principle of conferral and the competences of the Union
 - the principles of subsidiarity and proportionality
 - the status of the Charter of Fundamental Rights
 - the Union’s neighbourhood policy
 - citizenship of the European Union
 - the role of national parliaments
 - the role of the Union’s institutions
 - external action, including the Common Foreign and Security Policy (CFSP), and the Common Security and Defence Policy (CSDP), and
 - procedures for further revision of the Treaties.
- 2.2. As its new name suggests, the amended TFEU fills out the “detail” (Edward Q S115). In its amended form, it begins with the words “This Treaty organises the functioning of the Union” (new Article 1 TFEU). The Campaign against Euro-federalism (CAEF) interpreted the TEU as “the constitutional part” of the EU Treaty structure, and the TFEU as the “‘implementational’ part” (p S123).
- 2.3. Nicolas Gros-Verheyde, writing in *Europolitics* (7 November 2007), suggested that this new division “implicitly subordinates [the TFEU] to the Treaty on the European Union, and consequently to the objectives that treaty sets for Europe. As a result, principles previously considered declarative ... become fundamental principles guiding European policies”. Professor Damian Chalmers⁵, in oral evidence to us, said that “[i]t may be that one finds that various provisions in the Functioning are interpreted in the light of the earlier provisions, but broadly speaking they all have equal weight” (Q S3). He thought Mr Gros-Verheyde’s case was “arguable”, but “overstated” (Q S4). In supplementary written evidence, he added that he thought the risk “very slight indeed”: “[t]he new Article 1 TEU makes clear that the two Treaties and, one assumes, their individual provisions are to have equal value. I see this as a further safeguard with equal value being understood as the detail and checks of the latter Treaty not being able to be undermined by the more open wording of the former Treaty” (p S16). Professor Steve Peers⁶ wished

⁵ Professor in EU Law, London School of Economics.

⁶ University of Essex.

that the division had been carried further, with the detailed rules on foreign policy placed in the TFEU, “since there is no distinction ... between placing them there and keeping them in the TEU” (p S151).

What becomes of the Pillars?

- 2.4. Under the existing Treaties, the “first pillar” of the European Union is the supranational European Community. The “second pillar” (foreign and security policy) and “third pillar” (justice and home affairs) are areas of intergovernmental cooperation with their own decision-making mechanisms, where the Union does not have explicit legal personality. The Lisbon Treaty merges the first and third pillars, and abolishes the European “Community” because the distinction is no longer necessary—there is just one organisation, the Union. Justice and home affairs policy moves into the generally applicable mechanisms of the Union (based on those of the old first pillar/Community), which are laid out in the TFEU. The Common Foreign and Security Policy, which remains subject to specific procedures, is outlined in the TEU. Sir Francis Jacobs thought that the Treaty’s demolition of the pillar structure removed a “patchwork system ... widely regarded as opaque, incoherent and generally unsatisfactory” (p S148). However, others may find a symbolic importance in a structure that, in legislative process terms, no longer sets the economic community in the foreground.

Are the amendments to the structure helpful?

- 2.5. The European Parliamentary Labour Party argued that, by establishing the Union as “one single legal entity and structure”, the Lisbon Treaty will end the “confusion” between the European Community and the European Union (p S141). Sir David Edward thought that the reforms made by the Lisbon Treaty had the advantage of bringing the TEU and TEC/TFEU together “in what ought at least to be a coherent way” (Q S115). However, according to Professor Helen Wallace⁷, “We have ended up with a slightly muddled outcome because of the circumstances in which this Reform Treaty has been born” (Q S161).

Conclusions

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

The values and objectives of the European Union

- 2.7. The Lisbon Treaty amends the TEU to give, for the first time, a concise statement of the values and objectives of the Union in one place: Articles 2 and 3 of the amended TEU.

⁷ Centennial Professor, European Institute, London School of Economics.

2.8. Article 2 of the amended TEU sets out the Union's "values":

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." (Article 2, amended TEU)

2.9. This statement of "values" is new. It is partially drawn from the "principles" contained in Article 2 of the TEC and Article 6 of the current TEU. The new Article 2 adds "human dignity" and general "equality", but it includes terms from or very similar to those used throughout the Treaties and in Union case-law, making the question of whether there are any significant changes a matter of interpretation.

2.10. Article 3 of the amended TEU sets out the objectives of the Union:

BOX 1

Article 3 of the amended TEU

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

- 2.11. This Article replaces the lists of objectives and activities set out in Article 2 of the current TEU and Article 3 of the current TEC. In comparison to the objectives currently set out in Article 2 TEU, the aim of promoting “peace, its values and the well-being of its peoples” is new, as is the explicit objective of a high level of protection and improvement of the quality of the environment (currently included in the “Principles” of the TEC—Article 2 TEC). The statement that the Union shall respect cultural and linguistic diversity and safeguard and enhance Europe’s cultural heritage is also an addition. The paragraph on economic and social objectives adds specific references to “price stability” and a “highly competitive social market economy”. There is also a stronger and clearer commitment to combating social exclusion and discrimination and to promoting social justice and protection. The references to “territorial cohesion” and “solidarity among Member States” are new, and the Union’s objectives in the international scene are provided in greater detail.
- 2.12. In amending the Union’s objectives (as set out in current Article 2 TEU), references are removed to the common defence policy, the introduction of a citizenship of the Union (the common defence policy features in Article 2 TFEU, and citizenship is set out in Part Two of the TFEU), and the objective of maintaining the *acquis communautaire*, which was inserted as part of the compromise reached at Maastricht.
- 2.13. In comparison to the list of activities set out in the TEC (Article 3), there is no mention of the aim to ensure “that competition in the internal market is not distorted” (see Chapter 9). There is also no mention of a number of the other TEC activities, such as a common policy in the sphere of agriculture and fisheries, a common policy in the sphere of transport, and a contribution to the attainment of a high level of health protection.
- 2.14. The report on the Lisbon Treaty by the European Parliament’s Committee on Constitutional Affairs⁸ has the European Parliament welcoming “the fact that the Treaty establishes in a clearer and more visible way the values, common to all Member States, on which the Union is founded, as well as the objectives of the Union and the principles governing its action and its relations with Member States” (European Parliament resolution of 20 February 2008 on the Treaty of Lisbon). In written evidence to us, Andrew Duff MEP said the Lisbon Treaty “clarifies the values and reaffirms the objectives of the Union” (p S135). However, Sir David Edward thought the amendments a backwards step, and told us that “whereas the objectives in the EC Treaty were very clear, the objectives of the proposed Treaty on European Union might be said to amount in some respects to little more than a wish list. From the point of view of the citizen and from the point of view of a court, the proliferation of objectives, without any very clear indication of which are to take precedence over others, is going to create difficulty” (Q S115).

Conclusions

- 2.15. **The statement of Values in Article 2 TEU closely follows the statement of “principles” set out in Article 6(1) of the current TEU. “Respect for human dignity” and general “equality” have been added, and the Values are placed in the context of other values**

⁸ Drafted by Richard Corbett MEP and Iñigo Méndez de Vigo MEP.

assumed to prevail in the Member States, such as tolerance and justice. We agree that these other values are accepted among the Member States. Respect for human dignity and equality have been recognised as general principles of EC law in the case-law of the European Court of Justice, so their addition does not, in our view, amount to a significant change.

- 2.16. The statement of objectives in Article 3 TEU replaces the one found in the current TEU. While the new statement covers much of the same ground, the formulation of the objectives differs from the present provisions, and some objectives are removed and some are added, such as references to the development of “a highly competitive social market economy” and to promoting “social justice and protection”. The differences are likely to have some effect on the way in which other provisions of the Treaties are interpreted, not only by the European Court of Justice but also by the other institutions when undertaking their tasks. In certain cases, notably Article 352 TFEU (the revised version of the current Article 308 TEC, sometimes known as the “flexibility clause”, considered further in Chapter 11), the statement of objectives will be directly relevant to the scope of Treaty provisions. In other cases the effects of the change will be felt only at the margins, in particular, to resolve uncertainty in interpretation of other Treaty provisions. Whether the changes will mean that proposals that would not be made under the existing Treaties will be brought forward, or that potential proposals will not emerge, remains to be seen.

Citizenship of the Union

- 2.17. The Lisbon Treaty introduces references to EU citizenship in the provisions on Democratic Principles in Title II of the TEU, and amends the provisions of the TEC on citizenship.
- 2.18. The amended TEU (Article 9) describes EU citizenship as deriving from nationality of a Member State, and as additional to (not a replacement for) national citizenship, foreshadowing the same description and more detailed provisions in the TFEU. Article 10 TEU notes that the Union is founded on representative democracy where EU citizens are “directly represented” in the European Parliament and Member States are represented in the European Council, and affirms the right of citizens to participate in the democratic life of the EU. Article 11 TEU provides for citizens’ “initiatives”—a proposal for EU action may be initiated if a million signatures can be obtained to back the proposal.
- 2.19. The TFEU contains other and more detailed provisions on citizenship, based on the current Articles 17 to 22 of the TEC. The new features are as follows. An illustrative list of the rights provided by the Treaties is added (Article 20 TFEU). The Council of Ministers will have a new power to adopt, by unanimity, measures in the field of social security and social protection for the purpose of facilitating rights of free movement and residence within the EU (Article 21). There is also a power for the Council to adopt measures for the better coordination of the provision of consular assistance by the Member States to one another’s nationals (Article 23); such provision is currently provided for in the TEC. The procedure for

citizens' initiatives is set out in Article 24, and is considered further in Chapter 11 of this report.

Conclusions

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

The competences of the European Union

The principles of conferral, subsidiarity and proportionality

- 2.21. Competence is the term used to define the responsibility for decision-making in a particular policy field. The Lisbon Treaty seeks to describe and codify the division of competences between the Union and the Member States (new Articles 4 and 5 of the amended TEU, new Title I of the TFEU).
- 2.22. Article 5 of the amended TEU states that "The limits of Union competences are governed by the principle of conferral", under which "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." The amended TEU (Article 4) confirms for the first time and in the clearest terms that "competences not conferred upon the Union in the Treaties remain with the Member States". The Union "shall respect [Member States'] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."
- 2.23. Article 5 clarifies that "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level". This is the principle of subsidiarity; the Treaty refers, for the first time, to the sub-state level. Furthermore, "Union action shall not exceed what is necessary to achieve the objectives of the Treaties"—the principle of proportionality. The application of the subsidiarity and proportionality principles is described in detail in a Protocol to be annexed to the Treaties. These principles were previously included, in less specific terms, in Article 5 of the TEC. The Lisbon Treaty gives national parliaments power to police the principle of subsidiarity: see Chapter 11.

How will the Union's competences work?

- 2.24. The TFEU "determines the areas of, delimitation of, and arrangements for exercising [the Union's] competences" (new Article 1, TFEU). In new Article 2 of the TFEU further details are provided on the operation of the Union's competences under the reformed Treaties, as shown below.

BOX 2**Article 2 of the TFEU**

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall exercise their competence again to the extent that the Union has decided to cease exercising its competence.

3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions in the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.

Types of competence

- 2.25. Leaving aside competence for common foreign and security policy (see Article 2(4) and Chapter 7 below), there are three types of Union competence: exclusive competence, shared competence, and supporting competence. Where the Union has exclusive competence (see Article 2(1) TFEU, reproduced above), only the Union can legislate and adopt legally binding acts, and the principle of subsidiarity does not apply. The existence of exclusive competences is well established in Treaty law and European Court of Justice (ECJ) case-law.
- 2.26. Shared competence exists in areas where the Union and Member States are both able to act. This is the case in most areas both under the current Treaties, and under the reformed Treaties, as a list in the reformed TFEU confirms (see below). As Box 2 shows, "The Member States shall exercise their competence to the extent that the Union has not exercised its competence". A Protocol to the Lisbon Treaty states that "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area" (Protocol on the exercise of shared competence). Member States are therefore free to act in the same area, as long as they do not enact legislation that conflicts with EU law or principles (see Article 2(2) TFEU, reproduced above).

2.27. The Union has competence to carry out actions to support, coordinate or supplement the actions of member States in certain areas. Action by the Union in these areas of supporting competence may include adopting incentive measures and making recommendations; but it does not supersede the competence of Member States to act and must not entail the harmonisation of national laws (Article 2(5) TFEU).

What will the Union's competences be?

2.28. For the first time, Articles 3–6 of the TFEU provide lists setting out the divisions of policy areas into these types of competence; however, these lists are short and do not cover every aspect of Union activity. The lists allocate competences as set out below. For the detailed provisions relating to every competence, reference must be made to the subsequent provisions of the TFEU (see Article 2(6)).

TABLE 1
Types of EU competence

Union competence	Policy areas
<p>“The Union shall have exclusive competence in the following areas:” (Article 3 TFEU)</p>	Customs union
	Competition rules necessary for the functioning of the internal market
	Monetary policy for Member States which have adopted the euro
	Conservation of marine biological resources under the common fisheries policy
	Common commercial policy
	Conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope
<p>“The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 [exclusive competence, above] and 6 [supporting competence, below].”</p> <p>“Shared competence between the Union and the Member States applies in the following principal areas:” (Article 4 TFEU)</p>	Internal market
	Social policy, for the aspects defined in the TFEU
	Economic, social and territorial cohesion
	Agriculture and fisheries, excluding conservation of marine biological resources
	Environment
	Consumer protection
	Transport
	Trans-European networks
	Energy
	Area of freedom, security and justice
	Common safety concerns in public health matters, for the aspects defined in the TFEU
	And any other Union competence which is not listed in this table

<p>“competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs” (Article 4 TFEU)</p>	<p>The areas of research, technological development and space</p>
<p>“competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs” (Article 4 TFEU)</p>	<p>The areas of development cooperation and humanitarian aid</p>
<p>“The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:” (Article 6 TFEU)</p>	<p>Protection and improvement of human health</p>
	<p>Industry</p>
	<p>Culture</p>
	<p>Tourism</p>
	<p>Education, vocational training, youth and sport</p>
	<p>Civil protection Administrative cooperation</p>
<p>“The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.” “Specific provisions shall apply to those Member States whose currency is the euro.” (Article 5 TFEU)</p>	
	<p>“The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.” (Article 5 TFEU)</p>
<p>“The Union may take initiatives to ensure coordination of Member States’ social policies.” (Article 5 TFEU)</p>	

Limits on Union competence

- 2.29. A Declaration agreed at the IGC about the delimitation of competences (Declaration in relation to the delimitation of competences) “underlines” that competences not conferred upon the Union in the Treaties remain with the Member States. The Declaration goes into more detail about shared competence, explaining the reference in Article 2(2) of the TFEU to the Member States exercising their competence to the extent that the Union has

decided to cease exercising its competence. This situation arises when the relevant EU institutions decide to repeal a legislative act, “in particular better to ensure constant respect for the principles of subsidiarity and proportionality.”

- 2.30. The ability to repatriate competences (the mirror image of conferral) is included in the Treaties for the first time under the Lisbon Treaty reforms. The Council may, at the initiative of one or more of its members, and in accordance with Article 241 of the TFEU (which allows the Council to request the Commission to initiate proposals), request the Commission to submit proposals for repealing a legislative act. In the Declaration, the IGC “welcomes the Commission’s declaration that it will devote particular attention to these requests.” The Declaration also points out that the Member States, meeting in an inter-governmental conference⁹, may decide to amend the Treaties, including by increasing or decreasing the competences conferred on the Union.
- 2.31. Professor Wallace welcomed these “references to the possibility of proposals to reduce the competences of the Union also being legitimate ideas to put on the table”, saying “[t]hat used to be regarded as blasphemy” (Q S164). The European Parliamentary Labour Party said that whether such reductions were necessary or not depended on Member States, “because they [in the Council] are the gatekeepers of what goes into the European domain and what does not ... The EU does not determine its own remit—member states do—and the Reform Treaty will not change this” (p S141). Elmar Brok MEP told us that “it is clearly defined [in this Treaty] that the European Union does not have the competence of competences, it is clearly said in this Treaty that every competence the European Union has is given by Member States and can be taken away by the Member States” (Q S339).

Are the Union’s competences extended by the Lisbon Treaty?

- 2.32. Defining the extent to which the Union’s competences are extended by the Lisbon Treaty is difficult. The Treaty includes new articles formally specifying new competences, but some of these largely confirm areas of competence in which the Union has already legislated on a different legal basis. Competence is also extended less visibly by amendments to pre-existing articles, but again, the significance of such changes is debated.
- 2.33. The Minister for Europe, Jim Murphy MP, provided a list of the new or extended competences, noting that “[i]n almost all of these areas, the EU already takes action under other legal bases” (p S79). The extensions of competence he listed, which are analysed in greater detail later in this report, were in the following areas:
- **Energy:** currently listed as one of the Community’s activities and the EU has already acted in this field (see Chapter 9)
 - **Tourism:** currently listed as one of the Community’s activities and the EU has already acted in this field (see Chapter 9)
 - **Civil protection:** currently listed as one of the Community’s activities and the EU has already acted in this field (see Chapter 6)

⁹ In accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the amended TEU.

- **Intellectual property:** the EU has already acted in this field (see Chapter 9)
 - **Services of General Economic Interest:** the ability to legislate in this field already exists (see Chapter 9)
 - **Humanitarian aid:** the ability to adopt measures in this field already exists (see Chapter 7)
 - **Common Commercial Policy:** existing provisions on the common commercial policy are amended to refer to foreign direct investment (see Chapter 9)
 - **Travel and residence documents:** extends the current provisions for the adoption of legislation necessary to facilitate the exercise of the rights of free movement and residence of EU citizens to cover provisions on travel and residence documents and social security and social protection
 - **European Research Area:** the objective of achieving a “European research area” is added to the existing Treaty provisions dealing with activities in the area of research and technology
 - **Common safety concerns in health:** measures can already be brought forward in certain areas of health policy; the Treaty changes mean that measures may be brought forward regarding the harmonisation of standards of quality and safety in medicinal products and devices, and incentive measures may be brought forward regarding cross-border health threats and the protection of public health concerning tobacco and alcohol (see Chapter 8)
 - **Space policy:** new
 - **Administrative cooperation:** new (a provision for measures to support Member States, at their request, in improving their capacity to implement EU law effectively)
 - **Sport:** new (see Chapter 8)
 - **Crime prevention:** new
 - **European Public Prosecutor:** new (see Chapter 6)
 - **Diplomatic and consular protection:** a new provision for measures to facilitate coordination and cooperation among the Member States (see Chapter 7)
 - **Solidarity clause:** new (see Chapter 6).
- 2.34. The Minister’s view was that the extension of competence within the Lisbon Treaty was considerably less than in previous treaties such as the Maastricht Treaty or the Single European Act (Q S241). Elmar Brok MEP believed that “including the Single European Act, there is no Treaty where we have less transfer of competences” (Q S333).
- 2.35. Professor Wallace welcomed the extensions of legislative competence in the field of justice and home affairs, but opposed those in sport, tourism and space policy (Q S169). Changes in the justice and home affairs area are discussed in Chapter 6.
- 2.36. The European Parliamentary Labour Party stated that “[t]he Union’s objectives and competences in the fields of climate change, energy, space,

children’s rights, tourism, sport, public health and civil protection are defined in a clearer way, but are not new competences. Indeed, no new subject matters are given to the EU institutions—just changes to how the EU can handle them” (p S141).

Are the Lisbon Treaty’s definitions of competences helpful?

- 2.37. John Palmer felt that the Lisbon Treaty’s “new statement [of competences] will provide a clearer definition of the competences of the EU” (p S13), and Sir Francis Jacobs¹⁰ told us that the provisions were “valuable” and that it was “helpful” to have a “clear statement” of the competences (p S147). Professor Wallace thought that it “does not remove the potential for grey areas”. She felt that “[i]t is probably nonetheless important to have the phrasing that is there because ... it is a particular reassurance for people who have nervousness about subsidiarity and related questions” (Q S164).
- 2.38. David Heathcoat-Amory MP felt that the division of competences “could be useful”, but in his view it “fails because the division is really entirely on the terms of the European Union” (Q S62). Neil O’Brien¹¹ agreed that the delimitation of competences did not serve UK interests. He suggested that a division of competences had been seen as desirable in order to prevent “competence creep” but that the sharing of competences had actually been drawn up in an undesirable way as far as the UK was concerned (Q S64).
- 2.39. Professor Chalmers said that there was nothing in the Lisbon Treaty which would prevent or limit the European Court of Justice from extending competences from the base established by the Lisbon Treaty (Q S33). On the other hand, Sir Francis Jacobs thought that the Court could expect to be called upon more often to address the Treaties’ requirements regarding competences, “and perhaps to do so more stringently than hitherto ... there may well be successful challenges to Union measures on these grounds” (p S148).

Are shared competences residual competences?

- 2.40. Alongside the issue of any explicit extensions of competence made by the Treaty, David Heathcoat-Amory MP and Neil O’Brien were concerned about the list of shared competences included in the TFEU. Mr Heathcoat-Amory told us that “the definition of shared competences is that when the European Union legislates over one of them, the Member States lose their power to legislate in that area. So it is not a shared competence; it is rather that Member States will have a residual competence and that is not a welcome development” (Q S62). He pointed out that “the list here [Article 4 TFEU] of 11 policy areas is not exclusive; it only says ‘in the following principal areas’” (Q S66). The definitions in Article 4 were in his view also very broad (Q S63). We note however that Article 4 is governed by Article 2, which states that the scope of the Union’s competence is to be determined by the Treaty provisions specific to each area. Neil O’Brien suggested that the shared competences were potentially more trouble than they were worth in court. He believed that “these Articles will increasingly be used by the Court of Justice in making quite contentious legal rulings” (Q S64).

¹⁰ Advocate General at the European Court of Justice, 1988–2006.

¹¹ Director of Open Europe.

2.41. According to Mr O'Brien, the Protocol on the exercise of shared competence (see above) "is really just re-stating the problem because the idea of the area is not defined there in any way ... we still have the problem that it is up to the Court to decide on the limits of competence, so we have the problem of who guards the guards" (Q S67). Professor Wallace did not think the inclusion of the Protocol indicated any difficulty: she observed that "[i]t would not be the first time that a protocol or declaration had made a statement of the obvious" (Q S167).

Conclusions

- 2.42. **The TEU sets out for the first time a clear statement that the Union may only exercise such competences (powers) as the Member States have conferred on it—the principle of conferral (Articles 4 and 5). All other competences remain with the Member States, which may decide to reduce the competences of the Union (see Article 48(2) TEU). The significance of these provisions lies in the articulation of these principles; their content has always been implicit in the Treaties.**
- 2.43. **The TFEU sets out, for the first time, categories of competences—exclusive, shared and supporting (Articles 2 to 6 TFEU)—and refers to competences in the descriptions of each category by more or less broadly-defined areas. The categories reflect the provisions of the TEC setting out the competences and the conclusions of the ECJ as it has examined those provisions over the years. Most areas of EU activity are defined as shared competences, where the list is illustrative, not exhaustive. In the case of the supporting competences, Union action "shall not entail harmonisation of Member States' laws or regulations". The listing of areas of competences should not be regarded as determining the precise nature of the competences. For the detailed provisions relating to every competence, reference must be made to the subsequent provisions of the TFEU (see Article 2(6)).**
- 2.44. **The TFEU (Article 2(2)) sets out that when the Treaties confer on the Union a competence that is shared with Member States, the Member States may only exercise their competence "to the extent that the Union has not exercised its competence".**
- 2.45. **We consider that setting out the categories and the listing of areas of competence is a useful clarification. We comment in later chapters of this report on the additional competences which the Treaty confers.**

Legal personality

- 2.46. The European Community and Euratom have had express legal personality since their establishment. The Lisbon Treaty replaces the Community with the Union (Article 1, amended TEU), and inserts a new Article (Article 47) into the TEU final provisions which declares "The Union shall have legal personality." A single legal personality is thereby extended to the whole Union, i.e. the current Community plus the current second and third pillars.

What is the practical effect of extending legal personality to the whole Union?

- 2.47. The question of whether the extension of express legal personality has any impact on the Union's ability to enter into treaties in foreign and security policy has proved to be a contentious one.
- 2.48. According to Professor Chalmers, the merging of the first and third pillars would extend legal personality to justice and home affairs without the new Article being necessary, so the "real issue" was the extension of express legal personality to the second pillar. The Union had already entered into a number of international treaties in both the second and third pillars, and to this extent it already had implied legal personality. However, where the Union was involved in foreign affairs, for example in operations in Mostar in the 1990s, the reform made it possible for the Union to be held formally accountable (Q S10). Conferring legal personality on the Union would give it the capacity to sue and be sued in the area of foreign affairs (QQ S12–14).
- 2.49. Neil O'Brien suggested that the Government had traditionally resisted the conferral of a legal personality on the Union (Q S51). The Minister for Europe told us that the Government's position had changed because the Government was "able to secure the distinct treaty status for CFSP [Common Foreign and Security Policy]", retaining its special intergovernmental status. He said that "with the retention in a separate Treaty [the TEU as opposed to the TFEU] of CFSP, what this single legal personality does to the Union, the Government feels, is confirm the existing practice" (Q S242).
- 2.50. The Campaign against Euro-federalism saw the granting of legal personality to the Union as a step towards a European Federal State, giving the Union a "distinct corporate existence for the first time, something that all States possess. This new Union would be separate from and superior to its Member States" (p S124). Neil O'Brien also did not accept the move as codification. He said that there was a concern that "if the Union gets into the business of signing treaties in both the JHA [justice and home affairs] and the CFSP [Common Foreign and Security Policy] pillars, that could have implications for internal competences as well, because of course if the Union is doing international deals in these areas, there is implied internal competence and that could have knock-on effects on our laws here" (Q S51). David Heathcoat-Amory MP thought the move of "important symbolic significance", in that "[i]t will encourage the European Union to be seen and to try and be seen on the international stage as a unit replacing Member States" (Q S58).
- 2.51. However, Professor Peers told us that there is not "any reason to suppose that an express legal personality increases the EU's competence as regards the Member States" (p S151). An IGC Declaration (Declaration concerning the legal personality of the European Union) asserts that the express conferral of legal personality "will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties."
- 2.52. The European Parliamentary Labour Party thought that fears about the granting of legal personality were "misguided", as the EC "has always had legal personality" (p S141). Professor Peers agreed that "the concern about this issue from some quarters is simply misplaced", and Sir Francis Jacobs

said that such concern is “at least in part based on misunderstandings” (p S151; p S148).

- 2.53. Professor Peers noted that the EU “has been widely understood by EU institutions, Member States and non-Member States to have an implied legal personality for a number of years, and has signed and concluded a significant number of treaties in its own name since 2001” (p S151). Sir Francis Jacobs stated that “Article 24 already confers a treaty-making power [on the Union], which has frequently been used, and has been accepted by third States”, and that “the European Communities also have treaty-making powers ... [and] have concluded many hundreds of treaties and other international agreements” (p S148). Brendan Donnelly¹² agreed that “the Reform Treaty simply recognises an existing reality” in this area, thereby putting an end to an existing controversy (p S131). Both Professor Peers and Mr Donnelly pointed out that a number of international organisations already enjoyed express or implied legal personality (p S151, pp S131–2).
- 2.54. Sir David Edward was also not concerned in the least. He felt that the issue was “a red herring”, only remarked on because previously “it was tucked away at the end of the other Treaties and possibly was not noticed” (Q S118). Professor Wallace agreed with the Government that “the provision is much more about clarification and simplification than about introducing major new points of principle” and could see “a welcome point to doing that”—it would be helpful “not to have to argue about the legal personality of the Union when you are trying to get inter-agency cooperation” in troubled areas of the world (Q S163).
- 2.55. Sir Francis Jacobs pointed out that, since the Lisbon Treaty replaces the Community with the Union, the effect of denying the Union treaty-making power “would be to remove the Community’s existing treaty-making power, as well as disabling the Union from exercising its existing power” (p S148).
- 2.56. The new Article 216 of the TFEU provides more fully for the Union’s ability to make international treaties in line with Union competences. Under the reformed Treaties, the Union may conclude an agreement with third countries or international organisations “where the Treaties so provide”, “where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties”, if the agreement “is provided for in a legally binding act of the Union” or if the agreement “is likely to affect common rules or alter their scope”. John Palmer thought that “[g]iving the EU a legal personality will enable the Union to operate more effectively internationally” (p S13).
- 2.57. The European Community, which has had express legal personality since its establishment, has entered into numerous agreements, notably in the area of trade. The European Union has entered into agreements in exercise of the powers set out in current Articles 24 and 38 TEU; for example, the Agreement with the USA on the processing and transfer of passenger name records data by air carriers made in 2007.

Conclusions

- 2.58. **The Lisbon Treaty confers legal personality expressly on the EU, giving it the capacity to enter into legal relationships with other**

¹² Director of the Federal Trust; written evidence submitted in a personal capacity.

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

- 2.59. **The conferral of legal personality does not itself affect the EU’s competences, including its powers to enter into international agreements, or the relative competences of the EU and its Member States.**

The impact of the Treaty on the size of the Union

European Union enlargement

- 2.60. To a considerable extent, the Lisbon Treaty is a response to the enlargement of the EU over the past decade and the pressures it has put on the EU institutions (see Q S295, Business for New Europe p S141, Coalition for the Reform Treaty p S128). As to whether the Treaty’s adjustments would fit the Union for more enlargement, John Palmer told us that “[w]e are in almost a ten-year hiatus in which we have to see to what extent this Treaty ... prepares the Union to be able to handle yet further members” (Q S36). He thinks the Treaty “will not hold up” any applications (Q S36).
- 2.61. The Lisbon Treaty makes some small changes to the terms governing the accession of a European State applying to become a Member State of the EU (Article 49, current TEU; Article 49, amended TEU). Firstly, the applicant must respect the Union’s “values” as set out in the amended Article 2 TEU, rather than the current Treaty’s “principles” (Article 6, current TEU)—the only changes are the addition of “equality” and “human dignity” (see paragraph 9). It also has to be “committed to promoting them” for the first time.
- 2.62. As before, the country must apply to the Council, but the European Parliament and national parliaments will now also have to be notified (but will not have any new powers). The European Parliament will now give its “consent” by a majority rather than its “assent” by an absolute majority of its membership.
- 2.63. A new sentence is added specifying that “[t]he conditions of eligibility agreed upon by the European Council shall be taken into account”. Andrew Duff MEP told us that this meant that “[e]nlargement policy will now need to take into account the Copenhagen criteria” (p S138), the accession criteria agreed by the Copenhagen European Council in 1993 and the Madrid European Council in 1995. These criteria are currently political, economic and the requirement to be able to take on the obligations of membership. The reference to the European Council’s conditions may enable the EU to expand the criteria by adding new enlargement conditions, such as the Union’s integration capacity.

- 2.64. Professor Peers found it “hard to see what practical impact the amendments to Article 49 could have”, especially as, in his opinion, integration capacity was already taken into account in the timing of enlargement. According to Professor Peers, the amendments were “a political gesture to those Member States where there is a greater degree of concern about enlargement—without raising in themselves any new practical barrier to enlargement” (p S155).
- 2.65. Brendan Donnelly thought that the notification of an accession application to the European Parliament and national parliaments would “help the expression” of any “public and political reservations” surrounding the membership of any applicant country, “but it will not itself have created them or even substantially facilitated their emergence” (p S134).

Right to withdraw from the Union

- 2.66. The Lisbon Treaty expressly acknowledges Member States’ right to withdraw from the Union for the first time (Article 50, amended TEU). A Member State can make the decision to withdraw “in accordance with its own constitutional requirements”. It will then notify the European Council of its intention, and negotiate and conclude an agreement with the Union. The agreement will be concluded on behalf of the Union by the rest of the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. The Treaties cease to apply to that Member State when the agreement enters into force, or two years after the notification of the desire to withdraw, unless the European Council and the State concerned decide to extend the negotiations. Any withdrawing State wishing to apply for re-admittance must do so on the same basis as any other acceding country.

Conclusions

- 2.67. **The amended TEU provides expressly for the European Council to set conditions of eligibility for states aspiring to become members of the EU. This codifies existing practice under which the current “Copenhagen criteria” were agreed.**
- 2.68. **It is significant that the Lisbon Treaty adds to the Treaties a clause confirming the right of a Member State to withdraw from the Union, and also sets out the procedure it could use to negotiate a withdrawal.**

CHAPTER 3: SIMPLIFIED TREATY REVISION AND PASSERELLES

Background

3.1. Article 48 of the current TEU prescribes a procedure for revising the Treaties, including an intergovernmental conference. New Article 48 TEU offers four possible procedures:

- “Ordinary revision procedure” involving a Convention, to include representatives of national parliaments, alongside representatives of governments, the European Parliament and the Commission. The Convention which gave rise to the abandoned Constitutional Treaty included parliamentary representatives, but there was no requirement that it should do so; the Lisbon Treaty will make this a requirement.
- Ordinary revision procedure with no Convention, if the European Council and European Parliament decide that the extent of amendment proposed does not warrant one. National parliaments have no role in such a decision.
- “Simplified revision procedures” for restricted classes of amendment. These are sometimes referred to as the “ratchet” or “self-amending” clause.

Under Article 48(6) the European Council may amend Part Three of the TFEU *Union Policies and Internal Actions*,¹³ in any way that does not increase EU competences. The European Council must be unanimous, and Member States must approve “in accordance with their respective constitutional requirements”, but the Treaty itself gives no set role to national parliaments;

Under Article 48(7) the European Council may change the voting requirement for certain decisions¹⁴ from unanimity in the Council to qualified majority in the Council, or may change the procedure for any action under the TFEU from a special legislative procedure to the ordinary legislative procedure.¹⁵ The European Council must adopt any decision under this article unanimously. In addition, national parliaments must be given six months’ notice of a proposal to use these procedures, during which time any one of them may block it by indicating opposition (see also Protocol on national parliaments Article 6).

3.2. Article 48(7) TEU is the first of the new “*passerelles*” (“bridges”). *Passerelles* are provisions enabling procedural requirements to be reduced, or other adjustments made, without formal Treaty revision. They invariably require unanimity, giving each national government a veto. There are others, as follows.

¹³ For what this part covers, see Appendix 3. It does not cover the Common Foreign and Security Policy, external action or institutional matters.

¹⁴ Decisions under the TFEU or Title V of the TEU (external action and CFSP), except “decisions with military implications or those in the area of defence”.

¹⁵ The “ordinary legislative procedure” under the Lisbon Treaty is what is currently known as co-decision. See Chapter 4 below, and the Glossary.

- Article 31(3) TEU whereby the European Council may change the voting requirement for certain measures under the **Common Foreign and Security Policy** from unanimity to qualified majority.
 - Article 81 TFEU, whereby the Council may change the requirement for measures for judicial cooperation in civil matters concerning **family law** with cross-border implications from special legislative procedure to ordinary legislative procedure. A proposal to use this procedure must be notified to national parliaments, and any of them may block it by indicating opposition within six months. This is discussed in more detail in Chapter 6 below.
 - New Article 312 TFEU, whereby the European Council may change the requirement for the multiannual **financial framework** from unanimity to qualified majority.
 - New Article 333 TFEU, whereby the Council may change the voting requirement for an action under **enhanced cooperation** from unanimity to qualified majority, or from special legislative procedure to ordinary legislative procedure. Only Member States involved in the enhanced cooperation can vote.
- 3.3. The Lisbon Treaty also introduces *passerelle*-type procedures in respect of judicial cooperation in criminal matters: see Chapter 6.
- 3.4. *Passerelles* enabling procedural requirements to be reduced are not new; there are already two, as follows. To operate these *passerelles* the Council must act unanimously, but the current Treaties give no veto to national parliaments.
- Article 137(2) of the TEC, whereby the Council may change the requirement for decisions in certain fields of **social policy** from special legislative procedure to ordinary legislative procedure. This Article is amended by the Lisbon Treaty; it will become Article 153(2) TFEU;
 - Article 175(2) of the TEC, whereby the Council may change the legislative procedure for certain **environmental measures** from special legislative procedure to ordinary legislative procedure. This Article is amended by the Lisbon Treaty; it will become Article 192(2) TFEU.
- 3.5. There are also two existing *passerelles* concerning the area of freedom, security and justice covered by Title IV TEC, *Visas, asylum, immigration and other policies related to free movement of persons*, and Title VI TEU, *Police and judicial cooperation in criminal matters*: see Chapter 6.
- 3.6. The Lisbon Treaty offers national parliaments a veto, as set out above, over the second simplified revision procedure (Article 48(7)) and the family law *passerelle*. The European Union (Amendment) Bill offers this Parliament additional vetoes, in the Clause on parliamentary control of decisions, over not only these, but also the first simplified revision procedure (Article 48(6))¹⁶ and all the other *passerelles* which can be used to move from unanimity to qualified majority voting or from special legislative procedure to ordinary legislative procedure.

¹⁶ Note that the European Assembly Elections Act 1978, section 6(1), already provides that “No treaty which provides for any increase in the powers of the Assembly shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament.”

- 3.7. The European Parliament is also given an enhanced role in future revisions of the Treaties. The Parliament gains the right to initiate Treaty revision by submitting proposals for amendment to the Council. It will play a role in any Convention set up to discuss Treaty change proposed under the ordinary revision procedure, and must give its consent to any move from the European Council not to convene a Convention. It also has a role in the simplified revision procedure, again with the right to initiate Treaty revision.

Evidence

- 3.8. Margaret Wallström, Vice-President of the Commission and Commissioner for Institutional Relations and Communications Strategy, considered that the Lisbon Treaty “does not fundamentally alter” the procedures for treaty revision (p S162). Nonetheless, of all the issues raised in submissions to this inquiry by members of the general public, the simplified revision procedures were mentioned most frequently. Mr J A Wheatley considered this the Treaty’s “most dangerous aspect for any democracy” (p S162). Christopher Mowbray called it “a political ‘open cheque’” (p S150).
- 3.9. The Coalition for the Reform Treaty made the case for the simplified revision procedures. “This clause brings flexibility and may prove useful when using EU policy to respond to crisis situations” (p S130). Jens Nyman Christensen of the Commission¹⁷ likewise welcomed the flexibility, but saw it being used for technical amendments rather than crisis management. Following the current protracted round of Treaty revision, he did not expect the procedures to be used in the near future (Q S325).
- 3.10. The European Parliamentary Labour Party observed that those who described the Lisbon Treaty as “self-amending” ignored the fact that all the procedures for revision required unanimity (p S150; see also p S156). They welcomed the inclusion of national parliaments in Treaty Conventions under the ordinary revision procedure. The Centre for European Policy Studies, Egmont and the European Policy Centre (in “the Joint Study”)¹⁸, considered this “a significant increase in the capacity of national parliaments to influence the negotiating process”, but only if there was a Convention; national parliaments could not force one if the Council and European Parliament did not want it.
- 3.11. The increased role of the European Parliament in Treaty revision was also welcomed in some quarters. The Parliament’s own Committee on Constitutional Affairs called the new procedure “more open and democratic”¹⁹. The EPLP said it would produce “wider scrutiny and more public debate” (p S150).
- 3.12. Professor Peers suggested that, where the Treaties created a *passerelle* without a veto for national parliaments, this Parliament should give itself a veto through the ratification bill (p S156). Mr Heathcoat-Amory made the same point with particular reference to the *passerelle* for foreign and security policy (Q S105). The European Union (Amendment) Bill offers both Houses a veto

¹⁷ Director of Directorate E of Secretariat-General.

¹⁸ *The Treaty of Lisbon: Implementing the Institutional Innovations*, joint study by the Centre for European Policy Studies, Egmont and the European Policy Centre, November 2007.

¹⁹ Report on the Treaty of Lisbon, rapporteurs Richard Corbett and Íñigo Méndez de Vigo, 3 December 2007, point 2(i).

on this and other *passerelles*, in the Clause on parliamentary control of decisions.

- 3.13. Sir Stephen Wall²⁰ considered that the *passerelles*, by combining the requirement for unanimity with a parliamentary veto which in the UK will extend to all of them, added up to “a pretty strong democratic safeguard” (Q S229). Others made the same point, but with a less positive slant: John Palmer considered that the *passerelles* are unimportant (p S15); Professor Chalmers expected the procedure to be little used (Q S40); Brendan Donnelly expected it to be used only for minor matters (p S134). The Joint Study suggested that unanimity among national parliaments was even less likely than unanimity among governments, and that therefore the procedures might never be invoked at all. It noted that the general *passerelles* introduced by the Amsterdam Treaty had not been used to date.
- 3.14. Neil O’Brien and David Heathcoat-Amory MP considered the *passerelles* an inadequate substitute for conventional Treaty revision. Though they might give national parliaments a vote on individual changes, rather than on unamendable take-it-or-leave-it Treaties, the process would be less visible to the citizen, and more likely to go through on the nod (QQ S103–7).

Conclusions

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

²⁰ Vice-Chair, Business for New Europe.

CHAPTER 4: THE IMPACT OF THE TREATY ON THE EUROPEAN INSTITUTIONS

What are the European Institutions?

4.1. Article 13 of the amended TEU states that the Union's institutions are:

- the European Parliament
- the European Council
- the Council of Ministers
- the European Commission
- the Court of Justice of the European Union
- the European Central Bank
- the Court of Auditors.

4.2. Five of these are listed as institutions by the current TEU (Article 5). The Lisbon Treaty newly confers the status of institution on the European Central Bank and the European Council. These bodies will now be bound by all the Treaties' references to "the institutions", including the requirement to respect the principles of subsidiarity and proportionality (Article 5, amended TEU); to give equal attention to all citizens (Article 9, amended TEU); to give citizens and representative associations the opportunity to exchange their views on Union action (Article 11, amended TEU); to keep national parliaments informed (Article 12, amended TEU) and to practise mutual sincere cooperation (Article 13, amended TEU; see the analysis of the Treaty's impact on the European Court of Justice, below). The institutions are also bound to conduct their work as openly as possible (Article 15, TFEU), and to respect rules regarding the processing of personal data (Article 16, TFEU).

The Impact of the Treaty on the European Council

Membership and function

4.3. The European Council brings together the Heads of State or Government of the Member States and the President of the Commission. Under the Lisbon Treaty, the European Council will have the same composition, with the addition of the participation of the High Representative of the Union for Foreign Affairs and Security Policy (see Chapter 7) and a full-time European Council President (see below). Its purpose is stated in the current TEU as "provid[ing] the Union with the necessary impetus for its development and ... defin[ing] the general political guidelines thereof", and this function remains unchanged (although "general political guidelines" becomes "general political directions and priorities"). It will continue to exercise no legislative function.²¹ While the European Council is currently required to

²¹ Another job for the European Council is added by the existence of some "emergency brakes", which allow States, in the course of negotiations in meetings of the Council of Ministers (i.e. below the level of the European Council), to refer issues up to the European Council if they feel that a vital national interest is at stake. In this case, the other Member States are "propelled forward into enhanced cooperation" (p S137). In a situation of enhanced cooperation on a particular policy area among nine or more Member States, decision-making is made easier because those core States can move ahead with qualified majority voting (Articles 20, amended TEU and 326–334 TFEU).

meet at least twice a year, in practice it meets four times a year, and the Lisbon Treaty makes this an instruction, codifying the current situation.

- 4.4. As it does presently, the European Council is to take decisions by consensus, “except where the Treaties provide otherwise” (Article 4 TEU; Article 15, amended TEU).²² The European Council is recognised as a formal institution of the Union, bringing it under the supervision of the Court of Justice²³ (see below) (Article 13, amended TEU).

Status of the European Council

- 4.5. The European Council is given an enhanced status by its elevation to a formal Union institution (see Heathcoat-Amory, Q S68). However, whether this status amounts to a codification of existing practice or extends the European Council’s powers is a matter of dispute. Brendan Donnelly argued that few would disagree that the European Council already had the right to define the “general political priorities and directions” of the Union (p S132).
- 4.6. However, the Campaign against Euro-federalism saw the elevation as an “important ‘federalising’ aspect” of the Union’s new structure. According to CAEF, “[t]his would mean that in constitutional terms European Council meetings would no longer be ‘intergovernmental’ gatherings of Prime Ministers and Presidents outside supranational European structures. Those taking part, whether collectively or individually, would be legally bound to act in accordance with their obligations under the EU Constitution, which would have primacy over their responsibilities and duties as ministers of national governments in any case of conflict between the two ... The European Council would thus become in effect the Cabinet Government of the new Federal European Union” (p S125).
- 4.7. The Commission called the change “very small” and did not see it having any major practical implication. The Commission told us that “there was a feeling [the European Council] had reached maturity [as] a body in its own right” and the Treaty change recognised this (Q S312).

Simplification or complication?

- 4.8. To Professor Wallace, “it probably makes good sense at this moment in the history of the Union for the role and purposes of the European Council to be laid down in a more specific way in the Treaty. It seems to me quite logical ... for it to be embedded into the institutional system: it recognises practice” (Q S175). However, according to Professor Peers it would have been preferable had the European Council not been made a formal institution, with its own formal decision-making powers, because it “simply adds a new feature to the EU’s institutional framework, which should instead have been simplified” (p S152).

²² Consensus is not defined in the Treaties. It means that nobody signifies opposition. Where the European Council does vote, it shall be by qualified majority (see Glossary), in accordance with the voting procedures set out in Section 2 of the new Part Six of the TFEU (Articles 235–6).

²³ Article 263 TFEU.

A full-time President of the European Council

- 4.9. At present, the European Council is chaired by each Member State's Head of State or Government in turn, with each Presidency lasting six months.²⁴ Under the Lisbon Treaty, the European Council will be chaired by a full-time President, serving a term of two and a half years, renewable once. This President, who may not hold a national office, is to be elected by the European Council by qualified majority voting. The President is to chair the European Council "and drive forward its work", ensure the preparation and continuity of its work, "endeavour to facilitate cohesion and consensus within the European Council", and report to the European Parliament after every meeting (Article 15, amended TEU).
- 4.10. The full-time President will therefore fulfil the role currently expected of the Head of State or Government of the rotating Presidency State, which is not detailed in the current Treaties. There is an expectation that he or she will have the experience and time to fulfil this role more fully.

Is a full-time President necessary?

- 4.11. One of the major arguments made for a full-time President of the European Council is that such a post will add coherence to the preparation of European Council meetings and the strategies being defined in them. John Palmer told us that the appointment of a President of the European Council "should help with the preparation of the European Council [meetings], the identification of its priorities and—critically—with follow-up implementation of decisions by Heads of Government" (p S14). The European Parliamentary Labour Party agreed, and the National Farmers' Union considered that the "additional stability" provided by the President "will provide the continuity to the policy agenda necessary to tackle some of the challenges facing the EU" (p S140; p D15). Lord Brittan of Spennithorne²⁵ also thought that the greater continuity provided for by the creation of the full-time President would be a strength (Q S352). The Minister for Europe told us that the President would have "an important role primarily about maintaining continuity", which would be an "important step forward", especially in issues where the Union is looked to for momentum (Q S245).
- 4.12. It is also argued that the system of a rotating presidency of the European Council is no longer practicable. The Coalition for the Reform Treaty (CRT) and Business for New Europe (BNE, a member of the CRT) both argued that in a Union of 27 Member States, a rotating Presidency was "impractical", and that some Member States were "ill-equipped" for the "onerous" task of managing the Presidency (p S128; p S122). The Minister agreed that rotation was undesirable: "the European Union is the single biggest rules-based market in human history and yet we have tolerated a system where there is a rotating leadership every 26 weeks. You would not run a bowling club ... on a rotating presidency of 26 weeks, so I do not see why you should do it in the European Union" (Q S241). The Minister told us that almost all ministers across Europe accept that "the *status quo* leads to a degree of inefficiency"; the rotation of the Presidency meant that of every

²⁴ This is part of the rotating Presidency of the Council of Ministers; each Council including the European Council is chaired by the relevant minister of the Member State holding the Presidency.

²⁵ EU Commissioner 1989–99.

26-week term, it was possible for the Presidency to operate at full speed for only 16 or 18 weeks (Q S246).

- 4.13. A third argument made for the full-time President is that he/she “will be able to devote his/her full energies to the job” (p S128; p S122). Sir Stephen Wall told us that “the job of being President of the European Council is now too big a job for one person who is also trying to run a government to do in a six-month period” (Q S209). The Commission considered that “it is such a workload to prepare a Europe Council meeting by consulting 26 other colleagues that it is virtually impossible to fulfil your national role as prime minister or president fully and satisfactorily in the weeks preceding the European Council” (Q S299). According to Sir Stephen, the Government felt that the Union needed a President of the European Council “who much more than a politician in office doing it for six months, could spend time going round the capitals of the European Union, working with heads of government, working with the Commission, to devise that strategy and then bring it to fruition in the European Council” (Q S202). The Minister for Europe confirmed this: “I think that is an important improvement, that someone, perhaps not in advance of taking up their post, but certainly in the period of carrying out their post, would be expected to visit the vast majority, if indeed not all, of the Member States” (Q S249).
- 4.14. However, Professor Peers thought that “[t]here seemed to be no particularly pressing need for the creation of a full-time post of President of the European Council ... there does not seem to be enough work for the President to do” (p S152). Brendan Donnelly considered that a “quasi-permanent “Presidency may well be better able to “promote the cohesion and effectiveness of the European Council’s work” than a rotating presidency, “[b]ut because the European Council stands somewhat aside from the day to day activities of the European Union’s working institutions (sectoral Councils, Commission and Parliament) its capacity corporately to shape the work of these institutions is limited. General and occasional exhortations from the European Council become diluted in the complexities of the Union’s institutional and negotiating structures” (p S132).

Benefits of a rotating Presidency

- 4.15. Other witnesses considered that there were benefits to the current rotation of the European Council Presidency, which would be lost through the Lisbon Treaty’s reforms. Professor Wallace told us that the creation of a full-time President was something she had “always been against and always thought ill-conceived”. She preferred “the risk of rotation in the hope that rotation would now and again bring a very good President of the European Council and that if it brought us less good Presidents of the European Council it would only be for six months” (Q S175).
- 4.16. David Heathcoat-Amory MP thought that continuity and cohesion might be brought to decision-making “at the expense of public involvement”. He considered that “[a]t least when the presidency circulates amongst Member States, it does occasionally come back to home”, bringing decision-making closer to the citizen and exercising the attention of the public and national media of the Member State concerned. He considered that “all that will go if the permanent European President becomes yet another full-time official in Brussels, rather remote, bigger and more powerful”, creating “a bigger gap between the EU and its citizens” (Q S68).

- 4.17. According to Neil O'Brien, the creation of the full-time President replaces "a national leader with an obvious vested interest in the rights of Member States" with "yet another independent, free-floating Brussels institution interested in getting things done in Brussels" (Q S69).

Power of the President

- 4.18. The degree to which the President will wield significant power is also a subject of controversy, as is whether any strengthening of the European Council would mean strengthening intergovernmental forces within the Union, and therefore Member States' position, or strengthening "Brussels". Neil O'Brien called the full-time Presidency "quite a federalist idea". He thought that the Presidency "will gradually increase its powers and responsibilities", and mentioned the possibility of the President eventually becoming directly elected (Q S69). The Campaign against Euro-federalism thought that the creation of the full-time President "further emphasises the new federalist nature of the European Council", claiming that "[t]here is no gathering or meeting of Heads of State and Government in other international contexts which maintains the same chairman or president for several years while the individual national politicians come and go" (p S125). This was a concern expressed in submissions from members of the public: for example Sally DeBono thought that the creation of the President "further removes elected national governments from EU decision-making" (p S130).
- 4.19. However, others say that since the President will be elected by the heads of government gathered in the European Council, the change arguably enhances their power within the Union. The Coalition for the Reform Treaty stated that "the President will have no executive powers and is the mouthpiece of member states. One could argue that this measure actually constitutes a strengthening of the nation state, as it will improve the functioning of the Council of Ministers, the European institution in which national governments are represented" (p S129). Lord Brittan of Spennithorne told us that the full-time President would not have any more formal powers than the existing rotating President "but he is going to have them for longer", making the full-time President more effective (QQ S352, S354-5). Brendan Donnelly told us that "the new Presidential post was seen by its supporters and opponents as being likely to shift the institutional balance of the Union in a more 'intergovernmental' direction." In his opinion, however, "the powers of the new Presidency seem in the Reform Treaty to be limited to the point of marginality": his/her ability to make a substantial impact on the day-to-day workings of the Union was "more than questionable", and "[e]ven less plausible is the hypothesis that he or she will be able, even if willing, to alter in any significant manner the existing institutional balance of the European Union" (p S132).

What will be the President's role?

- 4.20. Sir Stephen Wall told us that "different people have different views about what the role of the European Council President should be" (Q S202). According to Mr Nymand Christensen, on behalf of the Commission, "[h]e or she will be responsible for preparing [the European Council], setting the agenda and monitoring the follow-up so far as it is within the remit of what the governments would do" (Q S299). However, "[t]he President will also

have a role in the most high-level aspects of the EU's external relations"²⁶. The amended TEU sets out that "the President of the European Council shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy" (Article 15, amended TEU; see Chapter 7). During Sir Stephen's time as head of the European Secretariat in the Cabinet Office, 2000–04, the Government saw the President's job "less in terms of the external role" but more in terms of "the setting of a strategy" (Q S202). The Minister told us that he thought "a relatively small part of the President of the European Council's job will be about foreign and security policy" (Q S248).

Relationships between the senior positions in the Union

- 4.21. The President of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (see Chapter 7) will both, along with the President of the European Council, have roles in the Union's external representation. Timothy Kirkhope MEP told us that there was "a very clear conflict" between the President of the European Council and the High Representative, which was "going to be a real problem" (Q S346). Professor Wallace was also concerned about the "coordination issues" between the European Council President and the High Representative (Q S175). She said that "[i]f one of the things that we will probably all value is that the European Union should be better at coordinating the right hand and the left hand in whatever policy areas it might be in relation to whatever external interlocutors it might be, we are not doing better in that direction" (Q S178). John Palmer did not think there would be a particular problem, but he admitted that "there could be some significant overlapping" (Q S17). Brendan Donnelly found that the post of European Council President was "subject to an unhelpful sharing of responsibility with the High Representative". He was concerned that the European Council President might enjoy a greater personal prestige than the High Representative, without exercising more real influence (p S132). Lord Brittan of Spennithorne, generally favourable towards the Treaty, told us that the post of High Representative was the part of the Treaty which troubled him the most (Q S355).
- 4.22. The distribution of international roles between the President of the European Council, the President of the Commission and the High Representative may create confusion for the rest of the world in trying to understand who speaks for the European Union. But some witnesses felt that the High Representative's new roles as Vice-President of the Commission and Chairman of the Foreign Affairs Council (replacing the present rotation among national foreign ministers) would reduce such confusion (see Chapter 7). Graham Avery²⁷ cautioned that the Treaty would thereby create a new "foreign affairs triangle" (Q C7). Charles Grant²⁸ thought that this triangular relationship was "a very real worry and concern", although even if it did not work perfectly "it cannot be worse than the current system" (Q C57). In

²⁶ *The Reform Treaty: the British approach to the EU IGC*, Cm 7174, July 2007, p 13.

²⁷ Secretary General of the Trans European Policy Studies Association.

²⁸ Director of the Centre for European Reform.

Professor Wallace's opinion, "the relationship of the [Commission] President and the High Representative is going to be quite testing" (Q S183).

- 4.23. The Commission did not see a problem. According to Jens Nymand Christensen, "it is clear that the texts foresee that the President of the European Council will represent the EU at Heads of State and Government level when we speak about foreign, security and defence matters" (Q S299). The statement that the President of the European Council will represent the Union only "at his or her level" reassures some that there will be no turf-war between the European Council President and the High Representative. Jens Nymand Christensen continued: "In all other matters of EU competence it is the President of the European Commission who represents the EU as it is today. In a way, it is not moving the roles around fundamentally from what the President of the European Commission has today vis-à-vis a rotating President and a more permanent President of the European Council ... there will develop a spirit of mutual interest and common understanding and preparations". He told us that "the President of the European Commission is accustomed to working with the Presidents of the European Council, some of them with large personalities, who also play out exactly the role that the future President of the European Council will play, in other words represent next to him the EU in a number of international fora." He said that this system "works amazingly well". Sir Stephen Wall was optimistic that the various personalities could work together, stressing, for example, that the role of the President of the European Council would be to supplement the role of the High Representative in external affairs, not substitute for it or compete with it (Q S206).
- 4.24. The creation of a full-time European Council President and a High Representative results in a European Union with no fewer than five prominent senior leaders: the President of the European Council, the Head of State or Government of the rotating Presidency of the Council of Ministers, the President of the European Commission, the President of the European Parliament, and the High Representative. Jens Nymand Christensen told us: "I do not subscribe to the idea that the new Treaty in any way leads to further overcrowding or overlapping compared to what we know today". He saw the President of the European Council not as "a supplementary President which did not exist before and who will suddenly be shuffling around trying to get his or her space", but as replacing the rotating six-month European Council presidencies held by the Head of State or Government of the Member State holding the Presidency of the Council of Ministers (QQ S306–7).
- 4.25. "As far as the relationship between the Commission President and the [European] Council President, in principle as far as the legal requirements and the provisions of the Treaty are concerned, it will be no different from what it is at present", according to Lord Brittan of Spennithorne (Q S355). However, Professor Wallace thought that "the relationship [of the Commission President] with the full-time President of the European Council is also going to be tricky" (Q S183). She said: "If I were President of the Commission I would say—indeed I heard him say it the day before yesterday—that it would take a great deal of talented effort by those involved to overcome the coordination question between the President of the European Council and the President of the European Commission"

(Q S175). Professor Simon Hix²⁹ considered that the full-time European Council President “may undermine the authority of, and most likely conflict with, the Commission President.” While the former may have higher prestige than the Commission President, the latter will have considerably more formal policy-making power, in terms of the right to initiate legislation and influence the EU’s policy agenda. According to Professor Hix, this means that in a situation of conflict between a European Council President and a Commission President, “the Commission President will invariably win out”. Meanwhile, any conflict “will be exacerbated by the fact that the European Council President will be accountable to the governments while the Commission President will increasingly be accountable to the European Parliament”. These competing sources of authority mean that “the EU will be in a situation of permanent ‘co-habitation’.” Professor Hix felt that “[a] potential solution, in the medium-term, would be to fuse the office of the Commission President and the European Council President” (Hix written). Neil O’Brien was alarmed by this prospect, and expressed concern at the failure of the UK Government to rule it out (Q S69). The Commission told us that this proposal was “not a current issue” although “it could return” (QQ S310–1).

- 4.26. Brendan Donnelly considered that “[t]he new [European Council] President’s relationship with the proposed ‘team presidencies’ will be another source of uncertainty and diffusion of his or her potential influence on the Union’s overall decision-making” (p S132). Professor Wallace and John Palmer agreed that this relationship would create a set of coordination issues that needed clarifying (QQ S17, S175). Professor Hix was concerned that the President of the European Council would not have the same political authority as the directly elected Heads of State or Government of the Member States, including the Head of State or Government of the State holding the rotating Presidency of the Council of Ministers, and “is likely to be beholden to the governments of the larger member states or a particular coalition of governments” (p S144). The Minister responded to this point by saying that as the President of the European Council will be elected by the Heads of State or Government, “ultimately that will be the source of [his/her] authority”. The Minister thought that the President would not be beholden to the larger Member States because “there is a breakdown of that system whereby one or two States can call all the shots” (Q S252). Professor Peers considered that there was no need to alter the current balance of roles between the European Council and Council chairs, stating that “the European Council President should concentrate on his or her relationship with the Member States’ leaders, and his or her external relations role, rather than spend time ‘chasing up’ the Council Presidencies, which after all are held by elected governments with rather more legitimacy (and, as regards the sectoral Council formations, with greater understanding of detailed issues)” (p S152).
- 4.27. Elmar Brok MEP made the point that the order in which these appointments were made in 2009 (following ratification of the Treaty and elections to the European Parliament) would be important (Q S346).

²⁹ Professor of European and Comparative Politics, London School of Economics.

Ambiguity about relations between the senior leaders?

- 4.28. The impact of the Treaty on the relations between the Union's senior leaders is, for some, hard to predict. Timothy Kirkhope MEP told us that "no-one has a complete answer as to how [the relationship between the European Council President and the High Representative] is going to work" (Q S346). According to John Palmer, "there are no clear answers at present to how [the European Council President's relations with the other senior leaders] will function in practice." He told us that this was "something one would expect to be the subject of a subsequent decision by the Council of Ministers" (p S14). Professor Wallace agreed that there remained "a very large number of coordination issues" which needed to be addressed (Q S175). Sir Stephen Wall told us that because the role of the European Council President was "controversial, it has not been possible to define it quite as closely as, I think, the British Government would have liked" (Q S202). Charles Grant thought it "very important that the governments do work out rough job descriptions of the Council President and the High Representative" (Q C57). The Minister agreed that a number of issues still needed to be addressed (Q S252), but he stressed that any decisions would need to be taken by unanimity. He recognised an urgency, saying that "it is absolutely essential [that] before this starts ... the exact roles, responsibilities and relationships have to be ironed out in precise detail ... we cannot allow the enactment of the Treaty across the European Union and then work out the detail; it has to be nailed down in advance of the commencement of the operation of the Treaty" (Q S252). He told us that "[w]e have agreed, as 27 Member States in the European Union, that this has to be worked through before commencement" (Q S253).
- 4.29. However, other witnesses suggested that the Treaty included deliberate ambiguity. John Palmer's understanding was that "the heads of government deliberately did not seek to address some of the mechanics of how the institutions will relate to each other ... because it is always open to an act of the Council to define a clearer functional answer to the question" (Q S17). Brendan Donnelly considered that many of the institutional provisions were "perhaps deliberately" permissive or tentative, so that their impact would depend on how they are implemented, which would be influenced by personalities and politics (p S131).
- 4.30. Other witnesses thought that more precision in the Lisbon Treaty about the relations of the senior leaders could not have been achieved. Sir Stephen Wall did not think that it would have been "feasible to define the roles so clearly that [the European Council President and the Commission President] were bound to get on" (Q S204). Lord Brittan of Spennithorne said: "I think all this has to be worked out and that it is complex I do not deny. That it is potentially problematic I do not deny. Is there a better way of doing it than that which is in the Treaty? I cannot think of one" (Q S356). While he was troubled by the role of the High Representative, he considered that "everything depends on the personalities. It can be made to work" (Q S355). He told us: "If I had *carte blanche* to write the Treaty, I do not think I would have wanted to write into it more provisions which would make it more likely to work than there are at the moment. The extent to which it works is dependent on personalities and working practices rather than any further or different treaty language" (Q S353).

- 4.31. Graham Avery said that good relations between the Presidents of the European Council and the Commission and the High Representative would be “absolutely essential”, adding, “[f]rankly, it depends on the personalities” (Q C7). Charles Grant thought that “a lot depends on the people involved ... If the people do not get on well it is not going to work well, however clever the institutional provisions” (Q C53). Elmar Brok MEP also felt that “people set realities”, and Sir Stephen Wall considered that “the structures will not deliver the result, the result does depend critically on choosing the right men or women to do those key jobs” (QQ S346, S202). In particular, the choice of President of the European Council would be “critical”, because “you could get a situation in which that person saw their role as being principally a role on the international stage, which risks the potential of them competing for space with the High Representative” (Q S205). Professor Wallace put it to us that the result would depend not so much on the written rules, as on evolving practice (Q S160).
- 4.32. There is another point of view that considers that the Treaty is actually more precise about the roles of the Union’s senior leaders than previous Treaties have been. Jens Nymand Christensen, for the Commission, told us that “the texts have been drafted in such a manner as to make it as clear as possible how each of those people will function. ... The texts have clearly been drafted with a view to limit any kind of confusion or turf battle” (Q S299).

Conclusions

- 4.33. **The Lisbon Treaty makes highly significant changes to the European Council, the purpose of which is to make the European Council work better. It will become part of the EU’s formal institutional framework and expressly subject, for the first time, to the jurisdiction of the ECJ. It will be given a more explicit leadership role in the EU.**
- 4.34. **The creation of a full-time European Council President, in place of a six-monthly rotation among heads of government, is a significant move, and is likely to make the European Council more effective at creating direction and action. This could mean a more active/activist European Council—a consequence which would be welcomed in some quarters but not in others.**
- 4.35. **The European Council President will have two broad roles: the primary one of leading the European Council, and also ensuring the external representation of the Union on issues concerning the CFSP at his or her level and without prejudice to the High Representative.**
- 4.36. **Concerns have been raised about the relationship between the European Council President and the other senior leaders of the Union, particularly the High Representative, the rotating presidency of the Council of Ministers, and the President of the Commission. There is little in the Lisbon Treaty itself to indicate how these relationships will work; only experience will show. While some progress towards clarifying this may be made before the Treaty’s provisions come into operation, much will depend on practice.**

The impact of the Treaty on the Council of Ministers

Membership and function

- 4.37. The composition of the Council of Ministers—ministers of each Member State meeting in different configurations according to the subject matter—is unchanged by the Lisbon Treaty. Its simplified remit is to “exercise legislative and budgetary functions” jointly with the Parliament, and “carry out policy-making and coordinating functions as laid down in the Treaties” (Article 16, amended TEU)³⁰.

The rotating Council of Ministers Presidency

- 4.38. Meetings of the Council of Ministers will continue to be presided over by the ministers of each Member State in turn—the rotating Council of Ministers Presidency (new Article 16, TEU). The exception is the Foreign Affairs Council, which will be chaired by the new High Representative of the Union for Foreign Affairs and Security Policy (see Chapter 7). The current informal arrangement whereby Member States work in team Presidencies, cooperating in groups of three successive six-month presidencies to set Council priorities, is reasserted in a Declaration of the IGC (Declaration on Article 9c(9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council), but not in the Treaties themselves. This cooperation is meant to encourage continuity and strategic planning across the six-month Presidencies.

Voting in the Council of Ministers—extension of qualified majority voting

- 4.39. Qualified majority voting (QMV) becomes the default voting method³¹ in the Council of Ministers (Article 16 TEU). The current default voting method is simple majority. Sensitive areas like tax and social security remain decided by unanimity, but significantly, a number of areas move from decision in the Council of Ministers by unanimity to decision by QMV. These include policy areas such as justice and home affairs, a number of matters relating to foreign and defence policy, plus certain internal matters including the rules governing the nature and composition of the Committee of the Regions and the Economic and Social Committee (Article 300 TFEU). The number of extensions is somewhere between 40 and 60 depending on interpretation.³² A number of moves to QMV in policy-making, such as decisions on EU cultural programmes, EU funding of humanitarian aid and most of police and judicial cooperation in criminal matters (subject to opt-outs and emergency brakes), are discussed in the other portions of this Report (see Chapters 8, 7 and 6 respectively).
- 4.40. The movement of policy areas from unanimity in the Council of Ministers to QMV is often discussed in terms of the loss of national vetoes and the ability

³⁰ The current requirements on the Council are to ensure coordination of the general economic policies of the Member States; have power to take decisions; and confer on the Commission powers for the implementation of the rules which the Council lays down, imposing requirements in the exercise of these powers, and directly implementing powers itself (Article 202, TEC).

³¹ The method which applies unless the Treaty provides otherwise.

³² The Foreign Secretary told the House of Commons on 21 January 2008 that the UK would not be affected by or could opt-out of 16 of these and that another 14 were “purely procedural” (HC Deb 21 January 2008 cols 1247–48).

of other Member States to out-vote the UK. Such views were expressed in much of the evidence we received from the general public: for example Margaret Boardman wrote that “there is more chance of EU laws being imposed on Britain regardless of whether our Government, Parliament and the people all oppose them” (p S120) (see also D. Adams p S119, Sally DeBono p S130).

- 4.41. Others took a different view. Brendan Donnelly said that, as a result of the Lisbon Treaty reforms, “some streamlining of decision-making (with its consequent risk that the United Kingdom or other countries may be outvoted) may be expected within the Council.” He stressed, however, that “even in matters theoretically susceptible of majority voting the Council normally tries to proceed by consensus, particularly to meet the wishes of a large country such as the United Kingdom”, meaning that the UK “is more likely to be the beneficiary of streamlined decision-making over time than its victim” (p S132).
- 4.42. Other witnesses also believed that the importance of the moves to QMV should not be overstated. Professor Chalmers told us that the extension of QMV “is largely in single market areas and some trade policy”, and that “the UK has largely reserved the right to opt into [or out of] the bits which are significant” (Q S2; on the area of freedom, security and justice see Chapter 6). The European Parliamentary Labour Party agreed, saying that “of the 50 extensions of majority voting, most are in areas that are either technical or where Britain has an opt-in/out” (p S141). “There will not be a revolutionary change”, according to John Palmer, because the most important impact of QMV has been to assist the process of reaching consensus in Council, and “[t]he actual occasions where people have been voted or out-voted have been precious few”. The extension of QMV, therefore, would continue to add “a significant pressure to achieve a flexible consensus” (Q S18).
- 4.43. Business for New Europe and the Coalition for the Reform Treaty noted that “majority voting is sometimes perceived in the UK as something to be feared” (p S129; p S122). Sir Stephen Wall told us that, with the extension of QMV, “occasionally you might lose a vote, but actually the British interest [is] better served by having more majority voting”, and that “insofar as majority voting is extended, it seems to me it is extended in areas where it is in our interest” (Q S213). The European Parliamentary Labour Party noted that “the veto is a double edged sword: if you have one, so does everybody else”. It thought that “[t]he handful [of extensions of QMV] that are politically important such as urgent humanitarian aid operations, aspects of energy policy and cooperation in the event of natural disasters are all where it is in Britain’s interests not to be blocked by the vetoes of others” (p S141). The ability of the UK to overcome obstructions from other Member States and “to push its political agenda” was also highlighted by Business for New Europe (p S122; see also p S129). The Government, in its White Paper on its approach to the IGC, stated that “[t]he Government supports QMV to unlock decision-making in the right areas where it is in Britain’s interest”.³³

Voting in the Council of Ministers—reform of qualified majority voting

- 4.44. The Lisbon Treaty makes significant changes to the rules for calculating a qualified majority. However, the current rules will continue to apply

³³ Cm 7174, p. 13.

exclusively until 31 October 2014, and between 1 November 2014 and 31 March 2017 any member of the Council of Ministers can request that a vote revert to these rules, meaning that the new rules only take full effect from 1 April 2017. Table 2 shows the new arrangements (detailed in Article 205, TEC; Article 16, amended TEU; Article 238, TFEU; Protocol on transitional provisions).

TABLE 2

Changes to qualified majority voting

Current Treaties—used exclusively until 31 October 2014	The double majority QMV system—used from 1 November 2014 and exclusively from 1 April 2017
<p>For a proposal from the Commission to pass:</p> <p>at least 255 votes (out of 345, meaning 73.9%),</p> <p>representing a majority of Council members (one member one vote) (i.e. at least 14 Member States, currently),</p> <p>and representing at least 62% of the Union population</p>	<p>For a proposal from the Commission or High Representative to pass:</p> <p>votes from at least 55% of Council members (one member one vote) (i.e. at least 15 Member States, currently),</p> <p>and representing at least 65% of the Union population</p>
<p>For other proposals to pass:</p> <p>at least 255 votes (out of 345, meaning 73.9%),</p> <p>representing two-thirds of Council members (one member one vote) (i.e. at least 18 Member States, currently),</p> <p>and representing at least 62% of the Union population</p>	<p>For other proposals to pass:</p> <p>votes from at least 72% of Council members (one member one vote) (i.e. at least 20 Member States, currently),</p> <p>and representing at least 65% of the Union population</p>
<p>Where not all members take part³⁴, for a proposal to pass it needs the same proportion of weighted votes (73.9%) and the same proportion of the number of Council members (majority/two thirds) and the same percentage of the population of the Member States concerned (62%) of the members taking part</p>	<p>Where not all members take part, for a proposal to pass it needs the same proportion of votes (55%/72%) and the same percentage of the population of the Member States concerned (65%) of the members taking part</p>

³⁴ These are provisions for situations in which not all Member States are participating in legislation, for example in cases of opt-outs or enhanced cooperation. They are not used in cases where a Member State participates but abstains; these cases are counted according to the usual rules applying to votes with 27 Member States.

The blocking minority

- 4.45. A blocking minority is simply a group of Member States whose votes prevent other Member States from finding the majority necessary to pass a proposal.
- 4.46. Under the current Treaties, there are no formal rules regarding blocking minorities. If all the Member States were participating, a group of Member States would require to include one of the following to prevent a proposal from passing: (i) 91 of the Council's 345 votes, (ii) a majority of Council of Ministers members (i.e. 14 Member States, currently) or for non-Commission proposals over one third of Council of Ministers members (i.e. 10 Member States, currently), or (iii) Member States representing more than 38 per cent of the population of the Union. At present, this means that the minimum number of Member States that can block a measure is three, on the basis of their population³⁵.
- 4.47. The Lisbon Treaty includes rules regarding the formation of a blocking minority (Article 16(4), amended TEU; Article 238(3), TFEU). Under the new system, if all Member States are participating, a blocking minority must include "at least four Council Members" representing more than 35 per cent of the population of the Union. This is to prevent any three of the UK, Germany, France and Italy being able to block a proposal (any three of these States would represent more than 35 per cent of the Union's population); a fourth State would be needed, without which "the qualified majority shall be deemed attained", even if the population requirement (65 per cent) were not met. The requirement for at least four Member States would remain regardless of future demographic shifts in Member States.

The UK's position under the new QMV rules

- 4.48. Voting weight is not everything. Many observers consider the UK's influence greater than its technical voting weight. Professor Wallace told us that "the numerical notion of voting" was "really not as important ... as the public debate would suggest" (Q S175).
- 4.49. Appendix 5 shows how the UK's share of the overall voting weight and the UK's share of a blocking minority will change under the Lisbon Treaty's new QMV rules. These calculations are based on Eurostat data as of 1 January 2006 for the purpose of illustration. The Lisbon Treaty is silent as to the data to be used in assessing the population of the Union for the purposes of future voting in the Council of Ministers, or the frequency with which such data are to be updated. This question may be contentious, as different data sets will apply different standards as to who should be counted (the issue of migration may prove controversial here).
- 4.50. As is explained in Appendix 6, arguably the most important term for calculating the UK's share of the voting weight under the current voting rules is the share of the votes that each Member State holds—in the UK's case, 8.4 per cent. Under the Lisbon Treaty, the important term will be the share of the population that each Member State represents—in the UK's case (according to Eurostat data), 12.3 per cent. In practice, therefore, the UK's voting power will increase from 8.4 per cent (UK share of current allocation among Member States) to 12.3 per cent (UK share of population).

³⁵ The possible combinations are: (i) Germany, France, UK; (ii) Germany, France, Italy; (iii) Germany, France, Spain; and (iv) Germany, UK, Italy.

- 4.51. The UK's share of the minimum blocking minority (i.e. the blocking minority including the smallest number of Member States required to back up the UK) will increase from 31.9 per cent (in terms of weighted votes) or 32.3 per cent (in terms of population) under the current Treaties to 35 per cent (in terms of population) under the Lisbon Treaty. The minimum blocking minority will include four Member States rather than three.
- 4.52. Under the Lisbon Treaty, there will be one further complication to Council of Ministers voting: a procedure which is the successor to the "Ioannina mechanism", which allowed a minority of countries smaller than that needed for a blocking minority to suspend a decision to allow the Council of Ministers further time to find an acceptable solution. Declaration 4 of the IGC sets out the agreement of the Member States to adopt an amended version of this mechanism³⁶.
- 4.53. The double majority system allows for simpler decision-making, and means that a larger number of combinations of Member States can constitute a qualified majority than currently. If more countries join the Union, there will be no need to renegotiate voting weights. Furthermore, the double majority system takes account of the double nature of the Union: a Union of Member States and of European peoples.

The impact of the reforms to qualified majority voting

Passing legislation more easily

- 4.54. Whether the change in the method of calculating a qualified majority to double majority voting is interpreted as a positive or negative change depends to a significant extent on one's opinion of European legislation. In the words of Neil O'Brien, "[i]f you want ... more EU legislation, then this Treaty is a good idea. If you are cautious about that, then this Treaty is perhaps not such a good idea" (Q S72). Andrew Duff MEP told us that "[t]he new Treaty will much enhance the Union's capacity to act by increasing the efficiency and effectiveness of the institutions and decision-making

³⁶ From 1 November 2014 to 31 March 2017, members of the Council of Ministers representing either 75 per cent of the proportion of the Union population necessary to constitute a blocking minority (i.e. representing 26.25 per cent of the total Union population, if all Member States are taking part), or three-quarters of the number of Member States necessary to constitute a blocking minority (i.e. 10, or 6 for non-Commission proposals, if all Member States are taking part), can express their opposition to the Council adopting an act by QMV. The Council of Ministers must then "do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by the law of the Union, a satisfactory solution". During this time, the State holding the Presidency of the Council of Ministers "shall undertake any initiative necessary" to find wider agreement, assisted by the Commission and Council of Ministers members. From 1 April 2017, the threshold needed to block a measure subject to QMV will fall to 55 per cent of the Union population necessary to constitute a blocking minority (i.e. 19.25 per cent of the total Union population, if all Member States take part) or 55 per cent of the Member States necessary to constitute a blocking minority (i.e. 8, or 5 for non-Commission proposals, if all Member States take part). The new procedure can only be modified or repealed following a decision of the European Council (i.e. unanimity is required to change these procedures)(Protocol on the Decision of the Council relating to the implementation of Art. 16(4) TEU and Art. 238(2) TFEU between 1 Nov 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other). The preamble to this protocol records that the procedure was "of fundamental importance" to the approval of the Lisbon Treaty. Between 1 November 2014 and 31 March 2017, the UK will be able to invoke the "Ioannina-II" mechanism if it has the agreement of Germany alone, or of other states adding up to 14.0 per cent of the Union's population. After 1 April 2017, the UK will be able to implement the "Ioannina-II" mechanism if it has the agreement of any of Germany, France, Italy, Spain, or Poland alone, or of several other similar states adding up to 7.0 per cent of the Union's population. See Appendix 5.

mechanisms. Armed with the Treaty, the EU will be able to face its new global challenges and address the issues which matter most to citizens—such as climate change, energy security, international terrorism, cross-border crime, asylum and immigration” (p S135). Neil O’Brien agreed that the new voting system “makes it considerably easier to pass legislation” (Q S71), and asked “do we think that the EU needs to pass even more legislation than it does at the moment?” Lord Leach of Fairford³⁷ thought it was a question of “how you deal with this flood of legislation” (Q S75).

Is the change in rules significant?

- 4.55. Professor Peers thought that the new voting system would only “modestly” increase the ease of adopting legislation, and thought that “[t]here did not seem any pressing reason for this change ... but neither would the new system appear to constitute a massive change in the nature of decision-making by qualified majority” (p S152). The difference between the old QMV system and the new QMV system is “not very significant” according to Professor Chalmers (Q S18); Lord Brittan of Spennithorne agreed (Q S374). Professor Hix wrote that “the difference between the two sets of rules is relatively minor because over 90 per cent of coalitions that commanded a majority under the Nice [current QMV] rules would also command a majority under the Reform Treaty rules” (p S144). Professor Wallace told us that the Council of Ministers prefers to take decisions by consensus, so explicit voting occurs on only a minority of issues, and does not tell us much about how QMV currently operates in practice. In her opinion, “[t]o the extent that it really bites, it bites in a much more implicit way, long before decisions are formally adopted ... If that is right, then the shift to the different majority voting would probably have a very small impact on the way things happen” (Q S175).

Is the new system an improvement?

- 4.56. The majority of evidence that we heard favoured the new QMV rules. Lord Leach of Fairford told us that “it is hard to object to the principle of recognising population in the voting system” (Q S75), and Business for New Europe and the Coalition for the Reform Treaty called the move to make voting proportionate with population a “much needed reform” (p S122; p S129)³⁸. Lord Brittan of Spennithorne’s instinct was “wholly...that the change in the arrangements is a beneficial one” (Q S380). Sir Stephen Wall thought the new system was better than the old QMV: “This is a logical, balanced and fair system” (Q S213). The double majority system represented an improvement in comprehensibility in comparison to the current triple majority QMV (at least to specialists, if not to the general public) (p S132). According to the European Parliamentary Labour Party (EPLP), the new system “will deliver fairer and more efficient decision making” (p S140). The National Farmers’ Union welcomed it as “simpler ... fairer and more transparent” (p D15). The fact that the change would mean the Union could enlarge “without a further Treaty and institutional horse-

³⁷ Chairman of Open Europe.

³⁸ Under the current system of qualified majority voting, population is only taken into account in that a member may request verification that the Member States constituting the qualified majority represent at least 62 per cent of the total population of the Union. If this condition is not met, the decision is not adopted (Article 205, TEC).

trading on the weight each new member will have in the Council of Ministers” was an added benefit (p S122). While some have criticised the new voting method for being inequitable (see Professor Hix, p S145), Lord Brittan of Spennithorne told us that “the change in the voting arrangements, which frankly give more power to the larger countries and less to the smaller ones, makes it more difficult for [new Member States] to be trouble makers” (Q S361).

- 4.57. The EPLP added that “basing votes in Council on population will increase Britain’s share of the votes from 8.5% to 12%” (p S140) (see Appendix 6). This was reinforced by the Minister who told us that the Government is “really pretty content with the new system of moving away from qualified majority voting to double majority voting” (Q S260). In his view, “the UK will be one of the main beneficiaries because ... we are going to a situation where our population of 60.6 million means that, instead of having an eight per cent share of the vote in the Council, we go to a 12 per cent share” (Q S260). The National Farmers’ Union thought that the move “will give more clout to [populous] countries such as Germany and the UK” (p D15). Lord Brittan of Spennithorne told us that the slight difference in the voting system would be “wholly to Britain’s advantage because we will have a higher proportion of the votes” (p S14; Q S374).

The timetable for transition to full use of double majority voting

- 4.58. The possibility for Member States to request that the old QMV rules be used for votes before 1 April 2017 means that the new rules will not apply exclusively for almost a decade after the Treaty’s ratification. John Palmer thought that this delay was “greatly to be regretted”, and Professor Chalmers thought that the timetable was “significant”, and suggested that the new rules might be overtaken by events (p S14, Q S18).

The blocking minority

- 4.59. Different interpretations of the figures are possible. A report by Open Europe states that “The UK stands to lose nearly 30 per cent of its ability to block EU legislation in the Council” (Open Europe: *A guide to the constitutional treaty*, second edition, February 2008). According to Neil O’Brien (Director of Open Europe), where the UK Government wishes to assemble a blocking minority, its position “is going to be jeopardised under the new voting system because it will be much harder for us to block legislation” (Q S71). Professor Peers agreed, arguing that the new blocking minority rule “constrains the ability of the UK to participate in blocking minorities (although of course the rule will work to the UK’s favour when it is participating on the side of the majority)” (p S152).
- 4.60. On the other hand, Business for New Europe, the Coalition for the Reform Treaty and the Minister told us that the UK’s share of a blocking minority will increase from 32 per cent to 35 per cent (p S122; p S129; Q S260). Sir Stephen Wall told us that the current minimum of three Member States to form a blocking minority was “a mistake” because “it is not very often that we are in league with two other large Member States in wanting to block something” so he did not think the change in the minimum to four Member States “is going to be significant in terms of undermining British interest to block” (Q S213). It was the Government’s view that “this new system will give us a greater opportunity, where we so wish, to gather a blocking

minority” (Q S261). The Minister regretted that “sometimes the conversation about Europe is trapped in a dialogue about a double negative, that, ‘Europe is a real threat, but don’t worry, we’re protecting you from it’” (Q S263).

The “Ioannina-II” mechanism

- 4.61. Professor Chalmers thought the use of the “Ioannina–II” mechanism from 2017 would be significant. He told us that it would mean that “states representing 19.25 per cent of the population can block legislation and, if one thinks that a lot of the time we will want to be deregulating legislation, that is a very small blocking minority...It does not actually help the UK” (Q S18).
- 4.62. However, Professor Wallace told us that “the Ioannina decision is useless in practice” and in practice “not very interesting ... I would guess the same is likely to be true with the version that we now have there ... So it has a symbolic importance, but is probably ... not very important” (Q S175).
- 4.63. Sir Stephen Wall told us that the mechanism was only rarely and briefly invoked (Q S213). He thought that the new mechanism “serves a political purpose here and now, and will not actually be invoked very much in practice” (Q S214). He pointed out that the Treaty does not specify how much time has to be allowed to try and reach agreement after the invocation of the Ioannina mechanism.
- 4.64. The Minister described the Ioannina mechanism as “a protection” (Q S264).

Transparency in the Council of Ministers

- 4.65. The Lisbon Treaty includes a transparency clause (new Article 16(8) of the amended TEU): “The Council shall meet in public when it deliberates and votes on a draft legislative act.” Each meeting of the Council of Ministers will be divided into two parts, dealing separately with legislative acts and non-legislative activities, the first half only being public.
- 4.66. The European Parliamentary Labour Party called this change a “long overdue reform that was driven by the 2005 UK Presidency” (p S139). Federal Union considered that the provision could, if applied properly, “make a great deal of difference to the way in which the European Union functions.” It could enable national parliaments to hold their governments to account more effectively for their actions in the Council of Ministers; could oblige national governments to explain and justify their actions more completely, contributing to public understanding; and might make national governments less willing to support proposals that they could not justify to their voters (pp S142–143).
- 4.67. Professor Peers said that the move was “welcome” and “should be implemented by the publication of the proceedings of the Council’s public meetings in a form of *Hansard* (which could be online only)” (p S152). Federal Union felt that not just a final vote but “every stage of the legislative procedure should be open to scrutiny”, especially all amendments to legislative proposals (p S142).
- 4.68. However, Lord Brittan of Spennithorne regretted the move, considering that “the position in which there was haggling and negotiation rather than the necessity to take up public positions was on the whole a good arrangement” (Q S376).

Conclusions

- 4.69. **The extension of the use of qualified majority voting (QMV) to more than 40 new areas is a significant change. Qualified majority voting becomes the default voting method in the Council of Ministers. Where there is a move from unanimity to QMV, if the UK wishes to block legislation it will have to construct a blocking minority rather than use a veto; the UK's share of a blocking minority goes from 32 per cent to 35 per cent. Equally, the extended use of QMV may help to advance UK interests in some cases. The extension of QMV, because it does not depend on consensus, may result in faster decision-making.**
- 4.70. **The new system for calculating a qualified majority is more equitable and takes more account of population than the current QMV rules, and the revision is significant. The UK's voting weight increases from 8 per cent to 12 per cent.**
- 4.71. **The provision requiring the Council of Ministers to meet in public when it legislates is important. The Council of Ministers will continue to meet in private when it is discussing and voting on non-legislative matters. We believe that the proceedings of the public meetings of the Council of Ministers should be recorded and published for public consumption.**

The impact of the Treaty on the European Commission

Function of the Commission

- 4.72. Under the current Treaty provisions, the European Commission's task is to "ensure the proper functioning and development of the common market", by ensuring that the Treaties are applied, formulating recommendations and delivering opinions, participating in the shaping of measures taken by the Council and European Parliament, and exercising the powers conferred on it by the Council for the implementation of the rules the Council lays down. Under the TFEU, the Commission "shall promote the general interest of the Union and take appropriate initiatives to that end". It shall ensure the application of the Treaties, oversee the application of the law of the Union under the supervision of the Court of Justice, execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties, and ensure the external representation of the Union in cases not otherwise provided for in the Treaties. The Commission will continue not to represent the Union's Common Foreign and Security Policy, which will be in the hands of the High Representative of the Union for Foreign Affairs and Security Policy (Article 17 of the amended TEU) (see below).
- 4.73. The Commission continues to have control of annual and multiannual programming, and maintains its near-monopoly on the right of initiative in Union legislation (Article 17 of the amended TEU)³⁹.

³⁹ The Member States have a right of initiative in the areas of judicial cooperation in criminal matters and police cooperation, and in relation to administrative cooperation in those areas (see Chapter 6). In certain cases, the European Parliament, European Court of Justice, European Central Bank, and European Investment Bank have a right of initiative. The Union does not adopt legislation in the Common Foreign and Security Policy (see Chapter 7).

4.74. Professor Chalmers noted that the Commission “has acquired a monopoly of initiative in new areas, notably what were previously Third Pillar areas”, and David Heathcoat-Amory MP also saw the expansion of the Commission’s role into areas which are currently intergovernmental as significant (QQ S28, S88). The Commission also noted that its “right of initiative on most areas of policy in the EU” was preserved in the Treaty (Q S298). Mr Heathcoat-Amory regretted this. He considered that “any self-respecting, democratic institution, as the EU sometimes holds itself out as, should not tolerate a situation whereby a group of non-elected people meeting in private have a sole right to initiate legislation or the repeal of legislation” , and that this situation ought to have been changed in the Treaty (QQ S88, S90)⁴⁰.

Membership of the College of Commissioners

- 4.75. Currently, the European Commission is run by a College of Commissioners, made up of one Commissioner nominated by each Member State, including a President of the Commission. There will be one more five-year College with this membership, in post from 2009 to 2014. The only change to the membership of this College will be that the High Representative of the Union for Foreign Affairs and Security Policy will be a Commissioner and one of the Commission Vice-Presidents (Article 17 of the amended TEU).
- 4.76. From 1 November 2014, the number of Commissioners will reduce to two-thirds of the number of Union members (so, in an EU of 27 Member States, to a College of 18). The Commissioners will be allocated to Member States on a system of rotation, meaning that each Member State will not be represented in the College in one Commission out of every three (five years out of every 15). The effect of enlargement to a number not divisible by three is not spelled out. However, the Treaty specifies that the European Council can decide at any time (by unanimity) to change the number of Commissioners (Article 17 of the amended TEU).
- 4.77. This rotation rule means that the choice of person for the post of High Representative will be limited by their nationality. An effective High Representative may have to step down after one term because his or her nationality is due to be rotated out. The same will apply to the Commission President.
- 4.78. An IGC declaration (Declaration on Article 9d of the Treaty on European Union) states that when the College no longer includes representatives of each Member State, “the Commission should pay particular attention to the need to ensure full transparency in relations with all Member States”, by liaising, sharing information and consulting with all Member States. Furthermore, “the Commission should take all the necessary measures to ensure that political, social and economic realities in all Member States ... are fully taken into account.”

A more executive Commission

4.79. The current arrangement of one Commissioner per Member State is, according to the Government, “unwieldy” and “unnecessary” because “[t]here are not 27 jobs to do” (Q S240). The Minister for Europe told us that the College may gain significantly increased influence “by being smaller

⁴⁰ The European Council can and does ask the Commission to bring forward legislation.

and more effective” (Q S240). John Palmer and the European Parliamentary Labour Party both thought the reduction in the College’s size should improve its cohesion (p S15; p S141), while the Coalition for the Reform Treaty and Business for New Europe called the reduction “welcome” because “the college of Commissioners has to be a reasonable size to function” (p S130; p S122). The National Farmers’ Union thought the reduction would contribute to the coherence of Commission policies (p D15). Lord Brittan of Spennithorne considered that a smaller College would be more efficient (Q S350). David Heathcoat-Amory MP agreed that “small Commissions probably mean more powerful Commissions because they will be less influenced by national influences, which are supposed not to exist but we know that they do”. He thought that “a smaller, more executive body with wider powers is envisaged” (Q S88).

The loss of the UK Commissioner—some of the time

- 4.80. The United Kingdom will not have a Commissioner in the College for five out of every 15 years, under the rotation rules of the Lisbon Treaty. Neil O’Brien felt that national interests would be less strongly represented “because it will be more difficult for [the UK] in times that it does not have a Commissioner to find out what is going on in the Commission”. He did not accept that the proposal would reduce bureaucracy in the European Union, saying that “[t]here are 65,000 people working for the EU and its agencies now. Removing nine of them will not make a significant dent in that bureaucracy. All it will do is reduce our input over the process” (Q S90). Professor Chalmers considered that the lack of a UK Commissioner “will affect perceptions of the Commission very strongly” (Q S39), while Professor Peers agreed that the reduction of Commissioners “will create a perception that the Member States without a Commissioner are not ‘represented’ on the Commission at any given point and that therefore the Commission (further) lacks legitimacy, even though the Commissioners are supposed to be independent of Member States and the Member States’ governments and electorates will still be represented fully in the Council and the EP” (p S153).
- 4.81. Lord Brittan of Spennithorne, the UK Commissioner 1989–1999, told us that “there will be a loss”. A Commissioner was expected to inform the College if a proposal would be particularly disastrous or beneficial for his or her Member State, and to explain to the country what the Commission and EU were up to. “If there is not a Commissioner there will not be a single figure of the same authority to do that in that way”. According to Lord Brittan, “it would be ridiculous to pretend that there will not be a genuine loss to this country, as to every other country, when we do not have a Commissioner” (Q S366). He added that it would be helpful if the UK were not the first big Member State to be without a Commissioner, and that he did not think the advantages of a smaller Commission would be outweighed by the disadvantage of being without a Commissioner at times (Q S368).
- 4.82. Sir Stephen Wall thought that having a Commissioner from each Member State created a “danger of those commissioners being seen to be the national representative in Brussels”, which was “not what the system is designed to be” (Q S222). He thought that “a smaller Commission will have greater regard for their duties as Commissioners with responsibility for the interests of the Union as a whole”. He conceded that there was a “potential cost” of not having a UK Commissioner at certain points, but equally he considered

that “successive British Commissioners have actually taken their responsibilities to the Commission, as opposed to the Government from which they came, rather seriously”. He told us: “I do not myself see that there is a significant British interest that will be lost if on occasion there is not a British Commissioner”. The European Parliamentary Labour Party felt that “[b]eing without a commissioner for one term in three is better than always having a member of an oversized and unwieldy Commission” (p S141).

- 4.83. Professor Wallace thought the Lisbon Treaty’s provisions regarding the eventual membership of the College “a kind of fudge”; they were “not clear” and it was possible for them to be rescinded. She told us that “[w]e are not out of the woods on the membership of the college” (Q S183).

The Commission’s relations with Member States temporarily without Commissioners

- 4.84. The Commission has “hardly begun” to discuss how it will deal with the third of Member States without Commissioners at any one time. Jens Nymand Christensen, for the Commission, told us that there is “a question that we need to answer in a satisfactory manner as to how we establish contact of a different nature than we have today with the ... Member States that would not be in the College. We have no answer to that question today” (Q S316). The Commission considered it “important to ensure that the Commission can execute and play its role fully towards all Member States ... and that the role and the initiatives and decisions of the College are equally respected” whether Member States have a Commissioner or not. The Commission would not want there to be undue focus on those Member States with Commissioners (Q S318).
- 4.85. Lord Brittan of Spennithorne felt that when the UK did not have a Commissioner to explain in the UK what the Commission and the EU are doing, “there is a heavier responsibility on the Government itself to do it” (Q S368). In his opinion, the role of the Europe Minister in this area should be enhanced (Q S371). The Commission’s London office could take on the role of explaining Commission proposals in the UK when the UK did not have a Commissioner (Q S373).

The Commission President

- 4.86. Whilst the role of the Commission President is largely unchanged by the Lisbon Treaty, the method by which he or she is appointed changes (Article 17, amended TEU). Under the current system, the President is nominated by the Council (composed of Heads of State or Government) acting by a qualified majority; this nomination is then approved by the European Parliament (Article 214, TEC). Under the Lisbon Treaty, the President will be nominated by the European Council acting by a qualified majority (as now) and “[t]aking into account the elections to the European Parliament and after having held the appropriate consultations” (Article 17 of the amended TEU). The candidate shall be “elected” by a majority of the European Parliament’s members, rather than “approved” (a change of emphasis). If the candidate is rejected, the European Council will have a month to propose a new candidate.

Power of the President

- 4.87. According to Professor Chalmers, the President will have a considerable role in the reallocation of Commission portfolios. “He or she becomes a lot more central in my view and has become a lot more central in the last five or six years” (Q S38). In his view, “the Commission is moving away—and this will affect its priorities—from being something close to a British style cabinet with first amongst equals and collegiate responsibility to a much more presidential system”. The President will have “a lot of power”, which “will influence the whole nature of the Commission once you have moved towards the end of the term and that person has an eye either to reappointment or non-reappointment” (Q S28).
- 4.88. John Palmer agreed that “[i]f the presidential commission emerges more strongly ... the Commission will play a more important part in the balance of powers in the future than some people right now imagine” (Q S28). David Heathcoat-Amory MP pointed out that the President “will gain the ability to sack individual Commissioners” (Q S88): the Lisbon Treaty provides that “A member of the Commission shall resign if the President so requests”, not “after obtaining the approval of the College” as the current TEC provides (Article 17 of the amended TEU; Article 214 of the TEC). However, Lord Brittan of Spennithorne was “not sure” that this change “is going to make a great deal of practical difference” (Q S350).
- 4.89. Professor Wallace told us that “in practice the President is becoming much more important or has the scope for operating in a more presidential way”, because already “fewer things go to the full College for full debate in oral sessions ... much more is done in smaller chambers or groupings.” She felt that “a president who is skilful is in a position to exploit that” (Q S183). According to the Minister for Europe, “the formal powers [of the Commission President] have not changed”, but his sense was that “the increased influence of the President of the Commission will come about by the Commission itself being more effective” (Q S266).

The Commission’s accountability to the European Parliament

- 4.90. The arrangements for appointing a new College of Commissioners are unchanged, with one significant exception. As is currently the case, the Council and President-elect will adopt a list of Commission candidates. The Commission candidates, including the President (elected by the European Parliament; see above) and High Representative (appointed by the European Council acting by a qualified majority) will be subject as a body to a vote of consent by the European Parliament. They will then be appointed by the European Council, acting by qualified majority (as now). For the first time the Treaties will explicitly state that the Commission as a body is responsible to the European Parliament (Article 17 of the amended TEU). The European Parliament retains its power to censure the College, an act which would force its resignation. The College’s five-year term continues to parallel the five-year term of the European Parliament.
- 4.91. The Commission believed that the election of the Commission President by the European Parliament will give the President “great democratic legitimacy insofar as he is proposed by 27 democratically elected governments and is then elected by the directly elected representatives of the European Parliament and he is subsequently, with his whole team, voted in as a College” (Q S314).

4.92. The way in which the Commission's relationship with the European Parliament will affect the selection of the College and their respective actions is hard to predict. Professor Wallace told us that "[i]t may be that we shall see presidents in the future under the new system having to be vigilant towards the Parliament in a slightly different way from that in the past" (Q S183).

European Parliamentary party nominations for President

- 4.93. A number of our witnesses thought it likely that the obligation on the European Council to take into account the elections to the European Parliament would result in European Parliamentary parties going to the next European Parliamentary elections in 2009 not only with lists of Parliamentary candidates and programmes, but with proposed Commission Presidency nominees. John Palmer felt that this would be "of very considerable importance because in the European Council it will allow Presidents of the Commission to point to a direct mandate" (Q S28). He considered that this would strengthen the democratic legitimacy of the Commission President (p S15).
- 4.94. Brendan Donnelly felt that this development might strengthen the democratically legitimising capacity of the European Parliament, providing an obvious political consequence of European Parliamentary elections. "If the President of the European Commission were demonstrably a candidate issuing from and supported by the current majority in the European Parliament, then this would fundamentally change the relationship between Commission and Parliament, making it more like that between national parliaments and national governments. It would also change the nature of European Elections, giving to electors a sense of personal choice and involvement in European decision-making" (p S133).
- 4.95. Professor Peers considered this development "wholly appropriate on democratic grounds". The public would "know who they were 'voting for' as Commission President", and "it would be unreasonable for EU leaders to refuse to nominate someone whose sponsoring party had won more seats in the EP than any other party" (p S153).
- 4.96. Federal Union told us that such nominations would "give the President of the Commission the same kind of legitimacy as that enjoyed by the prime minister of a Member State", and that the alternative was the selection of a President "as a result of opaque and distant negotiations behind closed doors", which was not the way that positions of political importance should be determined (p S143). Jo Leinen MEP agreed that "[f]rom 2009 onwards the President of the European Commission should not be found after the elections behind closed doors in the European Council, it should be an open process before the elections" (Q S340).
- 4.97. The European Parliament's election of the Commission President, combined with the need for a vote of confidence by the Parliament for the entire College, would, in the eyes of the European Parliamentary Labour Party, "make it clear that the Commission is not a bunch of unelected bureaucrats, but is a politically accountable executive dependent on the confidence of the elected Parliament" (p S140). The Coalition for the Reform Treaty and Business for New Europe also supported the move, which in their opinion made the Commission more democratically accountable (p S130; p S122).

- 4.98. The Commission told us that the requirement to take into account the elections was “quite significant” and that “it is correct that there is a debate about who should lead the Commission following direct elections to the European Parliament” (Q S315). Neil O’Brien felt that the European Parliament was gaining a significant power in electing the Commission President, and “in the future Commission Presidents are more likely to have a strongly integrationist bent in line with the general opinion of the European Parliament” (Q S81).
- 4.99. Lord Brittan of Spennithorne told us that “‘taking into account’ does not mean the same as ‘following’”. According to him, “what it will mean is that it would be difficult for Member States to come up with a proposed president who was known to be violently contradictory to and opposed to the weight of opinion in the European Parliament ... I do not think it is going to make as much difference as all that” (Q S351). He thought that “‘take account of’ gives the flexibility but at the same time a nod in the direction, in effect saying it has to be acceptable to the Parliament, which is about right” (Q S363).
- 4.100. Questions remain regarding party nominations for Commission President. Will the elected President feel beholden to the political party or group which put his or her name forward? Will the President always be a candidate of the majority party or group? Could the Council refuse to nominate someone sponsored by the party commanding the majority in the Parliament? Experience will tell.

Will the link with the European Parliament become stronger?

- 4.101. Other witnesses have argued that the terms of the Treaty will do little but reinforce already close ties between the Commission and the European Parliament. Sir Stephen Wall told us that there would be a “closer linkage” between the outcome of European Parliamentary elections and the selection of the Commission President (Q S222), and that “there is probably going to be greater regard for political balance as well as geographical balance” in the selection of the leaders of the European Union, but that this would not just apply to the President of the Commission (Q S224). The requirement to take account of European Parliament election results in selecting the nominee for President “could be important” in the view of Professor Peers, but in his opinion this already appeared to be a factor in the 2004 selection. He told us that “there appears to be nothing to prevent it becoming a factor on a regular basis under the present system” since the party with the largest group in the Parliament “will be reluctant to support a nominee with a different political background”. The provision in the Lisbon Treaty “would likely cement the significance of this factor”. Professor Peers also pointed out that it would be possible under the existing Treaty framework for European Parliamentary parties to nominate candidates for President and “try to insist that EU leaders select the candidate whose party secured the biggest number of votes in elections” (p S153).
- 4.102. The Minister for Europe considered that the current situation, where a nomination was put to the European Parliament for its agreement or dissent, “will still be the case under the Lisbon Treaty”. In his opinion, “[w]hat is different” was the phrase requiring the European Council to take into account the Parliament’s election result. This he called “a statement of the political reality”, because under the current Treaties, “the fact is that a

candidate proposed to the European Parliament that did not command the support of the majority of the European Parliament would not be elected by the European Parliament”. Therefore, “in an operational sense, a practical sense and even a political sense, that changed phraseology has no impact; it simply codifies ... the current arrangements as they stand” (Q S266).

- 4.103. The Minister thought that the fact that a European Parliamentary party had supported a particular candidate during campaigning “may be” taken into account in the European Council’s nomination for a President, but he thought this outcome unlikely. If the parties were to support candidates, that might “send a signal” to the European Council in its nomination, but “there is no sense that that is what is currently being considered at all”. The parties would have “no formal influence”. Furthermore, he would be surprised if a party was able to agree on a candidate and surprised if they chose to do so, and he thought “it would seem in many capitals to be extraordinarily presumptuous” (Q S269).
- 4.104. Professor Hix told us that the “election” of the Commission President by the European Parliament was not a real change and that in practice, “the procedure for selecting the Commission President in the Reform Treaty is exactly the same as the existing procedure” (p S145). The European Council “already has to ‘take account’ of the results of the European elections”, so the Lisbon Treaty provisions were “purely symbolic” (p S146).

The possibility of packaging

- 4.105. Frank Vibert⁴¹ saw a graduated role for the European Parliament in the selection of three of the senior leaders of the European Union, as shown in his table (p S158). However, in his opinion a “highly important qualification to this picture” was to be found in Declaration 6 of the IGC, which reads: “In choosing the persons called upon to hold the offices of the President of the European Council, President of the Commission and High Representative of the Union for Foreign Affairs and Security Policy, due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its Member States.” According to Mr Vibert, this implied that “the three appointments are to be chosen as a package”, following inter-institutional bargaining between the European Parliament and the Council (p S159).
- 4.106. Mr Vibert questioned whether this arrangement would produce the people most suited for these very different positions. He also wondered whether the arrangement would be seen as a step forward for parliamentary democracy, and whether the package would be viewed by the electorates as providing for a “balanced ticket” which would be more broadly representative. Mr Vibert felt that there was a danger that caucusing by party groupings within the Parliament accompanying the selection procedure might appear as “a division of the spoils of office between Council and Parliament” (p S159).

Conclusions

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

⁴¹ Director of the European Policy Forum; evidence submitted in a personal capacity.

- 4.108. **The reduction in the size of the College of Commissioners is an important change, and is intended to enable the Commission to function more effectively. If this is not the outcome, the European Council will be able to rethink its composition. The provision that seats be allocated on a strict rotation basis will mean that each Member State will not have a Commissioner of its nationality in the College for five years out of every 15. Although Commissioners ought not to be regarded as national representatives, the concern that a Member State without a Commissioner is disadvantaged will undoubtedly be raised, whether or not it is justified. The rotation rule will also be an arbitrary influence on the College's membership, and will restrict the candidates available for the posts of President of the Commission and High Representative.**
- 4.109. **The Treaty states that the European Council will need to take into account the elections to the European Parliament in nominating its candidate for election by the European Parliament to the post of Commission President. One consequence of this is that the European Parliamentary parties are more likely to go into European Parliamentary elections with proposed candidates for Commission President as well as their parliamentary candidates and programmes. The need for the European Council to take into account the results of the parliamentary elections is not a bar to the European Council coming to its own decision as to its preferred candidate, but the Council will continue to be unlikely to nominate a candidate who could not command the parliamentary majority necessary for election. In that sense there is no fundamental change from the current system which requires the Parliament's approval of the European Council's nominee, but the practical consequences of the Treaty provisions are as yet unclear.**
- 4.110. **The Treaty adds little to the formal powers of the Commission President. A more effective Commission could strengthen the Commission President's position in the balance of power among the institutions. This should be seen in the context of other factors affecting this balance (see below).**

The impact of the Treaty on the European Parliament

Function

- 4.111. Under the Lisbon Treaty the role of the European Parliament (EP) is increased⁴². Symbolically, the European Parliament is described as exercising legislative functions "jointly" with the Council, rather than simply exercising "the powers conferred upon it" by the TEC, in recognition of the increasing role of co-decision in Union legislation. It will also exercise budgetary functions jointly with the Council (see Chapter 10), and have an increased role in Treaty revision (see below) and in the selection of senior European Union leaders (as discussed above) (Article 189 of the TEC; Article 14 of the amended TEU).

⁴² The Government, in its White Paper on its approach to the IGC, stated: "The Reform Treaty will strengthen the role of the European Parliament" (Cm 7174 p 13).

The extension of co-decision

- 4.112. Under the Treaty, the co-decision method of legislating, whereby the Council and European Parliament are equal partners in the formation of legislation, is renamed the “ordinary legislative procedure” (Article 294 TFEU). The change is more than semantic: co-decision is extended to a substantially wider range of areas (the change is made by alterations to the specific articles dealing with each of these areas). The Government’s assessment is that there are 40 moves to co-decision in the Treaty (Q S271). Of these, Andrew Duff MEP felt that “[p]articularly important is the extension of co-decision into agriculture, fisheries, transport and structural funds—in addition to the whole of the current ‘third pillar’ of justice and interior affairs” (p S135). Co-decision is not extended to the CFSP.
- 4.113. Professor Peers told us that “it is appropriate to extend the co-decision powers of the EP to all areas where the Council adopts legislation by QMV” (p S152).
- 4.114. Many witnesses saw the extension of co-decision as heralding a substantially expanded role for the European Parliament. John Palmer told us that under the Lisbon Treaty the European Parliament would have “greater powers and potentially greater influence” (p S14); Neil O’Brien agreed that “there are a lot of new powers for the Parliament” (Q S81); Professor Peers thought the Treaty “will impact significantly on the EP’s powers” (p S152). Brendan Donnelly considered that “[t]he extension of the co-decision procedure will undoubtedly increase the influence of the European Parliament in a number of policy areas where until now its legislative role has been limited” (p S133).
- 4.115. Richard Corbett MEP told us that the ordinary legislative procedure will apply “to virtually all European legislation. In the few cases where it does not apply, in many of those there will still be consent or assent of the Parliament to an act of the Council or, indeed the other way around” (Q S330). Andrew Duff MEP reiterated to us that “[t]he European Parliament now becomes the co-equal legislator for almost all European laws” (p S135).

Other alterations to the European Parliament’s role

- 4.116. There are also other additions to the European Parliament’s strength. Andrew Duff MEP noted that “Parliament has to approve all ... association agreements, and those with budgetary or institutional implications” (p S137). According to Mr Duff, “[t]he new budgetary procedure ensures full parity between Parliament and Council for approval of the whole annual budget” (p S135)—an issue that is explored below (in Chapter 10). According to the EP Committee on Constitutional Affairs report, the Treaty is “thus ensuring full parity between Parliament and Council as regards approval of the whole annual budget” (European Parliament resolution of 20 February 2008 on the Treaty of Lisbon, point 2(d)). Professor Peers also identified an extension of the Parliament’s powers over the conclusion of international treaties (p S152): the Parliament was now asked for consent rather than assent in a number of cases (Article 218, amended TFEU).
- 4.117. The European Parliament is given an enhanced role in deliberations on any future revisions of the Treaties, as discussed above (Chapter 3). The EP Committee on Constitutional Affairs report calls the new procedures “more

open and democratic” (European Parliament resolution of 20 February 2008 on the Treaty of Lisbon, point 2(i)).

- 4.118. The European Parliament also gains a role in the conferral of delegated powers. Article 202 TEC currently provides that the Council may confer implementing powers on the Commission to adopt detailed rules within the framework of legislation adopted by the Council or by the Council and the European Parliament. This Article is replaced by two new Articles on delegated powers, Article 290 and Article 291. Under the revised provisions, a legislative act itself can delegate the power (rather than the Council), thereby empowering the European Parliament in situations of co-decision. It is explicitly provided that the legislative act may give the European Parliament or the Council power to revoke the delegation of a power. Article 291 provides that legislative acts can confer implementing powers on the Commission subject to the supervision of committees of representatives of the Member States (“comitology”).
- 4.119. In describing these changes to delegated legislation, Andrew Duff MEP stated that under the Lisbon Treaty, “[the European] Parliament and Council have co-equal powers to decide how to control delegated and implementing acts (comitology)” (p S138). The report of the European Parliament Constitutional Affairs Committee says that “democratic control in relation to the legislative powers delegated to the Commission will be reinforced through a new system of supervision in which the European Parliament or the Council may either call back Commission decisions or revoke the delegation of such powers” (European Parliament resolution of 20 February 2008 on the Treaty of Lisbon, point 2(e)). Richard Corbett MEP called these powers “an extra safeguard” (Q S330).
- 4.120. There will also be greater scrutiny by the European Parliament of agencies, notably Europol (Article 88, TFEU) (European Parliament resolution of 20 February 2008 on the Treaty of Lisbon, point 2(h)), and the Parliament is asked for consent rather than simply consulted in relation to actions to combat discrimination (Article 19, TFEU) and to strengthen the rights of Union citizens (Article 25, TFEU).
- 4.121. Finally, and as already discussed, the European Parliament will have a significant relationship with three of the five senior leaders of the Union. The Commission President will be elected by the European Parliament on the basis of a nomination which takes into account the results of European Parliamentary elections, the Commissioners including the High Representative are approved by and accountable to the European Parliament, and a third senior leader is the European Parliament’s own elected President. Only the rotating Council Presidency and the European Council President are appointed without reference to the European Parliament.

Comments on the European Parliament’s expanded role

- 4.122. Some of our witnesses supported the strengthening of the European Parliament’s position in the Union. The Minister for Europe told us that the Government “strongly welcome the extension of co-decision for the European Parliament ... it is clearly an extension of power and influence for the European Parliament which is the correct balance” (Q S240). The Coalition for the Reform Treaty sounded a similar note, telling us that “the

extension of the co-decision procedure should strengthen the role of the European Parliament, which is something we welcome” (p S129).

4.123. Many witnesses saw the expansion of the European Parliament’s role as good news for European democratic representation. Andrew Duff MEP told us that the increase in the Parliament’s powers “will greatly improve the democratic character of the Union” (p S135). In its report, the EP Committee on Constitutional Affairs “[w]elcomes the fact that democratic accountability and decision-making powers will be enhanced, allowing citizens to have greater control over the Union’s action” (European Parliament resolution of 20 February 2008 on the Treaty of Lisbon, point 2). Brendan Donnelly welcomed the fact that “[i]n the new areas now subject to co-decision, democratically elected politicians will come to play a larger role in a decision-making process traditionally dominated by civil servants, both national and international, and national ministers for whom European questions represented often only a small proportion of their responsibilities” (p S133). This was echoed by the European Parliamentary Labour Party, not surprisingly (p S139).

4.124. Sir Stephen Wall regretted that “in this country, we treat the European Parliament as a kind of state secret”. In his view, “if we are talking about popular support for the European project ... the more people know about their democratic representation through the European Parliament, the better” (Q S219). He felt that the fears of people who had worried that co-decision would give the European Parliament too much power *vis-à-vis* the other institutions had not been realised, and that “the British Government’s experience by and large has been that this process has led to, on the whole, acceptable outcomes” (Q S220). However, in general those largely in favour of an active EU will tend to support the strengthened role of the European Parliament in providing EU-level democratic accountability, while those largely opposed to an active EU will tend to regard this as a shift away from the democratic control of national parliaments and governments.

Scrutiny of legislation

4.125. The European Parliamentary Labour Party pointed out that the process of co-decision required “the dual approval of elected governments in the Council of Ministers and directly elected MEPs in the European Parliament”, and that “[t]his dual scrutiny provides a double quality control for all European legislation” (p S139). Richard Corbett MEP said that in co-decision “we have two quality controls before European legislation is adopted: acceptability to the Council—Ministers who are accountable to their national parliaments—acceptability to those directly elected by the electorate to act at the European level on European issues” (Q S330). He thought that “enhancing the role of the Parliament is something that brings added value to the scrutiny of European legislation”. He considered that “[o]ur European Union will be more democratic than any other international structure in the world” (Q S330). The Minister for Europe thought that while the extension of co-decision might mean slower legislation, it would also mean improved legislation (QQ S271, S274, see also p D15).

The party-politicisation of the European Parliament

4.126. John Palmer told us that the Parliament would, with its extended role in co-decision, “intervene more strongly ... than past practice would have

suggested”, because of the “growing politicisation of the European Union decision-making process”. National divisions in the European Parliament were being replaced by political divisions, with the “gradual emergence of the European parties” and changing voting records (Q S22). Accordingly, John Palmer thought that we would “see an increasingly self-confident Parliament”, in its relations both with the Commission and with the Council (Q S23). Although the Treaty did not create the trend, it “will allow new avenues in which this developing tendency can express itself” (Q S26).

- 4.127. Lord Brittan of Spennithorne said: “I thought [the European Parliament] was pretty politicised already so I cannot see how it can become more politicised ... We have waited a long time for there to be a situation in which the political parties do not take much account of national differences and I certainly do not see anything in the Treaty which will accelerate that process” (QQ S363–364).

Is the extended role of the European Parliament overstated?

- 4.128. Some witnesses thought that the change would not be great. Professor Hix told us that the Lisbon Treaty’s extension of co-decision to “a limited number of areas” would mean that the European Parliament will experience “a relatively minor extension” of its powers compared to previous Treaties (p S145); Lord Brittan of Spennithorne agreed (Q S362). “The co-decision procedure is already well established in many areas of the Parliament’s work”, Brendan Donnelly stressed, and the Lisbon Treaty would reinforce, but not create, the European Parliament’s sense of identity as co-legislator with the Council. According to Mr Donnelly, the Lisbon Treaty was “a further step” in the process of integrating the European Parliament into the Union’s decision-making, and the extension of co-decision an “appropriate and logical next step” (p S133).
- 4.129. Brendan Donnelly described an awareness in the European Parliament of a paradox that the Parliament’s increasing powers over the past three decades had not improved its public standing. He doubted that the Lisbon Treaty’s extension of co-decision would reverse this divergence (p S133).

“First-reading deals”

- 4.130. With the extension of co-decision, the European Parliament’s workload will increase. To maintain the European Parliament’s efficiency, it would be necessary to adopt more acts by first-reading co-decision “deals” between the European Parliament and the Council, according to Professor Peers⁴³. He objected to the “current lack of rules of any kind on the transparency and accountability” of such deals given that the negotiation of such agreements took place between a small number of key players behind closed doors. It would be preferable if the public could see where a proposal would be subject to a first-reading deal, what stage discussions had reached, and what drafts were being discussed—as they

⁴³ “First reading deals” are based on private meetings between relevant players in the Council, the European Parliament and the Commission, to allow agreement to be reached after a first consideration by the Parliament. Changes which will be proposed by the European Parliament at first reading are agreed in advance with the Council, which allows the measure to be speedily adopted. They are discussed further in Chapter 11 in the context of the yellow card, and in Chapter 6 in the context of the enhanced role of the European Parliament in the Area of Freedom, Security and Justice.

should whenever there were informal co-decision negotiations (p S153). We note that the problem will be mitigated by the new Transparency provision, which will require the Council to prepare its first reading position in public.

Changes to the European Parliament's membership

- 4.131. The European Parliament will, in a symbolic change, be composed of “representatives of the Union’s citizens” rather than “representatives of the peoples of the States brought together in the Community” (Articles 189 and 190 of the TEC; Article 14 of the amended TEU). The Campaign against Euro-federalism considered that this linguistic change illustrated “the constitutional shift the Treaty would make from the present European Union of national States and peoples to a new federal Union of European citizens” (p S126).
- 4.132. Under the Lisbon Treaty, the Parliament will be restricted to 750 Members, plus its President (i.e. 751). This cap was welcomed by the Coalition for the Reform Treaty as an important step if the Parliament “is to remain a central, efficient actor in the EU system” (p S129). The minimum number of national representatives will be six members per Member State (Malta) and the maximum 96 (Germany) (Article 14, amended TEU).

Distribution of seats

- 4.133. Before the 2009 European Parliament elections, the European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision determining the composition of the European Parliament from 2009 (Article 14 of the amended TEU; Protocol on transitional provisions, Title I, Article 2). This decision will be made on the basis of a proposal by the European Parliament. Declaration 5 of the IGC states that the European Council will base its decision on the content of the draft Decision annexed to the Resolution of the European Parliament dated 11 October 2007.
- 4.134. The new Article in the TEU specifies that the European Parliament representation “shall be degressively proportional”, and the draft decision spells out what degressive proportionality means: “the larger the population of a country, the greater its entitlement to a large number of seats; the larger the population of a country, the more inhabitants are represented by each of its Members of the European Parliament” (Article 14, amended TEU; Annex 1 to the resolution of the European Parliament of 11 October 2007 on the composition of the European Parliament).⁴⁴
- 4.135. The distribution of seats in the European Parliament will be as follows:

⁴⁴ The additional seat in the European Parliament created by the promotion of the President to number 751 was allocated to Italy by IGC Declaration 4, in derogation from the principle of degressive proportionality. Andrew Duff MEP called this move paradoxical, and the European Parliamentary Labour Party found it a matter of regret. Richard Corbett MEP told us that the European Parliament thought the move was “pretty outrageous”, but recognised the importance of making the Treaty acceptable to all 27 Member States (p S136; p S140; Q S334).

TABLE 3

The distribution of seats in the European Parliament

Member State	a) What the distribution would have been for 2009–2014 (due to accession of Romania and Bulgaria)	b) Seats for 2009–2014 under the EP resolution and IGC Declaration 4	Change made by the Treaty (b compared to a)
Germany	99	96	-3
France	72	74	+2
United Kingdom	72	73	+1
Italy	72	73	+1
Spain	50	54	+4
Poland	50	51	+1
Romania	33	33	
Netherlands	25	26	+1
Greece	22	22	
Portugal	22	22	
Belgium	22	22	
Czech Republic	22	22	
Hungary	22	22	
Sweden	18	20	+2
Austria	17	19	+2
Bulgaria	17	18	+1
Denmark	13	13	
Slovakia	13	13	
Finland	13	13	
Ireland	12	12	
Lithuania	12	12	
Latvia	8	9	+1
Slovenia	7	8	+1
Estonia	6	6	
Cyprus	6	6	
Luxembourg	6	6	
Malta	5	6	+1
EU 27	736	751	+15

4.136. Professor Peers told us that the new Treaty “will not have a significant impact on the composition or membership of the European Parliament” (p S152). The European Parliamentary Labour Party welcomed the move to degressive proportionality as “a fairer method than the current method of allocating seats according to blocks of countries and negotiating skill or trade-offs by EU leaders” (p S140).

European political parties

4.137. The Lisbon Treaty removes the TEC’s statement recognising the importance of European political parties “as a factor for integration within the Union”. They will now “contribute to forming European political awareness and to expressing the will of the citizens of the Union” (previously, this was “a European awareness” and “the political will”) (Article 10, TEU).

Conclusions

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

4.139. **The number of MEPs will be reduced from 785 to 751. (The number of UK MEPs will increase by one from 2009.) Also, Members of the European Parliament will be described as “representatives of the Union’s citizens” instead of “representatives of the peoples of the States brought together in the Community”, which has a symbolic significance for some (see Chapter 2). The Treaty will not otherwise have a significant impact on the composition or membership of the European Parliament.**

4.140. **Oversight by the European Parliament and Council of Ministers of the Commission’s delegated legislation powers will be reinforced.**

The impact of the Treaty on the European Court of Justice

Title and membership

4.141. The Lisbon Treaty calls the EU Courts collectively the “Court of Justice of the European Union” (CJEU). This continues to cover three entities: the Court of Justice itself (colloquially the ECJ), the General Court (currently named the Court of First Instance), and specialised courts (currently named “judicial panels”) (Article 19 of the amended TEU).

4.142. The membership of the ECJ is unchanged. However, an IGC Declaration (Declaration on Article 222 of the Treaty on the Functioning of the European Union regarding the number of Advocates-General in the Court of Justice) states that if the ECJ requested that the number of Advocates-General be increased from eight to 11, the Council would, acting unanimously, agree on such an increase: this would give Poland a permanent Advocate-General (joining those from Germany, France, Italy, Spain and the UK) and add two more rotating posts. In a substantial change to the way

Judges are appointed, a new panel will be established to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General (Article 255, TFEU; Sir Francis Jacobs p S150). However, the proposal and approval of candidates remain a matter for Member States alone.

The capability to make changes to the CJEU in future

- 4.143. The Council, acting by qualified majority and in co-decision with the European Parliament (formerly the Council by unanimity in consultation with the Parliament) will be able to set up specialised courts (formerly “judicial panels”). There is currently only one such court, the EU Civil Service Tribunal. Under this provision, a new court might be established to decide on trademark law cases; other new courts might follow. The Minister for Europe told us that the Government “strongly supported” the use of specialised tribunals (Q S281).
- 4.144. The Statute of the CJEU can be modified by the Council acting by qualified majority and in co-decision with the European Parliament, rather than only by unanimity, with the exceptions of Title I (judges), which may only be amended by treaty and Article 64 (languages), which requires unanimity.
- 4.145. In the opinion of Professor Peers, “[t]he greater facility to adapt the EU judicial system provided by the Treaty of Lisbon (due to majority voting on the Statute of the Court and the creation of new third-level tribunals) should be welcomed” (p S154). Andrew Duff MEP pointed out that, as currently, any further expansion of the ECJ’s powers would have to be agreed unanimously (p S137).

Function

- 4.146. The function of the CJEU, which is unchanged, is summarised in the amended TEU:

BOX 3

Article 19, amended TEU, paragraph 3

The Court of Justice of the European Union shall, in accordance with the Treaties:

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
- (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of the law of the Union or the validity of acts adopted by the institutions;
- (c) rule in other cases provided for in the Treaties.

The jurisdiction of the CJEU

- 4.147. In the area over which the Courts have jurisdiction, they have power to carry out seven main types of proceedings. These are:
- references for preliminary rulings—national courts referring to the Court for a ruling concerning the interpretation of Union law or the validity of an act of Union law;

- actions for failure to fulfil obligations—an action brought against a Member State, usually by the Commission;
- actions for annulment—an application for the annulment of a Union regulation, directive or decision, for example by an individual, Member State or EU institution;
- actions for failure to act—an action brought against an EU institution for failing to act when called upon to do so;
- giving opinions on the compatibility of EU international agreements with the Treaties;
- appeals—against judgments of the Court of First Instance;
- reviews—of Court of First Instance decisions on appeals from the EU Civil Service Tribunal.

The role of the CJEU in justice and home affairs law

- 4.148. The CJEU has jurisdiction only over the law of the European Community—i.e. the “first pillar” and to a limited extent in the “third pillar” (police and judicial cooperation in criminal matters). The transfer of the third pillar into the first means that the CJEU gains jurisdiction over this area. All national courts and tribunals will be able to refer questions relating to immigration, asylum and civil law (in place of final courts only), as well as policing and criminal law (with complications—see Chapter 6, which examines this subject in greater detail) (p S154).
- 4.149. Professor Wallace told us that “[t]he fact that the Court is now going to be able to receive litigation in justice and home affairs is hugely important” and something that she welcomed as increasing the rights of the individual to have access to litigation (Q S170). The Minister for Europe stated that the Government was “certain it should happen because the effect of the ECJ is absolutely essential” (Q S277). The move “establishes a clear and coherent system of jurisdiction to replace the present confusing jumble”, according to Sir Francis Jacobs, and it was “valuable” that the jurisdiction was being extended to justice and home affairs. He felt that the Union provided a model to all international organisations in the extent to which it was based on the rule of law, and that it would be “paradoxical, and perhaps unacceptable” if the Union’s actions in this field were to remain outside the Court’s jurisdiction (p S149).
- 4.150. However, the situation relating to the United Kingdom could be substantially different due to the UK’s ability to opt in to (or, in effect, out of) all EU justice and home affairs legislation and therefore this part of the CJEU’s jurisdiction (see *The UK opt-ins* in Chapter 6) (see also Palmer p S15, Edward Q S128, Chalmers Q S29, and Wall Q S225).
- 4.151. There is a further exception to the CJEU’s “third pillar” jurisdiction. The Lisbon Treaty maintains the rule (Article 35(5), current TEU) that the Courts “shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security” (Article 276, TFEU).

The role of the CJEU in foreign policy law

- 4.152. Activity under the old “second pillar”, the Common Foreign and Security Policy, remains outside the jurisdiction of the CJEU (see Duff p S137) (Article 24, amended TEU). New Article 275 of the TFEU states that the CJEU “shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions”.
- 4.153. However, the CJEU will have jurisdiction to monitor whether common foreign and security policy actions comply with Article 40 of the amended TEU, which states that the implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union’s competences (Article 275, TFEU). In other words, it will have “oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillar)” (p S137). Sir David Edward envisaged that the CJEU might be faced, “as it is faced at present, with the question of: does this fall within foreign and security policy or does it fall within some other competence of the Union?” As a decision that a certain area fell within another competence would mean that it fell within the Court’s jurisdiction, there was a risk that the Court might be accused of “meddling” (Q S129).
- 4.154. The CJEU will also be able to rule on the legality of decisions providing for restrictive measures (sanctions) against natural or legal persons adopted by the Council under the common foreign and security policy (Article 275, TFEU). In other words, it “can hear appeals against restrictive measures” (p S137).
- 4.155. The Minister for Europe told us that the Government had been particularly keen to ensure that the relationship of the CJEU to the Common Foreign and Security Policy was clear, and welcomed that the Treaty “confirms ... that there is no role for the ECJ in terms of Common Foreign and Security Policy ... that was important for us” (Q S280).

The CJEU’s controls on legality and failure to act

- 4.156. Under the TEC, the European Parliament, Council or Commission could have an action brought against them for a failure to act (Article 232, TEC). The Lisbon Treaty amends this so that it applies also to the European Council, European Central Bank and any other body, office or agency of the Union (Article 265, TFEU). The Lisbon Treaty also adds the European Council and other bodies, offices and agencies to the list of institutions the legality of whose acts is monitored by the CJEU (judicial review of the institutions) (Article 263, TFEU).⁴⁵ This means that EU institutions, Member States and individuals can challenge any of the Union’s institutions or bodies for acting in infringement of the Treaties or for failing to act as required by the Treaties.
- 4.157. Sir Francis Jacobs considered that the new jurisdiction in respect of the acts and failures to act of bodies and agencies was “significant as there is an increasing number of entities with power to take decisions directly affecting

⁴⁵ The bodies and organs of the EU are also added to the list of bodies for whose acts the Court can provide interpretation (Article 267 TFEU).

the interests of individuals but which are at present not subject to the jurisdiction of the Court” (p S149). Sir David Edward thought that this new jurisdiction “could become significant” (Q S127), but that whether the CJEU’s considerable additional powers of judicial review would be extremely significant was “totally unforeseeable”. He told us that “[i]n so far as powers are conferred on the European Council, then probably the majority of Member States would require that there should be a jurisdiction of control [by the Court]” (Q S131). Professor Chalmers considered that “the European Council does not have many duties or responsibilities, so ... yes, formally [the CJEU] does have increased powers of judicial scrutiny but the circumstances where that will happen will be quite narrow” (Q S29). The Commission said that “[w]hen you read the Conclusions of the European Council it is very difficult to see how the European Court can come in on them ... it is not a substantial change” (Q S313). Professor Peers welcomed the jurisdiction over the European Council as “essential” (p S152).

- 4.158. The Committee of the Regions joins the European Central Bank and Court of Auditors in having the right to stand before the Court “for the purpose of protecting their prerogatives” (Article 263, TFEU).

Actions for failure to fulfil obligations

- 4.159. Currently, if the Commission considers that a Member State has failed to fulfil an obligation under the TEC (for example, to transpose a directive), it can take the Member State to the Court of Justice (Article 226, TEC; this Article is not substantively amended by the Lisbon Treaty). Under the TFEU, the stages that lead to a reference to the Court for the imposition of a fine on the Member State are now shortened, because the Commission will no longer have to submit to the Member State a “reasoned opinion” detailing the Member State’s failing (Article 260(2), TFEU; Article 228(2), TEC), and allow it time to respond.
- 4.160. The Commission⁴⁶ regarded the procedure on penalties as “reinforced” (p S161). Andrew Duff MEP told us that “the powers of the Court and the Commission to impose penalties in case of infringement are increased” (p S137), and Sir David Edward saw “a significant extension of the power to fine” in the new provisions of Article 260. The removal of the reasoned opinion procedure meant that the Commission “can come more quickly from the stage of a finding of a breach of an obligation to a request for the Court to fine” (Q S127). Secondly, “there is power to fine in respect of failure to implement directives and that can be requested by the Commission ... directly in the application to the Court which asks for a finding of a failure to implement a directive” (Q S127). This is in a new paragraph (3) of Article 260. Sir David thought it “would ensure that the pressure on Member States to implement directives would be strengthened” (Q S127).
- 4.161. Professor Peers told us that, “[t]he speedier application of Article 228 to bring proceedings for enforcement of prior ruling is welcome, but the possibility of imposing fines for the initial breach of the obligations to transpose a Directive under Article 226 is not” (p S154). He thought that the amendment was “unnecessary in light of the speedier application of Article 228”: if the Commission frequently applied for these fines it would slow

⁴⁶ In written evidence submitted by Vice-President Margot Wallström, Commissioner for Institutional Relations and Communication Strategy.

down the Court, and “the Commission will have to spend much time arguing about the collection of the fines”. According to Professor Peers, the system should be replaced by a system “whereby the Commission could take a decision finding a failure to transpose a Directive by a Member State, which could then be subject to annulment actions by a Member State, and which could subsequently be enforced by proceedings under Article 228”. This would speed up the process of determining failures to transpose EU legislation and reduce the burden on the EU judiciary. He told us that “[a] Member State like the UK, with a relatively good record of transposing EU legislation, should welcome such a move”.

- 4.162. The Courts also gain a jurisdiction to rule on procedural issues in relation to acts of the European Council or the Council under Article 7 TEU which can lead to the suspension of the rights of a Member State which is in serious breach of its obligations (Article 269, TFEU; see Edward Q S127).

Right of individuals to refer cases to the Court

- 4.163. The right of citizens or corporations to challenge EU acts is widened slightly. Under the current TEU, a person can institute proceedings against an act addressed to that person—this does not change. A person can also institute proceedings against an act which is of “direct and individual” concern to him or her—this does not change. Additionally, under the TFEU, a person will be able to institute proceedings against a regulatory act which is only of “direct concern” to him or her (i.e. not also of “individual” concern to him or her), as long as the regulatory act does not entail implementing measures (which would be a matter for national, not EU, courts) (Article 263, TFEU).

- 4.164. Sir Francis Jacobs told us that this alteration increased the scope for protection of individuals and companies against regulatory acts, because the condition that the regulatory act be of “individual” concern “has often made it difficult or impossible for individuals and companies to take cases to the Court”. He said that the reform would be widely welcomed, although the term “regulatory acts” was not clear (p S149). Sir David Edward thought it “potentially could give rise to a significant extension, at least of the workload of the Court to the extent that legislative and regulatory activity of the Union directly affects individuals” (Q S127). However, Professor Peers felt it “does not go far enough to address the concern that access to judicial review of EU measures by individuals is too limited under the existing system” (p S154).

Emergency preliminary rulings

- 4.165. The Lisbon Treaty adds a specification to the provisions regarding preliminary rulings from the ECJ: “If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay” (Article 267, TFEU). The ECJ made a proposal for an urgency procedure in July 2007 (see Edward, QQ S127–8).

Intellectual property

- 4.166. The Council, acting by unanimity, can confer jurisdiction on the CJEU in disputes relating to the application of acts adopted on the basis of the TFEU which create Union intellectual property rights (Article 262, TFEU).

Professor Chalmers told us that this was codification; the Court had been interpreting legislation on intellectual property rights since 1997 (Q S29).

Is an expanded role for the CJEU a good thing?

- 4.167. An expanded role for the CJEU means more judicial oversight of EU laws and law-making. Some welcome this as a change which may improve legislation and other acts of the institutions, and give additional legal rights to the EU's institutions, Member States, corporations, organisations and citizens. The Minister for Europe told us that the role of the CJEU was "absolutely essential" (Q S277). In its response to a report on the Treaty by the House of Commons European Scrutiny Committee, the Government stated that "ECJ jurisdiction is an important element of assuring the application of Community Law in every Member State. Overall, the UK has benefited from this"⁴⁷. Professor Wallace thought that "there are areas of justice and home affairs where the right of the individual to have access to litigation seems to me critically important" (Q S170). Sir Francis Jacobs considered that the changes "can be seen as providing substantially greater judicial protection against European Union measures and as strengthening the rule of law in the Union" (p S150).
- 4.168. Giving more powers to the Courts will not be welcome in all quarters, however. Lord Pearson of Rannoch referred us to the "judicial activism" of the Court, which in his view made the Government's red lines unreliable (p S151). Martin Howe QC spoke about cases in which in his view the ECJ had "advanced the goal-posts". He said that "once you have the jurisdiction of the European Court of Justice in interpreting a measure its expansive philosophy comes into play and you lose control, really, over the interpretation and application of a measure as part of your law" (QQ E204, E206–11). There was a view in the UK that the Court was a "constructionist court that wants to advance the frontiers of European competence", in the words of Sir Stephen Wall (Q S226).
- 4.169. We heard some arguments against this view. Sir Stephen Wall told us that the history of the ECJ over the past 10 or 15 years did not bear it out (Q S226), and John Palmer thought that Judges "have not been driven by any great political agenda" in his experience (Q S32). Sir David Edward, for twelve years a Judge of the Court of Justice himself, said: "I detected no propensity one way or the other [to stand back or creep forward] for the very simple reason that ... I did not have the time and none of us had time to develop propensities" (Q S130).

Can the CJEU cope with its expanded role?

- 4.170. "[T]he Court of Justice is currently operating at close to full capacity", according to Professor Chalmers (Q S29). The expansion of the CJEU's jurisdiction in combination with recent enlargements will further swell the Court's docket, particularly in the area of justice and home affairs, and there is discussion about the Courts' ability to cope with the effects of the Lisbon Treaty. The expansion of the area in which the CJEU can take action will also have implications for the range of expertise which its Judges will need to possess. Both of these issues are explored in Chapter 6.

⁴⁷ First Special Report, Session 2007–08, HC 179, p. 21

“Variable geometry”

4.171. Enhanced cooperation, opt-ins, and opt-outs will mean that EU law and the jurisdiction of the Court will vary across the Member States. Sir David Edward acknowledged that in an EU of 27 Member States, “variable geometry” was “almost inevitable”, but was sorry that “there will be the disadvantages of unequal application of the law and unequal application of the Court’s jurisdiction” (Q S137). Jo Leinen MEP told us that while the positive side of opt-outs was flexibility, “the negative side is that we are a community of law ... and opt-outs create incoherence in this Union” (Q S334) (see also Chapter 6).

A point of principle: mutual sincere cooperation

4.172. David Heathcoat-Amory MP brought to our attention that the Treaty specifies that “[t]he institutions shall practice mutual sincere cooperation” (Article 13, amended TEU). He found it “alarming that the Court is mandated to cooperate not with Member States but with the other institutions”, particularly as the Courts often hear cases between the Commission and a Member State. In Mr Heathcoat-Amory’s opinion, “this undermines the status of the Court and it will cease to be an independent arbiter between the rights of the Union and the rights of Member States” (Q S96). Lord Leach of Fairford agreed: “The whole principle is wrong” (Q S96).

4.173. Sir David Edward was not convinced that there was a problem. “This particular provision goes with the provision that the Member States shall practice mutual sincere cooperation. I would suspect that in this particular context ‘The institutions shall practice mutual sincere cooperation’ is aimed at the relationship between the Council, the Commission and the European Parliament” (Q S152). He supposed that such an obligation could be imposed on the CJEU “in so far as the Court is acting as an institution as opposed to a jurisdiction ... There are circumstances in which the Court is indirectly involved in treaty negotiations” (Q S153).

Primacy of law

4.174. Without it being directly mentioned in the Treaty, the treaty-making process has affirmed the primacy of EU law over the law of Member States. In a Declaration, the IGC recalled that “in accordance with well settled case-law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case-law” (Declaration concerning primacy). It quoted an opinion of the Council Legal Service which asserted that “[t]he fact that the principle of primacy will not be included in the future [i.e. Lisbon] treaty shall not in any way change the existence of the principle”. Likewise, the affirmation of this principle in the Declaration does not give it any meaning that it has not previously had: it is a statement of the existing position.

Conclusions

4.175. **The Treaty significantly expands the role of the ECJ. The Treaty’s most important impact on the ECJ is that it will gain jurisdiction over the justice and home affairs area as a result of the merger of the third**

pillar with the first. The impact of the Court’s jurisdiction on the UK will differ from that on other Member States to the extent that the UK uses its opt in/out from all justice and home affairs legislation (see Chapter 6).

- 4.176. **The ECJ’s jurisdiction will not be extended to the Common Foreign and Security Policy except in the two clearly defined areas cited above. However, in exercising its oversight in a case of conflict of competence involving foreign and security policy, a decision that the competence lay elsewhere, bringing it into the Court’s jurisdiction, might lead to charges that the Court was extending its role.**
- 4.177. **The new provision on actions for failure to fulfil obligations is likely to place extra pressure on Member States to implement directives. In addition, the Treaty provides that action for failure to act will be able to be brought against not just the European Parliament, the Council of Ministers or the Commission, but also against the European Council, European Central Bank or any other body or agency of the Union. The Treaty also provides for a slight widening of the right of individuals to challenge EU acts.**

Overall impact on institutional balance

The European Parliament

- 4.178. Professor Chalmers told us that if there was “one big message from the Treaty, it would be that there is a significant growth in the powers of the European Parliament, largely at the expense of the Commission, but not exclusively so” (Q S2). Elmar Brok MEP said that “we [the European Parliament] have more or less all that we wanted to have” (Q S333). Richard Corbett MEP, Andrew Duff MEP and the European Parliamentary Labour Party all agreed that the role of the European Parliament would be enhanced by the Treaty, as did Professor Peers and Brendan Donnelly (Q S330; p S135; p S139; p S152; p S133). Professor Wallace noted that “each successive Treaty reform has produced an expansion of the European Parliament’s legislative powers” and that this was “as true of this Treaty as is it of its predecessors” (Q S179). The Commission also told us that “[t]he powers of the European Parliament will be strengthened” (p S160). John Palmer concurred that “[t]he European Parliament has emerged with greater powers and potentially greater influence”, and considered: “You are going to see an increasingly self-confident Parliament in general terms and both in relations vis-à-vis the Commission and to its co-legislative partner in the Council” (p S14; Q S23). However, Lord Brittan of Spennithorne did not think that the Treaty would make “a very big, further difference” to the powers of the European Parliament (Q S362).

Democracy and national parliaments

- 4.179. Some considered that an increased role for the European Parliament was part of a victory for democracy as a whole in the Union. Federal Union saw democracy as the “big idea” of the Lisbon Treaty, and Andrew Duff MEP and the European Parliamentary Labour Party also saw democracy as the winner (p S143; p S135; p S139). Elmar Brok MEP told us that the Treaty was good for democratic accountability, and that the important Treaty change was “the stronger roles of national parliaments and the European

Parliament” (Q S333) (for analysis of the role of national parliaments under the Lisbon Treaty, see Chapter 11). The Government saw national parliaments among the winners from the Treaty, particularly this Parliament when its veto over *passerelles* (see Chapter 3) was taken into account (Q S240). Professor Peers agreed that the national parliaments stood to gain, and Lord Brittan of Spennithorne concurred: the Treaty, and in particular the card procedures (see Chapter 11), enhanced the role of national parliaments and this was one of the Treaty’s most important aspects as far as the UK was concerned (p S155; Q S385). The Speaker of the Portuguese Assembleia da Republica, Jaime Gama, addressing a parliamentary meeting hosted by the European Parliament in December 2007, went so far as to say that “national parliaments are the greatest winners”. The Commission stated: “The Treaty of Lisbon significantly increases the involvement of national parliaments” (p S161).

4.180. Federal Union told us that “[n]ational parliaments are one of the big gainers from the Reform Treaty, or rather, they are if they want to be” (p S143). This was due not only to the cards, but also to the requirement for the Council to legislate in public, which would make it easier to hold national ministers to account (see also p S161). However, the actual impact would depend on national politicians’ willingness to organise themselves, rethink their procedures, and get involved. Likewise Timothy Kirkhope MEP said, “I am concerned about the quality of democracy as opposed to the quantity in this context. The level and standard of scrutiny which exists in terms of our own national legislatures is extremely patchy” (Q S332). Elmar Brok MEP called for cooperation: “It is not a question of whether it is the national parliament or European Parliament. We have to become stronger through cooperation to do our job and control our bureaucracies, both the national and European ones ... the Treaty of Lisbon gives us a better possibility of doing that if we want to do so” (Q S333). John Palmer advised national parliaments to combine forces with the European Parliament, for instance by admitting their MEPs as non-voting members of EU scrutiny committees (Q S24). Sir Stephen Wall observed that this Parliament had been more cautious about involving MEPs than some others (Q S230). Brendan Donnelly reckoned that the Treaty’s provisions embodied the view that “national parliaments represent an important source of legitimacy and national political discourse” for the EU (p S134). He recommended that parliaments should respond by improving their scrutiny of national ministers in the Council; and by producing reports which compelled attention on merit, quite apart from procedural rules.

4.181. David Heathcoat-Amory MP was one of the representatives of the House of Commons in the Convention on the Future of Europe. He considered that, whereas each of the EU institutions gained something from the Treaty, “the losers are national parliaments” (Q S48). In his view this was because in the Convention national parliaments were disorganised and had no unifying agenda. Neil O’Brien, Director of Open Europe, likewise considered that, weighing the provisions regarding national parliaments against the simplified revision procedure (see Chapter 3) and other changes, the net effect was negative (Q S100). The Campaign against Euro-federalism saw the cards as “small compensation” for the transfer of law-making powers to the EU (p S125).

The European Council and the Council of Ministers

- 4.182. Lord Brittan of Spennithorne had “no doubt at all that [the Treaty’s] re-ordering of affairs leads to more power for Member States as expressed in the European Council, if you like at the expense of the Commission” (Q S350). According to the Coalition for the Reform Treaty, “[o]ne could argue that [the creation of the full-time European Council President] actually constitutes a strengthening of the nation state, as it will improve the functioning of the Council of Ministers” (p S129). However, Brendan Donnelly did not think that the Treaty would make a great difference to the role of the European Council (p S132). No witnesses told us that the influence of the Council of Ministers would change significantly.

The Commission

- 4.183. Professor Wallace told us that “there has been something of a secular decline of the Commission in the system generally and part of the embedding of the European Council is an illustration of that in this new Treaty”. She did not see the Treaty as “having lots of obvious prizes for the Commission in the way it operates in the institutional system” except that “it has a clearer role now in justice and home affairs which it has worked very hard for”, and possibly some role in relation to the External Action Service (Q S183). According to Jens Nyman Christensen for the Commission, “[t]he Commission’s powers are not fundamentally changed” by the Treaty (Q S298). However, he considered that the extension of co-decision in the Treaty would impact on the Commission, which would have to adjust to the European Parliament becoming “a player on a par with the Council in deciding agricultural policy” (Q S298). He noted that the European Parliament “is there in the Treaty to control the Commission and to monitor what we do” (Q S314); as mentioned above, Professor Chalmers and John Palmer considered that the European Parliament’s powers would affect the Commission’s influence. Professor Chalmers thought that the Commission was “a winner in some areas, a loser in others”. It had acquired a monopoly of initiative in new areas, but the new consent procedure for the appointment of the Commission President, the confirmation of co-decision as the ordinary legislative procedure, and the introduction of the citizen’s initiative “lead to a diminution of Commission influence” (Q S28).
- 4.184. John Palmer thought that while “[t]he Commission has not gained formally from the Treaty to the extent that the European Parliament has ... the point about its weakening can be greatly over-stated.” According to Mr Palmer, “[i]f the presidential Commission emerges more strongly ... the Commission will play a more important part in the balance of powers than some people right now imagine” (Q S28). The Minister agreed that the Commission itself would be more effective, and thereby gain greater respect and consent, and greater influence for the Commission President (Q S266).

The balance of influence

- 4.185. David Heathcoat-Amory’s judgement was that all of the EU institutions “get more powerful”; he compared the Convention to Lewis Carroll’s caucus race where “[a]ll have won and all must have prizes” (Q S89). The Minister, the Coalition for the Reform Treaty and Jo Leinen MEP all presented the Treaty as a response to the enlargement of the EU and a consequent need to “make the EU function” again after enlargement

(QQ S295, S329, p S128), implying that more effectiveness was necessary.⁴⁸ Lord Brittan of Spennithorne said that “if the Treaty as a whole makes the European Union more efficient, that is to the benefit of all its institutions including the Commission because it knows that what it says and does is more likely, if accepted by the Member States, to be implemented in an effective way” (Q S350). Whether one thinks that the institutions needed to become more effective depends on how one views the consequences of greater effectiveness.

- 4.186. Lord Brittan of Spennithorne stated: “I do not regard it as a Treaty that hands power in any significant way to the European Union institutions beyond what they already have” (Q S348). In his opinion, “this Treaty does not involve ... any significant transfer of sovereignty” (Q S349). While members of the public disagreed with this assessment in their submissions to us, and did not think the Treaty was in the British interest, Elmar Brok MEP told us that “Britain was a winner in the negotiations ... It was a winner as no other country” (Q S339).

Conclusion

- 4.187. **The Treaty’s effects on the balance of influence between the various EU institutions will only be observable over time. The European Parliament gains significant extra influence, which is seen by some as being at the expense of the Commission and the Council. The addition of a full-time President of the European Council introduces a rival pole of influence to the Commission President. The position of High Representative is significantly enhanced by the Treaty. But a smaller Commission may be a more effective Commission. The ECJ’s jurisdiction is significantly extended. The opportunities for national parliaments to exercise their role are enhanced (see Chapter 11).**

⁴⁸ However, according to Professor Wallace the processes of the EU have coped well with enlargement to date (Q S160).

CHAPTER 5: FUNDAMENTAL RIGHTS

- 5.1. Although the 1957 Treaty of Rome did not contain specific provisions on the protection of fundamental rights, the ECJ has nonetheless upheld the need for respect for fundamental rights in the context of action at EC/EU level since the Community's early days. In *Internationale Handelsgesellschaft*,⁴⁹ the ECJ concluded that "In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the ECJ. The protection of such rights, whilst inspired by the constitutional traditions common to Member States, must be ensured within the framework of the structure and objectives of the Community." Since then, both the Court's jurisprudence and the Member States have given increasing prominence to the need to have regard to fundamental rights in the growing areas of EU law. Successive treaties from Maastricht onwards have strengthened the position of fundamental rights in the EU.

Protection of fundamental rights in the existing EU legal framework

Article 6 TEU

- 5.2. Article 6 TEU was first included (in a more limited form than its present formulation) in the Treaty on European Union (the Maastricht Treaty), signed in 1992,⁵⁰ and was subsequently amended by the Amsterdam Treaty in 1997. It now provides that the Union is founded on the principles of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".⁵¹ The Union must respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR)⁵² and as they result from constitutional traditions common to the Member States, as general principles of Community law.⁵³
- 5.3. Following the *Internationale Handelsgesellschaft* case, the ECJ, both in its Advocates-Generals' opinions and in its judgments, has regularly referred to its duty to ensure observance of the general principles of law, of which fundamental rights form an integral part. In identifying particular rights and interpreting their content, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, including, in particular, the ECHR.⁵⁴

⁴⁹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, paragraph 4.

⁵⁰ Ex-Article F, TEU. TEU articles were renumbered following amendments introduced by the Treaty of Amsterdam in 1997.

⁵¹ Article 6(1) TEU.

⁵² The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, was agreed in the context of the Council of Europe, an intergovernmental organisation now comprising 47 member States and not to be confused with the European Community or the European Union.

⁵³ Article 6(2) TEU.

⁵⁴ See, for example, Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)*, opinion of Advocate General Léger, 28 September 2006, paragraph 102, and judgment of the Court, 14 December 2006, paragraph 26.

Charter of Fundamental Rights

- 5.4. In June 1999, the Member States decided that fundamental rights applicable at EU level should be consolidated in a Charter to enhance their visibility.⁵⁵ A Convention was set up to draft a Charter of Fundamental Rights of the European Union and it was instructed to include in the Charter the rights guaranteed by the ECHR and those derived from the constitutional traditions common to the Member States; and to take account of economic and social rights contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.⁵⁶
- 5.5. In December 2000 the Charter of Fundamental Rights of the European Union, drawing on the “constitutional traditions and international obligations common to the Member States”,⁵⁷ was “solemnly proclaimed” by the European Parliament, the Commission and the Council and published in the Official Journal.⁵⁸ It does not currently have legally binding force.
- 5.6. Prior to the adoption of the draft Charter by the Convention, the Bureau of the Convention prepared Explanations for each article of the Charter. The Explanations are intended to clarify the provisions of the Charter, indicating the sources and scope of each of the rights set out. They have no legal value.⁵⁹
- 5.7. The lack of legally binding force does not mean that the Charter has been ignored. First, it is a political document which expresses the aspirations of the EU institutions and the Member States as regards the level of fundamental rights protection in the EU. Second, the Charter is a point of reference for EU institutions and bodies when carrying out their tasks. The Commission has undertaken to ensure that legislative proposals it adopts comply with the Charter.⁶⁰ A new Community agency, the Fundamental Rights Agency, is tasked with carrying out pre-legislative scrutiny of Commission proposals when requested to verify their compliance with fundamental rights as defined in Article 6 TEU, having regard in particular to the ECHR and the Charter.⁶¹ As a consequence, the Charter indirectly influences the formulation of legislative proposals at EU level by affecting the

⁵⁵ Presidency Conclusions of the Cologne European Council, 3–4 June 1999, Document 150/99 REV 1 at paragraph 44.

⁵⁶ Decision of the European Council at Annex IV of the Cologne Presidency Conclusions. The European Social Charter guarantees social and economic human rights. It was adopted in the framework of the Council of Europe in 1961 and revised in 1996 (1961 Charter: Council of Europe Treaty Series 35, adopted on 18 October 1961; 1996 Charter: Council of Europe Treaty Series 163, adopted on 3 May 1996). The revised version was signed by the United Kingdom in 1997 although only the 1961 version has been ratified by the United Kingdom. On 9 December 1989, the Heads of State or Government of 11 of the then 12 Member States adopted the text of the Community Charter of the Fundamental Social Rights of Workers. The Community Charter was not signed by the United Kingdom until 1998.

⁵⁷ Recitals to the Charter.

⁵⁸ OJ C 364/1 of 18.12.2000.

⁵⁹ The full text of the original Explanations can be found in Document CONVENT 49 of 11.10.2000.

⁶⁰ Commission Communication Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systematic and rigorous monitoring, COM (2005) 172. This Communication has been the subject of a Report of this Committee: *Human Rights Proofing EU Legislation*, 16th Report of Session 2005–06, HL Paper 67.

⁶¹ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights OJ L53/1 of 22.02.2007. See in particular recital (9) and Article 4(2). The Committee has published a Report on the Agency: *Human rights protection in Europe: the Fundamental Rights Agency*, 29th Report of Session 2005–06, HL Paper 155.

“ideological drift” of legislation (Q S32). Although this was identified as a “worry” for some by Professor Chalmers, not all witnesses saw this as a cause for concern. Fair Trials International (FTI), for example, were in favour of Commission and Member States’ proposals being required to conform with the provisions of the Charter (p E148).

- 5.8. Increasing reference is also being made to the Charter in the EU courts.⁶² While the ECJ was initially hesitant to refer explicitly to the Charter in its judgments it has now, following a number of Advocate General opinions containing Charter references, begun to do so (p E141). In a 2006 judgment, the ECJ referred to the Charter along with other sources of international law upon which it drew to ascertain the extent of the right to family life, emphasising that the Community legislature (in this case, the Council and the Parliament) had acknowledged the importance of the Charter by referring to it in the recitals of the Directive in question.⁶³ Professor Chalmers understood the Charter to be “a source of law in the same way as the ECHR is in national constitutions” (Q S30). Sir David Edward highlighted that Article 51 of the Charter addressed the provisions of the Charter to the EU institutions, including the ECJ. As a result, the Court was duty-bound in his view to apply the Charter and promote its application (Q S138).
- 5.9. **Notwithstanding the Charter’s current lack of legally binding status, it is already an instrument of some importance to EU institutions and bodies and the Member States when taking action in the area of EU law. It is likely that, quite apart from the Treaty of Lisbon, references would increasingly be made to the Charter both before and by the ECJ.**

Fundamental rights protection under the Treaty of Lisbon

Article 6 TEU

- 5.10. The Treaty of Lisbon substantially revises Article 6 TEU. The most important change relates to the legal status of the Charter: new Article 6(1) provides that the Charter will have the same legal value as the Treaties. The article clarifies that “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”. It also stipulates that the Charter rights are to be interpreted in accordance with the “horizontal” provisions⁶⁴ of the Charter and with “due regard” to the Explanations prepared by the Bureau of the Charter Convention.
- 5.11. The Charter and the Explanations were adapted during the negotiations on the Treaty of Lisbon to introduce some changes to the horizontal articles. As a result, the Charter was “solemnly proclaimed” for a second time by the European Parliament, the Commission and the Council on 12 December

⁶² See, for example, the judgment of the Court of Justice of 3 May 2007 in Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*; opinion of the Advocate General of 14 December 2006 in Case C-305/05 *Ordre des barreaux francophones et germanophones and others v Conseil des Ministres* (in particular paragraph 48).

⁶³ See the judgment of the Court of Justice in Case C-540/03 *Parliament v Council* [2006] ECR I-5769 at paragraph 38.

⁶⁴ Articles 51 to 54 of the Charter clarifying the Charter’s scope and applicability.

2007.⁶⁵ However, the text of the revised Charter has not been reproduced in the text of the Treaties, and it does not appear in the Protocols. The European Trade Union Confederation (ETUC) said they would have preferred to see the Charter text included in order to enhance the visibility of fundamental rights for the citizen (ETUC para 4).

- 5.12. Amended Article 6(2) TEU provides that the Union shall accede to the ECHR.
- 5.13. New Article 6(3) TEU of the Treaty reflects existing Article 6(2), a provision which has been used extensively by the ECJ in developing its fundamental rights jurisprudence. It provides that “Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

Charter of Fundamental Rights

- 5.14. The Charter contains 50 “rights, freedoms and principles” in six Titles, namely: Dignity (I), Freedoms (II), Equality (III), Solidarity (IV), Citizens’ rights (V) and Justice (VI). It also contains the four horizontal Articles 51 to 54 clarifying the applicability and scope of the Charter’s rights, freedoms and principles. Before considering the effect of the change to the Charter’s legal status, it is helpful to look at the provisions of the Charter and some of the problems which have arisen in understanding their content.

i. The difference between rights and principles

- 5.15. The Charter does not identify which of its provisions are rights, which are freedoms and which are principles. Sir David Edward noted that the language of the Explanations in this regard was unhelpful and that the distinctions between the three different categories were not clear (Q S140).
- 5.16. The nature of “freedoms” appears to be least controversial: while expressed as a separate category in the preamble, in practice they fall under either “rights” or “principles”. The ECHR, for example, covers both “human rights and fundamental freedoms” and lists a number of what are essentially rights which can ultimately be relied upon before the European Court of Human Rights in Strasbourg. Thus Title II of the EU Charter on Freedoms includes the right to liberty and security of the person, the right to respect for private and family life and the right to freedom of expression, all of which are guaranteed by articles of the ECHR and seem to be “rights”. Other “freedoms” in the Charter, such as the freedom of the arts and sciences in Article 13, are of a different nature.
- 5.17. The important distinction to examine appears to be the one between rights and principles. There was some discussion of this issue when the Charter was first drafted: in particular, speeches given by Lord Goldsmith QC, the Government’s representative on the Convention which drafted the Charter, provide some useful comments on the approach taken by the drafters to the question of rights and principles. In a paper presented in 2001, Lord Goldsmith drew a distinction between “individually justiciable classic rights”, principally the civil and political rights guaranteed under the ECHR, and new social and economic rights which, he said, were not justiciable in the

⁶⁵ The adapted Charter and the revised Explanations have been published in the Official Journal: OJ C 303/1 of 14.12.2007 and C 303/17 of 14.12.2007.

same way but instead inform policy making by the legislator.⁶⁶ These latter rights were examples of the “principles” referred to in the Charter, which although common to all Member States were implemented differently in national law and practice. Such principles, explained Lord Goldsmith, “only give rise to rights to the extent that they are implemented by national law or, in those areas where there is such competence, by Community law”.⁶⁷ In a 2002 address at the annual conference of Liberty, the British human rights organisation, he referred to the economic and social rights set out in the Charter as “aspirations and objectives for what Government should do”.⁶⁸ The concept of “principles”, he explained, was adopted to mark this distinction between rights and aspirations or objectives. Principles could be recognised in the Charter by the use of “particular language which is not the language of guarantee”.

- 5.18. Applying Lord Goldsmith’s explanations to the Charter, it would seem that many of the “principles” are to be found in Title IV—“Solidarity”—which deals with social and economic rights. These “rights”, according to Lord Goldsmith, are not justiciable and enforceable but merely call for State intervention through national legislation. The need to maintain this “important” distinction and the lack of precision of the December 2000 Charter’s wording were reasons why Lord Goldsmith opposed the Charter becoming legally binding.⁶⁹
- 5.19. Whether there is a general acceptance of the distinction drawn, or its application, as explained by Lord Goldsmith is debatable. The ambiguity is exacerbated by the different wording in the various articles of Title IV: the use of the word “right” in some and the absence of a reference to national laws and practices in others. Echoing Lord Goldsmith, the Department for Work and Pensions (DWP) saw an important distinction between rights and principles, regarding the latter as merely providing guidance to the legislator (p G27). However, Martin Howe QC was dubious as to whether such a clear-cut distinction was possible (Q E289).
- 5.20. The December 2000 version of the Charter, although stating that it contains “rights, principles and freedoms”, does not attempt to draw or explain in express terms any distinction between these concepts. Article 52 of the December 2000 Charter merely refers to rights contained in the Treaties (Article 52(2)) and in the ECHR (Article 52(3)). The Charter as adapted in anticipation of its legally binding status includes a new Article 52(4), referring to rights resulting from constitutional traditions common to Member States, and a new Article 52(5), which for the first time seeks to clarify the distinction between rights and principles. It stipulates that the provisions of the Charter containing principles “may be implemented by legislative and executive acts” of the Union and the Member States when implementing Union law. Such provisions “shall be judicially cognisable only

⁶⁶ Paper by the Rt Hon Lord Goldsmith QC presented to the Heinrich Böll Stiftung, 24 February 2001 “A Charter of Rights, Freedoms and Principles” at paragraph 34:
http://www.gruene-akademie.de/download/europa_goldsmith.pdf.

⁶⁷ *Supra* at paragraph 35.

⁶⁸ An address by the Rt Hon Lord Goldsmith QC to the Liberty Annual Conference, 8 June 2002 “Human rights v civil liberties”:
<http://www.attorneygeneral.gov.uk/attachments/LIBERTY%20ANNUAL%20CONFERENCE,%208%20JUNE%202002.doc>.

⁶⁹ *Supra*.

in the interpretation of such acts and in the ruling on their legality”. Two points arise from this. First, Charter principles do not, therefore, of themselves give rise to directly enforceable rights. But they may influence the ECJ (or a national court) when interpreting the nature and extent of rights afforded by Union law or by national legislation implementing Union law, and even when deciding whether such a law is within the relevant legislator’s competence and valid at all. A declaration of invalidity could of course affect directly enforceable rights, e.g. those that would have existed under or been abrogated by the law had it been valid. Second, there is still nothing in Article 52 as adapted which identifies clearly which of the Charter provisions constitute rights and which principles.

- 5.21. The revised Explanations give examples of principles: they include Article 25 on the rights of the elderly, Article 26 on the integration of persons with disabilities and Article 37 on environmental protection. The Explanations also state that some articles may contain elements of rights and principles, referring as examples to Article 23 on equality between men and women, Article 33 on family and professional life and Article 34 on social security and social assistance. On this basis, some social and economic rights would not be mere principles but may give rise to justiciable rights.
- 5.22. **It is now clear that under the adapted Charter a distinction exists between rights (which are directly enforceable) and principles (which are only justiciable in the circumstances identified in Article 52(5)). The introduction of Article 52(5) recognises this and gives a clear indication as to its effect. But there is obscurity about how and where the distinction is to be drawn, and, in particular, a failure in the Charter and its Explanations to spell out clearly which of the Charter articles involve rights and which principles. The distinction will in practice have to be worked out in future cases before the ECJ.**
- 5.23. The distinction between rights and principles may have implications for the extent to which the UK Protocol on the Charter will lead to a different approach being adopted in respect of the United Kingdom from the rest of the EU. This is discussed further in the section on the UK Protocol below.

ii. References to national law

- 5.24. Whether one accepts Lord Goldsmith’s explanation as to the difference between rights and principles or not, it seems clear that articles of the Charter which make express reference to national law must be different from articles which do not make such references. If the former are to some extent enforceable rights, the question arises as to the effect of the reference to national law on the interpretation of the scope of the right guaranteed. Further, to the extent that the Union has competence and legislates in areas which are within its competence quite apart from the Charter, national legislators and courts will, in any event, be subject to that legislation. But the issue presently being considered is whether (and if so how far) the Charter contains rights which the ECJ might use to supplement, or might treat as existing even in the absence of, any such legislation. It is helpful to consider two examples: the right to health care and the so-called right to strike.

a. The right of access to health care

- 5.25. Article 35 provides that, “Everyone has the right of access to preventative health care and the right to benefit from medical treatment under the

conditions established by national laws and practices”. It goes on to provide that “a high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities”.

- 5.26. The Explanations indicate that this article is based on Article 152 TEC (new Article 168 TFEU), which relates to public health, and on Articles 11 and 13 of the European Social Charter, respectively the right to protection of health and the right to social and medical assistance. However, witnesses suggested that it is not clear whether there is a “free-standing” right of access to medical care in the Charter which requires compliance with some minimum threshold, or whether the article is merely declaratory and says in effect no more than that if national law provides the right to health care then individuals have the right to health care (Q E291).
- 5.27. Articles 11 and 13 of the European Social Charter do oblige Member States to establish a minimum level of health protection and of access to health treatment. Examples include the obligations in Article 11(2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health and in Article 13(1) to ensure that any person who is without adequate resources and who is unable to secure such resources be granted adequate assistance, and, in case of sickness, necessary care.
- 5.28. The stipulation in Article 35 of the Charter that everyone has the right to access, and benefit from, medical treatment under the conditions established by national laws and practices simply records the position as a matter of fact: everyone does indeed have the right to access, and benefit from, medical treatment under the conditions established by national laws and practices. This would not prevent courts from interpreting national law in accordance with the provisions of the European Social Charter, which requires minimum standards to be put in place. **But reference to national laws and practices prevents Article 35 itself from being held to establish a minimum right of access to medical treatment. Such a right could only be established (if at all) by reference to other international instruments and constitutional practices.**
- 5.29. The second sentence of Article 35—“A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities”—might be considered to impose an obligation on both the EU institutions and Member States when they are drafting and implementing EU law. That obligation would be a broad one to ensure “a high level of human health protection”. However, it is expressed—in particular through its reference to the definition and implementation of Union policies—as a guiding principle to the legislator. This seems to us to be a good example of a Charter provision which could be either a right or a principle. Even assuming that it is a right, in assessing what constitutes a high level of human health protection, courts may have regard to the obligations undertaken by Member States in international agreements, including the European Social Charter. Taking all this into account, it would in our view be surprising if the ECJ or any national court, when interpreting this provision, did not temper any right to health care by allowing Member States significant discretion in its application.

b. The right of collective bargaining and action

- 5.30. One particularly controversial right in the Charter is the so-called right to strike, contained in Article 28 of the Charter (“the right of collective bargaining and action”). That article provides that “Workers and employers, or their respective organisations, have, in accordance with Union law and national law and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflict, to take collective action to defend their interests, including strike action”. There appears to be a concern in the United Kingdom that this would introduce a right to strike, which does not currently exist in this country (pp G18–19 & G37–38).
- 5.31. The Explanations indicate that Article 28 is based on Article 6 of the European Social Charter,⁷⁰ which provides for a right to bargain collectively, and points 12–14 of the Community Charter of the Fundamental Social Rights of Workers, which deal with collective action. The Explanations also refer to Article 11 ECHR (the right of assembly and association), which has been held by the European Court of Human Rights to include a right to collective action, although that right is not absolute and may be limited by national law.⁷¹
- 5.32. The Chartered Institute of Personnel and Development were particularly concerned that the Charter would incorporate a right to strike in UK law (p G18). Professor J R Shackleton, Dean of Westminster Business School, also raised a number of concerns in this area (p G37). The Confederation of British Industry (CBI) considered that the granting of a new right here could have an adverse effect and threaten the flexibility of the UK labour market. However, the CBI indicated that they had sought independent legal advice on the extent to which the Charter could be used to extend EU law in this area which concluded that the risk was “relatively low”. In light of this, the CBI were “less concerned that the Charter could confer additional employment regulations on the UK labour market” (p G20).
- 5.33. The Department for Business, Enterprise and Regulatory Reform (BERR) were categorical on this issue, insisting that the Charter makes clear that Article 28 rights are to be exercised “in accordance with national laws and practices”. They concluded that “no new rights are established and there is no possibility of a return to secondary picketing in the UK” (p G21). Similarly, Andrew Duff MEP insisted that “Under no conceivable circumstances ... will the Charter give rise to direct claims for positive action by the EU or Member States in the matter of pay, trade union law, strikes or social security” (p G28).
- 5.34. Professor Alan Dashwood, for the Bar Council, considered that the content of Article 28 on the right to collective action was “extremely anodyne”. He was of the opinion that if the ECJ were inclined to develop the right to strike by raising matters such as secondary picketing then it would not gain anything from the Charter: it would have to look more widely at international agreements concluded by the Member States and at the constitutional traditions of Member States. He concluded that he did not think that the

⁷⁰ The UK has lodged no reservation to Article 6 of the Social Charter on the right to bargain collectively. Article 6 was not amended by the revised Charter in 1996.

⁷¹ E.g. *Schmidt and Dahlström v Sweden* (Application No. 5589/72), judgment of 6 February 1976, Series A, No 21 at paragraph 36.

language of the Charter “would be any help at all for the Court” (Q E334). This was a view shared by Martin Howe QC (Q E292).

- 5.35. As Ms Jane Golding, of the Law Society of England and Wales, pointed out (Q E474), recent case-law from the ECJ would seem to support this view. In two cases decided in December 2007, the Court recalled that the right to take collective action, including the right to strike, was recognised by various international and Community instruments. It concluded that “the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures”. However, like the Strasbourg Court, the ECJ recognised that this right may be subject to certain restrictions. The Court referred to Article 28 of the Charter and the reference to national laws and practices, noting that in Finnish law, the law in question in the case, the right to strike was indeed restricted in some circumstances.⁷² Interestingly, the Charter was used to introduce the limitation to the right to strike, and thus seemed to be employed by the Court more as a brake than an accelerator in these cases.
- 5.36. **Article 28 of the Charter does not create a free-standing right to strike: it is clear that within the Community framework, the right to collective action, including the right to strike, is already recognised as a general principle of law. Furthermore, Article 28 clearly stipulates that workers and employers have the right to collective bargaining “in accordance with Union law and national laws and practices” and the ECJ, in its December judgments, has indicated the significance of this limitation.**

iii. New rights or re-statement of existing rights?

- 5.37. As regards the content of the rights, freedoms and principles included in the Charter, the recitals to the Charter explain that it “reaffirms” rights as they result from various sources, including the ECHR, the constitutional traditions and international obligations of Member States, the Social Charters of the Union and the Council of Europe and the case-law of the ECJ and the European Court of Human Rights. Professor Elspeth Guild, of the Centre for European Policy Studies, explained that “The objective of the Charter is not to create new rights *per se* but rather to permit them to apply correctly and properly within the European Union” (Q E189).
- 5.38. The Explanations set out the source of each of the Charter rights.⁷³ Thus it can be seen that the right to liberty in the EU Charter’s Article 6 is based on Article 5 of the ECHR (right to liberty and security) and the Article 21 right in the Charter against discrimination originates in Article 13 TEC, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage.⁷⁴

⁷² Case C-438/05 *International Transport Workers’ Federation & Finnish Seamen’s Union v Viking Line ABP & OÜ Viking Line Eesti*, judgment of 11 December 2007 at paragraphs 43–44; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others*, judgment of 18 December 2007 at paragraphs 90–92.

⁷³ The European Parliament’s website on the Charter also provides extensive information regarding the source of Charter rights: http://www.europarl.europa.eu/comparl/libe/elsj/charter/default_en.htm.

⁷⁴ Council of Europe Treaty Series 164, adopted on 4 April 1997.

- 5.39. The extent to which the language in the Charter goes beyond existing rights guaranteed by other national and international sources was disputed by witnesses. David Heathcoat-Amory MP pointed to Article 13 of the Charter, which provided that the arts and scientific research should be free of constraint, and Article 29, which asserted that everyone had the right of access to a free placement service. He considered that these were new rights and that this was quite clear from the Explanations of these articles (Q S94).
- 5.40. On the other hand, the DWP were quite clear that the Charter “does not create any new rights, freedoms or principles”. They were of the view that it recorded rights existing under national and EU law and made them more visible (p G27). The Law Society of England and Wales agreed: “The Charter does not create new rights but rather collects together rights already in existence. It does not create new rights under national law and only applies when national governments are implementing EU law. It would not introduce new general rights into national law” (p E101). The ETUC saw the Charter as a shield rather than a sword: rather than replacing national human rights instruments, it could be used to protect the citizen where EU legislation might impinge on fundamental rights (p G29). However, the Department of Innovation, Universities and Skills (DIUS) and the Department of Children, Schools and Families (DCSF) pointed out that the rights in the Charter sometimes appeared to go beyond the source of the right set out in the Explanations (p G25).
- 5.41. Dr Eve Sariyannidou explained that over the past four decades, the ECJ had recognised a variety of social and labour rights in an “incremental expansion of human rights protection”. She considered that the Charter did not change the substance of protection of fundamental rights but provided a “comprehensive catalogue of rights and principles in a more consistent and transparent manner that renders the existing protection more comprehensible to EU citizens” (p G35).
- 5.42. We asked Jack Straw MP, Lord Chancellor and Secretary of State for Justice, whether he thought that the Charter created new rights. Ms Rebecca Ellis, for the Ministry of Justice, told us that the Government were clear that the Charter only reaffirmed existing rights (Q E539).
- 5.43. Clearly, the extent to which the Charter (however much it recites that it is reaffirming existing rights) actually contains new fundamental rights or principles continues to be a controversial issue. The nature of this Report prevents in-depth analysis of each of the Charter rights, but we do consider that it is helpful to examine the three rights raised by witnesses, which might be considered to be some of the Charter’s more contentious rights: Article 13 on the right to freedom of the arts and sciences; Article 14 on the right to education; and Article 29 on the right of access to a free placement service.⁷⁵

a. The right to freedom of the arts and sciences

- 5.44. Article 13 of the Charter provides that “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.” The Explanations say this is “deduced primarily from the right to freedom of thought and expression”. Reference is made to Article 10 ECHR (freedom of expression) and to the limits to freedom of expression contained in that

⁷⁵ The right of collective bargaining in Article 28 of the Charter, another particularly controversial article, is considered above.

Article; and to the need to balance the right to freedom of expression with the right to human dignity protected under Article 1 ECHR. While there is no question that the right to freedom of expression is protected under existing human rights obligations, the question arises as to the extent to which this right can be interpreted as including a right to “freedom of the arts and sciences” extending beyond the right of expression itself.

- 5.45. Unlike Article 10 ECHR, Article 19(2) of the UN International Covenant on Civil and Political Rights (ICCPR)⁷⁶ on freedom of expression makes specific reference to artistic expression, guaranteeing the right to “seek, receive and impart information and ideas of all kinds ... in the form of art or through any other media of his choice”. Despite the absence of a specific reference to artistic freedom in the ECHR, the European Court of Human Rights, when asked to consider the content of the Article 10 ECHR right, held that: “Admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression”.⁷⁷
- 5.46. As regards freedom of the sciences, the UN International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁸ in Article 15 recognises the right to enjoy the benefits of scientific progress and the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author. Article 15(2) provides that steps to be taken by contracting States to protect this right include “those necessary for the conservation, the development and the diffusion of science and culture” and Article 15(3) provides that contracting States “undertake to respect the freedom indispensable for scientific research and creative activity”. The ECHR has also considered the right to freedom of expression in the scientific context, but it did not attribute any particular significance to the scientific aspect of the case in question.⁷⁹
- 5.47. There is no doubt that the right to freedom of expression applies in the artistic and scientific contexts as it does in all contexts, although the right is not absolute. However, Article 13 of the Charter is expressed not as a right to freedom of artistic or scientific expression but as a stipulation that “the arts and scientific research shall be free from constraint”. **To the extent that Article 13 is indeed an enforceable “right” and not merely a guiding “principle” it is difficult to assess whether it is a new right without further clarification as to its content. The language of Article 13 is vague and one could conclude from the Explanations that the right is limited to freedom of artistic and scientific expression. If it extends further than freedom of expression itself, then, given that the rights in the Charter are derived from international obligations binding on the Member States, Article 1 of Protocol 1 to the ECHR, which provides a right to protection of property, Article 19(2) of the ICCPR and Article 15 of the ICESCR will very probably be important in ascertaining the scope of the right in practice.**

⁷⁶ Ratified by the United Kingdom on 20 August 1976.

⁷⁷ *Müller v Switzerland* (Application No. 10737/84), judgment of 24 May 1988, Series A, No 133 at paragraph 27.

⁷⁸ Ratified by the United Kingdom on 20 August 1976.

⁷⁹ *Hertel v Switzerland* (Application No. 25181/94), judgment of 25 August 1998, Reports 1998–VI.

b. The right to education

- 5.48. The DIUS and DCSF suggested that Article 14, providing for a right to education and to access to vocational and continuing training, went beyond the terms of Article 2 of the First Protocol to the ECHR, on which it claimed to draw. They pointed to three differences between the Charter right and the ECHR right: (i) the Charter right was expressed as a positive right, whereas the ECHR right was expressed as a “right not to be denied education” (i.e. a negative right); (ii) unlike the ECHR right, the Charter right expressly included vocational training; and (iii) the UK had a reservation on Article 2 of Protocol 1, stipulating that the right was not an absolute right for individuals to be educated wherever and however they want (p G25).⁸⁰ However, upon examination, the three differences highlighted by the DIUS and the DCSF appear less significant.
- 5.49. First, whether or not the right is expressed as a positive one or a negative one makes little difference in practice. The European Court of Human Rights has held that Article 2 of Protocol 1 provides a positive right to education, notwithstanding its negative formulation.⁸¹
- 5.50. Second, the Explanations demonstrate that the Charter right is also derived from the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers. While Article 2 of Protocol 1 ECHR does not contain an express right to vocational training, Article 10 of the Social Charter does contain such a right, reiterated in the Community Charter which provides that “Every worker of the European Community must be able to have access to vocational training and to receive such training throughout his working life”.⁸²
- 5.51. Third, like the right in Article 2 of Protocol 1 ECHR, the Charter right is not absolute. Article 14(3) of the Charter, which reflects the second part of Article 2 of Protocol 1,⁸³ refers to the right of parents to have their children educated in accordance with religious and philosophical beliefs but provides that this right shall be “in accordance with the national laws governing the exercise of such freedom and right” i.e. it is not an absolute right for individuals to be educated wherever and however they want.
- 5.52. Aside from the points made by the DIUS and DCSF, there are two further provisions in Article 14 of the Charter which are not mentioned in the instruments cited by the Explanations. First, Article 14(2) provides that the right to education “includes the possibility to receive free compulsory education”. Although this goes beyond the terms of Article 2 of Protocol 1, and of the Social Charter and the Community Charter, the provision is not without precedent. The ICESCR provides, in Article 13(2)(a), that “primary

⁸⁰ The right in Article 2 of the Protocol is accepted “only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure”—United Kingdom reservation made at time of signature of Protocol, 20 March 1952.

⁸¹ See, for example, judgment of 23 July 1968 on the merits of the “Belgian Linguistic” case, Series A no. 6, paragraph B.3: “In spite of its negative formulation, this provision uses the term ‘right’ and speaks of a ‘right to education’. Likewise the preamble to the Protocol specifies that the object of the Protocol lies in the collective enforcement of ‘rights and freedoms’. There is therefore no doubt that Article 2 does enshrine a right”.

⁸² Point 15 of the Community Charter.

⁸³ “In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.

education shall be compulsory and available free to all”. Second, Article 14(3) refers to respect for the “freedom to found educational establishments” which, although not mentioned in the ECHR, the Social Charter or the Community Charter, is referred to in Article 13(4) of the ICESCR: “No part of this article [on the right to education] shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions”.

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

c. The right of access to a free placement service

5.54. Article 29 of the Charter on the right to a free placement service is described in the Explanations as being “based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers”. Article 1(3) of the Social Charter obliges parties “to establish or maintain free employment services for all workers”. The reference to point 13 of the Community Charter appears to be in error: point 13 refers to the right of collective bargaining; point 6 provides that “Every individual must be able to have access to public placement services free of charge”.

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

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

iv. Horizontal articles

5.57. The Charter’s concluding horizontal articles set out the field of application, scope and interpretation of the Charter. Article 51(1) provides that the Charter is addressed to EU institutions, bodies, offices and agencies of the Union and to Member States when implementing EU law, a qualification which is absent from the terms of Article 6(1) itself. It also provides that the principle of subsidiarity is to be respected. Article 51(2) states that the Charter does not extend the field of application of Union law beyond the

powers of the Union, nor does it establish or modify any Union powers or tasks.

- 5.58. Professor Steve Peers, speaking for Statewatch, and Jane Golding stressed the need for a link with Union law before the rights in the Charter would apply (QQ E106, E474). Dr Eve Sariyannidou spelled out the position: the Charter may be used to challenge and ultimately strike down EU legislation which does not comply with its provisions, but it cannot be used to challenge non-compliant national legislation unless the legislation in question is implementing EU law (p G36).
- 5.59. Martin Howe QC referred to a “fear that the EU Charter would ... spread out from the field of Union law across the board into unrelated fields of national law”. This was not a concern that he shared (Q E284). Professor Peers was of the view that most criminal proceedings, for example, would not have a link with Union law, and therefore the Charter would not apply to them (Q E106).
- 5.60. **It is clear from Article 51(1) of the Charter that it does not apply to situations involving purely domestic law. For the Charter to be directly relevant, there must be a link to Union law. It remains of course quite conceivable that national courts applying domestic law might, in some cases, find an analogy or some inspiration in EU law, but that would not be an unusual process.**
- 5.61. As regards any possible extension of competence resulting from the legally binding force of the Charter, Dr Clemens Ladenburger, of the Commission Legal Services, stressed that the terms of Article 51(2) were quite clear in this respect. He did not think that the Charter “would prompt the EU legislator to adopt new legislation in areas where otherwise it would not” (Q E385).
- 5.62. Article 52 provides some interpretative guidance. In particular, it states that where Charter rights correspond to ECHR rights, the meaning and scope of the rights shall be the same as those laid down by the ECHR.
- 5.63. As mentioned above, some changes were made to the Charter itself during the Treaty of Lisbon negotiations to provide further clarification as to how the rights in the Charter are to be applied and interpreted.⁸⁴ Article 52(4) provides that rights resulting from constitutional traditions common to the Member States are to be interpreted in harmony with those traditions. In particular, the need for guidance on the distinction between “rights” and “principles” prompted the new Article 52(5).⁸⁵ Article 52(6) provides that full account is to be taken of national laws and practices as specified in the Charter, which would appear to give some weight to the references to national law discussed above. Article 52(7) requires courts of the Union and the Member States to give “due regard” to the Explanations.
- 5.64. Articles 53 and 54 provide that nothing in the Charter shall be interpreted as restricting fundamental rights, nor shall the Charter be interpreted as providing a right to engage in activity which aims to destroy or limit the rights in the Charter.

⁸⁴ These changes were first discussed in the context of negotiations on the Treaty establishing a Constitution for Europe as that Treaty would also, had it entered into force, have given the Charter legally binding status.

⁸⁵ This is discussed in greater detail in the section on rights and principles above.

The Charter's new status

5.65. The decision to grant the Charter legally binding status—the same legal value as the Treaties—has provoked mixed reactions. The evidence we received generally favoured giving the Charter legally binding effect. In support of that view, Professor Guild considered that the impact of this change would be beneficial in helping to focus the minds of EU legislators and providing interpretative guidance to national courts when examining measures implementing EU law (Q E177). Andrew Duff MEP saw the decision to give legally binding effect to the Charter as a “huge step forward for the European citizen” (p E136) and the Law Society of England and Wales commented that it would allow the rights in the Charter “to be recognised or interpreted in new ways that could bring positive benefits to individuals” (p E100). Baroness Nicholson of Winterbourne MEP, Fair Trials International, ETUC and JUSTICE also welcomed the Charter’s new status (pp E148, E156–157, E169–170 & G29). Those with concerns feared the consequences of giving enhanced significance to the Charter (pp S131 & E154).

i. Understanding Article 6(1) TEU

5.66. There has been little comment on how legally binding status can be given to a declaratory document such as the Charter. Given that the Charter itself affirms that it simply records existing rights, some witnesses have suggested that the terms of Article 6(1) are surprising. James Flynn QC, for the Bar Council, suggested that new Article 6(1) was “a little circular” given that the Charter claimed simply to reaffirm rights which existed already (Q E331). Professor Jo Shaw, University of Edinburgh, also commented on the peculiarity of “giving what is apparently a declaratory instrument the same legal values as [the Treaties]” (Q E67).

5.67. Dr Ladenburger recognised the declaratory status of the Charter, but considered that giving the Charter legally binding force would incite the EU institutions to pay “the utmost attention to respecting these fundamental rights” (Q E383).

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

ii. The general impact of the change to the Charter’s status

5.69. Those of our witnesses who considered that the Charter created new rights were, as a result, of the view that the grant of legally binding status would have a discernible effect on the EU and Member States. However, the majority of our witnesses concluded that the change was unlikely to have much impact. BERR insisted that nothing would change for the UK following the elevation of the status of the Charter by the Treaty of Lisbon (p G21). This was a view shared by several other witnesses. Sir David Edward concluded that the change to the status of the Charter “adds nothing very much to where we are already” (Q S138). Professor Jo Shaw was dubious that there would be much change: “I am not convinced that the

Charter in any event, whether recognised in this form or not, is going to have a stunning impact on the Court of Justice's fundamental rights jurisprudence" (Q E67).

- 5.70. As Professor Guild explained, "We are looking at a framework of fundamental rights in which the Charter is only one piece" (Q E188). Dr Sariyannidou noted that "The EU Charter will remain a consolidation of existing law and, thus, authoritative evidence of the law in force". She did not consider that the Lisbon Treaty revisions marked a substantial change in direction (pp G35, G37). This was a view shared by Mr Duff: "one can safely conclude that UK labour market policy is unlikely to be directly affected by the decision to make the Charter binding" (p G28).
- 5.71. Professor Peers, for Statewatch, explained why the Charter's new status would have a limited impact: "it always has to be kept in mind when discussing the Charter that human rights are already protected as general principles of law" under existing Article 6(2) (Q E106). Dr Ladenburger also highlighted the importance of this point, emphasising that the general principles were already "well developed by the case-law of the Court of Justice", and thought it unlikely that the change in the Charter's status would fundamentally alter the Court's case-law (Q E383). Professor Peers concluded that "The general principles are there ... and the Court of Justice would continue to develop them even if the Charter were not there" (Q E109). Support for this view can be found in the recent ECJ cases concerning the right of collective action: despite the fact that the Charter does not currently have legally binding force, the Court found that the right to collective action was a general principle of EU law. As to whether the Charter created a presumption that the rights it contained did in fact exist, Ms Ellis did not consider this to be an issue: "Insofar as they derive from existing sources, they are in existence" (Q E540).
- 5.72. **Leaving aside the UK/Polish Protocol, the effect of declaring the Charter to have the same legal value as the Treaties is likely to preclude any argument that the rights and principles "reaffirmed" do not already exist as fundamental rights and principles in the area of EU law. We doubt whether this represents any great change from the position as it is and would anyway prove to be, having regard to current and emerging ECJ jurisprudence. Declaring the Charter to be legally binding will of course be likely to encourage and probably to speed the development of such jurisprudence.**
- 5.73. One argument which is levelled against the Charter is that although it does not create new rights, it would enable existing rights which are not directly enforceable in the United Kingdom to be legally enforced. This was a point raised by Mr Howe, who explained that by granting the Charter legal status the ECJ and national courts would be given jurisdiction to rule on violations of the Charter (and consequently on violations of international treaties) (QQ E283, E287). Ms Golding added that once the Charter is enshrined in primary EU law "the rights enshrined in it can be applied directly". She concluded that this would lead to a change not of substance but in the way rights are applied (Q E473).
- 5.74. Professor Dashwood considered that the Charter did not increase the possibilities for acts of the Member States and Union institutions to be challenged in courts. As for the role of the Charter in such challenges, Professor Dashwood said "I do not think [the Court] would find the Charter

nearly as useful as it would the international agreements to which the Member States are parties, or the constitutional positions of the Member States". Mr Flynn concluded that "one might expect to see references to [the Charter] possibly in judgments but it is unlikely to change the picture very much" (QQ E331–335).

- 5.75. The rights at issue are those in the Charter deriving from international instruments which, although ratified by the United Kingdom, do not give rise to a right directly enforceable in UK courts or the ECJ. This is the case in relation to most obligations undertaken outwith the context of the EC or the EU, because the "dualist" approach of the legal systems of the United Kingdom means that international obligations are only incorporated into domestic law once they are transposed.⁸⁶
- 5.76. An example of such a right is the right to protection in the event of removal, expulsion or extradition in Article 19 of the Charter. Article 19 has two components: the prohibition of collective expulsions; and the prohibition on extraditing an individual to a State where there is a serious risk that he will be subject to the death penalty, torture or other inhuman or degrading treatment or punishment.⁸⁷
- 5.77. The Explanations indicate that Article 19(1) is derived from the Fourth Protocol to the ECHR. However, this Protocol has not been ratified by the United Kingdom. As a result, the United Kingdom's obligations in this field derive only from other international instruments which it has ratified. The United Kingdom's obligation to make decisions on expulsion on an individual basis can be inferred from Article 13 of the ICCPR and Article 32(2) of the 1951 Geneva Convention relating to the status of refugees.
- 5.78. The fact that treaties have not been incorporated as such into law in the United Kingdom does not mean that unincorporated rights which they provide are necessarily unenforceable.⁸⁸ Courts in the United Kingdom, when interpreting the scope of rights which exist as general principles or under the Human Rights Act 1998, are also entitled to have regard to international agreements and frequently do so.⁸⁹
- 5.79. Like the British courts, in the EU context the ECJ also illuminates its reasoning process by having regard not only to the text before it but also to relevant international treaty obligations in order to assist its interpretation. This practice would clearly continue irrespective of whether the Charter is legally binding. New Article 6(1) TEU will require the Court to have regard, in interpreting the scope of the Charter rights, to the Explanations setting out the sources of the rights, which in turn refer to relevant international instruments.

⁸⁶ Contrast the case of France, a monist system, where international obligations give rise to directly-enforceable rights under French law once the international instrument has been ratified.

⁸⁷ As the Explanations set out, the prohibition on expulsion where there is a risk of torture or ill-treatment has been reflected in the case-law of the Strasbourg Court which establishes that Article 3 of the ECHR on the right to freedom from torture and inhumane or degrading treatment also prohibits expulsion where there is a risk of torture—Case 22414/93 *Chahal v United Kingdom*, judgment of 15 November 1996, Report 1996–V at paragraph 74.

⁸⁸ The Asylum and Immigration Act 1993 provides, in s.2, that "Nothing in the immigration rules ... shall lay down any practice ... contrary to the [Geneva] Convention".

⁸⁹ *R v Immigration Officer at Prague Airport, ex parte ERRC* [2004] UKHL 55 per Lord Steyn and Baroness Hale of Richmond.

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

iii. Overlap with the ECHR and the Strasbourg Court

5.81. According to Martin Howe QC, one important consequence of giving the Charter legally binding status may be that the ECJ will be increasingly asked to interpret the ECHR, given that a number of Charter rights are derived from that instrument. The risk is that a difference in approach may develop between the Strasbourg and Luxembourg Courts. He suggested that this could, however, be remedied by the Union signing up to the ECHR (QQ E277 & E279). Dr Ladenburger highlighted the significance of Article 52(3) of the Charter here, which made it clear that insofar as Charter rights were derived from ECHR rights, the Charter right was to have the same scope and meaning as the ECHR right in question (Q E383).

5.82. We have previously highlighted the role that the European Union could play in ensuring better protection of fundamental rights within its Member States and thus alleviating the growing caseload of the European Court of Human Rights.⁹⁰ While we recognise that it is possible for inconsistencies to emerge in the treatment of fundamental rights by the two courts, in practice the ECJ pays attention to the jurisprudence of the Strasbourg Court, and has generally avoided any direct conflict.⁹¹

5.83. **Accession of the Union to the ECHR would greatly reduce the risk of inconsistencies, and provide a means of redress if they did occur, by making the Union and its institutions subject to the jurisdiction of the European Court of Human Rights.**⁹²

The UK and Polish Protocol

5.84. The United Kingdom and Poland have secured a Protocol, which under new Article 51 TEU will have the same legal value as the Treaties, on the application of the Charter in the UK and Poland. The recitals of the Protocol

⁹⁰ *Human rights protection in Europe: the Fundamental Rights Agency*, 29th Report of Session 2005–06, HL Paper 155 at paragraph 93.

⁹¹ As in Case C-145/04 *Spain v United Kingdom*, judgment of 12 September 2006, where Spain sought unsuccessfully to challenge as contrary to European law the way in which the United Kingdom gave the Gibraltarians the right to vote in elections to the European Parliament, following the European Court of Human Rights' decision in *Matthews v. United Kingdom* (Application No. 24833/94), judgment of 18 February 1999, holding that the United Kingdom was under the Human Rights Convention obliged to give them such a vote. Similarly, the Strasbourg Court interprets the ECHR compatibly with EU law, e.g. *Bosphorus Airlines v Ireland* (Application No. 45036/98), judgment of 30 June 2005; and *DH & Others v Czech Republic* (Application No. 57325/00), judgment of 13 November 2007 at paragraph 187.

⁹² We discuss this further below when we consider EU accession to the ECHR.

set out the context. Notably, recital 8 refers to the “wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter”, and recital 9 explains that Member States are “desirous therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and the United Kingdom and of its justiciability within Poland and within the United Kingdom”. Recital 12 reaffirms that the Charter is without prejudice to other obligations of the United Kingdom and Poland deriving from Union law generally.

i. A Charter opt-out?

- 5.85. Some witnesses seemed to consider that the Protocol effectively constituted an opt-out from the Charter (pp E148, E156). However, Professor Dashwood considered the Protocol to play a role in assisting interpretation of the Charter only: “The Protocol is not an opt-out for the United Kingdom; it is an interpretative protocol” (Q E332). This was a view echoed by Dr Sariyannidou: “[The Protocol] does not say that the Charter is not binding in the UK and in this respect it does not amount to an ‘opt-out’” (p G36). The ETUC referred to “opt out” as “inaccurate terminology” (p G29).
- 5.86. The Government also viewed the Protocol as an interpretation guide rather than an opt-out. The DWP said categorically, “The UK Protocol does not constitute an ‘opt-out’. It puts beyond doubt the legal position that nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law” (p G27). The DIUS and the DCSF referred to Articles 51 and 52 of the Charter and the Protocol as providing “some useful clarification of the effect of the Charter rights” (p G25). Professor Shaw suggested that in fact, the Protocol was a “Declaration masquerading as a Protocol” (Q E70). Indeed, she considered it extraordinary that the Member States should purport to instruct British courts as to how they were supposed to interpret the Charter (Q E73).
- 5.87. The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol.**

ii. The terms of the Protocol

- 5.88. Article 1(1) of the Protocol stipulates that the Charter does not extend the ability of the ECJ or any British or Polish court to find the laws and practices of the United Kingdom or Poland inconsistent with the Charter.
- 5.89. Article 1(2) provides that, for the avoidance of doubt, nothing in Title IV of the Charter (the “Solidarity” rights) creates justiciable rights applicable to Poland or the UK except insofar as such rights are provided for in their national laws.
- 5.90. Article 2 of the Protocol provides that to the extent that the Charter refers to national laws and practices, it shall apply to the UK and Poland only to the extent that the rights or principles it contains are recognised by the laws and practices of the UK or Poland.

iii. The effect of the Protocol

- 5.91. As outlined above, the Charter itself contains articles concerning the scope and interpretation of the rights it contains. The question of whether the

Protocol intends to depart from these articles and set out a different interpretation to be applied specifically in the UK and Poland has created some confusion.

- 5.92. Professor Guild pointed to the lack of clarity in the Protocol, saying “it is not entirely clear exactly what the objective of the Protocol is beyond some kind of statement about fundamental rights and their application in the UK and Poland”. She considered a variety of interpretations to be possible (QQ E178–179). The Law Society of Scotland also pointed to the lack of clarity as to what would be the position in the UK and commented on the “unfortunate lack of legal certainty” that would result (p E165). Dr Sariyannidou concluded that the Protocol was “a matter of presentation rather than content or substance” (p G37).
- 5.93. Given the lack of clarity as to the aim of the Protocol, witnesses found it difficult to judge what the Protocol’s effects might be. Martin Howe QC noted: “one has to ask whether [the Protocol] is simply declaratory of the consequences of the Charter across the whole European Union or whether, alternatively, it is intended to create some different legal effect of the Charter inside the United Kingdom and Poland, as compared with the other Member States”. He concluded that the Protocol might have no substantive legal effect and might simply be a reassertion of Article 51(1) of the Charter itself (QQ E283 & E285). As Professor Shaw highlighted, the recitals of the Protocol appear to indicate that there is no change intended to the *status quo* (Q E71).
- 5.94. In seeking to identify what would be the effect of the United Kingdom and Polish Protocol, the important question, according to Professor Peers, was the extent to which the rights in the Charter differed from the general principles of Union law: if the ECJ ruled that the Charter rights and the general principles were one and the same, then, in Professor Peers’ view, “the distinction between the Charter and the general principles is irrelevant and therefore the British Protocol is meaningless”.⁹³ However, if there was some scope for discussion as to whether the Charter and the general principles encompassed the same rights, then Professor Peers considered that the Charter might have some impact and the Protocol could be important. He concluded that even if the Charter and the general principles were to some extent different, the Protocol would not exclude the Charter entirely for the UK. It would simply prevent national courts and the ECJ from criticising national law in light of the Charter. However, as the recitals to the Protocol reaffirmed, the Protocol did not limit obligations incumbent on the UK as a result of Union law generally and those rules would continue to apply (Q E106). Andrew Duff MEP suggested that even if the Charter was not identical to the general principles at present, over time the case-law would develop in this direction (p E137).
- 5.95. Professor Chalmers thought that the Protocol was not worth a great deal (Q S31). However, this view was not shared by Professor Dashwood. He saw the Protocol as part of the belt-and-braces approach of the Government. In his view the Charter did not create new rights and did not enlarge the possibility of acts of Member States or EU institutions being challenged on fundamental grounds and the Protocol provided additional, but unnecessary, protection for the United Kingdom in this regard. For those who took the

⁹³ This was a view shared by Maria Fletcher, lecturer in European law at the University of Glasgow (p E152).

opposite view and considered that, to some extent at least, the Charter did create new rights, then for Professor Dashwood, the Protocol provided that as far as the United Kingdom was concerned the Charter must be interpreted as not creating new rights (Q E332). Jane Golding also emphasised that, in her view, the Protocol was secured by the United Kingdom in order to provide certainty that “it had covered all the angles” (Q E474).

- 5.96. Mr Straw was quite frank about the intention behind the Protocol and its likely effect: in his view, the Protocol was intended to reflect the terms of the Charter’s horizontal articles themselves. He told us “[the Protocol] puts beyond doubt what should have been obvious from other provisions” (Q E541).
- 5.97. Professor Jacqueline Duthail de la Rochère, of the University Paris II (Panthéon-Assas), did not consider that the Protocol would lead to any great change in the way the Charter was applied, given the careful drafting of the horizontal articles of the Charter itself. She concluded that although the Protocol would probably provoke a significant amount of discussion and debate among lawyers, it might in the end produce little in the way of case-law (p E141).
- 5.98. Some witnesses who welcomed the Charter were concerned about the operation of the Protocol. The Trades Union Congress (TUC) raised two issues. First, they were concerned that the Protocol might hinder the use of the ECJ to ensure access to existing EU-based workers’ rights. They pointed to the recent practice of the Court to draw on the Charter when interpreting EU employment directives and considered that it would be “unacceptable” for the Protocol to restrict the Court’s power to do so in future. Second, they expressed a concern that the Protocol would restrict the right of UK citizens to claim rights through the ECJ and that this would lead to a widening difference between rights for UK and other EU citizens over time (pp G39–40). The ETUC, however, noted that the Protocol did not allow the United Kingdom to evade its obligations under EU law (p G30).⁹⁴
- 5.99. Witnesses who expressed concerns at the introduction of a legally binding Charter did not appear to be reassured by the existence of the Protocol. David Heathcoat-Amory MP complained that the Protocol was “wafer thin” and Neil O’Brien feared that the Court would interpret the Protocol however it liked (QQ S94–95). Sally DeBono was also dubious that the Government’s “red line” would hold (p S131).
- 5.100. The Chartered Institute of Personnel and Development was concerned that the protection afforded by Article 1 of the Protocol in respect of the Title IV Solidarity provisions of the Charter might be traded at some future point in return for concessions in other areas, a worry shared by Professor Shackleton (pp G18, G38).
- 5.101. Dr Sariyannidou suggested that the ECJ’s obligation to ensure the uniform application of EU law would trump the UK Protocol. This could be relevant if the Court were to be asked to interpret, for example, UK implementation of EU labour and social legislation. She considered that the United Kingdom would have more success in resisting the Charter through insisting on a

⁹⁴ The Protocol recitals state that it is “without prejudice to other obligations devolving upon ... the United Kingdom” under the Treaties and EU law generally.

rigorous application of the principle of subsidiarity in Article 51(1) (pp G36–37).

5.102. The recitals make several references to the desire of Member States to “clarify”—not prescribe—the application of the Charter. Lord Goldsmith, who was to a large extent responsible for drafting the horizontal provisions of the Charter in his role as Government representative on the Convention and who also drafted the Protocol, emphasised this point in a recent paper to the British Institute of International and Comparative Law: “The negotiations at the June European Council and subsequent Intergovernmental Conference provided Government with the opportunity to bolster existing safeguards and set in stone how the Charter will operate in the UK, as in all Member States”.⁹⁵

5.103. **We therefore see the broad legal effect of the Protocol as follows:**

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

⁹⁵ Speech by the Rt Hon Lord Goldsmith QC to the BIICL, 15 January 2008: “The Charter of Fundamental Rights”.

Charter Article 52(5), when interpreting or ruling on the validity of legislative or executive acts taking place under Union law on the basis of a Union competence not connected with the Charter.

- (d) The Protocol should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States. But to the extent that the Explanations leave some ambiguity as to the scope and interpretation of the Charter rights, and as to the justiciability of the Title IV rights especially, the Protocol provides helpful clarification. We would not be surprised if, in considering the scope of the Charter in future, EU and domestic courts had regard to the terms of this Protocol in order to assist interpretation of the Charter's horizontal articles, even in cases where the United Kingdom and Poland were not involved. Indeed, given that, despite media reports, it is an interpretative Protocol rather than an opt-out, it is perhaps a matter of regret, and even a source of potential confusion, that it was not expressed to apply to all Member States.**

5.104. In assessing the impact of the Protocol, it should be recalled, as highlighted by Professor Peers, that the Charter is not the only “door” to protection of fundamental rights in the EU. New Article 6(3) TEU on general principles of Union law also provides a means for challenge to EU law and UK implementing legislation on the basis of violations of fundamental rights, as is the case under existing Article 6(2). Nothing in the Protocol changes the position in this regard as the legally binding status of the Charter is irrelevant where a fundamental right constitutes a general principle (Q E106). The Court's approach to this has been clearly demonstrated in the context of the recent rulings on the right to collective action.⁹⁶ Where a Charter right is declared by the Court to constitute a general principle which would exist under EU law irrespective of the Charter, any protection afforded by the Protocol will fall. The extent of the ECJ's current interpretative practice is recognised by Martin Howe QC, who concluded that the power of the ECJ to rule on violations of the Charter (and therefore on violations of rights which presently exist only under international treaties outside the EU/ECHR context) might already exist because the Court recognised that the basic principles in the Charter were general principles common to the Member States (Q E283).

5.105. **Ultimately, the interpretation of the Protocol is a matter for the courts and, in both the national and EU contexts, we do not think it is possible at this stage to predict precisely what courts would decide if faced with the task of interpreting the Protocol's language. Clearly, European and domestic courts could not ignore the text of the Protocol but it is likely that the ECJ will develop a tendency to refer to Charter rights and their origins, as well as new Article 6(3) TEU⁹⁷ on the general principles of EU law, and would develop its fundamental rights jurisprudence on that basis.**

5.106. To the extent that the Protocol does in practice limit the application of the Charter in the United Kingdom, some witnesses suggested that there might

⁹⁶ See discussion of the “right to strike”, *supra*.

⁹⁷ Current Article 6(2) TEU.

well be an indirect application of the Charter in any case through rulings of the ECJ on how EU legislation should be interpreted. A ruling on a case not involving the United Kingdom and based on an interpretation of the Charter would in principle have to be respected and followed by UK courts (Q E284).

- 5.107. Andrew Duff MEP criticised the Government for negotiating a special Protocol and highlighted the risk of the UK's self-imposed exclusion from development of Charter case-law: he considered that in the long term the United Kingdom would inevitably be brought under the umbrella of the Charter but would have deprived itself of the opportunity to help shape the fundamental rights regime by preventing its courts from playing a role at this early stage of the Charter's development. He saw the Charter as having a symbolic value that, for example, Schengen did not and concluded that, "It does seem rather bizarre for any government—especially a social democratic one—to seek to deprive its people of the higher standards of rights protection now required by the rising level of European integration" (p E137).
- 5.108. Fair Trials International also condemned the Government's negotiation of the Charter Protocol, expressing deep disappointment at the signal such a move sent about the UK's commitment to securing equal rights for all EU citizens and, more broadly, the EU's commitment to fundamental rights. In FTI's view, the acceptance of different fundamental rights standards in the EU seriously compromised the EU's credibility and undermined the effectiveness of the EU's human rights policy (p E148). The ETUC said it "deplore[d] the political message" that the Protocol sent to citizens. They stressed the indivisibility of the Charter and the importance of avoiding an "*à la carte*" instrument which depended on the political considerations of the day (p G29).
- 5.109. **One effect of the Protocol will be to discourage the ECJ from basing its analysis of fundamental rights solely on the Charter. British courts are therefore generally unlikely to be faced with the problem of deciding, in the light of the Protocol, how they should treat case-law of the ECJ interpreting EU law on the basis of the Charter alone.**
- 5.110. **The Protocol may have the effect of reassuring those who have concerns about giving the Charter legally binding status.**
- 5.111. **British courts already refer to the Charter in identifying the scope of fundamental rights.⁹⁸ Nothing in the Protocol will prevent them from continuing to do so in future, drawing on the Charter in the same way as they draw on many international human rights instruments, when interpreting the content of fundamental rights.**

Accession to ECHR

- 5.112. Witnesses generally welcomed EU accession to the European Convention on Human Rights. Professor Maria Kaiafa-Gbandi, of the Aristotle

⁹⁸ See for example *R v East Sussex County Council and the Disability Rights Commission ex parte A, B, X & Y* [2003] EHC 167 (Admin) per Munby J at paragraph 73: "the Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention".

University of Thessaloniki, noted the importance of EU participation in the ECHR, particularly in light of its increasing powers (p E162).

- 5.113. While Fair Trials International were in favour of EU accession to the ECHR, they expressed some concern at the risk of overlap and confusion between the EU and the Council of Europe (p E148). Martin Howe QC saw Union accession to the ECHR as one way of dealing with the problem that might be created by increasing interpretation of the ECHR (via the Charter) by the Luxembourg Court (Q E279). Accession itself is not without difficulties: Professor Chalmers pointed to the problems that would arise in relation to ECHR accession regarding accountability and what “exhaustion of domestic remedies”—a condition which has to be fulfilled for a case to be admissible in Strasbourg—would mean in the EU context (Q S16).
- 5.114. Mr Heathcoat-Amory MP noted that, at present, there is no provision in the ECHR for accession of non-States. He concluded that “it is quite clearly foreseen that the European Union shall accede to a body in that sense like a State” (Q S58). Maria Fletcher suggested that while the wording of Article 6(2) states that the Union “shall accede” to the ECHR, given the need for unanimity for any accession decision under Article 218(8) TFEU this may not be as straightforward as some expect (p E152).
- 5.115. Finally, the Law Society of Scotland highlighted a potential problem which could arise in Scotland as a result of the dual human rights jurisdiction of the Union and the Council of Europe. The Scotland Act 1998, which introduced devolution in Scotland, requires all legislation passed by the Scottish Parliament to be compatible with both ECHR rights and EU law. Where there is an incompatibility with either, the Scottish legislation in question is “not law”. Clearly any inconsistency between the Union and the Council of Europe could have undesirable consequences for Scotland (p E165).
- 5.116. Protocol 14 to the ECHR was prepared with EU accession in mind and as a result amends Article 59 of the ECHR, which deals with signature and ratification. New Article 59(2) provides that, “The European Union may accede to this Convention”. Further amendments will be required to make accession possible from a technical point of view but it is quite clear that special arrangements have been and will be made to allow the EU to accede to the ECHR as an international organisation rather than a State.⁹⁹
- 5.117. Clearly there will be issues which will have to be resolved but we do not consider there to be any serious problems or obstacles here. We note the importance of consistency in the two regimes for Scotland and the obligation on its legislature under the devolution settlement. This problem has existed since the entry into force of the 1998 Scotland Act and will not be made worse by the Treaty of Lisbon. On the contrary, accession to the ECHR would help to secure consistency.
- 5.118. **We have in the past identified strong reasons for supporting EU accession to the ECHR.¹⁰⁰ The Strasbourg Court would then be**

⁹⁹ The Protocol will enter into force once it has been ratified by Russia, the only remaining Council of Europe member State not to have ratified it.

¹⁰⁰ *EU Charter of Fundamental Rights*, 8th Report of Session 1999–2000, HL Paper 67 at paragraph 154; *The future status of the EU Charter of Fundamental Rights*, 6th Report of Session 2002–2003, HL Paper 48; and *Breaking the deadlock: what future for EU procedural rights?* 2nd Report of Session 2006–07, HL Paper 20 at paragraph 52. At the moment the Community cannot accede to the ECHR: see opinion 2/94 of the ECJ of 28 March 1996 [1996] ECR I-1759.

recognised as the final authority in the field of human rights. This would assist to avoid any risk of conflict between European Union law and the European Convention on Human Rights as interpreted in Strasbourg, by placing fundamental rights on a single consistent foundation throughout the EU. We continue to be of the view that the Government should encourage Member States to pave the way for accession by the Union to the ECHR at the earliest opportunity.

CHAPTER 6: AREA OF FREEDOM, SECURITY AND JUSTICE

Introduction

- 6.1. Some of the most controversial changes introduced by the Treaty of Lisbon are in the area of freedom, security and justice. This Chapter sets out the proposed changes and assesses the impact on existing EU law in this area.

EU cooperation in justice and home affairs

- 6.2. Cooperation in the field of justice and home affairs first appeared on the European Union agenda in 1992 with the conclusion of the Maastricht Treaty and the creation of the three pillars.¹⁰¹ The existing European Community became the First Pillar of the European Union, and the Second and Third Pillars introduced were Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) respectively. Unlike the First Pillar, which operates chiefly on the basis of co-decision with the European Parliament and qualified majority voting in the Council, the Second and Third Pillars are intergovernmental in nature. Accordingly, measures adopted within the framework of justice and home affairs required unanimity in the Council of Ministers and the European Parliament was granted a limited consultation role only.
- 6.3. With the conclusion of the Treaty of Amsterdam in 1997, the concept of an area of Freedom, Security and Justice (FSJ), covering all aspects of JHA, was born. One of the principal changes introduced by Amsterdam was the reshuffling of Treaty provisions on JHA policies to move some JHA matters, namely immigration and asylum measures, border controls and the areas of civil and family law, from the Third Pillar into the First Pillar. The Third Pillar was renamed Police and Judicial Cooperation in Criminal Matters, to reflect the change.
- 6.4. The Treaty of Lisbon completes the absorption of the remaining Pillar Three aspects of JHA—i.e. police and judicial cooperation in criminal matters—into Pillar One. This will mean that measures under all aspects of the Area of Freedom, Security and Justice will be determined by the ordinary legislative procedure of qualified majority voting and co-decision unless otherwise specified, and will, subject to transitional and, in the case of the UK, opt-in arrangements, which we discuss below, come over a period within the jurisdiction of the ECJ.
- 6.5. Some of our witnesses said that cooperation in the field of asylum, immigration, civil and criminal law and policing was not undertaken as an aim in itself. Rather, it was a necessary corollary of the development of the internal market, which resulted in free movement and the creation of a “common space”. In the criminal sphere, they said, cooperation at EU level was necessary to ensure that individuals did not escape prosecution simply by exercising their free movement rights (QQ E158, E408). The Lord Chancellor also stressed that the more movement of people and business across borders, the greater the need for a high degree of cooperation and

¹⁰¹ A number of treaties in this area had already been agreed within the framework of the Council of Europe—see <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> for a full list of Council of Europe treaties.

mutual recognition on legal matters. In his view, it was in the interests of the UK and its citizens to be involved in “wider and deeper cooperation on justice and home affairs” to ensure that citizens abroad benefitted from rights equivalent to those they would have within the United Kingdom (QQ E475–476).

General reactions to the changes in the area of Freedom, Security and Justice

- 6.6. Professor Jo Shaw, of the University of Edinburgh, noted that the area of freedom, security and justice will see the “most substantial substantive and procedural changes” if the Treaty of Lisbon enters into force (Q E1). Andrew Duff MEP welcomed the changes and concluded that the Union “will enjoy a greater capacity to act effectively to meet pressing contemporary challenges of security, liberty and freedom of movement” (p E135). Dr Valsamis Mitsilegas, Queen Mary University of London, considered that the changes to the decision-making process as well as the changes to the substantive criminal law provisions would provide “a fresh impetus for a number of new, extensive legislative initiatives in EU criminal law” (p E166).
- 6.7. A number of witnesses pointed to the benefits they believed the new Treaty would bring to citizens of the EU. Sir David Edward noted that measures taken in the FSJ area are “liable directly to affect the liberty of the individual” and he pointed to the need for adequate parliamentary scrutiny and judicial control of such measures (p E142). Brendan Donnelly considered that the reforms proposed under the new Treaty would simplify and enhance transparency in the Union’s decision-making structure, which would make it easier for the citizen to understand (p E132).
- 6.8. Other witnesses opposed the changes in the FSJ field and questioned whether it was necessary or desirable to move all of this field into the First Pillar, with the consequence of moving from intergovernmental consensus to QMV, co-decision and ECJ jurisdiction. The Freedom Association criticised a number of aspects of the reform (p E153) and Mrs Anne Palmer JP, Sally DeBono and Mr Torquil Dick-Erikson also expressed concerns (pp S131, E131–132, E171–172). These concerns are considered in more detail below.
- 6.9. The Law Society of Scotland saw increased EU action in this area as an inevitable consequence of the internal market, and pointed out that it was in the general interests of all to ensure the “efficient cross-border functioning of our justice systems where that is required”. However, they highlighted that traditions and norms of national justice systems should “be treated with care” and that the principle of subsidiarity should be strictly observed (p E163).¹⁰²

Institutional changes in freedom, security and justice

- 6.10. As briefly outlined above, the area of Freedom, Security and Justice encompasses several different fields. Broadly speaking, these are: civil law, family law, criminal law, policing, border controls, visas, asylum and immigration. Institutional changes in all of these areas are introduced by the Treaty of Lisbon.

¹⁰² Within the UK, Scotland has a separate legal system, protected under the Act of Union 1707.

The Pillar structure

- 6.11. Although they fall under the same policy heading and are dealt with by the same Directorate-General of the Commission, FSJ measures are unique in that they currently fall across the First and Third Pillars. Thus Title IV of the TEC (First Pillar) deals with civil law (including family law), border controls, visas, asylum and immigration; while Title VI of the current TEU (Third Pillar) covers criminal law and policing. An important consequence of this divide is that the legislative procedure for a measure varies depending on the subject matter.

i. Arrangements under the existing Treaties

a. Legislative procedure

- 6.12. Title IV—Articles 61–69 of the TEC—is headed “Visas, asylum, immigration and other policies related to free movement of persons”. Originally forming part of the Third Pillar under the EU Treaty, this Title was inserted into the TEC by the Treaty of Amsterdam in 1997. A number of specified areas, principally visas and asylum, became subject to qualified majority voting and co-decision with the European Parliament following a transitional period (although some visa-related measures moved to QMV and consultation only). Other areas continued to be subject to unanimity in the Council following consultation of the European Parliament. Civil law, excluding aspects of family law, was moved to QMV and co-decision by the 2001 Treaty of Nice. A provision in Article 67(2) provides that measures to be adopted on the basis of unanimity can, by a unanimous decision of the Council, be moved to QMV. This *passerelle* has been used: a 2004 Council Decision extended qualified majority voting and co-decision to border checks, free movement and some aspects of immigration.¹⁰³ Unanimity and consultation have been retained for legal migration and measures relating to family law.
- 6.13. Title VI—Articles 29–42 of the TEU—is entitled “Provisions on police and judicial cooperation in criminal matters”. Measures under Title VI are adopted by unanimity following consultation with the European Parliament.¹⁰⁴

b. Possibility for enhanced cooperation

- 6.14. The possibility for enhanced cooperation exists in both the TEC and the TEU. Under the TEU, Articles 40–41 and 43–45 allow a minimum of eight Member States to adopt measures among themselves in the Title VI field. There are a number of conditions to be met and Article 43a makes it clear that enhanced cooperation is only available as a “last resort”. Member States must seek authorisation from the Council (acting by QMV) before engaging in enhanced cooperation and those participating in the enhanced cooperation must bear any costs associated with the measure. Articles 11 & 11a TEC permit enhanced cooperation in any of the areas covered by the TEC, under the rules established in the TEU.

¹⁰³ Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC), OJ L 396/45 of 31.12.2004.

¹⁰⁴ Except implementing measures under Article 34(1)(c) and (d).

ii. Position post-Treaty of Lisbon

- 6.15. As outlined, the principal change to the area of Freedom, Security and Justice is what is commonly referred to as the “collapse of the Pillars” but is more accurately described as a merging of the Pillars: the Third Pillar will cease to exist and all fields which are currently under current Titles IV TEC and VI TEU will, from the date of entry into force of the Treaty of Lisbon, come into the new Title V TFEU.
- 6.16. Mr Dick-Erikson was opposed to the merging of the pillars, which he considered would lead to the eventual suppression of the British Common Law system in favour of the Civil Law system prevalent in mainland Europe (p E131). This was a view shared by the Brethren Christian Fellowship, which said that the pillar arrangement “has been instrumental in maintaining the essential national interest of individual governments” in the sensitive areas of foreign policy and justice and home affairs (p E125). Martin Howe QC also queried whether one would want to extend the “loss of control” which the merging of the pillars and resulting ECJ jurisdiction entailed to sensitive areas of criminal law (Q E204) and David Heathcoat-Amory MP concluded that “I think it is a very big change” that the “very delicate and important area of criminal justice” would cease to be intergovernmental in nature and become part of mainstream EU activity (Q S50).
- 6.17. Professor Shaw, on the other hand, said that the requirement for unanimity in this area was “broadly seen by many as a major obstacle to effective decision-making” (Q E2). This was a point supported by Mr Straw, who pointed to the difficulties in agreeing by unanimity a Convention on the mutual recognition of driving disqualifications (Q E475). The NSPCC raised a similar point in relation to the recent proposed Framework Decision on the recognition of prohibitions arising from convictions for sex offences against children.¹⁰⁵ That proposal was intended to ensure that a disqualification from working with children imposed in one Member State would be recognised and enforced in another. It aimed to prevent convicted offenders from escaping such prohibitions by moving to another Member State. Ms Spencer Chapman, NSPCC European Adviser, noted that despite general agreement in the Council that legislation on this matter was important, unanimity was not achieved and the proposal had not been adopted (Q G16).
- 6.18. Sir David Edward considered it important to bring the Third Pillar into the First Pillar for two reasons: first, he thought that the line of demarcation between Third Pillar and Community activities was becoming increasingly difficult to draw;¹⁰⁶ and second, he considered the move important to ensure that measures in the field of criminal law and policing were subject to proper parliamentary scrutiny and judicial control (p E142). The Law Society of England and Wales were also of the view that the pillar structure in the EU had allowed EU justice and home affairs policy to develop outside the framework of democratic accountability and judicial scrutiny and for that reason strongly supported the merging of the pillars (p E99).

¹⁰⁵ Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children, document 14207/04 COPEN 133 of 05.11.2004.

¹⁰⁶ Witness recent cases of the ECJ C-176/03 *Community v Council (Environmental Damages)* [2005] ECR I-7879 and C-440/05 *Ship-Source Pollution*, judgment of 23 October 2007, discussed below.

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

a. Changes to legislative procedure

- 6.21. For the most part, measures adopted under the new Title V will be adopted in accordance with the ordinary legislative procedure, i.e. qualified majority voting and co-decision with the European Parliament. The main exception to this rule is that measures relating to family law will continue to be adopted by unanimity and consultation (discussed further below).
- 6.22. Many witnesses saw benefits in a move to QMV in this area. The Law Society of Scotland saw this as “one of the concrete benefits” of reforms proposed by the Treaty of Lisbon. In their view, the move would provide welcome consistency, transparency and comprehensibility (p E163). JUSTICE concluded that the current system of unanimity was “inappropriate” for an EU of 27 Member States and believed that, in theory, the move to QMV should result in legislation passing more quickly through the Council, with fewer concessions being granted to individual Member States (p E154). Maria Fletcher called the change “a most welcome development” which she hoped might prevent “political stagnation” in the decision-making process and improve the quality of EU legislation given that the veto had often resulted in legislation being agreed at the “lowest common denominator” (p E150). This was a view echoed by Fair Trials International (FTI), which said that the new rules “should improve efficiency by increasing the probability of proposals being approved, and decreasing the likelihood of governments blocking proposals” (p E146). The Law Society of England and Wales also highlighted the benefits of the move to QMV in the area of criminal law and policing, which they agreed would speed up the decision-making process and ensure that particular Member States could not delay or block specific proposals (p E100).
- 6.23. However, the Freedom Association opposed the introduction of QMV in the area of criminal law. In its view, this area involved “fundamental national issues” and should be a matter for the UK Government (p E153). The Brethren Christian Fellowship took a similar view, seeing extension of QMV as being “at the expense of national sovereignty and the very fine influence of British courts” (p E125). JUSTICE also noted that the move to QMV would not necessarily benefit the citizen, as this would depend on the content of EU legislation being passed, a concern shared by the Law Society of England and Wales (pp E154, E100).
- 6.24. Professor Peers, for Statewatch, pointed out that the removal of the veto meant that if the UK decided to participate in a measure under Title V (the

UK has the right to choose whether to opt in to Title V measures—see below), there was a risk that it would be bound by a measure with which it did not, in the end, agree (Q E97). Professor Chalmers considered that there was a “real risk of diminution of influence” for the United Kingdom as a result of the move to QMV. Where previously in Third Pillar matters Member States were operating in the “shadow of the British veto” and were therefore more willing to listen and address UK concerns, the possibility that the UK might choose not to participate in a measure might make other Member States less inclined to try and accommodate the UK (p E127).

- 6.25. Dr Mitsilegas considered that the application of the Community method to current Third Pillar matters would change how Member States operated as legislators in the Council as regards measures relating to criminal law (p E166). However, Professor Chalmers considered that the differences between QMV and unanimity were overstated. He suggested that unanimity did not slow down decision-making or prevent salient or contentious measures from being adopted. He pointed to the spirit of compromise and culture of consensus in Council Working Groups as the principal factor in ensuring that unanimity did not lead to the consistent blocking of proposals for EU legislation (p E127). Furthermore, as Professor Guild noted, in practice serious concerns of Member States were taken into consideration even where the measure was to be adopted by QMV. She pointed to the negotiation of the Bolkenstein Directive¹⁰⁷ as an example of this practice (Q E129).
- 6.26. Mr Straw took issue with the assumption that the UK would always find itself in the minority. He pointed to the UK’s influence in the Community as a result of its size and highlighted that “we can and we do win arguments” (Q E475). In practice, he thought that the JHA Council probably would adopt more legislation than it does at present and that there would be an increase in Union activity in the FSJ area (QQ E478, E480).
- 6.27. **The move to QMV in almost all areas of FSJ is a significant change. Notwithstanding the already existing spirit of compromise in the JHA Council, the move is likely to speed up decision-making in the Council and prevent legislation being adopted at the level of “lowest common denominator”. It is likely that one effect of the change will be an increase in Union activity and the volume of legislation agreed in this area.**
- 6.28. **The change will remove Member States’ vetoes in respect of criminal law and policing and legal migration. This means that it will be possible for the UK, in some cases, to be bound by a measure in the area of criminal law or policing against its will, although the likelihood of this happening will be greatly reduced by the existence of a general right not to opt in for the UK (discussed further below). The corollary of this is that one Member State, or a small group, will no longer be able to block measures supported by the UK, subject to the possibility of using the emergency brake (discussed further below).**

¹⁰⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376/36 of 27.12.2006. The proposal was amended significantly during negotiations in the light of the concerns of some Member States.

- 6.29. The greater involvement of the European Parliament in FSJ measures was welcomed by many of our witnesses¹⁰⁸. Michael Cashman MEP emphasised that “for the first time these matters will be debated openly in a directly elected parliament” which would ensure that deals were not reached in secret behind closed doors (Q E389). Maria Fletcher considered that European Parliament participation would “lend legitimacy” to EU action in the field of criminal justice and was therefore “long overdue” (p E150). Professor Kaiifa-Gbandi was in no doubt that the European Parliament’s involvement would reduce the democratic deficit of measures adopted in this area (p E158). FTI, the Law Society of England and Wales and the Law Society of Scotland also hoped that the co-decision process would bring greater democratic accountability and transparency in the field of criminal law and policing (pp E146, E99, E163). The Law Society of England and Wales were confident that the European Parliament would be “an effective player” in ensuring the balance between security, freedom and rights and could operate as an effective counterbalance to the “lowest common denominator” decisions currently adopted in the Council (p E99).
- 6.30. The Centre for European Reform (CER) agreed that the move to QMV might speed things up in the Council, but warned that co-decision with the European Parliament could slow things down. They highlighted in particular the change in dynamic in FSJ measures which would be the likely result of the European Parliament’s new co-decision power, considering that co-decision would be likely to “water down security-based EU measures”, preferring safeguards for citizens. In their view, this would be a positive development: “the speed of JHA decision-making is not nearly so important as the quality of the decision taken” (pp E125–126).
- 6.31. Professor Chalmers agreed that the European Parliament tended to see itself as “the guardian of civil liberties against the Member States and the Commission”, demonstrated in a series of recent cases brought by the European Parliament against the Council.¹⁰⁹ As a result, in Professor Chalmers’ view the European Parliament would probably successfully introduce a significant number of amendments (p E127). JUSTICE also thought that the European Parliament might provide a greater focus on the rights and interests of citizens and residents of the EU and for that reason “strongly” welcomed its new role (p E155). Baroness Ludford MEP, a member of the European Parliament’s LIBE Committee,¹¹⁰ appeared to confirm these expectations, suggesting that the change to the legislative procedure “would make life easier for progress of some of the more civil liberties measures” (Q E389). However, Professor Chalmers thought that this might translate into a greater use of the European Parliament’s right under the co-decision procedure to reject a legislative proposal here than in other fields (p E127).
- 6.32. While Statewatch generally welcomed the enhanced role of the European Parliament, Tony Bunyan, for Statewatch, sounded a note of concern. He pointed to the high number of first-reading deals made between the European Parliament and the Council since it gained co-decision powers in

¹⁰⁸ Though not all—see Brethren Christian Fellowship p E125.

¹⁰⁹ Cases C-317/04 & C-318/04 *Parliament v Council* [2006] ECR I-4721 on the PNR agreement and Case C-540/03 *Parliament v Council* [2006] ECR I-5769 on the Family Reunification Directive.

¹¹⁰ Committee on Civil Liberties, Justice and Home Affairs.

the Title IV area under the Treaty of Amsterdam (see Chapter 4). Mr Bunyan criticised this practice as opaque and as undermining the standing of the European Parliament, in particular as regards its reputation for focusing on individual rights (QQ E82–87). However, Philip Bradbourn MEP thought the practice of first reading deals was likely to grow (Q E398).

- 6.33. Baroness Ludford pointed to the drivers for first reading deals, explaining that there is a benefit to be had in dealing with legislation as expeditiously as possible. However, she stressed the need to keep colleagues in the European Parliament well-informed and expressed some concerns about the availability of documents. This was something that she thought committees should, and could, address. Both she and Mr Cashman pointed out that where first reading deals were agreed by the European Parliament, it was generally because they would get a better deal for the citizen from the Council than at second or third reading (QQ E398, E400).
- 6.34. A recent Working Document prepared for the European Parliament Working Party on Parliamentary Reform¹¹¹ highlights the growing practice of first reading, and early second reading, deals. In the LIBE Committee, principally responsible for existing Title IV measures, 19 of the 23 proposals considered were concluded at first reading and the remaining four at second reading. The Working Document points out that first reading deals demonstrate the flexibility of the procedure and the high degree of trust and willingness to cooperate in the institutions. On the other hand, it acknowledges the risks of lack of transparency and democratic legitimacy, as well as potential risks to the quality of the legislation. It makes proposals for improvements to ensure that decisions to pursue first reading deals are taken after careful consideration and only in appropriate cases and also to enhance transparency where first reading deals are concluded.
- 6.35. **The involvement of the European Parliament in new areas of FSJ is likely to impact on the adoption of measures in this field. We would expect the European Parliament to focus on protection of citizens' rights and to take an active role in shaping measures in the area of criminal law and policing.**
- 6.36. **We welcome the steps being taken by the European Parliament to address the issues raised by first reading deals. We stress the need for transparency particularly in an area of such considerable interest to citizens as FSJ.**
- 6.37. As regards the retention of unanimity and consultation in family law, the Law Society of England and Wales saw differences in law and procedure in the Member States as “significant” and considered the retention of unanimity in this area (with the potential to transfer to QMV in the future) as sensible in order to safeguard national interest (p E100). The Brethren Christian Fellowship also had concerns about the EU’s role in family law (p E125).
- 6.38. In our session with Mr Straw, it became apparent that there was scope for argument as to whether a measure would be a family law measure, and thus subject to unanimity, or a broader civil law measure which would fall under the QMV regime. Rebecca Ellis, for the Ministry of Justice, considered that a

¹¹¹ Working Document No. 12 ‘Codecision and Conciliation’ 11 December 2007.

decision would have to be taken in the context of each instrument proposed (QQ E487–492).

- 6.39. A specific *passerelle* in new Article 81(3) TFEU would allow the Council, acting unanimously and after consultation with the European Parliament, to decide that certain aspects of family law may be adopted under the ordinary legislative procedure. A decision to move to QMV may only be adopted by the Council with the approval of all national parliaments—opposition by any one national Parliament, within six months of notification to it of the proposal, being sufficient to block the transfer.
- 6.40. The family law *passerelle* is referred to in Clause 6(1)(d) of the European Union (Amendment) Bill, which provides that a Minister may not vote in favour of a decision to move to QMV in the Council unless parliamentary approval has been given. Clause 6(2) of the Bill makes it clear that the agreement of both Houses would be required.
- 6.41. Professor Peers highlighted that the Article 81(3) TFEU *passerelle* had become even stricter as a result of the introduction of the new national parliamentary veto and therefore provided a greater safeguard for national interests. He concluded that it was “a significant change, and in fact protects national parliaments and protects the specificity of family law decision-making more effectively than the existing Treaty does” (QQ E103–104).
- 6.42. **The retention of unanimity in matters of family law will provide an important safeguard to ensure that family law measures agreed at EU level do not negatively impact on UK law. However, it is not always clear what constitutes family law and this is likely to be a matter for some debate. We expect that an assessment would have to be made in each case. This is likely to be more important for other Member States as the UK will be able to choose whether to opt in to any civil or family law measure in any case.**
- 6.43. **The *passerelle* provision in Article 81(3) TFEU is stronger than the existing *passerelle* in Article 67(2) TEC in providing that national parliaments can directly veto a proposal to make use of it. As discussed in Chapter 3, thought will have to be given as to how this right of veto will be implemented in the UK. A further protection is provided by the European Union (Amendment) Bill as the approval of both Houses is required before a Minister can vote in favour of the use of the *passerelle* in the Council of Ministers.**

b. The emergency brake and enhanced cooperation

- 6.44. Measures proposed under Articles 82(2) and 83 (Judicial Cooperation in Criminal Matters) are subject to emergency brake provisions, complemented by provisions to facilitate enhanced cooperation. Under Articles 82(3) and 83(3), any Member State can pull an emergency brake where it considers that the draft legislation “would affect fundamental aspects of its criminal justice system”. The matter is then referred to the European Council and the ordinary legislative procedure is suspended. If the European Council arrives at a consensus within four months, the matter is referred back to the relevant Council for continuation of the legislative procedure. Where no agreement is reached, then the ordinary procedure remains suspended but if at least nine Member States wish to proceed with the measure, they have to notify the

European Parliament, the Commission and the Council and authorisation for enhanced cooperation is deemed to have been granted.

- 6.45. It should be noted that the emergency brake does not apply to all areas of criminal justice. Cooperation envisaged under Article 82(1) is not subject to an emergency brake provision. This paragraph of the Article provides for measures: (a) to facilitate mutual recognition of judgments; (b) to prevent and settle conflicts of jurisdiction; (c) to support the training of the judiciary and its staff; and (d) to facilitate cooperation between judicial authorities as regards criminal proceedings and enforcement of decisions.
- 6.46. Articles 86 (European Public Prosecutor) and 87 (Police Cooperation) provide variations on the emergency brake and enhanced cooperation provisions. Article 86 requires unanimity voting and provides that in the absence of unanimity a group of at least nine Member States may refer the matter to the European Council for discussion. Again, in the absence of consensus after four months, if at least nine Member States wish to proceed with the measure then they have to notify the European Parliament, the Commission and the Council and authorisation for enhanced cooperation is deemed to have been granted. Similarly, under Article 87(3) unanimity is required for measures concerning operational cooperation between law enforcement authorities. In the absence of unanimity, a procedure mirroring that provided for in Article 86 applies.
- 6.47. Article 20 TEU and Articles 236–334 TFEU set out the provisions on enhanced cooperation in more detail. They reflect the existing provisions on enhanced cooperation in the Treaties.
- 6.48. Professor Dutheil de la Rochère explained that the idea behind the emergency brake is to make the approximation of criminal law more palatable to Member States by permitting them a get-out clause in cases where they consider that fundamental aspects of their criminal justice systems will be affected (p E139). Ms Julia Bateman, for the Law Society of England and Wales, considered that proposals in policing and criminal justice “do have a particular resonance in terms of national law and procedure” and the Law Society saw the emergency brake as a “sensible mechanism” to offset some of the risks in removing the national veto from this sensitive area (Q E438 & p E100). Ms Fletcher considered that the inclusion of the emergency brake and enhanced cooperation provisions indicated that criminal justice remained an area requiring additional safeguards for Member States (p E151). JUSTICE saw the emergency brake as a further useful safeguard against the UK being bound by the text of a measure with which it did not agree, although its possible use by other Member States could replicate some of the very problems the introduction of QMV sought to avoid, i.e. delays in decision-making and the watering down of proposals (p E 156). Professor Shaw pointed out that Member States would generally lose political capital in pulling the emergency brake (Q E41).
- 6.49. The Freedom Association had concerns about the emergency brake. They saw it merely as a “rhetorical device to enable our government to suggest we have control over these matters, while making it easy for them to acquiesce privately to EU proposals” (p E153). Mr Straw stressed that there was a legal basis for the emergency brake, and that the UK would be prepared to use it if necessary. However, he agreed that the significance of the brake derived to a large extent from its existence rather than its use: the threat of its use would

be sufficient to strengthen a Member State's negotiating hand (QQ E502–506).

- 6.50. Professor Shaw saw no reason why the UK would not be able to use the emergency brake in the same way as other Member States. She said, “I do not see that there is going to be in any sense a ruling out of the UK and that just because the UK has decided to participate in this particular measure, it is somehow subject to a duty of good faith and a duty of participation that does not apply to any other Member State” (Q E38). Professor Chalmers also considered that the UK would be legally entitled to refer a matter to the European Council using the emergency brake procedure. However, in his view, the political costs to the UK would be significant (p E127). Mr Donnelly considered that it would be a matter for “careful reflection” for the UK Government how they approached the exercise of the emergency brake where they had availed themselves of their right to opt in to a measure. He also thought that the political cost to the UK of pulling the emergency brake would be greater than for other Member States given the UK's right not to participate (p E134). Mr Straw recognised the special position of the UK indicating that, having opted in, a decision to pull the brake would be taken in extreme cases where an unforeseen amendment or difficulty arose during the negotiation which affected fundamental aspects of the UK criminal justice system (Q E502–503).
- 6.51. Professor Chalmers suggested that other Member States might challenge a UK referral to the European Council before the ECJ, arguing that the existence of the UK opt-in restricted the right of the UK to make use of the emergency brake. The argument would be, he explained, that operation of the emergency brake was on the basis that a proposal affected fundamental aspects of the Member State's criminal justice system. If a proposed measure affected fundamental aspects of the UK's criminal justice system, the UK should simply choose not to opt in. If it decided to opt in it would be difficult for the Government then to argue that the proposal affected fundamental aspects of the UK criminal justice system (p E127). Mrs Claire-Françoise Durand, Acting Director-General, Commission Legal Services, did not agree. She referred to the subjective language of the Treaty itself, noting: “it is hardly controllable by the Court because the sentence starts with ‘Where a member of the Council considers that’ it affects ...” She observed that the notion of consensus in European Council meetings made it unlikely that other Member States would try to circumscribe the right of a Member State to operate the emergency brake (QQ E351–352). Mr Straw also alluded to the consensus approach in the European Council and thought that it would be “extremely rare” for the ECJ to adjudicate on decision-making in the European Council (Q E507).
- 6.52. In any event, witnesses thought that the emergency brake was likely to be used sparingly. Professor Shaw said “I absolutely do not think this is a symbolic provision but I certainly do not think anybody imagines it is going to be in even annual use” (Q E41). Professor Dashwood, for the Bar Council, also thought it would be used “very infrequently” (Q E319).
- 6.53. **The introduction of an emergency brake is a noteworthy development which is of particular importance to Member States which do not have the right not to opt in to FSJ measures. Although it is unlikely to be frequently used in practice, it is likely to impact on negotiations in the Council through the possibility of its use.**

- 6.54. **We see no reason why the UK should not be able to use the emergency brake but in practice the UK's right not to opt in to individual measures is likely to diminish the occasions where use of the emergency brake will even arise for consideration in the United Kingdom.**
- 6.55. **The emergency brake is provided for in the Treaty itself and has the same legal value as any other Treaty provision. We consider the prospect of a challenge before the ECJ to a Member State's use of the emergency brake to be remote.**
- 6.56. Witnesses were divided as to whether facilitating enhanced cooperation was a good idea. The Law Society of England and Wales saw the facilitation of enhanced cooperation as “an important corollary”, even a “necessary counterpart”, to the emergency brake (Q E438 & p E100) and Professor Dutheil de la Rochère described it as a “reasonable balance” (p E139). Martin Howe QC was “broadly positive” about this development: in his view, one should not expect an organisation of 27 Member States not to adopt a specific measure simply because one Member State objected. Enhanced cooperation was, he said, “a logical corollary for greater freedom of action” (Q E241).
- 6.57. The Law Society of England and Wales cautioned against the emergence of an area of FSJ characterised by a “patchwork of legal rights and obligations”. In their view, this could undermine the “overall coherence” of EU law in this area and call into question the goal of a “genuine area of freedom, security and justice” (Q E438 & p E100). Professor Shaw was not in favour of having “more and more variegated, concentric, overlapping, underlapping circles of Member States involved in different measures”. She pointed out that such an approach was not in the best interests of transparency and maximum public understanding and participation in the EU (Q E34). James Flynn QC, for the Bar Council, saw the mixture of “different schemes, different compositions and different institutional arrangements” as “a bit ridiculous”. He regretted that the effect of all this would be that FSJ would become a subject for specialists as a result of its complexity (Q E336). JUSTICE also highlighted the “undesirable aspects” of creating a “two-tier” system in which Member States’ obligations differed (p E156). Florian Geyer, Centre for European Policy Studies, considered this to be a particular problem in light of the fact that police and judicial cooperation was developed as a “flanking measure” of opening up borders within the internal market. The rationale was that “As we may be losing security by opening up borders, we will enhance cooperation of judges and policemen and we will make it easier not to rely on borders as gatekeepers of security”. In light of this, differentiation could lead to particular difficulties (Q E158).
- 6.58. Professor Dashwood pointed to another potential problem with enhanced cooperation, which was “defining its boundaries and preventing spill-over”. Member States might disagree as to the extent to which Member States not participating in one measure should have the right to participate in another separate but related measure. However, he concluded that a “measure of differentiation is a price that we have to pay for the great enlargement, which I think was a very necessary thing” (Q E319, Q E336).
- 6.59. Professor Guild was more critical of enhanced cooperation provisions. She was concerned that they undermined the legitimate concerns of some Member States by allowing the agreement by a limited group of Member

States of a proposal which would in many cases ultimately be adhered to by a greater number of Member States, as in the case of the Prüm Treaty (Q E151).¹¹² Fair Trials International also suggested that the streamlined procedure for authorisation for enhanced cooperation might suppress discussion and debate and undermine efforts for a more consensual solution. It urged Member States not to use the enhanced cooperation provisions as a means to “bypass proper debate, scrutiny and assessment” (p E147). While recognising that in a Union of 27, some measure of variable geometry was inevitable, Sir David Edward saw disadvantages in the unequal application of the law and the ECJ’s jurisdiction. He pointed out that a decision to undertake enhanced cooperation was to be taken as a “last resort” under new Article 10(2) TEU and concluded that enhanced cooperation would not be something “lightly adopted or conceded to a group of Member States”. There was, he said, a “significant hurdle to be overcome” (Q S137). Maria Fletcher agreed that there might be “political reticence” about too frequent recourse to the enhanced cooperation provisions (p E151), although Dr Mitsilegas stressed that the momentum created by the simplified enhanced cooperation procedure should not be underestimated (p E169).

- 6.60. Baroness Ludford MEP considered it unlikely that the enhanced cooperation provisions would be much used if past precedent was any indicator. She indicated that the Prüm Treaty was not undertaken as an enhanced cooperation measure. She also pointed out that there could be issues regarding the participation of MEPs who were not elected in Member States participating in the enhanced cooperation¹¹³ (Q E401, Q E402).
- 6.61. **The Treaty of Lisbon facilitates enhanced cooperation in relation to judicial cooperation in criminal matters within Articles 82(2) and 83, the creation of a European Public Prosecutor (Article 86 – see below) and police cooperation within Article 87(3). It is not clear whether this will have a significant impact in practice. The procedure has not been used to date despite circumstances arising in which it may have been appropriate. However, there are diverging views on the extent of the need for cooperation in this area across the Member States and the negotiation of this flexible procedure suggests that some, at least, anticipate having recourse to it.**
- 6.62. **Enhanced cooperation may lead to a patchwork of legislation but is a necessary element of flexibility in a Union of 27 Member States.**
- 6.63. Our attention was drawn to concerns regarding the Union’s future external competence under the Lisbon Treaty and the impact on the area of FSJ where different levels of cooperation are envisaged, either through enhanced cooperation or by non-participation of the UK or Ireland under the opt-in arrangements. New Article 216 TFEU provides that the Union will have the competence to enter into international agreements where the conclusion of an agreement is “necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is

¹¹² The Prüm Treaty was agreed by seven Member States outside the EU framework. In that case there were insufficient numbers for enhanced cooperation but it is not clear whether attempts were made to achieve the numbers required. A number of Member States not party to the original Prüm Treaty were subsequently revealed to be keen to join. It is currently in the process of being converted into an EU instrument, so that it will be binding on all Member States, with minimal changes. See this Committee’s 118th report (2006–07) *Prüm: an effective weapon against terrorism and crime?* (HL 90).

¹¹³ See below in relation to the UK opt-in.

provided for in a legally binding Union act or is likely to affect common rules or alter their scope”.

- 6.64. Mr Howe questioned how this external competence would work where the UK had chosen not to opt in to a particular proposal. He considered that the Protocol did not deal with this question and that the UK might find itself bound by external rules in areas in which it had not chosen to participate (QQ E224–233). Sir David Edward disagreed: he thought that where the UK had not opted in, the Union probably still had power to conclude external agreements, but to the extent that the UK had not opted in, the agreements would not bind the UK (QQ S123–125). Professor Dashwood also thought that while Article 216 could allow the conclusion of an international agreement in the context of enhanced cooperation, the agreement would bind the Union but not non-participating Member States (Q E321).
- 6.65. Mrs Durand confirmed that the Commission’s view was that the Union would have external competence where a measure had been adopted under the enhanced cooperation provisions, but any external agreement would only bind those Member States party to the enhanced cooperation. The external competences of Member States not party to the enhanced cooperation would not be affected (QQ E348–349).
- 6.66. **The Union would have external competence derived from a measure which had been adopted internally under the enhanced cooperation provisions but this would only extend to those Member States party to the enhanced cooperation.**

The right of initiative

- 6.67. Under the Treaty of Lisbon the right to propose EU legislation—the right of initiative—will generally rest with the Commission, although in some circumstances Member States (and in limited cases other institutions) have the power to make a proposal for legislation.

i. Arrangements under the existing Treaties

- 6.68. While Title IV is subject to the “Community method” and therefore the Commission has exclusive right of initiative in respect of proposals for Community legislation, in Title VI the right of initiative is shared by the Commission and the Member States. In practice the majority of proposals emanate from the Commission, but any Member State may make a proposal for a Framework Decision and many have done so.¹¹⁴

ii. Position post-Treaty of Lisbon

- 6.69. New Article 76 provides that measures in Chapters 4 and 5 of new Title V TFEU (i.e. measures relating to police and judicial cooperation in criminal matters—old Title VI TEU) shall be adopted on a proposal from the Commission or on the initiative of a quarter of the Member States. Thus some element of the Member States’ right of initiative has been retained, albeit in a more limited form.
- 6.70. The Law Societies welcomed the change. They considered that this would ensure a more coordinated and coherent approach to legislation, planned in

¹¹⁴ A recent example is the Sex Offenders initiative, discussed above.

line with long-term EU strategies rather than being based on topical national considerations (pp E99, E163).

- 6.71. Maria Fletcher regretted the retention of any right of initiative for Member States under the Treaty of Lisbon. She pointed to practical experience of Member States' proposals, which in her view had been problematic to date: Member States tended to make proposals reflecting, to a disproportionate degree, domestic problems and proposals were often inadequately drafted. She considered that the Commission was better placed to submit proposals given that it acted in the interests of the Union and had the capacity and expertise to consult widely and conduct impact assessments (p E150). This was a view shared by FTI, which expressed regret that Member States would not be required to produce similar assessments when making use of their right of initiative (p E147).
- 6.72. Not all proposals in the area of FSJ, whether they emanate from Member States or the Commission, are supported by the statistical and other evidence critical for assessing the need for proposed legislation, and especially its compliance with the subsidiarity principle. The problem is greater with Member States' initiatives: while the Commission always provides an explanatory memorandum and sometimes provides an impact assessment, Member States rarely provide either.

Jurisdiction of the European Court of Justice

i. Arrangements under the existing Treaties

- 6.73. The ECJ's jurisdiction over FSJ measures is not uniform: a different regime applies depending on whether the measure in question has been adopted under the First or the Third Pillar. Sir Francis Jacobs was critical of the various rules surrounding the Court's jurisdiction, saying the resulting patchwork system is "widely regarded as opaque, incoherent and generally unsatisfactory" (p S148).

a. Title IV jurisdiction

- 6.74. The ECJ's jurisdiction in respect of Title IV TEC measures is relatively extensive. As with other First Pillar measures, the Court can rule on applications for annulment of EC legislation where the Member States or the Commission have brought a challenge to the legality of the instrument (Article 230 TEC). It can also rule on actions for failure to act on the part of the Council, Parliament or Commission (Article 232 TEC) and in infringement actions brought against Member States for failure to fulfil obligations, for example, by incorrectly transposing EC legislation (Articles 226–7 TEC).
- 6.75. The broad preliminary reference jurisdiction afforded to the Court under Article 234 TEC, which allows any court or tribunal of the Member States to refer questions relating to the interpretation of EC law to the ECJ for a ruling, is curtailed as regards Title IV measures. Article 68(1) TEC provides that preliminary references can only be made from national courts against whose decisions there is no judicial remedy under national law (i.e. courts of final appeal, such as for example the House of Lords in the United Kingdom). A blanket exception from the ECJ's jurisdiction is provided in Article 68(2) TEC in respect of measures taken under Article 62(1) TEC

(removal of internal borders) relating to the maintenance of law and order and the safeguarding of internal security.

b. Title VI jurisdiction

6.76. In contrast to the position under Title IV, the ECJ has only a limited jurisdiction over Third Pillar measures. Article 35 TEU gives the ECJ jurisdiction in relation to annulment actions, but not infringement proceedings. The ECJ also has jurisdiction to give preliminary rulings where the Member State in question has made a declaration accepting the jurisdiction of the ECJ. Member States can opt to limit the preliminary ruling jurisdiction to courts of final appeal or alternatively to allow any national courts to refer a question to the ECJ. To date, 14 Member States, including France, Germany and Italy, have accepted the jurisdiction of the Court, 12 of which allow any national court to refer a question to the ECJ for a ruling.¹¹⁵ The UK has not accepted the Court's jurisdiction. Again, there is a blanket exception to the Court's jurisdiction on review of the validity or proportionality of police or law enforcement operations or the exercise of responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security.

ii. Position post-Treaty of Lisbon

6.77. Under the Treaty of Lisbon, the whole area of FSJ will come under the general jurisdiction of the Court. This means that annulment actions, infringement proceedings and actions for failure to act will be possible in relation to any FSJ matter. Preliminary references will be available for any national court. However, the Court still has no jurisdiction to review the validity or proportionality of operations carried out by the police or by law enforcement services or the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.¹¹⁶

a. Extent of increased jurisdiction of the Court

6.78. The extension of full jurisdiction to all areas of FSJ by the Treaty of Lisbon entails three principal changes to the current arrangement.

6.79. First, under new Article 267, preliminary references will for the first time be possible from all national courts and tribunals on questions relating to asylum, immigration and civil law matters (i.e. existing Title IV TEC), and not just from courts of final appeal.

6.80. The extension of the preliminary reference jurisdiction in this area was welcomed by most of our witnesses. In Professor Guild's view, the change was "fundamental and the most important change which is taking place in this field" (Q E166), and she expressed strong support for the extension. Professor Peers explained one of the problems with the existing more limited jurisdiction: "In the absence of [the ECJ] getting asylum cases, it is impossible to talk about establishing a common European asylum system and

¹¹⁵ For full details, see Information concerning the declarations by the French Republic and the Republic of Hungary on their acceptance of the jurisdiction of the ECJ to give preliminary rulings on the acts referred to in Article 35 of the Treaty on European Union OJ L 327/19 of 14.12.2005.

¹¹⁶ New Article 276 TFEU.

to have uniform standards, or any move towards uniform standards, across the European Union” (Q E92). Jane Golding, for the Law Society of England and Wales, considered the increased jurisdiction important in order to improve consistency of interpretation and she saw an advantage in having a “unified judicial architecture” (Q E464).

- 6.81. Professor Chalmers suggested that there was a risk that the ECJ might become an asylum court because, unlike most areas of EU law, asylum cases were the sorts of cases that were regularly before national courts (Q S29). However, Professor Peers considered it premature to assume that a large number of asylum cases would find their way to the Court. He said that of the 400,000 or so asylum cases each year in the EU, only some were pursued before the courts, and of those, even fewer would be referred to Luxembourg for a ruling. He concluded, “I am more concerned that it is not getting asylum cases than by the number of cases it might get” (Q E92).
- 6.82. Second, new Article 267 TFEU preliminary references will be available in all Member States in the area of criminal law and policing (i.e. existing Title VI), from any national tribunal or court.
- 6.83. The increased preliminary reference jurisdiction of the Court in this area was welcomed by Dr Mitsilegas. He considered that this would enable “a meaningful dialogue between national courts and the ECJ on matters which ... may have fundamental implications for both the Union and Member States” (p E166). The Law Society of England and Wales considered that the enhanced role of the Court would “facilitate consistency, clarity and legal certainty” (p E100).
- 6.84. Third, infringement proceedings will be possible in respect of instruments adopted in the area of criminal law and policing. This means that the Commission will, for the first time, be able to take action when Member States have failed to implement adequately instruments adopted in this field. Mr Geyer considered that there would be a clear advantage for the citizen if the Court had jurisdiction to hear infringement cases brought by the Commission in this area (Q E175). Maria Fletcher hoped that the new power would “encourage and secure a better application and enforcement of EU criminal law at the national level” (p E151).

b. General views on the Court’s enhanced jurisdiction

- 6.85. Many witnesses saw the changes to the jurisdiction of the ECJ as a positive step. Professor Dutheil de la Rochère called the improvement “significant” (p E140) and Maria Fletcher thought the changes would “secure more effective judicial oversight of EU developments and enhance legal certainty” (p E151). The Law Society of Scotland saw the extension of the ECJ’s jurisdiction as “the natural concomitant of the move to qualified majority voting” (p E164) and Professor Wallace saw the change as “hugely important” and something which she personally welcomed (Q S170). However, the Freedom Association opposed the enhanced role of the ECJ in the area of FSJ; indeed, it saw a need to reduce the Court’s role here (p E153). The Brethren Christian Fellowship also regretted the greater involvement of the ECJ, which it thought would come at the expense of national sovereignty (p E125).
- 6.86. Sir Francis Jacobs considered in detail the implications of the new jurisdiction of the Court. He suggested that there would be advantages and

disadvantages. In terms of advantages, the Treaty of Lisbon, in Sir Francis' view, "establishes a clear and coherent system of jurisdiction to replace the present confusing jumble". More substantively, he considered that the Court's new powers of judicial review and interpretation of FSJ measures would be valuable. He noted that "Experience has shown that there is often little benefit in international measures if there is no mechanism for enforcement and no method of securing uniform interpretation". Sir Francis also referred to broader considerations, noting the wide respect in which the European Union was held across the world. He considered that it would be "paradoxical, and perhaps unacceptable, if the Union's activities in fields impinging most seriously on civil liberties were to remain immune to the jurisdiction of the European Court of Justice".

- 6.87. As for possible objections to the extension of the Court's jurisdiction, Sir Francis highlighted two: the argument that the subjects concerned are at the very heart of national sovereignty; and the concern that Union measures and Court decisions might not take full account of the special features of UK arrangements in this area. In respect of the former, Sir Francis suggested that it was precisely because of the importance of these areas that full judicial review and jurisdiction should be available. As regards the UK-specific concern, Sir Francis pointed out that the UK had the right to intervene in any proceedings before the Court and explain in detail any special features which may apply in the UK. In this regard, Professor Guild considered that the Court showed "substantial deference to the difference in the national systems" (Q E130). Sir Francis referred to the need for a balance between the possible disadvantages of ECJ decisions for the UK and the wider interest of having an effective system of judicial review for other Member States and the EU as a whole. He concluded that this "wider interest does not seem to be much recognised in the UK" (p S149).
- 6.88. **The increase in the jurisdiction of the ECJ is a significant development. It replaces the complex existing regime of jurisdiction with a clear and uniform rule and is likely to increase consistency and legal certainty in the application of EU law. If the Lisbon Treaty enters into force, the ECJ will have jurisdiction over all new Title V TFEU measures¹¹⁷. The position as regards existing Title VI TEU measures is discussed in the section on transitional provisions below.**
- 6.89. **For the first time, Member States will be able to be taken to the Court for failure to implement properly EU legislation in the area of criminal law and policing. This is likely to encourage them to implement more effectively measures agreed in this area. Ultimately, the question of the interpretation of an EU instrument will be a matter for the Court and its rulings will be binding on the United Kingdom. As a result it is important that any special features of UK law in this area be taken into account by the Court and in this regard, the right of Member States to intervene in any action before the Court is significant.**

c. Practical effects of the Court's enhanced jurisdiction

c(i) Increase in workload

- 6.90. Some witnesses thought that extending the Court's jurisdiction would have the effect of multiplying the number of preliminary references the Court

¹¹⁷ But subject, for the UK, to the opt-in—see below.

received (pp S149, E140). Professor Chalmers referred to the areas of asylum, immigration and crime as “the very heartlands of national judiciaries” and suggested that there might well be “significant deployment of EC law in national courts in these fields and considerable [preliminary] references”. He noted that the Court was currently operating close to its full capacity and was already over-stretched. He expressed concern that the sheer volume of judicial activity in the new Title V fields could result in the “crowding out” of other areas of EU law, particularly given the requirement in Article 267 TFEU that priority be given to cases where a party was in custody (p E128 & Q S29).

- 6.91. However, not all witnesses agreed that there would be a significant increase of cases as a result of the new jurisdiction. Mrs Durand questioned whether there would in fact be greater numbers of cases before the Court: she pointed out that in recent years there had been very few cases in these areas (Q E369). Professor Guild noted that since the ECJ was granted preliminary reference jurisdiction from courts of final instance in the area of existing Title IV in 1999, there had only been one preliminary reference to the Court on an asylum issue. She concluded that “It does not seem at the moment that the area of borders, immigration and asylum are going to overload the Court”, although she did suggest that reference regarding questions of civil justice might be more frequent (Q E167). Ms Golding indicated that the general feeling of the Law Society was that they did not see that there would be a sudden increase in cases as a result of the extended jurisdiction (Q E469) and Professor Peers was not convinced that there would be an unmanageable number of cases (Q E92).
- 6.92. If there were a significant increase in workload, some witnesses thought that the Court might find it difficult to cope. Sir Francis Jacobs suggested that the extension of jurisdiction “may raise serious problems, and may very soon make it necessary to undertake a full review of the Union’s judicial system” (p S149). Sir David Edward pointed out that new Article 267 required the Court to act with the “minimum of delay” where a case involves a person in custody. He noted that delays involved in preparing and translating submissions, oral hearings, deliberation and judgment could “with the best will in the world” stretch to a significant number of months (p E143).
- 6.93. Professor Peers thought that some mechanism would probably be developed to deal effectively with any increase that might result (Q E92); and the Commission did not think that the Court would be unable to cope with its new jurisdiction. Mrs Durand pointed to the Court’s recent moves to put in place a procedure for accelerated treatment of FSJ questions in cases where individuals were in custody (Q E369).¹¹⁸ A number of our witnesses referred to this new procedure, which Professor Guild called “a very sensible approach” (QQ E92, E168). However, Sir David Edward warned of the need to balance the obligations of the Member States under Article 6 of the ECHR (the right to a fair trial) against the advantages of a uniform interpretation of FSJ acts. In any case, even the minimum of delays would be likely to pose serious problems for the 110/140 day rules in Scottish criminal procedure which require that where an accused has been remanded in custody to await trial, the preliminary hearing must take place within 110

¹¹⁸ Amendments to the Rules of Procedure of the Court of Justice OJ L 24/39 of 29.01.2008.

days of full committal, and the trial itself must commence within 140 days (p E143).¹¹⁹

- 6.94. **The ability of the ECJ to handle its existing workload, and in particular the time taken to dispose of preliminary references by national courts, is already a matter of concern. The CILFIT criteria established by the ECJ give national courts and the ECJ no real scope for declining to make or hear a reference in any case open to any doubt.**¹²⁰
- 6.95. **The existing preliminary reference jurisdiction under Title IV and Title VI has not given rise to a large volume of cases. But the Treaty of Lisbon would open the way, even though probably only over a period, for an increase in the volume of preliminary references which could prove detrimental to both European and national legal systems and to individual litigants. The new accelerated procedure for cases where an individual is in custody represents only a limited amelioration in one particular sphere. This may not be sufficient to resolve the problems that arise in jurisdictions with limitations regarding the time spent in custody before trial or limitation periods for the conclusion of criminal proceedings. The question of delay is a general one relevant to all criminal and civil proceedings in the area of FSJ. Member States are bound under Article 6 of the ECHR to ensure that both criminal and civil proceedings are determined fairly and within a reasonable time.**

c(ii) Shape of the Court's docket and judges' expertise

- 6.96. Professor Chalmers suggested that the new jurisdiction of the Court could significantly change the profile of its docket (p E128).¹²¹ Martin Howe QC expressed some concern about the need for expertise in the FSJ area in the ECJ. He noted that in the area of intellectual property law for example, an increasing number of judgments were being delivered by ECJ judges without much expertise in that area. Given the current appointments system, Mr Howe saw little scope for ensuring that appointments to the Court included judges with criminal law experience, unless Member States themselves took into account the need for judges with a criminal law background in making their individual nominations (QQ E257–E261).
- 6.97. This was also seen as a potential problem by Sir David Edward, commenting on “the degree to which members of the Court can be expected to deal with an ever-growing range of legal subject-matter”. Sir David considered that this problem would be particularly acute in respect of preliminary references, given that under the new Treaty any national court would be permitted to

¹¹⁹ Section 65(4) of the Criminal Procedure (Scotland) Act 1995 as amended.

¹²⁰ The CILFIT criteria derive from Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415. In this case, the ECJ held that “A court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community” (paragraph 21).

¹²¹ The Court's docket is its list of pending cases.

request a ruling from the ECJ. As Sir David explained, “the ECJ is often faced with references in which there has been no detailed discussion of the issue in any national court, and the document referring the case written by the national judge may contain little or no explanation of the factual or legal background.” The problem was exacerbated because the Commission, which often provides helpful assistance to the Court, was required to plead in the language of the case and was not always able to provide legal agents sufficiently familiar with the language in question who possessed knowledge of the law in the area concerned. He concluded that “This could present a serious problem in a field as technical and nationally oriented as criminal law and procedure”. A possible solution, he suggested, might be to set up a special tribunal which could sit once every three to six months to deal with, for example, cases arising out of the Brussels Regulation¹²². Thinking regarding the structure of the Court was, he said, the Cinderella of all inter-governmental conferences (p E143, QQ S132–134).

- 6.98. Klaus-Heiner Lehne MEP considered that some progress had been made with new Article 255 of the TFEU which provided for the establishment of a panel of senior lawyers and judges to give an opinion prior to appointment on the suitability of candidates to perform the duties of a judge or advocate-general. He did not think it acceptable that the nomination of judges should be solely a matter for heads of government. However, he was not convinced that broader reform would be feasible or even desirable. In his view, shared by Mr Cashman, the ECJ would have to decide how to organise itself to ensure that the relevant skills were available in appropriate cases (QQ E417–420).
- 6.99. **The expansion of the ECJ’s jurisdiction over criminal and civil matters is over time bound to be matched by an expansion in the range of the legal issues coming before it. The ECJ to date has had limited experience of ordinary criminal and civil proceedings and it has not been necessary for Member States to nominate judges with any such experience.**
- 6.100. **The Treaty of Lisbon will continue to provide for one judge per Member State (which in practice means nominated as a candidate by that Member State) and for any judge to be “appointed by common accord of the governments of the Member States” for a six-year, renewable period. The creation of the new panel under Article 255 “to give an opinion on candidates’ suitability” is a welcome step, but it is unclear how far, if at all, such a panel will be able to influence Member States to nominate for consideration candidates having particular expertise or experience which it would benefit the ECJ to have.**
- 6.101. **Further, the unchanged six-year, renewable tenure appears in principle undesirable. The manner and tenure of appointments and the general working of the ECJ are all matters which may require revisiting.**

¹²² Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12/1 of 16.01.2001.

d. Effect of changes to the rules on standing

- 6.102. Changes to existing Article 230 TEC, new Article 263 TFEU, which permit individuals to challenge the legality of an act or regulatory act in certain circumstances, may have an impact on the Court's role in the area of FSJ (pp E140, S149). New Article 263 TFEU expands the possibility for individuals and legal persons to challenge regulatory acts by removing the requirement that the acts in question be of "individual concern" to the applicant: instead, regulatory acts need only be of "direct concern" and not entail implementing measures. Neil O'Brien suggested that the new rules on standing would permit everyone involved in asylum appeals (some 80,000 people in the UK every year) to go to the ECJ to seek redress, which would be a significant increase in the Court's workload (Q S97).
- 6.103. **It is unlikely that the change to the standing rules will itself result in a flood of asylum cases. New Article 263 TFEU allows challenges to the legality of EU legislation, but challenges in domestic asylum cases tend to relate to how asylum laws are interpreted or applied in practice. Challenges on these grounds would come before the ECJ in the form of preliminary references under new Article 267 and not under new Article 263. In any event, Article 263 still requires that an individual show that an act of an EU institution or body is of "direct concern" and this is likely to remain a significant limitation in practice.**

Passerelles in FSJ

i. Arrangement under the existing Treaties

- 6.104. There are currently two *passerelles* in the area of FSJ. The first can be found in Article 67 TEC and allows the Council to move from unanimity to QMV in Title IV TEC areas. It has been used once as outlined above to move the areas of border checks, free movement and some immigration aspects from unanimity to QMV.¹²³ The second *passerelle* is found in Article 42 TEU and allows Member States to move from unanimity to QMV in areas of the Third Pillar. It has never been used: although its use was proposed in 2006 by the then Finnish Presidency, there was insufficient support from Member States.¹²⁴

ii. Position post-Treaty of Lisbon

- 6.105. Aside from the general *passerelles* in the Treaty, which are set out in Chapter 3, there are a number of specific *passerelle*-type provisions in new Title V TFEU. These are:
- Article 81(3)—allows the Council to decide to transfer some aspects of family law to QMV and co-decision. Any decision must be adopted by unanimity following consent of the European Parliament.

¹²³ Council Decision of 22 November 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, OJ L 396/45, 31.12.2004.

¹²⁴ The Select Committee reported on the proposed use of the *passerelle*: *The Criminal Law Competence of the European Community*, 42nd Report of Session 2005–06, HL Paper 227.

- Article 82(2)(d)—allows the Council to decide to extend the list of specific aspects of criminal procedure which can be the subject of minimum rules to facilitate mutual recognition of judgments. Any decision must be adopted by unanimity following consent of the European Parliament.
- Article 83(1)—allows the Council to decide to extend the list of areas of crime which can be the subject of minimum rules defining crimes and sanctions. Any decision must be adopted by unanimity following consent of the European Parliament.
- Article 86(4)—allows the European Council to extend the powers of any future European Public Prosecutor to include serious crime having a cross-border dimension. Any decision must be adopted by unanimity following consent of the European Parliament and consultation of the Commission.

6.106. Given that all the FSJ *passerelles* require unanimity in the Council or the European Council, there is no possibility that changes will be made without the consent of the United Kingdom government¹²⁵.

National parliaments and devolved administrations

- 6.107. Currently national parliaments have no special role in the area of freedom, security and justice. National parliaments do, however, review proposals in this area for compliance with the subsidiarity principle among other considerations, as they do proposals in all areas of EU action. Two proposals in FSJ have been the subject of COSAC subsidiarity check exercises.¹²⁶
- 6.108. Under the Treaty of Lisbon, a specific role for national parliaments in the area of FSJ is envisaged. Article 69 provides that national parliaments ensure that proposals under Chapters 4 and 5 (i.e. criminal law and policing) comply with the principles of subsidiarity and proportionality using the yellow and orange card procedures (see Chapter 11). The Centre for European Reform pointed out that under the Protocol, the threshold required to trigger the yellow card was lower in FSJ than in other areas: a quarter of the parliamentary votes is required, as opposed to a third in other areas of EU law (p E127).
- 6.109. Sir David Edward emphasised the need for effective machinery to ensure that the UK Parliament was fully informed as to the potential effects of FSJ proposals on the different internal judicial systems within the United Kingdom (p E142). This was particularly important as the areas concerned were devolved to the Scottish Parliament and Executive under the Scotland Act 1998. The Law Society of Scotland also stressed the importance of ensuring maximum involvement of devolved institutions in relation to proposals which fell within their competence. They pointed to two potential difficulties: the short timescale permitted for a review of subsidiarity in relation to a particular proposal, giving little time for full consultation with

¹²⁵ And, in the case of the Article 81(3) *passerelle*, the consent of both Houses of the UK Parliament under clause 6(1)(d) of the European Union (Amendment) Bill, as discussed above.

¹²⁶ See Chapter 11. The two FSJ proposals involved were the Commission Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters (Rome III) COM (2006) 399 of 17.07.2006 and the Proposed Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism COM (2007) 650 of 06.11.2007.

devolved administrations; and the potential disagreement between devolved parliaments and Westminster regarding a particular proposal and the absence of any mechanism for resolving such tension (p E164).

6.110. Mr Jack Straw MP pointed to the “very established arrangements” for cooperation between the UK Government and the devolved administrations. A Joint Ministerial Committee on Europe, chaired by the Foreign Secretary and composed of UK Ministers and representatives of the devolved administrations, discussed issues arising from devolution. A protocol dealt with matters such as attendance at EU meetings. He noted that the Solicitor-General for Scotland had attended the last two JHA meetings and was fully involved in the briefings. He had spoken on a proposal which raised issues for Scotland. Mr Straw observed that there was no problem in practice. Wales and Northern Ireland did not raise specific problems in this area because Wales was not a separate legal jurisdiction and differences with Northern Ireland were slight. Furthermore, justice and home affairs issues were not devolved under the Welsh and Northern Irish devolution settlements (Q E524–526).

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

FSJ policy areas—changes in scope

6.112. The Treaty of Lisbon introduces a number of changes to the existing provisions of Title IV and Title VI. We consider each of the policy areas in turn.

Borders, asylum, immigration and visas

i. Arrangements under the existing Treaties

6.113. Articles 62–64 set out the Community’s competence in the area of borders, asylum and immigration. Article 62 provides that the Council shall adopt:

- measures with a view to ensuring the absence of any controls on persons when crossing internal borders;
- measures on the crossing of external borders, which shall establish standards and procedures for checks on persons at borders and rules on visas for intended stays of no more than three months; and
- measures setting out conditions under which third-country nationals shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

6.114. Article 63 provides that the Council shall adopt:

- measures on asylum concerning the allocation of responsibility for assessing asylum claims; minimum standards on the reception of asylum seekers; minimum standards on qualification as refugees; and minimum standards on procedures for granting or withdrawing refugee status;
- measures on refugees and displaced persons setting out minimum standards for temporary protection and promoting a balance of effort

between Member States in receiving and bearing the consequences if receiving refugees and displaced persons;

- measures on immigration policy relating to conditions of entry and residence and standards on procedures for the issue of long-term visas and residence permits and concerning illegal immigration and illegal residence, including repatriation of illegal residents; and
- measures defining the rights and conditions under which a third-country national legally resident in one Member State can reside in another.

6.115. Article 64(2) allows the Council to adopt provisional measures where a Member State is confronted with an emergency situation characterised by a sudden inflow of third-country nationals.

ii. Position post-Treaty of Lisbon

6.116. The new provisions on borders, asylum and immigration are set out in new Articles 77–80 TFEU. Article 77(1) provides that the Union shall develop a policy with a view to ensuring the absence of internal border controls, carrying out checks at external borders and introducing an integrated management system for external borders. Article 77(2) provides that to achieve these goals, the Council and the European Parliament shall adopt measures concerning:

- the common policy on visas and short-stay residence permits;
- checks to which those crossing external borders are subject;
- conditions under which third-country nationals are free to travel within the Union for a short period;
- the gradual establishment of an integrated management system for external borders; and
- the absence of controls on persons crossing internal borders.

6.117. Article 77(3) provides that where action is necessary to facilitate the right to move and reside freely within the Union and the Treaties have not provided the necessary powers, the Council may adopt measures concerning passports, identity cards, residence permits or other such documents acting unanimously following consultation of the European Parliament.

6.118. Article 78 deals with the development of a “common policy on asylum, subsidiary protection¹²⁷ and temporary protection”. Measures for a common asylum system shall comprise:

- a uniform status of asylum for third-country nationals valid throughout the Union;
- a uniform status of subsidiary protection for third-country nationals;
- a common system of temporary protection for displaced persons in the event of a massive inflow;
- common procedures for granting and withdrawing uniform asylum or subsidiary protection status;

¹²⁷ Subsidiary protection is protection offered on humanitarian grounds to persons who are not formally refugees.

- criteria and mechanisms for allocating responsibility for asylum claims;
- standards concerning reception of applications for asylum or subsidiary protection; and
- partnership and cooperation with third countries to manage inflows of persons applying for asylum or subsidiary or temporary protection.

Article 78(3) mirrors existing Article 64(2) on emergency situations.

6.119. Article 79 sets out the Union's competence to develop a common immigration policy by adopting measures on:

- the conditions for entry and residence, and standards on the issue of long-term visas and residence permits;
- the definition of rights of third-country nationals residing legally in a Member State including conditions governing freedom of movement and residence in other Member States;
- illegal immigration and unauthorised residence, including removal and repatriation of those residing without authorisation; and
- combating trafficking in persons.

6.120. Article 79(3) allows for the conclusion of readmission agreements between the Union and third countries.¹²⁸ Article 79(4) provides for the possibility of incentive measures to promote integration of legally staying third-country nationals. Article 79(5) provides that this Article “does not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”.

6.121. New Article 80 provides that the Union's policies in this Chapter and their implementation “shall be governed by the principle of solidarity and fair sharing of responsibility”. This appears to strengthen the existing Article 63(2)(b) provision which provides for measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

6.122. Martin Howe QC pointed to a “general intensification of the Union's policies in these areas”, highlighting Article 79 on a common immigration policy (Q E243).

6.123. Professor Shaw noted that, in general, the existing provisions on asylum, immigration and border controls were not particularly well or clearly drafted. They were considerably clearer under the Lisbon Treaty. She noted that the new language of these provisions imported some of the language of the 1999 Tampere conclusions on justice and home affairs¹²⁹ which was not included in the existing articles of the TEC. In this regard, she referred to language about fair treatment of third-country nationals and uniform status of asylum and subsidiary protection (QQ E54–55).

6.124. Professor Peers considered that “The borders and visas power is slightly broader than the existing power because the visas policy is broader in

¹²⁸ Readmission agreements provide for States to accept the return of nationals and third-country nationals who have passed through their territories on their way to a State in which they ultimately claim asylum.

¹²⁹ Conclusions of the Tampere European Council of 15–16 October 1999 2001/99.

- principle and the power to regulate the freedom to travel is broader in principle”. He also thought that the asylum power was “much broader” and a “more intensive” power than at present. He pointed to clarifications as to the power over migration and the significance of Article 79(5) in permitting Member States to regulate volumes of third-country nationals seeking work, in the light of the general shift in this area from unanimity to QMV. Professor Peers welcomed in particular the move to QMV and co-decision in legal migration, which he called “a very significant change” (Q E102).
- 6.125. As regards particular changes, Professor Peers noted that under new Article 79(2)(c), the negotiation of readmission agreements with third countries was brought formally into the Treaties, although it was accepted that the power to conclude readmission agreements currently derived from Article 63(3)(b). Professor Peers did not consider that this new express power to adopt them changed very much (Q E102).
- 6.126. One change highlighted by Professor Shaw relates to the new ability under Article 77(3) TFEU to adopt measures on passports, identity cards, residence permits and other such documents. Under existing Article 18(3) TEC, action in these areas by the Community to attain the objective of ensuring free movement is not permitted. Professor Shaw welcomed this change (Q E54).
- 6.127. Mr Bunyan, for Statewatch, also referred to existing Article 18(3) which made it clear that the EU could not impose rules regarding biometric passports. The new provision in Article 77(3) allows such rules to be adopted by unanimity following mere consultation with the European Parliament. Mr Bunyan called this “probably one of the most outrageous provisions in the new Treaty”. He was critical of the limited consultation role afforded to the European Parliament under the new article and the broad formulation of the power (Q E101).
- 6.128. Professor Peers, for Statewatch, pointed out that the passport clause in Article 77(3) was subject to two limitations: action by the Union must be necessary to facilitate the free movement rights of EU citizens; and the power only exists where the Treaty does not provide the necessary power. On the latter, Professor Peers pointed to a number of passport security measures adopted on the basis of the EU’s competence over external borders. In his view, therefore, Article 77(3) would not be available for such measures, which would instead have to be adopted on an external borders legal base, which would give the European Parliament a co-decision role. The matter might be more ambiguous as concerns identity cards, which might not be quite as clearly an external borders matter. As regards the facilitation of free movement rights, Professor Peers saw this as an important proviso, which would exclude Article 77(3) being used as the legal base for security-based measures given that such measures could not be said to facilitate free movement but might actually prove to be a hindrance to the exercise of free movement rights (Q E101).
- 6.129. **There have been important changes to the provisions on border controls, asylum and immigration. In many cases, the changes appear to reflect existing practice, for example, the new express power to conclude readmission agreements.**
- 6.130. **The use to which new Article 77(3) can be put is not clear. To the extent that it provides a legal basis for measures concerning identity**

cards, this could have important implications for States which do not have identity cards. However, Article 77(3) is subject to unanimity which provides protection for Member States and the UK also has the right to choose whether to opt in (as discussed further below).

Civil justice

i. Arrangements under the existing Treaties

6.131. Current Article 65 TEC provides for the adoption of measures “in the field of judicial cooperation in civil matters having cross-border implications”. Such measures are to be taken “in so far as necessary for the proper functioning of the internal market”. Article 65 goes on to set out a non-exhaustive list of such measures, specifying that they “shall include” measures:

- to improve and simplify the system for cross-border service of documents, cooperation in the taking of evidence and recognition and enforcement of decisions in civil and commercial cases;
- to promote the compatibility of Member States’ rules on jurisdiction and conflicts of law; and
- to eliminate obstacles to the good functioning of civil proceedings, by promoting compatibility of civil procedure rules if necessary.

ii. Position post-Treaty of Lisbon

6.132. The substantive aspects of new Article 81 (which replaces existing Article 65) are in two parts. Article 81(1) sets out the general competence in civil matters, providing that the Union shall “develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of extra-judicial decisions”. It explicitly allows for the adoption of harmonising measures.

6.133. Article 81(2) provides that the Council and the European Parliament are to adopt measures “particularly when necessary for the proper functioning of the internal market” aimed at ensuring:

- the mutual recognition and enforcement of judgments and decisions in extra-judicial cases;
- cross-border service of documents;
- compatibility of Member States’ rules on jurisdiction and conflicts of law;
- cooperation in the taking of evidence;
- effective access to justice;
- elimination of obstacles to the good functioning of civil proceedings, by promoting compatibility of civil procedure rules if necessary;
- development of alternative methods of dispute resolution; and
- support for the training of the judiciary and judicial staff.

6.134. New Article 81 no longer contains any absolute requirement that measures adopted be “necessary for the functioning of the internal market”. Mrs Durand was of the view that the change to this Article was a deliberate

one to separate cooperation in civil matters from the proper functioning of the internal market and enable cooperation in any case which had cross-border implications. However, she noted that in practice, it was difficult to come up with examples of measures which would be excluded under the current wording but could fall within the new wording, particularly given that the overriding consideration here is the cross-border dimension (QQ E361–362). Ms Golding agreed that the change in wording appeared to reflect the recognition that it was not always appropriate to link cross-border issues in civil and family law with the internal market (QQ E444–445).

- 6.135. When asked whether this change in language was significant, many witnesses thought not. Professor Peers pointed to the continuing requirement that the measures have cross-border implications which had, he said, been a “significant constraint” in practice (Q E103). Professor Guild agreed that this competence remained limited (Q E172) and the Law Society of England and Wales concluded that the principal limitation here was the need for “cross-border implications” (Q E443).
- 6.136. James Flynn QC on the other hand, referred to the “fairly significant changes of wording” in the new Article 81, highlighting the change from “necessary” to “particularly when necessary” for the functioning of the internal market. Furthermore, he pointed out that the list of areas in Article 81(2) was longer than that in the current Article 65. He suggested in conclusion that “it is a more widely framed article, and I suppose therefore one can expect slightly more ambitious proposals from the Commission” (Q E326).
- 6.137. Professor Peers, on the other hand, was of the view that the revisions in new Article 81 did not do very much. He noted that although it might seem easier to adopt measures because new Article 81 specified that they might harmonise national law, in practice measures adopted on the basis of the existing power entailed the harmonisation of national law in some cases, such as rules on conflicts of law and jurisdiction. He pointed to some new areas added to the Union’s powers, such as effective access to justice, but noted that these “essentially reflect measures which the Union has adopted already under the existing powers” (Q E103).
- 6.138. Similarly, the Law Society of England and Wales considered the provisions on civil justice and family law to have “changed the least” and concluded that the new provisions “restate much of what is in the current Treaties”. Ms Bateman pointed to new specific reference in Article 81 to, for example, alternative dispute resolution and access to justice, but suggested that this was to some extent “window dressing” given that the Mediation Directive¹³⁰ has already been adopted on the basis of existing Article 65. She saw the increased specificity as “using the opportunity ... to state the principles that have been relied on and pin them down into a Treaty article as opposed to a broad understanding” (QQ E439–442).
- 6.139. Ms Ellis, for the Ministry of Justice, considered that Article 65 TEC had in the past been interpreted “in quite a broad way” and she saw the changes introduced by the Lisbon treaty, which would provide a closed list of areas

¹³⁰ Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters COM (2004) 718 of 22.10.2004. Political agreement on the proposal was reached at the JHA Council on 8–9 November 2007, 14617/07 (Presse 253).

for cooperation in civil matters, as “actually more helpful in clarifying what this [Article] covers” (Q E493).

- 6.140. **The power under the current Article 65 to adopt measures of judicial cooperation in civil matters is itself potentially broad, since the list of areas of potential action given is non-exclusive. Article 81 contains a more extensive list of areas of potential action. However, these in practice are areas in which cooperation has already been undertaken under the current Article, and the list given is exhaustive.**
- 6.141. **In lieu of the present absolute requirement that measures taken be necessary for the proper functioning of the internal market, Article 81 provides that measures may be taken “particularly when” so necessary. But, under both existing Article 65 and new Article 81, such measures are only permissible in civil measures “having cross-border implications”, itself a significant limitation. Both the existing and the new articles are capable of giving rise to differences of view regarding the scope of their application in particular situations, and we doubt whether this is much affected by the changes in Article 81. This is an area where the new powers of national parliaments to police the subsidiarity principle (see Chapter 11) may be particularly important. We consider the requirement that there should be “cross-border implications” or “a cross-border dimension” further below.**

Police and judicial cooperation in criminal matters

i. Arrangements under the existing Treaties

- 6.142. Title VI sets out the objective of “preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud”.¹³¹ To achieve this aim, Article 29 envisages:
- closer cooperation between police forces, customs authorities and other competent authorities in the Member States both directly and through Europol;¹³²
 - closer cooperation between judicial and other competent authorities of the Member States, including cooperation through Eurojust,¹³³ and
 - approximation, where necessary, of rules on criminal matters in the Member States.
- 6.143. In the case of police cooperation, Article 30 TEU envisages operational cooperation between law enforcement authorities in the Member States; exchange of relevant information; joint training and secondments; common evaluation of investigative techniques; and promoting cooperation through

¹³¹ Article 29, second paragraph.

¹³² Europol is the European Police Office, a European law enforcement organisation based in The Hague. Europol was established by Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office OJ C 316/1 of 27.11.1995 and Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office OJ C 316/2 of 27.11.1995.

¹³³ Eurojust is the European Judicial Cooperation Unit, an EU body established to stimulate and improve the coordination of investigations and prosecutions between competent authorities in the Member States. Eurojust was established by Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime OJ L 63/1 of 06.03.2002.

Europol by enabling it to support the preparation of investigations and ensure coordination of investigating authorities where appropriate.

6.144. As far as criminal cooperation is concerned, Article 31 TEU sets out that this “shall include”:

- facilitating cooperation between competent ministries and judicial authorities;
- facilitating extradition between Member States;
- ensuring compatibility of rules where necessary to improve cooperation;
- preventing conflicts of jurisdiction between Member States;
- adopting minimum rules defining criminal offences and penalties in the fields of organised crime, terrorism and illicit drug trafficking; and
- encouraging cooperation through Eurojust (see below) by enabling it to facilitate coordination between national prosecuting authorities and support criminal investigations in cases of serious cross-border crime and by facilitating cooperation between Eurojust and the European Judicial Network.¹³⁴

6.145. Mutual recognition was expressly endorsed as the cornerstone of cooperation in criminal matters at the European Council in Tampere in 1999. This was re-stated in the Hague Programme.¹³⁵

ii. Position post-Treaty of Lisbon

6.146. The Treaty of Lisbon makes a number of changes to the provisions on police and judicial cooperation in criminal matters and the new provisions are set out in Articles 82–89 of the TFEU. Martin Howe QC saw the new provisions on criminal law as “in some respects ... a widening and in other respects ... a sort of intensification of the more broadly-defined definition” (Q E238).

6.147. Mrs Durand, of the Commission Legal Services, was clear that the new criminal law cooperation Chapter “does not increase the competences but makes them more precise”. She pointed for example to the replacement of the current non-exhaustive nature of the list of competences under Article 31 by the list of specific actions permitted under the Treaties (Q E338).

6.148. Maria Fletcher welcomed the clarification brought by the Treaty of Lisbon of the Union’s competence in the field of criminal law. She pointed to the lack of clarity in the existing Treaty and the “awkward legal wrangling” that had resulted from it. Clarification was particularly important in her view given the move to QMV in this field (pp E149–E150).

a. Rules regarding mutual recognition, judicial cooperation and criminal procedure

6.149. Article 82 sets out the Union’s competence in the area of mutual recognition, judicial cooperation and criminal procedure.

¹³⁴ The EJN is a network of judicial contact points aimed at improving the standards of cooperation between judicial authorities in criminal matters. The EJN was established by Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network OJ L 191/4 of 07.07.1998.

¹³⁵ Communication from the Commission to the Council and the European Parliament ‘The Hague Programme: Ten priorities for the next five years: The Partnership for European renewal in the field of Freedom, Security and Justice’ COM (2005) 184 of 10.05.2005.

- 6.150. Article 82(1) sets out measures to coordinate the criminal justice systems of the Member States, including measures to lay down rules and procedures for ensuring mutual recognition of all forms of judgments and judicial decisions;¹³⁶ to prevent and settle conflicts of jurisdiction; to support the training of the judiciary; and to facilitate cooperation between Member States' judicial authorities in criminal proceedings and the enforcement of judgments.
- 6.151. Ms Fletcher suggested that the Article 82(1)(a) competence to lay down measures to ensure mutual recognition was a “catch-all” provision for the implementation of the mutual recognition principle. Approximation would therefore only be justifiable if mutual recognition proved inadequate. Ms Fletcher considered that this would “ensure maximum coordination while allowing maximum respect to national traditions”. However, she pointed out that the new provisions gave no guidance as to whether mutual recognition was appropriate in any given circumstances, and as a result the argument as to whether a mutual recognition or approximation approach was to be preferred was unlikely to be resolved (p E149).
- 6.152. **The new Article 82(1) confers a more specifically defined power to adopt measures of judicial cooperation in criminal matters in a more extensive but exhaustive list of areas. In particular, the new Article makes specific reference for the first time to measures to settle as well as prevent conflicts of jurisdiction and to measures to support the training of national judiciaries and their staff. The new Article replaces an existing power under Article 31(1)(a) to (d) which is of uncertain and controversial width, not least because the list of areas of potential action given is both vague and non-exclusive. Overall, the clarification and definition of power in this field by the Lisbon Treaty is unlikely to involve any significant expansion of jurisdiction, although it may encourage a more active role for the EU in the listed areas.**
- 6.153. Specific measures on criminal procedure are envisaged by Article 82(2) and are to be adopted “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”. Such rules must take into account the differences between the legal traditions and systems of the Member States and shall concern: mutual admissibility of evidence; the rights of individuals in criminal procedure; the rights of victims of crime; and any other aspects of criminal procedure which the Council has identified in advance by a unanimous decision with the consent of the European Parliament.
- 6.154. Professor Shaw considered the new language in the Treaty to be a “huge advantage”. In particular, she welcomed the inclusion of a specific reference to “cross-border” in Article 82(2), which she suggested would come as a relief to several Member States. She explained that “rather than these rather airy references on a slightly uncertain basis to Article 31 plus Article 34(2)(c) as being the legal basis, you will be able to point to a specific provision ... so you will be able to identify whether it concerns mutual admissibility of evidence, the rights of individuals, the rights of victims ...” (Q E24)

¹³⁶ For discussion of the principle of mutual recognition in criminal matters, see below.

- 6.155. Mrs Durand highlighted some particular examples of the more defined competence in Article 82(2). As regards cooperation in criminal procedure, she noted that competence was currently governed by Article 31(1)(c) TEU which provided for measures to ensure the compatibility of applicable laws within Member States. She considered this to be a “wide” definition of competence, which, she suggested, taken together with the non-exclusive nature of Article 31, meant that one could “almost say that this competence is open-ended”. Under the revisions introduced by the Lisbon Treaty, however, Article 82 listed three aspects of criminal law which could be subject to harmonisation: the mutual admissibility of evidence, the rights of individuals and the rights of victims of crime. Although this list could be extended under Article 82(2)(d), any extension would require unanimity in the Council and the consent of the European Parliament (Q E338).
- 6.156. Professor Dutheil de la Rochère considered that Article 82 “provides a stronger and clearer legal basis to EU acts aiming at developing mutual recognition”. She pointed to new limits introduced by Article 82(2) and (3), which restricted EU legislation agreeing minimum rules to that which was necessary to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters having a cross-border dimension. Any rules “must take into account the differences between the legal traditions and systems of the Member States” (p E138).¹³⁷ Baroness Ludford MEP also highlighted the limitation of competence to measures which “facilitate mutual recognition”. She considered that the change would be “marginal” (Q E388).
- 6.157. Mr Straw did not consider the new power in Article 82(2) was wider than under the existing Treaty. He thought it resolved the current dispute over competence in this field (Q E495).
- 6.158. Ms Bateman commented on the specific reference in Article 82(2) to the rights of individuals, which she called “the main development” in procedural criminal law. She alluded to the difficulties faced by the Commission’s 2004 proposed Framework Decision on procedural rights¹³⁸ and concluded that the Law Society welcomed the express reference in the amended Treaty because it resolved the question of whether the competence to adopt measures of this nature existed. Similarly, the express reference to admissibility of evidence clarified the legal base here, a subject of some discussion during the negotiations on the European Evidence Warrant¹³⁹ (Q E428). Dr Mitsilegas also considered that the Treaty of Lisbon “addresses the current controversy regarding the existence and extent of [criminal procedural] competence” (p E167).
- 6.159. When asked whether the Treaty of Lisbon extended EU competence in the area of criminal law, Professor Peers said, “there has always been a dispute over the scope of the existing criminal powers of the European Union. That has never really been settled, and therefore it is difficult to say whether the [Treaty of Lisbon] is an expansion or even potentially a narrowing of the

¹³⁷ Article 82(2).

¹³⁸ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM (2004) 328 of 28.04.2004.

¹³⁹ Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters COM (2003) 688 of 14.11.2003. The Council agreed a general approach on this proposal on 1 June 2006 (10081/06 Presse 168).

criminal law powers of the European Union”. He explained that a “vague power to facilitate cooperation” had been replaced by a “very specific power ... to deal with domestic criminal, procedural issues”, but only to the extent necessary to facilitate mutual recognition. He noted that “depending on whether you think the existing power is very narrow or very broad, that is either an expansion or a narrowing”. Professor Peers considered the existing power to be quite broad and therefore saw the provisions of the Lisbon Treaty as a narrowing of competence (Q E92).

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

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

b. Approximation of substantive criminal law

6.162. The power to approximate definitions of criminal offences and sanctions is provided in Article 83.

6.163. Developing existing Article 31(1)(e), new Article 83(1) provides for the adoption of EU legislation establishing minimum rules concerning the definition of criminal offences and sanctions in the areas of “particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis”.

6.164. The article goes on to list the areas of crime as:

- terrorism;
- trafficking in human beings and sexual exploitation of women and children;
- illicit drug trafficking;
- illicit arms trafficking;
- money laundering;
- corruption;
- counterfeiting of means of payment;
- computer crime; and
- organised crime.

6.165. The Council may, after obtaining the consent of the European Parliament, adopt a unanimous decision to include other areas of crime. Maria Fletcher suggested that any additional areas of crime would have to fulfil the criterion

mentioned in Article 83(1) of being “areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis” (p E150).

- 6.166. Dr Ladenburger, of the Commission Legal Services, stressed that the new Article 83 restricted the existing competence by the reference to the fact that each area of crime to be subject to harmonisation must “not only be particularly serious but also have a cross-border dimension”. This limitation, he suggested, might be obvious, but it was not explicitly included in the existing Treaty (Q E345). However, there is no mention here of mutual recognition and it would appear that this principle is not to be one of the governing criteria in this field (p E150).
- 6.167. As Mr Howe indicated, it is clear that Article 83(1) provides a more extensive list of areas in which there is a competence to adopt minimum rules defining criminal offences than its predecessor, and Professor Kaiafa-Gbandi concluded that the Lisbon Treaty “clearly expands and deepens” EU competence in the area of substantive criminal law. She also pointed to the ambiguity of the terms involved (Q E239 & p E158). This was a matter also raised by Professor Shaw, who noted that there was no “uniform, unified, universal concept of computer crime or indeed organised crime” (Q E25).
- 6.168. Mrs Durand emphasised that under the existing Treaty, Article 31(1)(e) set out the competence of the Union to adopt harmonisation measures in three domains: organised crime, terrorism and illicit drug trafficking. However, Article 31(1)(e) was, she noted, governed by the non-exclusive nature of Article 31(1) and also by Article 29, which set out the objective of preventing and combating crime and provided examples of the kind of crime envisaged, introduced by the words “in particular”. The list of crimes under the existing Treaty was, in her view, open-ended but under the amended Treaty there would be an exhaustive list of nine areas of crime. Again, although the list could be extended, this would require a unanimous decision of the Council following consent of the European Parliament (Q E338).
- 6.169. Despite the limited formulation of the Article 31(1)(e) power to adopt legislation defining criminal offences and penalties in the areas of organised crime, terrorism and illicit drug trafficking, Professor Dutheil de la Rochère pointed out that this article had been used to adopt legislation concerning environmental offences and sexual offences against children (p E138). Dr Ladenburger suggested that “one could probably point to a harmonising act for each of the areas of crime already” (Q E345). Ms Bateman agreed: “There is a reference [in Article 83(1)] to sexual exploitation and a specific reference to money laundering or computer crime (cyber crime), but I doubt this is as significant as it might appear because the EU has already taken action in these areas anyway” (Q E428).
- 6.170. Mr Geyer, for CEPS, also addressed concerns that the competence of the Union in this area had been extended. He considered that much of the new Article simply reflected action already undertaken by Member States in the Third Pillar. The new Treaty, he said, clarified and structured this area of cooperation. He concluded: “In the end, a virtually uncontrolled area which has often been labelled as an interior ministers’ ‘playground’ is in fact constrained and tamed”, and the Treaty did not necessarily extend the substance of criminal law cooperation (Q E132).

6.171. In Mr Straw's view, the scope for action under Article 83(1) was "similar to that envisaged in the existing Treaty" and he pointed out that with the exception of measures to tackle the illegal trafficking of arms or the sexual exploitation of women, measures had already been adopted by the Council in all the areas listed (Q E495).

6.172. Relevant measures in each of these fields include:

- terrorism: Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism¹⁴⁰ and proposal for a Council Framework Decision amending Framework decision 2002/475/JHA on combating terrorism;¹⁴¹
- trafficking in human beings and sexual exploitation of women and children: Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings¹⁴² and Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography;¹⁴³
- illicit drug trafficking: Joint Action 96/750/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking¹⁴⁴ and Council Resolution 97/C 10/02 of 20 December 1996 on sentencing for serious drug-trafficking;¹⁴⁵
- illicit arms trafficking: Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons¹⁴⁶ and Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EC on control of the acquisition and possession of weapons;¹⁴⁷
- money laundering: Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing¹⁴⁸ and Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community;¹⁴⁹
- corruption: Council Framework Decision of 22 July 2003 on combating corruption in the private sector;¹⁵⁰
- counterfeiting of means of payment: Council Framework Decision of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment;¹⁵¹

¹⁴⁰ OJ L 164/3 of 22.06.2002.

¹⁴¹ COM (2007) 650 of 06.11.2007.

¹⁴² OJ L 203/1 of 01.08.2002.

¹⁴³ OJ L 13/44 of 20.01.2004.

¹⁴⁴ OJ L 342/6 of 31.12.1996.

¹⁴⁵ OJ C 10/3 of 11.1.1997.

¹⁴⁶ OJ L 256/51 of 13.09.1991; Corrigendum OJ 54/22 of 05.03.1993.

¹⁴⁷ COM (2006) 93 of 02.03.2006.

¹⁴⁸ OJ L 309/15 of 25.11.2005.

¹⁴⁹ OJ L 309/9 of 25.11.2005.

¹⁵⁰ OJ L 192/54 of 31.07.2003.

- computer crime: Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems;¹⁵² and
- organised crime: Joint action 1998/733/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.¹⁵³

6.173. Professor Peers was of the view that the provisions on substantive criminal law “do bring about a fair amount of clarity as compared to the existing text”, a clarity which he thought necessary in light of the introduction of QMV to this area (Q E92).

6.174. In respect of these areas of “core” criminal law, Mr Stephen Hockman QC, for the Bar Council, concluded that given that these are particularly serious crimes with a cross-border dimension, “one can certainly see why the Community would want to have competence in those situations” (Q E318).

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

6.176. New Article 83(2) provides an alternative ground for approximating substantive criminal law by defining criminal offences and sanctions where this “proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures”. The existing Community competence for such measures derives from ECJ cases C-176/03 *Environmental Damages* and C-440/05 *Ship-source Pollution*,¹⁵⁴ although the Court in its judgment in the *Ship-source Pollution* case limited the criminal law competence of the Community to definitions of criminal offences and held that the power did not extend to the setting of sanctions. It should be recalled, as Sir David Edward pointed out, that under Cases C-176/03 and C-440/05, it was not in dispute that there was a competence at EU/EC level to define criminal offences and sanctions (pp E142–143). The dispute related to whether that competence arose under the intergovernmental Third Pillar, which requires measures to be adopted by unanimity following consultation of the European Parliament, or whether it

¹⁵¹ OJ L 149/1 of 02.06.2001.

¹⁵² OJ L 69/67 of 16.03.2005.

¹⁵³ OJ L 351/1 of 29.12.1998.

¹⁵⁴ Referenced above.

arose under the Community Pillar, under which measures are adopted by QMV in co-decision with the European Parliament.

- 6.177. Article 83(2) goes on to specify that Directives under this Article are to be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measure in question. Thus if an Article 192 TFEU legal base were used to adopt, by QMV and co-decision, measures harmonising standards in environmental protection, then any measures defining criminal offences and sanctions in respect of a breach of those standards would also have to be adopted by QMV and co-decision.
- 6.178. Mr Hockman pointed out that this kind of “regulatory” criminal law was well-known in the UK jurisdiction and was employed to ensure that people comply with regulatory limits set. He did not consider that it should cause “major practical problems” (Q E318).
- 6.179. The question arises whether, if the Treaty of Lisbon enters into force, the power to define criminal offences will continue to exist under substantive TFEU policy articles, such as new Article 192 TFEU on the environment, or whether Article 83(2) is *lex specialis* (a specific provision of law which supersedes a more general provision).¹⁵⁵ In other words, does Article 83(2) supersede the more general competence that would otherwise arise, or is it intended simply to set out the procedure for exercising a continuing criminal competence under other Treaty articles of the kind recognised under the current Treaties by the ECJ in cases C–176/03 and C–440/05? The answer is important for the UK’s right not to opt in, which only applies to measures adopted by the Union under Title V. An example of the latter type of procedural provision can be found in existing Article 300 TEC, which sets out the procedure for negotiating international agreements on behalf of the Community where the competence of the Community to enter into the international agreement in question is derived from some other source. Article 300 itself does not contain a power for the Community to enter into international agreements in a particular field.
- 6.180. Some witnesses considered that Article 83(2) resolved the ambiguities created by the *Environmental Damages* and *Ship-source Pollution* cases. In Professor Dutheil de la Rochère’s view, in a future case similar to the *Environmental Damages* case, Article 83(2) would be combined with new Article 192 TFEU to provide the necessary legal base for the measure (pp E138, E140). Maria Fletcher said that Article 83(2) “provides a neat solution to the rather complex situation” created by the *Environmental Damages* case (p E150) and Professor Shaw assumed that the competence identified in the *Environmental Damages* and *Ship-source Pollution* cases was intended to be subsumed and encompassed by Article 83(2) (Q E26). Mr Scott Crosby, of Crosby, Houben & Aps, was quite clear that “[Article 83(2)] is a specific rule ... the rule of construction is that where there is a specific rule or a specific legal basis, that prevents reverting to a more general legal basis ...” He concluded: “I think that Article [83(2)] is a *lex specialis*. It would be very difficult for the EU to justify using a more general legal base. I think it would be extremely difficult, if not impossible, to sustain an

¹⁵⁵ The ECJ recognises and applies the principle of *lex specialis*: see for example case C–325/05 *Ismail derin v Landkreis Darnstadt-Dieburg*, judgment of 18 July 2007 at paragraph 55; and case C–252/05 *Thames Water Utilities Ltd v South East London Division, Bromley Magistrates’ Court*, judgment of 10 May 2007 at paragraphs 39–41.

argument supporting a different legal basis before the Court of Justice” (Q E437).

- 6.181. Some witnesses were more equivocal. Mr Hockman said that “probably, but perhaps not definitely” the power to adopt harmonisation measures would derive exclusively from Article 83(2) once the Treaty of Lisbon had entered into force (Q E308). Although Mr Geyer considered it arguable that new Article 83(2) was *lex specialis* and therefore put an end to the line of ECJ jurisprudence on the question of definitions of offences and sanctions, he pointed out that there were differences in scope between Article 83(2) and the Court’s jurisprudence—notably regarding the scope of the policy areas in which the power to define offences applied—and suggested that one could argue as a result that the Court’s case-law might continue to be relevant to measures in the field of environmental policy (QQ E134–136).
- 6.182. Dr Mitsilegas pointed out that the article did not clarify what was meant by “essential” to ensure the effective implementation of a Union policy. He considered that future litigation on this point was likely. He was also unsure whether Article 83(2) provided a stand-alone legal base for such measures, or whether a dual legal base involving the substantive policy article would be required. For Dr Mitsilegas, if the *raison d’être* of the proposed criminal measure was to ensure the effective implementation of a Union policy, then the effectiveness of Union law would be undermined by the non-participation of one or more Member States. This might have implications for the UK’s right to opt in (p E167). Professor Shaw went further: “It is hard to see how the UK can opt out of that since it could not opt out from the underlying harmonisation measures” (Q E26).
- 6.183. Professor Peers agreed with Professor Shaw. He considered that Article 83(2) did clarify that the Union had the competence to adopt measures defining offences and sanctions in any area which had been subject to harmonisation measures, noting that under the *Environmental Damages* and *Ship-source Pollution* cases it was not clear whether this competence was limited to environmental or environment-related issues. However, he said, “it is not entirely clear to me whether the British opt-in would apply to such measures. I think it probably would not, because such measures would presumably be adopted on the other legal base ... It is not absolutely clear from the wording of the Treaty”. What was clear in any case was that the emergency brake provisions would apply and would be available for all Member States, including the UK (Q E99).
- 6.184. Both the Commission Legal Services and the relevant Committee of the European Parliament (JURI)¹⁵⁶ have yet to take a position on this question. Mrs Durand told us that the Commission Legal Services “are still in the process of analysing this particular legal question” and Mr Manuel Medina Ortega MEP, a member of the JURI Committee, said “We are discussing it in the Legal Affairs Committee and we do not yet know the answer”. A number of the MEPs we met expressed the personal view that it would not be appropriate for EU measures defining offences to be brought forward on a legal base other than Article 83(2). Baroness Ludford suggested that even if it were legally possible, it would be “politically unwise” (QQ E340, E405, E413).

¹⁵⁶ Committee on Legal Affairs.

- 6.185. Mr Straw was quite clear that measures defining offences would, if the Treaty of Lisbon entered into force, have to be adopted on the basis of Article 83(2). He pointed to the presumption under EU law that a specific legal base was to be preferred to a more general one. He concluded that there was no reason to expect measures of this nature to be brought forward on any legal base other than Article 83(2) and that the opt-in would therefore always apply (QQ E499–501).
- 6.186. Mr Howe concluded that, given the lack of clarity, there might be a political impetus to bind the UK into a particular measure and in that case, there might be a temptation to use the policy legal base thus circumventing the UK right not to opt in. He acknowledged that such a move would be challengeable before the ECJ, but noted that such a challenge might not be upheld by the Court (QQ E212–213).
- 6.187. **Different views were expressed to us on the question whether the new Article 83(2) in Title V supersedes the competence to establish minimum rules relating to criminal offences recognised, to date only in environmental contexts, by the Court in Cases C–176/03 and C–440/05. The answer is important because it is only in respect of measures proposed under Title V that the United Kingdom has a right not to opt in.**
- 6.188. **Our view is that Article 83(2) constitutes a *lex specialis*, which is framed and apt to subsume and supersede any competence which would otherwise exist under articles outside Title V. Its language is the language of conferral of competence (“directives may establish minimum rules ...”), not the language of procedure. Further, since the competence recognised in Cases C–176/03 and C–440/05 did not extend to the power to set minimum sanctions, Article 83(2) must in that respect go beyond procedure, and it seems implausible to suggest that the Treaty drafters intended there to be two overlapping articles conferring differing degrees of criminal competence, according to which was chosen as the base. The emergency brake introduced by Article 83(3) with express reference to Article 83(2) also seems clearly designed to apply to the exercise of criminal competence such as that recognised in Cases C–176/03 and C–440/05. The natural meaning of the language is, in short, that the competence recognised in those cases is being subsumed within Title V. On that basis the UK’s right not to opt in is preserved.**
- 6.189. **In the last analysis, even if we were to be held wrong in the views expressed about the UK’s opt-in in the previous paragraphs, it is clear from the language of Article 83(3) that the United Kingdom would retain the benefit of an emergency brake, in the event that a draft directive were promoted adopting minimum rules with regard to the definition of criminal offences and sanctions outside Title V in terms the UK considered would affect fundamental aspects of its criminal justice system.**

c. Eurojust and a European Public Prosecutor

- 6.190. New Article 85 builds on existing Article 31(2) TEU and provides that Eurojust’s mission “shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a

prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol". The European Parliament and the Council are empowered to adopt regulations to determine Eurojust's structure, operation, field of action and tasks. Tasks may include:

- the initiation of criminal investigations as well as proposing the initiation of prosecutions;
- the coordination of such investigations and prosecutions; and
- the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

6.191. There are limitations to Eurojust's powers in Article 85(2): formal acts of judicial procedure are to be carried out by competent national authorities.

6.192. Professor Dutheil de la Rochère described this as a more "ambitious" substitute to Article 31(2). She pointed out that Eurojust's competences would be strengthened under the new Treaty, which provided an express legal base for the Union to adopt legislation allowing Eurojust to initiate criminal investigations, to coordinate investigations and prosecutions conducted by competent national authorities and to strengthen judicial cooperation (p E139). The Centre for European Reform welcomed the proposals to strengthen Eurojust (p E126) but the Freedom Association was strongly opposed to any development of Eurojust (p E153).

6.193. Professor Chalmers was of the view that bringing Eurojust within supranational structures would make it more accountable to both national and supranational actors. It would, for the first time, be subject to the jurisdiction of the ECJ, a move which Professor Chalmers welcomed (p E127). The Law Society of England and Wales were of the view that the European Parliament was best placed to provide oversight and public scrutiny of the actions of Eurojust, which was currently outside the normal institutional framework and as a consequence was in an accountability "limbo". The Law Society therefore welcomed the changes proposed by the Treaty of Lisbon (pp E99–100).

6.194. Dr Mitsilegas suggested that the Treaty of Lisbon might result in significant changes in the nature and powers of Eurojust (p E168). However, Professor Shaw pointed to proposals already underway to reform Eurojust¹⁵⁷ and suggested that "the drivers of change are outside the Treaty reform process". She concluded: "I do not think that the Reform Treaty makes it more likely that it is going to be reformed than otherwise" (QQ E42–43).

6.195. Eurojust suggested that while the substantive provisions introduced into the TFEU by the Treaty of Lisbon were unlikely to affect to any great extent its operations, the procedural changes (the move to QMV and co-decision, the greater role for the Commission and the extended jurisdiction of the ECJ) would "have a significant impact on Eurojust's structure and operations in the medium and longer terms". In Eurojust's view, some of the amendments

¹⁵⁷ Communication on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the EU COM (2007) 644 of 23.10.2007; and Draft Council Decision on the strengthening of Eurojust amending Council Decision 2002/187/JHA of 28 February 2002, as amended by Council Decision 2003/659/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, Council Doc. 5037/08 of 07.01.2008.

being discussed in the context of proposals for reform under the existing Treaties might, if not adopted now, be brought forward again once the Treaty of Lisbon had entered into force (pp E144–145).

- 6.196. **There are already moves to reform Eurojust and to grant it a greater role in enhancing cooperation between national authorities. New Article 85 may facilitate more ambitious developments in the longer term.**
- 6.197. New Article 86(1) would allow a European Public Prosecutor (EPP) to be established in order to “combat crimes affecting the financial interests of the Union”. The decision to set up an EPP would be taken by the Council acting by unanimity after obtaining the consent of the European Parliament. In the absence of unanimity, an EPP could be established by at least nine Member States acting under the enhanced cooperation provisions of the Treaties.
- 6.198. Article 86(2) provides that the EPP’s Office shall be responsible for “investigating, prosecuting and bringing to judgment ... the perpetrators of, and accomplices in, offences against the Union’s financial interests”. The EPP shall exercise the function of prosecutor in the competent courts of the Member States in relation to such offences.
- 6.199. Article 86(4) allows the European Council, acting unanimously and after consulting the Commission and obtaining the consent of the European Parliament, to adopt a decision extending the powers of the EPP to include serious crimes having a cross-border dimension.
- 6.200. Professor Shaw explained that in the absence of an EPP, those suspected of committing fraud against the Community had to be prosecuted in the national system of one of the Member States, with recourse to mutual legal assistance instruments as required (Q E47). Professor Dashwood highlighted the policy underlying the initiative for an EPP: “in some Member States at least the authorities have not been very diligent in prosecuting offences that have to do with the interests of the Union because they do not have an impact on the national interests. The purpose of [the initiative] is to ensure that there will be somebody whose job it will be to get these cases before a judge” (Q E314). However, Professor Shaw suggested that developments in EU law had removed a number of the problems which the creation of an EPP would have solved. She called for a “thorough impact assessment” to judge whether or not there was a genuine need for an EPP’s Office (Q E48). Eurojust also highlighted the uncertainty surrounding the creation of an EPP, raising the question of whether Eurojust was intended to be an alternative or a precursor to the EPP. They asked whether Eurojust’s success would make an EPP more or less likely (pp E144–146).
- 6.201. The CER were unsure about proposals for the establishment of an EPP, considering that the case had not been adequately or clearly made out. They would instead prefer a more incremental development of Eurojust, and they pointed to the loss of valuable cooperation which would result if Eurojust were to develop into an EPP’s Office and the United Kingdom (as it almost inevitably would) chose not to opt in. However, they considered that adequate safeguards existed in the Treaty—notably the need for unanimity—to protect countries which were not in favour of an EPP at the moment. The CER remained concerned, however, that the Commission had not yet understood the need to make a clear evidence-based case for an EPP (p E126).

6.202. The Law Society of England and Wales were opposed to the creation of an EPP, considering that the case for an EPP had not been made (p E100), and the Law Society of Scotland also expressed concerns. They saw three principal problems with the proposal:

- the EPP would cut across national prosecutors and the detail of how this would be achieved in the various national legal systems was “fraught with political and other implications”;
- the experience of arriving at an agreed definition of particular crimes at EU level had not been wholly successful and the question of what constituted offences against the Union’s financial interests was unlikely to be an easier one to agree;
- questions surrounded the prosecutorial system to be adopted and the role of the EPP within that system (pp E164–165).

6.203. The creation of an EPP was vehemently opposed by the Freedom Association, which saw the moves as “transparent attempts to diminish national police and justice systems” (p E153).

6.204. Professor Kaiafa-Gbandi was concerned that the EPP, a body which had the potential to infringe upon individual rights, would be established under a legislative procedure involving a democratic deficit given the limited consent role of the European Parliament. In her view, such a move favoured the achievement of security aims at the expense of the protection of civil rights and liberties (p E161).

6.205. Professor Dashwood emphasised that the regulation had yet to be adopted: Article 86 merely provided a basis for a future regulation to be adopted (Q E314). Maria Fletcher suggested that the creation of an EPP was controversial and was unlikely to garner unanimous support in the short to medium term (p E151). Indeed, most witnesses commenting on this development accepted that any future EPP was likely to be created under the enhanced cooperation provisions and without the participation of the United Kingdom. Professor Shaw suggested that, with the facilitated enhanced cooperation provisions included in Article 86, “it does not seem inconceivable that such an office may be established for [a] group of nine or more Member States, I assume not including the United Kingdom” (Q E44).

6.206. Mr Kevan Norris, for the Home Office, made it clear that if an EPP were established by enhanced cooperation, that development would not affect non-participating Member States. In his view, the UK, if it chose not to participate in the creation of an EPP, it would not be obliged to execute a European Arrest Warrant¹⁵⁸ issued by the EPP (Q E508).

6.207. As regards the extension of the EPP’s remit, Professor Shaw suggested that the phrase “serious crimes having a cross-border dimension” might reasonably be expected to be interpreted in line with new Article 83(1) second paragraph, which listed for the purposes of that article the areas of

¹⁵⁸ The European Arrest Warrant (EAW) replaces traditional extradition arrangements between Member States. It simplifies and speeds up extradition of suspects and those convicted of certain offences. The mechanism was established by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190/1 of 18.07.2002.

serious crime contemplated by the phrase “serious crimes with a cross-border dimension” (Q E52).

- 6.208. There was some discussion of whether a decision to extend the scope of the EPP’s Office would have to be taken by unanimity of all 27 Member States or whether a decision could be taken in the context of the group of Member States participating in the enhanced cooperation. Professor Shaw suggested that it would require unanimous support from all 27 Member States (Q E53).
- 6.209. **Proposals for a European Public Prosecutor are not new, but this is the first time the structure for implementing this idea has been included in the Treaties. The inclusion of Article 86 in the TFEU makes it more likely that this post will one day be created. Any proposal to establish an EPP or subsequently extend its scope would require unanimity, and the UK’s opt-in would apply to such a measure. In the absence of unanimity, a group of Member States could proceed by enhanced cooperation.**
- 6.210. **If the UK were not to participate in the creation of the EPP, then it should not be affected by it. Although UK citizens living abroad could be subject to the EPP’s jurisdiction, the EPP could have no jurisdiction in the UK itself. Any obligation on Member States to recognise European Arrest Warrants issued by the EPP would have to be provided for in EU legislation under Title V, and the UK’s right to opt in would apply. If it did not opt in, then it would not be obliged to recognise European Arrest Warrants issued by the EPP.**

d. The role of mutual recognition

- 6.211. The Lisbon Treaty enshrines the principle of mutual recognition in the Treaties for the first time in the area of judicial cooperation in criminal matters. Article 67(3) provides that “The Union shall endeavour to provide a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for the coordination and cooperation between police and judicial authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws”. Article 82(1) provides that “Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions”. Article 82(2) refers to the adoption of measures “To the extent necessary to facilitate mutual recognition”.
- 6.212. Professor Dutheil de la Rochère highlighted the terms of Article 67(3), which she considered clearly showed that the approximation of criminal laws was intended to be subsidiary to other forms of action in the criminal law field, including administrative cooperation and mutual recognition of judgments (p E138). Ms Fletcher considered that the Article 82(2) reference to the facilitation of mutual recognition emphasised the hierarchical relationship between mutual recognition and approximation of laws (p E149).
- 6.213. Professor Kaiafa-Gbandi highlighted the problems surrounding the principle of mutual recognition which, although appropriate in the area of free movement of goods, was not capable of smooth transposition to the area

of criminal procedural law (p E159). This was a concern shared by Dr Mitsilegas (pp E167–168).

- 6.214. Professor Peers, for Statewatch, noted that there was no consensus on exactly how the principle of mutual recognition should be applied in the areas of civil and criminal law. He noted that the content of the principle differed in the mutual recognition measures which had already been adopted. In some the need for dual criminality was abolished; in others it remained; in still others Member States could choose whether to abolish the need for dual criminality. Similar divergences could be seen in the grounds for non-recognition and non-execution of the different mutual recognition measures. He suggested that the question of what mutual recognition involved, and the extent to which it required some level of harmonisation of substantive criminal law, might become increasingly important as mutual recognition measures began to be more commonly applied (Q E93).
- 6.215. As regards the ambiguous content of the principle of mutual recognition, Mr Geyer pointed to a Commission tender for a study to assess this principle. The tender's terms of reference note that, "During negotiations it often becomes clear that Member States have different perceptions of the principle of mutual recognition and its compatibility with certain grounds of refusal. In the absence of a clear concept of mutual recognition and its possible limits, the answers to certain fundamental questions had to be found during the negotiations of each of the different instruments. This has led to solutions that differ depending on the instrument concerned".¹⁵⁹ Mr Geyer considered that mutual recognition could not work in its "pure form" and required approximation of certain rules in order to establish the mutual trust necessary for mutual recognition to take place (QQ E142–144). The Law Society of England and Wales also recognised that mutual recognition depended on a certain degree of mutual trust, which was likely to require some minimum rules across the board (Q E431–433).
- 6.216. JUSTICE stressed that in order for mutual cooperation measures to be effective, judges must be able to have trust in each others' criminal justice systems. In this regard they considered the imbalance between cooperation measures facilitating prosecution and measures protecting the rights of suspects particularly unfortunate (p E154).
- 6.217. Maria Fletcher concluded that mutual recognition was set to remain "the key ordering principle" of the EU's criminal justice agenda following the entry into force of the Treaty of Lisbon (p E149). Dr Mitsilegas also commented on the "elevated" status of the principle of mutual recognition (p E167). Professor Peers did not consider that the specific reference to the principle in the new Treaty would make much difference, given that judgments of the ECJ had already clearly established that mutual recognition was an essential element of legislation in this area (Q E93).
- 6.218. **The inclusion of an express reference to the principle of mutual recognition in the criminal field by the Treaty of Lisbon lends some support to the view that cooperation is, wherever possible, to be preferred to harmonisation. But the new Article 82(1) includes within mutual recognition the approximation of laws and regulations under Articles 82(2) and 83. In reality and in the light of the Union's activity**

¹⁵⁹ Terms of Reference, Tender N° JLS/D3/2007/3 "Study: An analysis of the future of mutual recognition in criminal matters in the European Union" at pages 1–2.

to date in the criminal field, we doubt whether the introduction of general and unexplained references to mutual recognition will prove to have much significance.

e. Police cooperation

6.219. Police cooperation is dealt with under new Article 87 of the Treaty. It provides that the Union is to establish police cooperation involving all Member States' competent authorities. In particular, the European Parliament and the Council may adopt measures concerning:

- the collection, storage, processing, analysis and exchange of relevant data;
- support for the training of staff and cooperation on the exchange of staff, equipment and research into crime detection; and
- common investigative techniques in relation to the detection of serious forms of organised crime.

6.220. Article 87(3) allows the Council, acting by unanimity following consultation of the European Parliament, to establish measures concerning operational cooperation between authorities. In the absence of unanimity, an accelerator mechanism facilitates enhanced cooperation except in the case of measures which develop the Schengen *acquis*.

6.221. Witnesses did not identify any significant changes here. **The new provisions on police cooperation in Article 87 TFEU reflect the existing provisions in Article 30 TEU.**

f. Europol

6.222. Europol, the European Police Office, was established in 1995 by a multilateral Convention between the Member States. For some years the possibility has been canvassed of turning it into an agency of the EU, if only because of the inconvenience of having to conclude and ratify a multilateral Protocol every time an amendment to the Convention is needed, however minor.¹⁶⁰ On 5 January 2007 the Commission brought forward a proposal for a Decision establishing Europol as an Agency of the EU. Negotiations have been proceeding since then. A general approach has been agreed on a number of Chapters, and the Slovenian Presidency hopes that political agreement on the whole Decision can be reached by the end of June 2008, so that it can be adopted before the end of 2008. If this deadline is missed, Article 88(2) TFEU will require it to be adopted by Regulation made by co-decision with the European Parliament.

6.223. Under the 1995 Convention Europol's remit was limited to serious forms of transnational organised crime. The Council has a power under Article 2(2), which it has exercised a number of times, to increase the list of the "serious crimes" which fall within Europol's remit—but always provided that they are organised and transnational.

6.224. Under Article 3 of the latest draft of the Decision, the objectives of Europol would be "to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime

¹⁶⁰ Three Protocols have already been adopted, in 2000, 2002 and 2003.

affecting two or more Member States”.¹⁶¹ However Article 88(1) TFEU provides: “Europol’s mission shall be to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.”

- 6.225. The position therefore is that, so long as the current negotiations result in the adoption of a Decision before the end of 2008, that will be the constitution of Europol, even though it is likely to apply only from 1 January 2010. But a year earlier, on 1 January 2009, the entry into force of the TFEU will mean that Europol’s structure, operation, field of action and tasks are in future to be established by Regulations adopted by co-decision, and within the context of a “mission” set out in the Treaty whose wording, and possibly meaning, are different from the objective set out in the Decision.
- 6.226. **The reason for urgently continuing the current negotiations on the proposed Decision is, we assume, to prevent the European Parliament having powers of co-decision in relation to the constitution and functions of Europol as an agency. We regard it as unfortunate that the Member States should be attempting to override the effect of a provision of a Treaty they have just signed.**

Issues of “cross-border”

- 6.227. There are a number of references in the new Treaty to “cross-border” as a means of limiting action at EU level in sensitive fields of civil and criminal justice. One concern which arose was whether one could separate cross-border cases from purely domestic cases or whether such a division was, in practice, artificial and impossible to maintain.
- 6.228. Mrs Durand, of the Commission Legal Services, thought that the question of whether it was feasible to maintain a double system, one for cross-border action and the other at national level, was one which ought to be decided on a case-by-case basis. She considered that one could imagine certain areas where such a practice would be possible (Q E363). Ms Bateman, for the Law Society, also considered it possible to legislate in the area of cross-border civil law without this becoming part and parcel of domestic law. However, she conceded that there might need to be some “tweaking” of domestic provisions to allow the cross-border legislation to come into effect. The example she highlighted was in relation to the European Enforcement Order¹⁶² and the European Order for Payment¹⁶³ which required amendment to the English civil procedure rules in order to give effect to the new legislation (Q E446).
- 6.229. When asked whether there was any political desire in the European Parliament to use cross-border legal bases to legislate beyond cross-border cases, Michael Cashman MEP responded with an emphatic “no”.

¹⁶¹ Document 10327/07 of 4 June 2007.

¹⁶² Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims OJ L 143/15 of 30.4.2004 and Corrigendum OJ L 97/64 of 15.04.2005.

¹⁶³ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure OJ L 399/1 of 30.12.2006 and Corrigendum OJ L 18/11 of 25.01.2007.

Philip Bradbourn MEP, however, expressed some concern about “competence creep”. Baroness Ludford accepted that there was a danger of “spillover” into domestic law but emphasised the need to limit that spillover (QQ E414–416).

6.230. Ms Ellis, for the Ministry of Justice, accepted that in attempting to ascertain which cases had cross-border implications and which did not, there would be grey areas. Mr Straw pointed out that it would be for the ECJ to define “cross-border” but emphasised that he did not have concerns that measures adopted for cross-border cases would ultimately be applied to domestic cases (QQ E482, E492).

6.231. We recall in this regard our own inquiry into the proposal for a European Small Claims Procedure.¹⁶⁴ In that case, the original Commission proposal called for a procedure which would apply to both cross-border and internal cases. However, as we noted in our Report, Member States expressed overwhelming support for the view that the ESCP should be restricted to cross-border matters and should not cover cases which were purely internal to a Member State. The final scheme was limited to cross-border cases only.

6.232. In our Report, we set out in some detail the Commission’s reasoning in that case, which was based on the qualification in existing Article 65 that measures be “necessary for the proper functioning of the internal market”. The Commission considered that the existence of small claims procedures in some Member States and not in others, and the different rules, led to distortions in the functioning of the internal market. This argument was criticised by a number of our witnesses and we concluded that the Commission’s broad construction of Article 65 TEC would have “unacceptably wide implications for national laws and procedures”.¹⁶⁵

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

6.234. There are, however, difficulties in defining “cross-border”. As we highlighted in our Report on the ESCP, this will be a matter to be resolved on a case-by-case basis. We reiterate our conclusion that any definition of “cross-border” must be suited to the aim and requirements of the particular proposal.¹⁶⁶ In the event of a dispute, the ECJ will be the final arbiter, but this is another area in which the new powers of national parliaments to police the subsidiarity principle (see Chapter 11) may be particularly important.

National security and internal security

6.235. Article 4(2) TEU provides that “national security remains the sole responsibility of each Member State”. While there is nothing novel about this, it has not previously been spelt out in the Treaties.

¹⁶⁴ Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure COM (2005) 87 of 15.03.2005.

¹⁶⁵ *European Small Claims Procedure*, 23rd Report of Session 2005–2006, HL Paper 118 at paragraphs 55–63.

¹⁶⁶ Paragraph 70 of our Report.

- 6.236. It has not therefore been possible for the ECJ to interpret the meaning of the expression. We asked the Minister for Europe whether there was a danger that, in the unlikely event that it became necessary for the ECJ to rule on its interpretation, it might be given a narrower meaning than the Government might have wished. Mr Murphy thought that the ECJ would give full weight to the position of Member States regarding their own national security. He pointed to the new Article 73 TFEU which allowed Member States “to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent authorities of their administrations responsible for safeguarding national security” (pp F1–2). We would have thought it hardly needed a Treaty provision to make this clear, given that “national security remains the sole responsibility of each Member State”.
- 6.237. There are at present a number of references in the Treaties to “internal security”. In the amended Treaties these include Article 72 TFEU which contains a provision reading: “This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” The Title there referred to is Title V, “Area of Freedom, Security and Justice”. The existing TEU already contains in Article 33 a provision in the same terms relating to Title VI; and the TEC likewise in Article 64 relating to Title IV.
- 6.238. Title V TFEU also contains a new provision, Article 71, setting up a standing committee within the Council “in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union.” There are a number of other Treaty provisions referring to “internal security”. Mr Murphy explained that, like “national security”, “internal security” had not been defined either in legislation or by the ECJ, but that a minimalist interpretation would be that “internal security relates to matters of public order within a Member State, and in particular matters falling within the responsibility of the police authorities” (p F1).
- 6.239. On 12 July 2007 Mr Murphy gave oral evidence to this Committee on the June 2007 European Council. Discussing the distinction between national security and internal security, he said that the latter phrase was previously in common use but was in his view open to misunderstanding, since it had come to describe “two different but not mutually exclusive things. Internal security was the internal security within Member States but also internal security within the European Union, and we wished to move away from the possibility of misunderstanding, which is why we have now moved towards the description of national security, and the fact that it is for the first time explicit in the terms of this Treaty”.¹⁶⁷
- 6.240. Mr Murphy told us that he now judged that the new TEU Articles 4 and 5 provided sufficient protection of the interests of the United Kingdom in this area. But he believed that further work would be necessary to define the precise meaning and scope of “internal security” in the implementation of the Treaty, notably in the establishment of the Article 71 committee. Its detailed remit had yet to be established, but “it will include promoting and

¹⁶⁷ *Evidence from the Minister for Europe on the June European Union Council and the 2007 Inter-Governmental Conference*, 28th Report, Session 2006–07, HL Paper 142, Q 29.

strengthening operational cooperation in areas such as policing, data sharing, counter-terrorism and drugs” (pp F1–2).

- 6.241. We appreciate that it is not easy to define precisely the meanings of either “national security” or “internal security”, and that there may be some danger in defining them too narrowly. It would however be useful to have a list, though not an exhaustive one, of matters which fall within each of these two concepts. The Government may be able to give examples of such matters in the course of the debates on the Bill.
- 6.242. **It may be significant that the Treaties for the first time make clear that national security is a matter solely for the Member States.**
- 6.243. **It is unfortunate that a number of provisions of the Treaties refer to “internal security” when the meaning of that expression is unclear.**

The UK opt-ins

- 6.244. When the decision was taken in the Amsterdam Treaty to transfer certain aspects of FSJ from the Third Pillar into the First Pillar, the UK, together with Ireland, negotiated an opt-in arrangement which allowed it to control its level of participation in this area.¹⁶⁸ The merging of the pillars has focussed attention on the UK opt-ins.

The current position as regards the UK’s right to opt in

- 6.245. At present, in the Third Pillar (Title VI TEU) the unanimity requirement in criminal justice and policing matters obviates the need for any opt-in in this area. Any Member State may veto a proposal, which prevents the adoption of the measure.¹⁶⁹ As regards Title IV TEC, the UK has two separate opt-in protocols which regulate UK participation in such measures.

i. The current Title IV Protocol

- 6.246. The Protocol on the position of the UK and Ireland (the Title IV Protocol) deals with the UK’s right to participate in measures under Title IV. Article 1 establishes the “default” position—the UK’s blanket opt-out from the whole of the Title IV area. Article 2 provides that measures adopted under Title IV in which the UK does not participate shall not apply to the UK.
- 6.247. Article 3 of the Protocol permits the UK to choose, on a case-by-case basis, whether to participate in legislation proposed by the Commission under Title IV. The UK has three months from the presentation of the proposal by the Commission to notify the Council of its intention to participate. If the UK notifies its intention to participate, it is entitled to do so—other Member States cannot oppose the UK’s participation in the measure.¹⁷⁰ In the event that the UK opts in and then opposes the adoption of the measure and a

¹⁶⁸ Denmark also negotiated special arrangements but they are different from those relating to the UK and Ireland. Denmark has a blanket opt-out from Title IV and cannot choose to opt into specific measures. It is expected that there will soon be a referendum in Denmark on relinquishing the opt-out in favour of full participation in FSJ. See the website of the Danish Ministry of Foreign Affairs: <http://www.denmark.dk/en/servicemenu/News/DomesticPoliticalNews/Archives+2007/PMPromisesEUOptoutVote.htm>.

¹⁶⁹ Although a group of Member States could choose to proceed by enhanced cooperation as discussed above.

¹⁷⁰ Thus the UK has an opt-out and a right to opt in. The terms “opt-in” and “opt-out” are used in this Report as appropriate.

blocking minority is achieved, under Article 3(2) the Council can decide to exclude the UK in order to adopt the measure. In that case, the agreed measure will bind other Member States, including those in the original blocking minority, but it will not bind the UK.

6.248. Under Article 4 of the Protocol, the UK may apply to participate in a Title IV measure following its agreement and adoption by the Council. In this case, it must notify the Commission, which takes a decision on the UK request and on any specific arrangements deemed necessary to allow the UK to adhere to the measure. An opt-in post-adoption of the measure is on a “take it or leave it” basis: there is no right for the UK to re-negotiate the measure (Q E37).

6.249. Professor Peers thought that, currently, the UK had complete freedom to choose whether to participate in or remain outside proposals which fell under the Title IV Protocol (Q E90). However, this view was not universally accepted (Q E298). In particular, Mrs Durand stressed that the legal situation was “not very clear as to whether, once the UK had opted in to a measure [which has been enacted], it could opt out of an amendment to the measure” (Q E364). Kevan Norris, of the Home Office, also alluded to the lack of clarity surrounding the question of amendments but emphasised that the Government considered that there was freedom to decide whether or not to participate in a later amending measure (Q E510).

ii. The current Schengen Protocol

6.250. The Schengen Protocol integrates the Schengen *acquis* into the framework of the European Union. The Schengen *acquis* comprises agreements covering the abolition of checks at common borders as well as related cooperation and coordination between the police and the judicial authorities. When the Protocol was agreed in 1997, the UK (and Ireland) did not participate in any aspect of the Schengen *acquis*. Accordingly, the Protocol’s Article 4 provides that the UK (and Ireland) are not bound by the Schengen *acquis* and may at any time “request to take part in some or all of the provisions of the *acquis*”. The Council decides on such a request by unanimity.

6.251. Article 5 sets out provisions on “Schengen building measures”, i.e. proposals and initiatives to build upon the Schengen *acquis*. The UK may, “within a reasonable period”, indicate to the Council its desire to take part in such measures. Where it does not do so, the participating Schengen States may proceed without the UK.

6.252. Following the incorporation of the Schengen *acquis* into the EU framework, the UK requested the right to participate in some aspects of Schengen. The Council approved the request and a Decision was adopted in 2000.¹⁷¹ The UK now participates in police and judicial cooperation in criminal matters, the fight against drugs and the Schengen Information System (SIS).

6.253. Professor Peers drew attention to the fact that under the current Schengen Protocol, the UK is obliged to participate in measures which build upon parts of the Schengen *acquis* into which it has previously opted (Q E90). Under Article 8(2) of the Decision the UK is “deemed irrevocably to have

¹⁷¹ Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (2000/365/EC) OJ L 131/43 of 01.06.2000.

notified the ... Council under Article 5 of the Schengen Protocol that it wishes to take part in all proposals and initiatives which build upon” aspects of the Schengen *acquis* into which it has opted.

- 6.254. Similarly, Professor Peers explained that the Schengen Protocol also had a “lock-out” rule, which allowed the other Member States to refuse the UK permission to participate in measures which built upon measures into which it had not opted (Q E90). In recent cases before the ECJ,¹⁷² the UK challenged the refusal of the other Member States to allow it to join measures establishing a borders agency (Frontex)¹⁷³ and setting biometric standards for passports.¹⁷⁴ The Court’s judgment was handed down in December 2007 and it held that where the UK had not opted in to the underlying Schengen *acquis*, it could not rely on Article 5 of the Protocol to assert a right to participate in Schengen-building measures.
- 6.255. As Professor Shaw clarified, the issue in these cases did not concern the extent to which the UK can be forced to participate in a measure in which it does not want to take part but the extent to which it is blocked from participating in a measure in which it does want to take part (Q E18).

The position under the Treaty of Lisbon

- 6.256. Under the Treaty of Lisbon, the UK has secured the right to choose whether to opt in to all proposed measures in the field of freedom, security and justice. There are also clarifications and changes to the Protocols as regards the UK right to remain outside a measure. Professor Guild said that the position regarding UK participation in the area of freedom, security and justice has become more, rather than less, flexible under the new arrangements (Q E122). This view was accepted by many of our witnesses (QQ E364, E510).
- 6.257. **The opt-ins in the amended FSJ and Schengen Protocols will together apply to the whole area of FSJ, including those matters which currently fall within the Third Pillar and require unanimity. The right given to the UK to choose whether or not to opt in is, in certain respects discussed below, more flexible than the existing opt-in arrangements.**

i. The amended FSJ Protocol

- 6.258. The Protocol on the position of the UK and Ireland is renamed “The Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice” (“the FSJ Protocol”). The terms of the Protocol remain the same with two important differences which relate to the scope of the opt-in and the repercussions of non-participation in an amending measure.

¹⁷² Cases C–77/05 *United Kingdom v Council* & C–137/05 *United Kingdom v Council* judgments of 18 December 2007.

¹⁷³ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 349/1 of 25.11.2004. See European Union Committee, 9th Report (2007–08): *FRONTEX: the EU external borders agency* (HL 60).

¹⁷⁴ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States OJ L 385/1 of 29.12.2004.

a. Scope of the opt-in

- 6.259. The Protocol has been extended to cover all aspects of FSJ under what will be the new Title V TFEU. Ms Bateman saw this as a “significant development” (Q E453). As Professor Dashwood and Mrs Durand indicated, the Protocol will have a broader scope than at present (QQ E298, E364).
- 6.260. New Article 4a of the Protocol concerns measures amending existing measures in new Title V in which the United Kingdom participates and it confirms the right of the United Kingdom to choose whether to participate in proposed amending measures. While, as highlighted above, it has always been the position of the UK that it was not bound under the Title IV Protocol to participate in the amendment of measures into which it had previously opted, the matter is now clarified (Q E364).
- 6.261. The extension of the Protocol to the entire area of freedom, security and justice will allow the UK to decide, on an individual basis, whether to opt in to any proposed measure in the field. The inclusion of Article 4a confirming that the opt-in provisions will apply also to amending measures is a welcome clarification.**

b. Repercussions of non-participation in an amending measure

- 6.262. Article 4a(2) of the Protocol provides that where the Council determines that non-participation by the UK in the amending measure makes the existing measure “inoperable” for other Member States or the Union, it may, by qualified majority, decide to “urge” the UK to indicate its desire to participate within two months. Where the UK chooses not to participate, the existing measure shall cease to apply to the UK at the expiry of the two month notification period or at the entry into force of the amending measure, whichever is the later. In short, this procedure allows other Member States to eject the UK from participation in a measure where its refusal to participate in an amending measure renders the system “inoperable”.
- 6.263. Article 4a(3) of the Protocol provides that the Council may, by qualified majority, determine that the UK shall bear the “direct financial consequences, if any, necessarily and unavoidably incurred” as a result of the cessation of its participation in the existing measure.
- 6.264. As Professor Peers highlighted, the UK will, for the first time in the context of the FSJ Protocol, be put under pressure to participate in a measure, although, as witnesses stressed, the UK cannot be forced to participate (QQ E88, E97 & pp E151–152). He pointed out that the threat of ejection “would place greater pressure on [the UK] and would change the whole negotiating dynamics” (Q E98). In the case of the European Arrest Warrant (EAW), for example, if the UK refused to participate in an amending measure and the Council considered that the EAW would become inoperable if the United Kingdom were to continue participating in the system on the basis of the existing measure only, the Council could decide to eject the UK from the EAW mechanism. For this reason, Baroness Ludford MEP referred to the renegotiated opt-in as a “double-edged sword”: if the UK chose to opt out of an amendment, it could be “pushed out” of existing measures (Q E390). Maria Fletcher hoped that all sides would “show political restraint in the use of these provisions to prevent a too significant fragmentation of EU criminal justice” (p E152).

- 6.265. As both Maria Fletcher and Professor Peers pointed out, a Council decision that a measure had become “inoperable” would be open to challenge before the ECJ (p E152, Q E90). Professor Peers expected Article 4a(2) to be construed narrowly: the continued application of existing, rather than new, rules might make the operation of a measure more complex, but for a measure to be “inoperable” Professor Peers considered some sort of technical inoperability, which would mean the system would be unable to function without the UK’s participation in the amending measure, would be required (Q E90). This was a view shared by Baroness Ludford, who envisaged a proposed measure to move to a “SIS III” database, where the UK would either have to move to a higher level along with the rest of the Member States or withdraw from SIS altogether (Q E390). Professor Dashwood also suggested that the word “inoperable” was intended to set a high threshold (Q E298) and Mr Straw was quite clear that in the Government’s view, “inoperable” was “a high test” (Q E517).
- 6.266. Professor Peers raised the interesting possibility that the UK itself might argue that a measure would become “inoperable” following an amendment in which the UK does not participate, in order to be ejected from an existing measure in which it no longer wished to participate (Q E98).
- 6.267. **The amended FSJ Protocol differs significantly from its predecessor insofar as it permits the other Member States to eject the United Kingdom from an existing measure where it declines to participate in an amending measure. However, the right to eject the UK is subject to an important restriction: the UK’s non-participation in the amending measure must render the system “inoperable”. This is intended to set a high threshold and we would expect that some form of technical inoperability would, in practice, be required. We expect such cases to be rare.**
- 6.268. In terms of the sorts of costs that might be “necessarily and unavoidably incurred” in terms of Article 4a, Professor Shaw suggested that where an EU database had to be redesigned in order to prevent it from accessing directly into the UK database, the UK might be expected to pay the costs (Q E21). The Centre for European Reform saw little danger to the UK here (p E126). In relation to a similar provision in the Protocol on Transitional Provisions (discussed below), Martin Howe QC agreed that the words “necessarily and unavoidably” introduced quite a restriction on the costs that the UK would be expected to pay (Q E273).
- 6.269. **The test for requiring the UK to bear costs of non-participation is a strict one: costs must be “necessarily and unavoidably” incurred as a “direct” consequence of the cessation of UK participation.**

c. Views on the extended opt-in

- 6.270. The CER saw the extended opt-in as the least bad option which reflected political and legal realities (p E126). However, Andrew Duff MEP was critical of the derogations negotiated by the UK (p E135). His view was shared by Baroness Ludford who considered it “very sad, and unnecessary” that the UK had negotiated an extended opt-in (Q E390). Professor Wallace regretted the Government’s negotiation of a general opt-out here, concluding that there was a risk of “a good deal of legal complexity and confusion, which is not necessarily in the interests of British citizens and residents” (Q S191). At the other end of the spectrum, Michael Cashman MEP called it a

“brilliant position to have bargained” (Q E389). The Brethren Christian Fellowship was also in favour of the retention and expansion of the opt-in Protocol (p E125).

- 6.271. JUSTICE saw the UK opt-in as a retention of “an enhanced safeguard for national sovereignty in the light of the loss of the requirement of unanimity in Council”. They “cautiously” welcomed the UK opt-in, considering that it was necessary to retain a safeguard in the field of criminal law and policing. They regarded the opt-in as particularly important in relation to Article 83(2) on the definition of criminal offences and sanctions (p E155).
- 6.272. Sir David Edward accepted that with an EU of 27 Member States “some degree of variable geometry is almost inevitable”. However, he was concerned that a combination of opt-outs and enhanced cooperation would be “bound to impair both prompt and efficient action and also the transparency, objectivity and impartiality of the system”. He highlighted the problems that might in the future be faced by a local lawyer asked at short notice to represent a person affected by, or who might be entitled to rely on, an EU FSJ measure in attempting to understand what were the applicable provisions. Nonetheless, Sir David concluded that given the special characteristics of our systems of criminal justice, it might be safer that the UK had secured an opt-out here (pp E143–144).
- 6.273. Professor Guild alluded to a disadvantage in trading a veto, under unanimity, for an opt-out under QMV. In her view, the right to opt out entirely from a measure would put the UK in a very different position in terms of its ability to participate generally in the field compared with the conclusion of a framework decision, which would perhaps be less ambitious than a directive, under unanimity. She said that where there was not unanimous agreement in the Council, it might be better to have a system under which negotiations took longer to achieve a consensus, rather than to permit a smaller group to go ahead on their own. Lack of consensus, in her view, meant that there were “profound difficulties” with the proposed legislation for some Member States. She concluded: “It seems to me ... better to take a bit more time and to try to deal with the problems and resolve them and to wind up with legislation which all parties can agree rather than to leave some Member States behind” (QQ E123–125). Mr Howe also saw disadvantages in an opt-out rather than a veto: under the new Treaty, the UK would not be able to participate in criminal law measures “except by virtue of taking on board the whole shooting-match of measures which are fully, legally effective as part of the Community legal order” (Q E211).
- 6.274. **The extension of the opt-in arrangements puts the UK (and Ireland) in a special position. For those who support full UK participation in EU FSJ measures, this is likely to be viewed as an undesirable development. Those who have fears regarding the effect of a move to QMV in this area on national sovereignty, on the other hand, can see the opt-in as providing some reassurance. An extended right not to opt in for the UK is different from a veto under unanimity and, where the UK chooses not to opt in, other Member States will be able to adopt measures without UK participation. This may change the negotiating dynamic in the Council—but see paragraph 6.292 below.**
- 6.275. **At present there is no systematic parliamentary scrutiny of UK decisions on whether or not to opt in to particular FSJ measures. The**

House of Commons European Scrutiny Committee has recently drawn attention to this, in the context of the Lisbon Treaty.¹⁷⁵ We do so too, and we intend to give the matter further consideration.

ii. The amended Schengen Protocol

a. Scope of the opt-in

- 6.276. Like the amended FSJ Protocol, the Schengen Protocol is amended to permit the UK (and Ireland) complete freedom to decide whether to participate in Schengen measures. Article 5(2) of the amended Schengen Protocol provides additional flexibility for the UK to decide not to participate in measures which build upon aspects of the Schengen *acquis* in which it participates. In such cases, there is a presumption that the UK will participate, but Article 5(2) allows the UK to notify the Council within three months that it does not wish to take part in the Schengen-building measure.
- 6.277. As Professor Peers pointed out, this is a significant change to the Protocol which operates to the UK's advantage: the UK will, from the entry into force of the Treaty of Lisbon, have full freedom to opt in or remain outside provisions building upon aspects of the Schengen *acquis* in which it participates; this is more flexible for the UK than the present arrangement (QQ E88, E90, also Dashwood and Durand QQ E306–307, E364).
- 6.278. The amended Schengen Protocol does not address the question of the right of the UK to opt in to Schengen-building measures where it has not opted in to the underlying Schengen *acquis*, which was the subject of ECJ cases C–77/05 and C–137/05 discussed above. Mrs Durand explained that Article 4 of the Protocol remained unchanged and so the UK's right to opt in in these circumstances was unaffected by the Treaty of Lisbon revisions (Q E365). Professor Peers emphasised that, while the new Treaty made it easier to opt out of measures the UK did not want, it did not make it easier to opt into measures the UK did want (QQ E89, E91).
- 6.279. Like the FSJ Protocol, the Schengen Protocol increases the UK's flexibility to choose whether to participate in Schengen-related measures. It is clear that the UK will no longer be bound, as it is at present, to take part in Schengen-building measures where it participates in the underlying *acquis*. However, nothing in the Lisbon Treaty changes the position as regards the UK's right to opt in to Schengen-building measures where it has not opted in to the underlying *acquis*. In such cases, the Council may continue to refuse the UK's request to participate.**

b. Repercussions of non-participation in an amending measure

- 6.280. Amendments to the Schengen Protocol reflect new Article 4a of the FSJ Protocol. New Article 5(3) provides that where the UK has notified the Council that it does not wish to participate in a Schengen-building measure, any previous decision taken by the Council to allow UK participation in aspects of Schengen shall “cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council”. The Council will act by qualified majority on a proposal from

¹⁷⁵ EU Intergovernmental Conference: Follow-up Report, 3rd Report (2007–08), HC 16–iii, paras 67 and 70.

the Commission. Article 5(3) provides some guidance to the Council: it must seek to retain the widest possible measure of participation of the UK without seriously affecting the practical operability of the various parts of the Schengen *acquis*, while respecting their coherence. A mechanism is provided in Article 5(4) to allow the issue to be discussed by the European Council where the Council fails to adopt a decision. If the European Council fails to take a decision, then in the event that the Schengen-building measure is adopted, the Commission shall decide under Article 5(5) of the Protocol which aspects of the underlying Schengen *acquis*, if any, will cease to apply to the UK and under what conditions.

- 6.281. While the Protocol itself does not contain an article along the lines of Article 4a(3) of the FSJ Protocol on costs, a similar mechanism is provided in the Declarations. Declaration 47 explains that the conditions to be determined under Article 5(3), 5(4) or 5(5) of the Schengen Protocol in a Decision on the application of parts of the underlying Schengen *acquis* to the UK may determine that the UK “shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in some or all of the *acquis*”.
- 6.282. **Article 5(3) of the Schengen Protocol is an important new addition as it provides for a mechanism whereby the UK can be ejected from participation in parts of the underlying Schengen *acquis* which it has accepted if it declines to participate in a Schengen-building measure. This is the understandable *quid pro quo* of the UK’s new freedom to choose not to participate in such measures. Again, we expect such cases to be rare in practice.**
- 6.283. **In order for costs to be imposed on the UK as a result of the cessation of its participation, such costs must be “direct financial consequences” which are “necessarily and unavoidably incurred”. This is a strict test.**

iii. The effectiveness of the opt-ins

a. Will the opt-ins be effective in practice?

- 6.284. Professor Wallace thought that the impact of the Treaty in the area of FSJ was “less extensive than would otherwise have been the case” without the extension of the opt-out provisions under the FSJ Protocol (Q S192).
- 6.285. As to whether the opt-ins would be effective in law, Philip Bradbourn MEP expressed some concerns. He suggested that the Protocols might “not stand the strength of judgments down the line” (Q E397). Professor Guild, on the other hand, had no doubt that the opt-ins would be effective, looking at the UK’s exercise of its existing opt-out arrangements (QQ E154–156). Ms Bateman considered that the opt-in option secured by the UK “strongly protects the UK interest” and she concluded: “the opt-in arrangements do protect national interest and safeguard the legal systems in the UK, and obviously the particular common law interest or focus that goes with it” (Q E453).
- 6.286. The UK has enjoyed opt-in arrangements in the FSJ area since the conclusion of the Amsterdam Treaty in 1997 and there has been no challenge to the UK’s right to choose to remain outside proposed measures. The only point of contention which has arisen related to the UK’s ability to

participate in two Schengen-building measures in areas where it did not participate in the underlying *acquis*. The restriction on UK participation in these circumstances exists under the current Protocol and has not changed under the Lisbon Treaty.

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

b. Not opting in and participating in negotiations

6.288. For Professor Shaw, the main disadvantage of choosing not to opt in is the loss of the ability to participate in the shaping of the measure. However, she accepted that there might be a “gentlemen’s agreement” among Member States to allow the UK to participate in some negotiations without first opting in (QQ E34–36). Recent experience in relation to the Rome I Regulation¹⁷⁶ negotiations has shown that a decision not to opt in may not preclude UK involvement.

6.289. Diana Wallis MEP commented on the Rome I case. Here, the UK decided not to opt in but took part in discussions with a view to encouraging Member States to agree a measure into which the UK might later opt. Ms Wallis noted that this was a tempting option, but emphasised that there were negative aspects to this: the UK had no right to vote in the Council and its negotiating position was considerably weakened. She suggested that the patience of other Member States might wear thin and that such recourse to the Protocol was counter-productive in the long term, concluding that “you can pull that trick once”. She also suggested that opting in to a measure once it had already been agreed sent a negative message to citizens in the UK given that it would have to opt in to a measure agreed by other Member States without full UK participation (pp E85–86 & QQ E394–395).

6.290. The Minister did not agree that this strategy was a one-off. He pointed to the specific circumstances of the Rome I case which made the UK’s approach particularly effective. First, the UK position had considerable weight because of the strength of its financial markets and the volume of financial business that took place in the UK. Second, the UK had a serious problem with one of the proposals in the draft Regulation which made it impossible for the UK to opt in at the outset. He concluded that there might be other occasions where Member States had a strong interest in trying to secure UK involvement (Q E519).

¹⁷⁶ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 of 15.12.2005.

6.291. The UK's approach in the case of the Rome I Regulation has been shown to have been effective. It seems likely that the UK will now opt into the agreed measure, subject to the results of a consultation exercise to be carried out later this year.

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

c. Can the UK opt in and then opt back out again?

6.293. It was accepted by most witnesses that the UK is not permitted, under either Protocol, to opt in to a measure and then opt back out again should it decide that the direction of negotiations is not to its liking. A decision to opt in is irreversible (p E135, QQ E34, E222). JUSTICE highlighted that the result of this might be that the UK ended up being bound by legislation with which, as a result of amendments during negotiations, it did not fully agree; decisions on whether to opt in would therefore have to be taken "very carefully" (p E156).

6.294. Professor Shaw suggested that, although an opt-in decision could not be reversed, where the UK had opted in to a proposal but during the course of the negotiations the measure "changes dramatically" the UK might not be bound by its decision to opt in. It could argue that it had in fact opted in to something else (Q E39). Mr Howe was of the view that if the UK were to opt in to something which were subsequently amended to cause the UK problems, the UK would nonetheless be "stuck with it". However, he did accept that there might be a possible argument here (QQ E222–224).

6.295. We put this possibility to the Commission and to the Government. Both denied that such an approach was permitted under the Protocols. Mrs Durand considered that an opt-in decision was "for better or for worse" and that once the UK had decided to opt in, it had to accept the result of the negotiations (Q E366). Kevan Norris, for the Home Office, explained that "If we opt in to a proposal, we cannot then opt out during the negotiating procedure. So having opted in we are then like all other Member States and if that measure is then adopted we are bound by it" (Q E515).

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

d. How the UK uses its opt-in

6.297. Mr Straw indicated that the UK's policy in relation to opting in was unlikely to change following the entry into force of the Lisbon Treaty. Thus

the UK wished to cooperate in areas of justice and home affairs but retain control of its own borders (Q E509).

- 6.298. Brendan Donnelly noted that the UK had made good use of its opt-out in areas such as legal migration and visas and borders but had opted in without exception to asylum and civil law matters. He suggested that on this basis, it might have been possible for the Government to negotiate a more limited opt-in protocol, covering only those areas where the UK would in fact wish to consider remaining outside EU measures (p E133). This was also seen as an issue by the NSPCC and Save the Children, who were concerned that the UK would lose negotiating power in the area of child rights in FSJ because the existence of the opt-in could lead other Member States to conclude that the UK was not fully engaged in this area (Q G18). This was a point alluded to by Professor Guild, who asked whether it was worth the UK diminishing its negotiating capacity by seeking such a wide opt-out when primarily it wanted to be in (Q E122).
- 6.299. Diana Wallis MEP suggested that the UK had recently made “near-systematic” use of the Protocol by declining to opt in to three important instruments in the area of civil law (Rome I on the law applicable to contractual obligations; a proposed Regulation on maintenance obligations;¹⁷⁷ and Rome III on applicable law on divorce) on the basis that it might opt in once the measure had been agreed. She suggested that this represented a political trend which one could expect to continue and indeed expand into other policy areas (pp E84–85). The Law Society of Scotland supported the UK’s decision to remain outside recent proposals on, for example, Rome III. However, they highlighted the danger of isolation which arose from repeated decisions not to participate in a particular area of EU cooperation. They commended the UK practice of continuing to be involved in discussions during the evolution of the measure, even where the UK had decided not to opt in (pp E164, E166).
- 6.300. Professor Chalmers explained the choice which faced the UK in deciding whether to opt into a measure: “[The UK] will be faced by a Commission proposal with possibly some supranational qualities and some substantive provisions with which it is not comfortable, but which also carries some benefits. It can now choose to secure legislation that maximises the latter or it can refuse to participate”. Experience in relation to use of the opt-in in existing Title IV was that the UK had generally adopted the former strategy (p E127). Professor Peers considered that, provided the UK made effective use of its opt-in to stay away from proposals which would impact on the British common law system, there was no reason why the integrity of the common law system would be threatened under the new Treaty (Q E94).
- 6.301. Mr Palmer thought that the UK was likely to opt in to most of the justice-related agenda. Professor Chalmers agreed, although he suspected the UK would choose not to participate in measures relating to minimum rules and harmonisation of criminal law (Q S46). The CER were of the view that the UK was likely to opt in to most measures tackling terrorism, crime and illegal immigration. However, the Government would probably steer clear of measures to harmonise criminal procedure (p E126). This was a view shared by Professor Peers, though he warned that, although opting out of such

¹⁷⁷ Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations COM (2005) 649 of 15.12.2005.

measures would prevent a “threat” to the common law from the EU framework and the ECJ, this would not remove the risk that jurisprudence of the Strasbourg Court, under the Council of Europe’s European Convention on Human Rights, would have an impact on British law and procedure in this area (Q E95).

- 6.302. Dr Mitsilegas predicted, on the basis of the UK’s conduct in Third Pillar negotiations, that the UK would probably opt in to legislation amending the European Arrest Warrant, but would choose not to participate in legislation on minimum rights for suspects in criminal proceedings. This could, in his view, lead to complex legal questions, given that the EAW legislation might depend on adequate minimum standards being guaranteed across the EU, and the UK’s failure to participate could lead to other Member States concluding that the relevant standards were not in place here. The situation could be further complicated should the Commission choose to put forward the proposals as a package, or in the event of important cross-references to the minimum rights legislation in the EAW Directive. Dr Mitsilegas suggested that “the more integrated the ‘area of freedom, security and justice’ becomes, the harder it may prove for the UK to sustain its ‘pick-and-choose’ approach to EU home affairs” (p E169). This was a point also raised by the Law Societies (p E100). The Law Society of Scotland said, “It is essential that increasingly extensive measures being taken to increase the powers of police and prosecution authorities cross-border must be counterbalanced by measures applying at least basic minimum standards for suspects and the accused in criminal cases” (p E169). Ms Bateman expressed a concern that the Government would choose to opt in to “more prosecution-focused and investigatory powers rather than those measures that assist in terms of procedural safeguards for individuals or other matters in that field” (Q E453).
- 6.303. The CER and JUSTICE agreed that the United Kingdom’s partial participation could be problematic. However, as the CER pointed out, given the generally high standards in the UK as regards defendants’ rights, pressure from other Member States on the UK to opt in to such measures was unlikely to go as far as threatening to eject the UK from security-based measures such as the EAW (pp E126, E156).
- 6.304. It is not clear to what extent the Government will avail itself of its right to remain outside measures in the existing Title VI TEU once they are moved into new Title V TFEU. Mr Straw has suggested that the UK would seek cooperation to the maximum extent consistent with national interests and witnesses generally agreed that the UK was likely to participate in coercive measures in the area of criminal law and policing (Q E523). However, as outlined above, it has been suggested that UK participation in rights-based measures is less likely.
- 6.305. **It is important to maintain a proper balance between liberty and security. We share witnesses’ concerns that a pick-and-choose approach by the UK might result in the UK participating in the bulk of coercive security-based measures while eschewing rights-based measures and urge the Government to take a balanced approach to participation in this area.**
- 6.306. **We note the possibility that the Commission may propose coercive and rights-based measures in one instrument thus requiring the UK, if it wishes to participate in the coercive measure, to participate in the**

rights-based measures as well. Packaging measures in this way is unlikely to be possible in most cases but it may be feasible in some areas and would require the United Kingdom to take a view on whether this was desirable and acceptable.

e. The opt-in decision and devolved administrations

6.307. The Law Society of Scotland highlighted the specific problems that the opt-in could cause for devolved administrations as the UK has a single right to opt in or not. They noted that civil and family law and criminal justice are devolved matters which therefore fall largely within the competence of the Scottish Parliament and Executive. Further, they are areas where the law differs significantly between Scotland and England and Wales. The Law Society of Scotland pointed to the possibility that different views on the desirability of the UK opting in could be taken north and south of the border. The protection afforded by the opt-in should, they said, be seen in that light (p E164).

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

f. The European West Lothian Question

6.309. Ms Wallis said that an “untenable situation” was created for British MEPs by a UK decision not to opt in. This involved a European version of the West Lothian question, which asked why British MEPs should be entitled to participate in the negotiation of a measure which would, or might, not apply in the UK. She explained that neither Danish nor Irish MEPs participated in the work of the JURI Committee of the European Parliament and that Irish MEPs declined to vote in the plenary where Ireland had not opted in to a measure.¹⁷⁸ Ms Wallis indicated that, for the first time, some MEPs from other Member States had started questioning the right of UK MEPs to participate in these measures (p E86 & Q E394). Her concerns were shared by Baroness Ludford. Michael Cashman, on the other hand, suggested that there was support for UK MEP involvement in measures in which the UK was not participating, on the basis that a UK *rapporteur* in such a case was considered to be “objective” (QQ E391–394).

6.310. Mr Straw considered that restrictions on the participation of MEPs in European Parliamentary activities on the basis that their governments had chosen not to participate in a measure would be “very, very odd”. In any case, he concluded that, given the UK’s aim was to “cooperate to the maximum extent consistent with our national interests”, the European West Lothian question would be less of a problem than some might anticipate (QQ E521–523).

¹⁷⁸ Both Member States have only a substitute member on the JURI Committee.

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

Transitional arrangements

6.312. The changes to the area of Freedom, Security and Justice proposed by the Treaty of Lisbon will have implications for existing legislation in this field. Framework decisions, such as the European Arrest Warrant, were negotiated and agreed on the basis that they do not have direct effect and that the Commission and the ECJ have limited powers of enforcement and oversight. A new Protocol on Transitional Provisions (the Transitional Protocol) sets out, among other things, the arrangements for moving existing Third Pillar instruments into the First Pillar. Articles 9–10 of the Protocol deal with acts adopted on the basis of Title VI TEU prior to the entry into force of the Treaty of Lisbon.

The terms of the Protocol

6.313. Article 9 of the Protocol provides that the legal effects of the acts of the institutions adopted on the basis of the TEU prior to the entry into force of the Treaty of Lisbon “shall be preserved until those acts are repealed, annulled or amended”.

6.314. Article 10(1) limits the powers of the institutions in respect of existing Title VI measures. In particular, the Commission will have no jurisdiction to commence enforcement proceedings against Member States for failure to implement Framework Decisions and the powers of the ECJ will remain as set out in existing Title VI. Among other things, this means that the Court’s preliminary reference jurisdiction will be limited to those States which have made a Declaration accepting the jurisdiction of the Court.

6.315. Article 10(2) provides that the amendment of an existing Title VI measure “shall entail the applicability of the powers of the institutions ... as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply”.

6.316. Article 10(3) provides that the protection afforded by Article 10(1) will fall five years after the entry into force of the Lisbon Treaty subject to important further provisions discussed below.

6.317. Broadly, Professor Dashwood saw these as “sensible” measures to allow Member States to get used to the idea that EU institutions would in future have powers in relation to acts adopted in a very different institutional and procedural framework (Q E330).

How the Protocol will work

i. Renegotiation of existing Title VI measures

6.318. Professor Shaw thought that most of the existing Framework Decisions would probably be converted into Directives, although they might require

some renegotiating, especially to improve the drafting given that once converted the measures would be capable of having direct effect. She favoured prompt renegotiation, to assist national judges in applying and interpreting the measures (QQ E62–63). Dr Mitsilegas also thought that the Protocol was likely to result in a new wave of EU criminal law measures, mostly directives replacing existing Third Pillar framework decisions (p E169).

- 6.319. Professor Peers thought the opposite: “I think it is unlikely that they will readopt all of those measures, although it would be possible to do it quickly if they agreed not to change the text at all but simply to transpose them all as regulations and decisions”. However, he noted that even this latter course of action would mean “flooding the legislative system of the Community for a year with 50 or 100 measures” (Q E105). His view was echoed by Professor Dashwood, who also thought it unlikely that any significant number of measures would be re-negotiated (Q E327).
- 6.320. The Commission, who would principally be responsible for bringing forward proposals to convert existing Third Pillar measures, did not appear to envisage a wholesale conversion of framework decisions into Third Pillar instruments. Mrs Durand, for the Commission Legal Services, pointed to the difficulties in anticipating the future policy of the Commission but she highlighted Declaration 50 which provided that the institutions were invited to “seek to adopt, in appropriate cases ..., legal acts amending or replacing” existing Third Pillar instruments. She indicated that the qualification “in appropriate cases” was introduced by the Commission itself in order to provide some parameters for the sorts of proposals that the Commission should make. She was of the view that, despite the vague language, it was possible to conclude that not all existing measures were expected to be converted (QQ E370–371).
- 6.321. The Justice Secretary interpreted Declaration 50 in a slightly different way. He considered that it invited institutions to make “rapid progress in repealing and replacing existing Third Pillar measures to bring them under a First Pillar legal base”. Mr Straw acknowledged that it was unlikely that all existing measures would be repealed and replaced but expected the Commission to table measures repealing and replacing some of the more significant Third Pillar measures, such as the European Arrest Warrant (Q E529).
- 6.322. If measures were not renegotiated but simply became subject to the jurisdiction of the Court after the five years had expired, Professor Shaw suggested that they might not be capable of having direct effect (Q E63).
- 6.323. **We would expect the Commission to introduce measures to convert some of the more significant Title VI instruments, such as the European Arrest Warrant, soon after the Treaty of Lisbon enters into force. We would not be surprised if the Commission adopted a “repeal and replace” approach in order to ensure legal certainty.**
- 6.324. **It seems unlikely that the Commission will seek to convert all Title VI measures. We urge the Government to liaise closely with the Commission to ensure that measures which require redrafting or renegotiating are the subject of amendment measures before the end of the transitional period.**

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

ii. Identifying "amendments" and their effect

6.326. The Transitional Protocol refers to the effect of "amendments" on existing Title VI measures. Professor Peers suggested that sometimes it would be very obvious when a measure was "amended" and thus became subject to the Commission's powers of enforcement and the Court's jurisdiction. He suggested that adding a further ground for non-recognition into the Framework Decision on the European Arrest Warrant would constitute an obvious amendment. In other cases, however, the question of whether there had been an amendment would not have such an obvious answer. He raised the example of an amendment to an implementing measure, rather than to the parent measure. Highlighting the example of Europol, he asked, "Would the adoption of a new implementing measure, even with the same text as a previous implementing measure relating to Europol, mean that everything to do with Europol is considered amended, including the main decision, or will it be only each individual implementing measure which would be considered amended?" Similarly, if a provision of the Schengen *acquis* was amended, would that bring the whole *acquis* within the jurisdiction of the Court (Q E105)?

6.327. Mr Geyer, for CEPS, considered that the question of "amendment" would be a crucial one. He suggested that the consequences of amending an act might encourage the Commission to propose amendments solely in order to bring a measure under the jurisdiction of the Court (Q E175), although he concluded the Commission was likely to carry out a very careful assessment of all existing measures before deciding what action to take. Professor Dashwood thought that the question of deciding what would be the effect of an "amendment" was not straightforward. He did not consider that any amendment, however small, should have the effect of "neutralising" Article 10(1). This, he considered, would be a "very radical" consequence of amending an existing measure. But in his view it was clear what an amendment would be: even a deletion, he thought, "would clearly be an amendment" (Q E327).

6.328. Sir David Edward thought that, in practice, the UK would be very careful to establish whether or not a proposal was an "amendment" for the purposes of this proposal and could therefore decide not to opt in where it wished to avoid the consequences of agreeing the amending measure (Q S135). Mrs Durand also thought that in practice it would be clear whether or not a proposal was an "amendment", not least because under the Commission's rules on legislative drafting there was an obligation to specify whether or not a proposal was an amendment to a previous act (Q E372).

6.329. There was some disagreement among witnesses as to what would be the effect of an amendment to a framework decision in terms of the application of Article 9 of the Protocol. The Commission Legal Services considered that in this case, amendment would not affect the original Title VI measure.

Mrs Durand accepted that this could result in the “strange situation” that the unamended parts of the original measure would not have direct effect but the amended parts would (QQ E372, E376–382). Ms Bateman, for the Law Society of England and Wales, suggested that the situation created by such a reading of Article 9 would be “tortuous” (Q E462).

- 6.330. **The question of what constitutes an “amendment” under the Transitional Protocol proved controversial among our witnesses. But in our view it will be clear which proposed measures are “amendments” and Article 10(2) is unambiguous: any amendment, however small, will bring the amended act under the ECJ’s general jurisdiction and within the Commission’s enforcement powers.**
- 6.331. **We do not share the Commission’s interpretation of Article 9 of the Protocol. Article 9 says that the acts’ legal effects are “preserved until those acts are repealed, annulled or amended”. The obvious conclusion is that when those acts are repealed, annulled or amended, their legal effects are no longer preserved. It is difficult to understand how Article 9 can be read as meaning that only the amended parts of the act will have direct effect. If that were the meaning of Article 9 then the qualification in that article regarding repeal, annulment or amendment would be obsolete: insofar as amendments are introduced on a new Title V TFEU legal base they will be capable of having direct effect by default.**
- 6.332. **In practice, both of these issues will be circumvented if the Commission adopts a “repeal and replace” approach.**
- 6.333. Professor Peers identified a further ambiguity in the Protocol. In situations where the amendment of an act entailed consequences for the Commission’s enforcement powers and the Court’s jurisdiction, it was, in his view, not clear when these effects would take place. The new regime could apply as soon as the amending measure was adopted or alternatively it might only apply at the date of transposition of the measure, which might be some years after its adoption (Q E105).
- 6.334. **The Transitional Protocol leaves unclear from what date an amendment has the effect described in the Protocol. This ambiguity may be a reason for the Commission to prefer a “repeal and replace” approach whenever an amendment is contemplated.**

iii. The procedure on expiry of the transitional period

- 6.335. Article 10(3) declares that the transitional arrangements regarding the powers of the institutions will last for five years. Once the five year period has expired, all existing measures will fall within the ambit of the powers set out in the Treaties as amended by the Treaty of Lisbon.
- 6.336. The UK has negotiated special arrangements to ensure that where measures have not already been converted from Third Pillar to First Pillar measures in circumstances which would permit the UK to opt out if desired, it can exercise a block opt-out of remaining unconverted measures. Under Article 10(4) the UK may, six months before the expiry of the transitional period, notify the Council that it does not accept the new extended competence of EU institutions over any outstanding Third Pillar legislation. In that case, all outstanding Third Pillar legislation will cease to apply to the UK from the date of the expiry of the transitional period. Martin Howe QC pointed out

that the UK's right to opt out at this point was "unqualified" (Q E263). However, the article expressly states that this procedure does not involve amended acts under Article 10(2) (i.e. the UK cannot opt out of measures which have been amended and are as a result already subject to the jurisdiction of the ECJ). The blanket effect in other respects of exercising the opt-out is, however, mitigated by a right selectively to request to opt back in, which we discuss below.

- 6.337. As Andrew Duff MEP pointed out, the UK cannot continue to participate in existing Title VI measures once the five-year transitional period has expired if it refuses to accept the competence of the Commission to bring enforcement proceedings against it or the jurisdiction of the Court (p E135). Mr Howe considered that the UK might find itself presented with some unsatisfactory choices at the end of the five-year period given that a number of measures in which it would wish to continue participating might not yet have been transposed into the First Pillar (Q E265).
- 6.338. Mr Donnelly considered the possibility that the UK might choose at the end of the five-year period to exercise its right to a block opt-out from all remaining Title VI measures. He was highly critical of any future UK decision of this nature: "to abandon *en masse* British participation in all the intergovernmentally adopted JHA measures of the past decade as a protest against the jurisdiction of the European Court of Justice, and then inevitably to seek to opt back in to most of these measures, would expose the British Government to something little short of ridicule" (p E134).
- 6.339. **The possibility under Article 10(4) of the Transitional Protocol of exercising a block opt-out protects the UK's right to choose whether to participate in new measures in the FSJ field. However, we expect that the Government will be fully engaged with the Commission and other Member States to ensure that measures which might prompt them to use the block opt-out are amended before the expiry of the transitional period. Article 10(4) provides an emergency exit for the UK where the amendment of a controversial measure has not proved possible within the available time.**
- 6.340. The withdrawal of the UK from Third Pillar measures may necessitate consequential amendments to the measures in question. One example might be the withdrawal of the UK from the EAW, which would require Member States to amend legislation to exclude the UK from the ambit of the measure. The Council may adopt a decision to determine any necessary consequential and transitional arrangements by qualified majority and the UK will not participate in the decision. If there are direct financial consequences "necessarily and unavoidably" incurred as a result of the UK withdrawal, the Council may adopt a Decision determining that these should be borne by the UK. The Decision would be adopted by qualified majority on the basis of a Commission proposal.
- 6.341. Mr Straw pointed to the existence of the block opt-out and indicated that the possibility of financial consequences would encourage the Government to go through the list of Third Pillar measures and ensure that any which were unamended at the expiry of the five year period were uncontroversial and would not require use of the opt-out (QQ E531, E533–534).
- 6.342. **Provided that the Government undertake the task of sifting through existing Title VI measures in good time, they will be less likely to find**

themselves in the position of having to use the block opt-out and the question of costs will not arise. If the block opt-out is used, then, as with the costs provision in the FSJ and Schengen Protocols, we consider that the test for imposing costs is set at a high level.

- 6.343. Following a decision to exercise this block opt-out, the UK can notify the Council of its desire to opt in on a case-by-case basis to any of these measures under Article 10(5) of the Protocol. In this case, the provisions of the relevant opt-in Protocol will apply. The Article concludes that “the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence”.
- 6.344. **The right under Article 10(5) of the Transitional Protocol for the UK to opt back in to measures will ensure that, if the UK at the end of the five-year transitional period uses its block opt-out in relation to those Title VI measures which are not by then amended or re-enacted, the UK may immediately thereafter choose to opt back in to particular Title VI measures covered by that block exemption.**
- 6.345. **But the Treaty does not leave open the option of retaining the *status quo* in respect of Title VI measures after the transitional period. At the end of that period at the latest, the UK must either accept the Commission’s enforcement powers and the ECJ’s jurisdiction in respect of such measures or exercise its block opt-out, again accepting that if it chooses to opt back in to any particular existing measure, the Commission’s enforcement powers and the ECJ’s jurisdiction will apply.**

Civil protection

- 6.346. Part Five of the TFEU, External Action by the Union, includes a new Title VII entitled “Solidarity Clause” whose sole article, Article 222, provides that “The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to prevent the terrorist threat in the territory of the Member States” and for other similar purposes. The Member States are to “coordinate between themselves in the Council”. Declaration 37 to the Treaty of Lisbon makes clear that it is for individual Member States to decide on the best way of complying with this solidarity obligation.
- 6.347. Part Three has a Title XXIII on Civil Protection, also new, which overlaps considerably with Article 222. Its sole article, Article 196, provides that “The Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters”. Details are then given, and the European Parliament and the Council are required to “establish the measures necessary to help achieve the objectives referred to in paragraph 1”. Thus this Article does not in terms relate to terrorism, but encourages cooperation in prevention and protection against natural or man-made disasters. If a disaster does take place, it seems to be Article 222 which is more closely tailored to deal with the action to be taken.

- 6.348. We asked the Minister for Europe whether these two new Treaty provisions were necessary, and what their effect would be. In the case of the Solidarity Clause, he told us that the United Kingdom was well equipped to deal with most emergencies without external assistance; nevertheless emergencies might develop in unpredictable ways, so the Clause might be of direct benefit to the United Kingdom (pp F3–5). Additionally, the Clause envisaged regular assessments by the European Council of threats facing the Union. This of course is something which the European Council already frequently does, without the need for an express Treaty provision.
- 6.349. **The Solidarity Clause does not seem to us to have any legal significance; it does not enable Member States to do anything which they could not do without it. It does however serve to emphasise the political will of the Member States to stand together in the face of adversity.**

CHAPTER 7: EU FOREIGN, DEFENCE AND DEVELOPMENT POLICIES

External action of the EU

Overview

- 7.1. Much has been said in the UK press and specialist commentaries about the impact of the Lisbon Treaty in the area of foreign affairs, defence and development policy. Opinions diverge greatly—some feel the Treaty is of a radical and revolutionary nature, while others stress its evolutionary character and do not see it making significant changes in the way the system will work.
- 7.2. The Lisbon Treaty sets the framework for decisions on EU foreign policy. The Member States will continue to be the main decision-makers in this field. The principle of unanimity for decisions in the area of the Common Foreign and Security Policy (CFSP) will remain unchanged.
- 7.3. However, the Treaty contains a number of institutional innovations, designed to improve the much-criticised effectiveness and coherence of European foreign policy (Q C1). These include the post of High Representative, the External Action Service and greater cooperation and solidarity in defence matters. Much will depend on how these institutions will work in practice, as Professor Dashwood and Charles Grant told us (QQ C41, C42). In many respects, they will provide a framework of an enabling nature, providing the EU with the institutions to allow the Member States to forge common approaches and do things together where they so wish.
- 7.4. Professor Wallace expressed some concerns about how different aspects of the Treaty would be implemented in practice and how to ensure that the various aspects of the EU's external relations, including the CFSP, would be made to fit together into a coherent whole (Q S185). Her view was that the Treaty had made things more complicated in the foreign policy and security field than necessary, and that this meant that British voices would not be heard as “clearly and loudly as one might want” (Q S191).

Changes to the structure of the Treaties

- 7.5. As explained by Graham Avery, the Lisbon Treaty seeks to rationalise the external action of the EU, which is currently split between the Community pillar and the intergovernmental CFSP (Q C1). A major problem under the current Treaties is that the CFSP and the external dimension of Community policies are not always coordinated and mutually reinforcing. According to Charles Grant, the “current system is very sub-optimal”, although efforts had been made to address its weaknesses (Q C53).
- 7.6. Currently the Treaty provisions on external relations are spread across the TEC and the TEU. The TEC gives the Community competence over external action in areas such as trade and development cooperation, whereas Title V of the TEU contains some general provisions on the principles and objectives of external action, and provides the basis for the CFSP.
- 7.7. These arrangements will be streamlined to take account of the merging of Pillars One and Three and the maintenance of special arrangements for

CFSP. One innovation is the transfer of the provisions on the objectives of the CFSP (Article 11 TEU) into a new chapter called “General Provisions on the Union’s External Action”, covering the whole of the EU’s external action, whereas currently Article 11 only applies to the CFSP. The Lisbon Treaty will add a new Article 21 TEU setting out the principles underpinning EU external action.

- 7.8. The first sub-paragraph of new Article 21(1) TEU states that the Union’s action on the international scene “shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world ...”. The principles listed include democracy, human rights and the principles of the United Nations Charter and international law. The second sub-paragraph states that the EU should work towards building closer partnerships and promoting multilateral solutions: “The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations”.
- 7.9. The new structure clarifies and consolidates the general provisions on the principles and objectives of the external action of the EU into chapter 1 of Title V in the TEU. It also codifies the current practice of the EU by stating that the objectives of the EU include (new Article 21(2) TEU):
- to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
 - to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
 - to assist populations, countries and regions confronting natural or man-made disasters;
 - to promote an international system based on stronger multilateral cooperation and good global governance.
- 7.10. The Lisbon Treaty also adds the consolidation of the principles of international law and the prevention of conflicts to the objectives that are currently set out in Article 11 TEU.
- 7.11. The detailed provisions on the CFSP will remain in the TEU, Title V.
- 7.12. Mirroring this new structure in the TEU, a new Part Five will be created in the TFEU, bringing together the main external policy areas that are currently Community competences, plus any new, modified or codified provisions on other external policy matters. New Part Five TFEU—containing all the provisions on external action other than the CFSP—will be as follows:
- Title I: General provisions on the Union’s external action
- Title II: Common commercial policy
- Title III: Cooperation with third countries and humanitarian aid
- Chapter 1: Development cooperation
- Chapter 2: Economic, financial and technical cooperation with third countries

Chapter 3: Humanitarian aid

Title IV: Restrictive measures

Title V: International agreements

Title VI: The Union's relations with international organisations and third countries and Union delegations

Title VII: Solidarity clause.

- 7.13. Title I, Part Five, TFEU will make a cross-reference to the new general provisions on the Union's external action as set out in the TEU as amended. This will confirm that there is only one set of principles and objectives guiding the external action of the EU.
- 7.14. The new Article 3 of the TFEU states that the Union shall have "exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope." While this was interpreted by David Heathcoat-Amory as a significant extension of the Union's powers (Q S58), this recognition of exclusive competence in areas outside the CFSP is the codification of what has long been established by the case-law of the European Court of Justice.
- 7.15. New Article 8 TEU codifies the EU's European Neighbourhood Policy (ENP). It provides that the EU "shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation".
- 7.16. **These changes to the structure of the Treaties serve to consolidate, streamline and clarify the provisions on the EU's external relations. They do not change the overall objectives of the EU's external policies.**

The Common Foreign and Security Policy (CFSP)

- 7.17. Under the new Treaties, the CFSP will remain "subject to specific rules and procedures" (new Article 24 TEU). In the view of Professor Dashwood, the result of the Reform Treaty would be to create a two-pillar structure¹⁷⁹ (Q C96), and he expounded the steps which had been taken to preserve the particularity of the CFSP in the new Treaties (Q C43). Although there will no longer be pillars as such, the CFSP will retain its specific nature within the overall EU structure¹⁸⁰. There is therefore a clear distinction to be made between the CFSP and the other external policy areas, such as trade and development policy. One important difference between the CFSP and these latter policy areas is that different decision-making procedures apply. In contrast to the CFSP, legislation may be adopted in areas of EU external policy such as trade and development policy. Under the provisions of new Article 209 TFEU, what will be called the ordinary legislative procedure¹⁸¹

¹⁷⁹ Sir Stephen Wall also thought foreign policy would remain a separate pillar (Q S194).

¹⁸⁰ The Lisbon Treaty also changes the nomenclature of CFSP instruments, but not their legal status.

¹⁸¹ Currently "co-decision".

continues to apply to this policy area, but this procedure does not apply to the CFSP.

EU powers in CFSP matters

- 7.18. A first question which arises is: does the Lisbon Treaty give the EU any additional powers in the area of CFSP? The general view was that there will be no additional transfer of powers to the EU in the area of CFSP (see for example Dashwood, Q C43). For Professor Dashwood, this is because “the Union’s competence under the present CFSP as organised by Title V of the TEU is about as wide as it could be” (Q C43).
- 7.19. The Government holds the view, as expressed in para. 23 of its Explanatory Memorandum (EM) of 17 December 2007, that the Lisbon Treaty sets out the scope of the CFSP in the same terms as are already used in the current Treaties.
- 7.20. **The Treaty will not change the scope of the CFSP or transfer any additional powers to the EU in this area. The new provisions in the Treaty could lead to a more active role for the EU in the area of CFSP, but much will depend on the degree of consensus among Member States regarding such a role.**

Decision-making and the maintenance of the UK’s independent foreign and defence policy

- 7.21. Both the EU and the Member States have powers in the area of foreign and defence policy. This means that where the EU acts, it does not necessarily stop the UK and the other Member States acting. The Lisbon Treaty will not change this. The Government’s position—characterised as a “red line”—is that the Treaty will not affect the UK’s independent foreign and defence policy (as set out in paragraphs 23 and 24 of the Government’s Explanatory Memorandum).
- 7.22. Declarations 13 and 14 on the CFSP adopted by the Intergovernmental Conference stress that nothing will change as far as the responsibility of the Member States for their foreign and defence policy is concerned. Declarations are not part of the Treaty itself, but are political documents which can be used to help interpret the meaning of the Treaty text. Declaration 13 concerning the common foreign and security policy states in particular that:
- “The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations ...”.
- 7.23. The amended Treaties will also make it clear that the Union’s competences, including that for the CFSP referred to in article 2(4) TFEU, are conferred by the Member States to enable them to pursue interests that they have in common (Dashwood, Q C110). This principle of conferral is set out unambiguously in new article 5 TEU.

- 7.24. The Lisbon Treaty changes very little in the area of decision-making for the CFSP. The CFSP continues to remain “subject to specific rules and procedures” (new Article 24 TEU), i.e. it retains its intergovernmental nature. Currently, under Article 23 TEU, the general rule is that decisions under CFSP are taken by unanimity, which means that every Member State has a veto. This applies to the adoption of Joint Actions (e.g. to launch an operation) and Common Positions.
- 7.25. Currently there exists a procedure by which a Member State can abstain from supporting a decision requiring unanimity—including in respect of decisions having military or defence implications—while accepting that “the decision commits the Union” (Article 23(1) TEU). This is known as “constructive abstention”. The Lisbon Treaty will have no effect on this procedure.
- 7.26. Similarly, the Lisbon Treaty modifies the scope for decision-making by QMV as set out in current Article 23(2) TEU. The new Treaty provides that the Council acts by QMV “when adopting a decision defining a Union action or position, on a proposal which the High Representative ... has presented following a specific request from the European Council, made on its own initiative or that of the High Representative” (Article 31(2)).
- 7.27. This procedure is analogous to the current provisions on implementing decisions, whereby QMV can be used if a decision implements a previously-agreed Joint Action or Common Position. Therefore the principle that QMV applies only where agreement has previously been reached unanimously will be preserved under the new system. The High Representative is given a useful new tool by the provision, because he can suggest to the European Council that he be tasked with preparing a proposal. But in all cases, the European Council must *unanimously* agree to make this request, and only on this basis can a further decision then be taken by QMV. Abstentions do not prevent decisions being adopted by unanimity. (New Article 235 TFEU refers to European Council decision-making.)
- 7.28. This new procedure allows for decisions defining an EU action or position on a proposal from the High Representative to be adopted by qualified majority voting. However, the European Council must unanimously agree to request a proposal for a decision in a specific policy area.**
- 7.29. The other cases in which QMV applies will not change, save for consequential adjustments to reflect the simplification of the CFSP instruments (e.g. “decisions” rather than “Joint Actions” and “Common Positions”). The other specificities of decision-making under CFSP have also been maintained. First, as part of the QMV provisions, there is currently an “emergency brake” procedure allowing for the referral of a matter to the European Council in the event that a Member State intends to oppose it¹⁸². This procedure will be amended slightly to allow the High Representative to attempt to broker an acceptable agreement with the Member State concerned. Secondly, QMV does not apply to decisions “having military or

¹⁸² “If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity” (Article 31(2) TEU, as amended by the Lisbon Treaty, drawing on current Article 23(2) TEU).

defence implications”. These important safeguards will be preserved under the new Treaty.

- 7.30. New Article 42 will provide an additional safeguard because it clarifies that decisions relating to the Common Security and Defence Policy (CSDP), including those initiating a mission as referred to in this article, come under the unanimity rule. (Currently called the ESDP, the CSDP is an integral part of the CFSP—see below.) This makes it clear that decisions which may not have military or defence implications, but which could have operational implications in the case of civilian missions under the CSDP, have to be taken by unanimity.
- 7.31. There will be a number of other cases where the Council will act by QMV under the new Treaties in the framework of the CFSP:
- Decisions relating to the new start-up fund (new Article 41(3) TEU)(see Chapter 9);
 - The decision defining the European Defence Agency’s statute, seat and operational rules, pursuant to new Article 45;
 - Several types of decision regarding Permanent Structured Cooperation in defence (see below).
- 7.32. Apart from the cases discussed in this section, there are no other extensions of the use of QMV under the CFSP. However, the Lisbon Treaty will create a *passerelle*¹⁸³ providing for the extension of QMV to other cases under the CFSP (new Article 31(3) TEU). For this to happen, a decision must be taken by the European Council acting unanimously (i.e. the UK will hold a veto). The European Union (Amendment) Bill provides that the Government must not agree to activate the CFSP *passerelle* without prior parliamentary approval by both Houses.
- 7.33. The CFSP will retain its intergovernmental character based on the principle of unanimity and the search for consensus in decision-making. This does not mean that the CFSP imposes no constraints: the very purpose of reaching agreed positions would be undermined if each of the Member States was unfettered in the way they implement it. Therefore the Member States are legally bound by decisions, to which they have agreed, adopted by the Council under the CFSP¹⁸⁴.
- 7.34. This is seen by some commentators as a form of constraint on the UK’s independence of action. However, a raft of safeguards will continue to preserve the national sovereignty of the Member States in this area under the new Treaties. First, while decisions under the CFSP are legally binding, Member States must first agree to their adoption in the Council, or to be more precise, no Member State must oppose the decision although it is possible for them to abstain under the constructive abstention procedure¹⁸⁵. The “emergency brake” procedure allows for a decision to be delayed pending a consultation process in cases where a Member State declares that the decision will affect its vital national interests.

¹⁸³ See Chapter 3.

¹⁸⁴ New Article 288 TFEU (drawing on current Article 249 TEC) states: “A decision shall be binding in its entirety...”. The Lisbon Treaty does not change the binding nature of CFSP instruments (e.g. Joint Actions and Common Positions, renamed “decisions”).

¹⁸⁵ Article 31(1) TEU as amended.

- 7.35. A second safeguard is that under CFSP there is no provision for legal sanctions to enforce decisions against the will of a Member State, the CFSP being a policy area which relies on the goodwill of the Member States to implement those decisions. An additional safeguard of Member States' sovereignty in the defence field is that Member States decide on a case-by-case basis whether to contribute military or civilian personnel and assets in support of a mission.
- 7.36. **The evidence is that the Lisbon Treaty has preserved the independence of the UK's foreign and defence policy, subject to the constraints arising when unanimous agreement does prove possible. The fundamental principles of the CFSP will not change under the new Treaties. In particular, the principle of unanimity and the search for consensus in decision-making will continue to apply to the CFSP.**

The Role of the European Court of Justice in CFSP

- 7.37. The European Court of Justice currently does not have jurisdiction with respect to the provisions of the CFSP, save for its role in ensuring that the CFSP does not impinge on Community policies (Article 47 TEU). In addition to this, the Lisbon Treaty will give the Court jurisdiction to ensure that non-CFSP policies do not impinge on the CFSP (new Article 40 TEU).
- 7.38. The Court will also be given jurisdiction to review the legality of sanctions, as provided for by the second paragraph of Article 275 TFEU: "the Court shall have jurisdiction ... to rule on proceedings ... reviewing the legality of decisions providing for restrictive measures against natural or legal persons ...".
- 7.39. Currently economic sanctions under CFSP require Community legislation to implement them (Article 301 TEC), since the Community has competence in the movement of capital and trade matters. Therefore the Court already has jurisdiction to review the legality of sanctions implemented through the first pillar. However, the Lisbon Treaty will now make it possible for natural or legal persons to seek redress through the Court in respect of restrictive measures affecting them under the CFSP.
- 7.40. Open Europe expressed scepticism that the Court could be kept out of the CFSP, submitting that "the extent of the [ECJ's] jurisdiction over areas within CFSP remains unclear" (p C39). However, this scepticism was not shared by any of our other witnesses.
- 7.41. **We conclude that the Lisbon Treaty will provide for safeguards against encroachment of other areas of EU activities into the area of CFSP. This should protect the intergovernmental character of the CFSP. The Lisbon Treaty will also strengthen the system for upholding and protecting the rights of persons who are subject to restrictive measures adopted under the CFSP.**

Data protection in relation to foreign affairs

- 7.42. Article 39 TEU is a new provision introducing a specific legal basis for data processing by Member States when acting in the context of the CFSP. It requires the Council to "adopt a decision laying down rules relating to the protection of individuals with regard to the processing of personal data by the Member States" in relation to foreign affairs.

- 7.43. This provision derogates from the general data protection provision laid down in Article 16 TFEU. That article states that the EU should adopt data protection measures to cover “processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law”.
- 7.44. We asked for clarification on when the Council would be able to adopt decisions relating to data processing on the basis of Article 39 TEU rather than Article 16 TFEU. The question has significant implications as decisions which are directly concerned with CFSP are a matter for the Council alone, without any involvement of the European Parliament, whereas other data protection rules are for co-decision between the Council and the Parliament.
- 7.45. Under both provisions, compliance with the data protection rules is “subject to the control of independent authorities”. The Minister for Europe explained that, for the United Kingdom, this would be the Information Commissioner (pp F2–3). Similar arrangements for independent supervision are in place in other Member States. However, none of these independent authorities would be in a position to verify the lawfulness of a Council decision adopted under Article 39 TEU, and since decisions adopted in the CFSP field fall outside the jurisdiction of the Court of Justice there is no way in which a question relating to the interpretation and application of Article 39 could be referred to the Court.
- 7.46. Important questions have been raised by our witnesses. Could the Council adopt measures which involve data sharing with third countries but will be subject to a different, lower, set of data protection standards? Mr Geyer gave as examples measures on terrorism financing and terrorist lists (Q E159). However, the European Data Protection Supervisor has highlighted that the processing by the Council of a terrorist list would not even be covered by Article 39 as it refers only to activities of the Member States and does not encompass the institutions.¹⁸⁶
- 7.47. Another case in point would be international agreements relating to the collection of Passenger Name Records (PNR), and we raised this with the Government. So far two successive agreements concerning the transmission of PNR data to the US Department of Homeland Security have been negotiated under the third pillar.¹⁸⁷ Mr Murphy thought that international agreements on the use of PNR data were likely therefore to be brought forward under Article 16 TFEU, and not under Article 39 TEU (pp F2–3). We agree. If the Council attempted to use Article 39 TEU as the legal basis for agreements not relating to the CFSP, the Court of Justice would have jurisdiction to rule that this was not the correct legal basis.
- 7.48. The need to reconcile the protection of personal data with the public interest in national security and criminal matters is apparent from the Declarations. Declaration 21 acknowledges that data protection in the fields of judicial cooperation in criminal matters and police cooperation may require provisions specific to this area—a recognition perhaps that the proposed Council Decision on data protection in the third pillar departs significantly from the data protection principles contained in Directive 95/46/EC and Regulation No. 45/2001. These two instruments jointly provide for a general

¹⁸⁶ Peter Hustinx, letter to the Presidency of the Intergovernmental Conference, 23 July 2007.

¹⁸⁷ See *The EU-US Passenger Name Record (PNR) Agreement*, 21st Report of this Committee, Session 2006–07, HL Paper 108.

and comprehensive legal framework for the processing of personal data in the course of activities falling within the scope of Community law. Moreover Declaration 20 recalls that this legal framework includes specific derogations when rules on the protection of personal data have direct implications for national security.

- 7.49. Given that national security is already exempted from the general data protection framework under the legislation now in force, it is not clear to us what purpose Article 39 TEU is intended to serve. Baroness Ludford MEP expressed concern that it might be used by the Council to bypass the ordinary legislative process, avoiding both consent by the European Parliament and oversight by the Court of Justice, when it adopts decisions on terrorism and crime which involve data sharing with third countries. She told us that the European Parliament would “jump up and down” if this were to happen (Q E422).
- 7.50. **The new data protection provision in the CFSP field is significant because of its possible repercussion on the area of EU home affairs. Article 39 TEU is conspicuously different from Article 16 TFEU as a Treaty basis for data protection measures because it does not govern the activities of the EU institutions and bodies, and excludes oversight by the European Parliament and the Court of Justice. Clarity is needed as to the scope and purpose of Article 39.**

Development Cooperation and Humanitarian Aid

- 7.51. The Lisbon Treaty makes several changes in the area of development cooperation and humanitarian aid. It elevates the reduction and, in the long term, elimination of poverty to be the primary objective of the Union’s development cooperation policy (new Article 208 TFEU). This is consistent with the International Development Act 2002 in the UK¹⁸⁸.
- 7.52. The Treaty also requires the Union to “take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”. This reflects the EU’s efforts in recent years to attain policy coherence for development, a major aspect of the Paris agenda on improving aid effectiveness¹⁸⁹. The non-governmental umbrella organisation British Overseas NGOs for Development (BOND) strongly welcomed these Lisbon Treaty reforms and the placing of poverty elimination at the centre of EU aid policy (p C29).
- 7.53. The Government believe that the Lisbon Treaty reforms will enhance delivery of EU development policy and give EU aid greater coherence and effectiveness¹⁹⁰. For BOND, the implementation of the Lisbon Treaty would be the only opportunity between now and the next EU Financial Perspectives in 2014 to ensure that there was greater coherence in the EU’s external action and to improve the effectiveness of EU aid (pp C29–30).

¹⁸⁸ Jim Murphy MP, Minister for Europe, House of Commons Hansard, column 446W, 8 January 2008.

¹⁸⁹ The Paris Declaration, endorsed on 2 March 2005, is an international agreement to which over one hundred Ministers, Heads of Agencies and other Senior Officials adhered. They committed their countries and organisations to continue to increase efforts in harmonisation, alignment and managing aid for results with a set of monitorable actions and indicators.

¹⁹⁰ Jim Murphy MP, Minister for Europe, House of Commons Hansard, column 446W, 8 January 2008.

- 7.54. The Treaty provides a specific legal basis for the EU's well-established funding of humanitarian aid (new Article 214 TFEU), which is currently carried out on the basis of the development cooperation provisions of the TEC. The Treaty provides for qualified majority voting in the area of humanitarian aid.¹⁹¹ In this respect, the Government observe that the Treaty "promotes efficient and timely decision-making by extending qualified majority voting to humanitarian aid"¹⁹². The Treaty makes clear that humanitarian aid operations must be conducted in conformity with the international humanitarian principles of impartiality, neutrality and non-discrimination.
- 7.55. The Lisbon Treaty provides for the establishment of a European Voluntary Humanitarian Aid Corps (new Article 214 TFEU), with the purpose of establishing a "framework for joint contributions from young Europeans to the humanitarian aid operations of the Union...". The European Parliament and the Council will determine the rules and procedures for the operation of the Corps "acting by means of regulations in accordance with the ordinary legislative procedure...".
- 7.56. The Lisbon Treaty has implications for development cooperation which go beyond the amendment of the legal base for development policy. For BOND, "attempts to consolidate the EU's profile on foreign and security policy risk sidelining commitments on development" (p C29). Another concern was that the reduction in the size of the Commission from 2014 might mean that there would no longer be a separate Commissioner for Development.
- 7.57. A further issue is the way that development policy will be made within the Commission and who will control the development, humanitarian aid and external relations budget lines. Currently these funds come under the responsibility of four Directorates-General (DGs): the DG for External Relations (DG RELEX) in relation to Asia, Latin America and the EU's neighbours; the DG for Development and Humanitarian Aid (DG DEV) in relation to the African Caribbean and Pacific (ACP) countries, which receive funding from the European Development Fund (EDF); DG Enlargement; and the DG for humanitarian aid (ECHO). The implementation of the Lisbon Treaty might have implications for the internal organisation of the Commission services dealing with these policy areas and their corresponding budget lines, as well as for the overall coherence of the EU's aid policy.
- 7.58. The Lisbon Treaty reforms in the area of development policy will make clear that the primary objective of development cooperation is to reduce and eliminate poverty. This is in line with current UK policy and legislation. The Lisbon Treaty will have implications for the internal organisation of the Commission and its Directorates-General in relation to development policy. The creation of a specific legal basis for the EU's existing humanitarian aid activities aims to improve the efficiency of decision-making in this area and ensure that the EU's humanitarian aid respects international humanitarian principles.**

¹⁹¹ Government Explanatory Memorandum, para 16. See also the annex to the EM, point 30.

¹⁹² Jim Murphy MP, Minister for Europe, House of Commons Hansard, column 446W, 8 January 2008.

Measures relating to consular protection¹⁹³

- 7.59. The Lisbon Treaty will amend the provisions on consular protection currently contained in Article 20 TEC. The current Treaties provide for Member States' missions in third countries to assist each others' nationals on the same conditions as they would their own nationals and to establish the necessary measures amongst themselves (p S80). New Article 23 TFEU will provide that the Council may adopt directives establishing the coordination and cooperation measures to facilitate such protection. Decisions will be taken by QMV. This provision, as amended by the Lisbon Treaty, does not provide for Union delegations to undertake consular activities, an area which falls solely within the competence of the Member States¹⁹⁴.
- 7.60. **The Lisbon Treaty will allow the EU to adopt directives to facilitate the implementation of the Treaty provisions on consular protection. However, the requirement for Member States' missions in third countries to assist each others' nationals on the same conditions as they would their own nationals already exists under the current Treaties, and this is not, therefore, a significant change.**

The Institutional Innovations

The High Representative

The changes introduced by the Lisbon Treaty

- 7.61. The Lisbon Treaty considerably strengthens the position of the High Representative, who becomes High Representative of the Union for Foreign Affairs and Security Policy (hereafter "High Representative"), and whose office is separated from that of the Secretary-General of the Council. This post has been described as "triple-hatted", because the incumbent will:
- Assume responsibilities similar to those currently held by Javier Solana, Secretary-General/High Representative, in the Council (Article 26 TEU), i.e. to: "contribute through his proposals towards the preparation of the common foreign and security policy and ... ensure implementation of the decisions adopted by the European Council and the Council" (new Article 27 TEU);
 - Assume the responsibilities of the six-month rotating presidency for CFSP matters, including chairing the Foreign Affairs Council¹⁹⁵ (new Article 18) and representing the Union in CFSP matters: "The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue on the Union's behalf and shall express the Union's position in international organisations and at international conferences" (new Article 27(2) TEU). This means he will be able to speak directly on behalf of the Union on matters where it

¹⁹³ Consular protection comes under the "non-discrimination and citizenship" provisions (Title II, Part II) of the TFEU, rather than under the "external action" provisions of the TFEU, but it is included here because it relates to cooperation between Member States' missions in third countries.

¹⁹⁴ The Treaty will have no impact on the basis on which the UK Diplomatic Service provides consular assistance to either British Overseas Territories Citizens or unrepresented Commonwealth nationals (p S85).

¹⁹⁵ Currently the external relations session of the General Affairs and External Relations Council.

has an agreed position, whereas presently he does so “on behalf of the Council at the request of the Presidency” (current Article 26 TEU);

- Be a Vice-President of the Commission (new Article 18 TEU). “He shall ensure the consistency of the Union’s external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3”¹⁹⁶.

7.62. A new paragraph has been inserted, stipulating that “The common foreign and security policy shall be put into effect by the High Representative and by the Member States, using national and Union resources” (new Article 26(3) TEU). The Treaty gives the High Representative a role, together with the Council which already carries out this function, in ensuring the unity, consistency and effectiveness of action by the Union (new Article 26(2)). In fulfilling his mandate, the High Representative will be assisted by a European External Action Service (see below; new Article 27 TEU).

7.63. Under the current system, the High Representative has no right of initiative: this role is principally carried out by the rotating Presidency and the other Member States. This system has gradually reached its limits as Javier Solana has increasingly been mandated by the Council to undertake complex negotiations and dialogues with third parties, such as on the Iranian nuclear question. The Lisbon Treaty will give the High Representative greater flexibility, as he will be able to “refer to the Council any question relating to the common foreign and security policy and may submit to it initiatives or proposals as appropriate”, either of his own accord or with the Commission’s support (new Article 30 TEU). In the event of a crisis, the High Representative will also be able to convene an “extraordinary Council meeting within 48 hours or, in an emergency, within a shorter period” (new Article 30 TEU).

The case for change

7.64. The functions given to the High Representative in the Commission reflect the desire for a greater rationalisation and effectiveness of the EU’s external action which underlie the changes to the structure of the Treaties in this area. Several witnesses thought that the triple-hatting of the High Representative had the potential to improve the effectiveness and coherence of the EU’s external action (e.g. Grant, Q C53), since the High Representative would act as a bridge between the Council and the Commission. For Patrick Child, Head of Cabinet of the Commissioner for External Relations, the new system “will bring significant, potential benefits in terms of the overall coherence of the EU’s external action” (Q C34). He also mentioned that the High Representative would be able to enrich the Council discussions on CFSP matters “with more input from the external projection of what we call today ‘First Pillar Community Policies’” (Q C34). Examples of the latter would be trade, development policy and enlargement.

¹⁹⁶ Paragraphs 2 and 3 of Article 18 TEU refer to the High Representative’s role in conducting the CFSP and making proposals, and his role in chairing the Foreign Affairs Council.

- 7.65. In the view of the Minister for Europe, the combining of the responsibilities of the Commissioner with those of the High Representative was a “sensible and meaningful reform” which would align the external priorities of the Union with the budgeting process. However, the Government considered that much of the detail of how the High Representative post would work still remained to be worked out (Q S255).
- 7.66. A key advantage of the new system is that the EU will be represented by the High Representative in international forums and in dialogue with third countries, whereas under the current system, the “troika” consisting of the Commissioner for External Relations, the High Representative and the rotating Presidency all represent the EU in forums such as the Diplomatic Quartet on the Middle East Peace Process¹⁹⁷. The Lisbon Treaty could therefore serve to make the EU’s external representation more effective.

The High Representative’s role in the Commission

- 7.67. The relationship between the High Representative, the President of the European Council and the President of the European Commission with regards to the external action of the EU is discussed in Chapter 4. A further question is how the Commission will coordinate its external policies. The challenge is two-fold. First, coordination will be necessary among the High Representative and the various Commissioners with responsibility for external policy areas such as trade (Q C54). The High Representative will have a coordinating role within the Commission in this respect (new Article 18(4) TEU), but this will not allow him to impose decisions on his colleagues. The President of the Commission can also be expected to have a role in overseeing the Commission’s external policies.
- 7.68. In relation to internal coordination within the Commission, the Minister was unable to give a precise answer as to which Commissioners would come under the coordinating ambit of the High Representative (QQ S257–9). The situation is complicated by the fact that the number of Commissioners will come down to two-thirds of the number of Member States in 2014, unless the European Council decides otherwise (Article 17(5) TEU). The Minister stated that how the issue was resolved would partly be dependent on the decision to be taken as to allocation of portfolios in the reduced Commission. However, there will be a period during which the High Representative / Vice-President is in post but there are still 27 Commissioners. During that period the major role of the High Representative within the Commission will be that of the current External Relations Commissioner. Which other responsibilities will the High Representative have in a reduced Commission? Potentially the High Representative could have a very wide policy remit, covering trade, enlargement, development cooperation and humanitarian aid, in addition to those responsibilities held by the current External Relations Commissioner. The only certainty is that there will be a separate portfolio for the common commercial policy (Q S259, Q S208).
- 7.69. In addition to the challenge of internal coordination, the Commission will have to seek agreement with the Council on all policies with a significant external dimension. The presence of the High Representative in the Commission could facilitate this task, but will not be sufficient to bridge any fundamental differences of opinion between the Commission and the

¹⁹⁷ *The EU and the Middle East Peace Process*, this Committee’s 26th Report (2006–07), HL 132.

Member States, who will continue to take the ultimate decisions in the Council on all matters relating to the CFSP.

An excessive workload?

- 7.70. Another challenge identified by witnesses was the sheer workload that would fall on the shoulders of the High Representative due to the weighty responsibilities of his triple-hatted role, a problem which had been underestimated according to Graham Avery (Q C10). For Charles Grant, the post could not work unless the High Representative had two senior deputies, one for his work with the Council and one for that with the Commission (Q C55).

Too much power?

- 7.71. Open Europe expressed concern that the new role would serve to “concentrate power in the hands of the High Representative, and increase his/her representation within and access to various EU bodies” (p C33). A similar view was expressed by Mr Heathcoat-Amory, for whom “the new post will be substantially more powerful than the present equivalent, who is a Council representative. He or she will conduct foreign policy; that is a new verb in the Treaty. They will be able to draw on the resources of the External Action Service” (Q S78). According to Mr Heathcoat-Amory, the intergovernmental system underlying the CFSP would be challenged by the new post of High Representative, especially in the light of his responsibilities within the Commission.
- 7.72. However, the Treaty contains several checks on the exercise of the High Representative’s prerogatives. First, decisions will continue to be taken by the Council, the body representing the Member States. As Sir Stephen Wall explained to us, the crucial point is that the High Representative “can only operate on the basis of instructions from foreign ministers, but we do have a more coherent presentation of policy in the Middle East than we had in the days when individual foreign ministers from individual European countries were going and singing each to a slightly different hymn sheet” (Q S209).
- 7.73. Secondly, the High Representative will be accountable to the Council and the European Council. Under new Article 18(1) TEU, the European Council will be able to end the High Representative’s term of office. As a Vice-President of the Commission, the High Representative will exercise powers similar to those currently held by the Commissioner for External Relations and will be bound by Commission procedures in this respect (new Article 18(4) TEU).
- 7.74. For Sir Stephen Wall, the fact that the High Representative would be accountable to the Council as well as being a member of the Commission would not be a problem in practice. He explained that a difference in opinion between the Commission and the Council was not very likely in “today’s climate”. Furthermore, if the High Representative was competent, which almost “by definition” he would be, then he should be able to manage relations so that the situation did not arise in the first place. The advantage of the new system was that there would no longer be two people who covered the same policy area while having control over different parts of it. Vesting that control in one person “should make for greater coherence in the way that we manifest our common policy”, since “the greatest means by which

the European Union exercises influence are through the instruments at our disposal, which include trade and aid matters” (Q S206).

- 7.75. **The creation of a High Representative for Foreign Affairs and Security Policy/Vice-President of the Commission represents an important institutional innovation of the Lisbon Treaty, which could have a significant impact on the way the EU formulates and implements its external policies. In light of the evidence which is discussed above and in Chapter 4, the post could bring additional coherence and effectiveness to the EU’s external action, but much will depend on the way the High Representative exercises his powers, as well as his working relationships with the Member States, the President of the European Council, and the President of the Commission.**
- 7.76. **The post brings together three functions that exist under the current Treaties (the Council Presidency, the Commissioner for External Relations and the High Representative). The chairing of the Foreign Affairs Council by the High Representative is a key innovation which will give the incumbent a further degree of influence over decision-making in the area of CFSP. This could lead to a change in the way the Member States interact with the High Representative and contribute to EU policy-making in this area.**

The UN Security Council

- 7.77. Some observers in the UK have expressed concerns that the UK will lose its permanent seat on the UNSC, or that the “new High Representative will have an automatic right to speak for the UK in the UN Security Council on issues where the EU has taken a position” (p C33).
- 7.78. As regards the first proposition. Sir Stephen Wall commented that “the notion that any British government or any French government would agree to that seems to be very far-fetched; we do not. We will continue to vote in the Security Council as the United Kingdom” (Q S212).
- 7.79. A further issue is the role that will be played by the High Representative. Under the current Treaties, there is nothing preventing the High Representative or any other person addressing the UNSC, if the members of the UNSC, including the UK, so wish. According to evidence given by the Foreign Secretary to the House of Commons Foreign Affairs Committee “The European Union has the right to speak [in the Security Council] at the moment ... It can speak, but it obviously cannot vote, because votes are reserved for members of the Security Council”.¹⁹⁸ Speaking to the same Committee, Professor Christopher Hill of the University of Cambridge explained: “Mr Solana already speaks at the Security Council by invitation, and of course the Presidency does as well.”¹⁹⁹
- 7.80. New Article 34 TEU provides that “When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those

¹⁹⁸ Q 581, evidence given by the Secretary of State for Foreign and Commonwealth Affairs, the Rt. Hon. Mr David Miliband MP, to the House of Commons Foreign Affairs Committee, 12 December 2007. *Foreign Policy Aspects of the Lisbon Treaty*, 3rd report of Session 2007–08, HC 120–II.

¹⁹⁹ Q 454, evidence given by Professor Christopher Hill to the House of Commons Foreign Affairs Committee, 21 November 2007. *Op.cit.*

Member States which sit on the Security Council shall request that the High Representative be invited to present the European Union's position". However, the Security Council as a whole must agree to this request, otherwise the High Representative will not be invited to speak. Diplomats and representatives from various international organisations regularly get invited to present their positions, so this is not something new. As explained by Sir Stephen Wall, what will change with the Lisbon Treaty is that "on occasions where, including with the agreement of the United Kingdom, there is a common European policy, the High Representative can speak to that policy in the UN Security Council, but when it comes to voting, the British Government will have its complete freedom as to how it votes" (Q S212).

- 7.81. What will not change is that much of the negotiation behind closed doors leading to the public sessions of the UNSC only involves the representatives of the states that are members of the UNSC discussing among themselves. Since the EU is not a member of the UNSC—which will not change with the Lisbon Treaty—the High Representative will not be a party to these discussions (Q S212).
- 7.82. **It is clear that the Treaty changes nothing in the UK's right to retain its seat on the UN Security Council, its role as a permanent member, its right to speak, and its individual vote and veto. Where the EU has a unanimous common position, the UK will be required to request that the High Representative present that position; but that possibility does not displace the UK's right to speak and vote.**

The European External Action Service

The case for the Service

- 7.83. The rationale for the creation of a European External Action Service (new Article 27 TEU) is two-fold: to support the High Representative in his expanded role (Q C74), and to represent the EU overseas. Currently the High Representative has access to limited resources in terms of analysis and advice. Additionally, the system is characterised by "two separate bureaucratic machines in the Council and the Commission" (Grant Q C71). This results in a degree of overlap and competition, even rivalry in some cases. There is also a lack of consistency between the CFSP and EC external policies managed by the Commission. Charles Grant's view was therefore that it would be "highly desirable to create a single service that contains, as is the plan, relevant officials from the Council, the Commission and the Member States".
- 7.84. For John Palmer, the service should improve the quality of information and analysis available to the High Representative in preparing CFSP proposals (p S14). A key advantage of the new Service was that it would provide common analysis, because it was very difficult for Member States to agree on a common policy when they did not share a view of the events and developments on the ground (Q C71).
- 7.85. The Service will also ensure greater consistency in the way the Union's positions are presented on the international stage. Currently, others find the multiple voices speaking for the EU—the Commission, the High Representative, the Presidency—confusing, and this undermines the EU's effectiveness. At times the institutions cannot even agree among themselves, which has a negative impact on the EU's credibility. The Service should

assist the High Representative in formulating clear unambiguous messages that can be simultaneously conveyed by the EU institutions.

- 7.86. Professor Dashwood was very concerned about the current competition and even turf wars across the foreign policy, trade and development cooperation policy areas. In his view the post of High Representative could help resolve this problem: “he will need a cabinet which is strong enough to knock heads together” (Q C74).
- 7.87. In addressing the question of why the Service would be of benefit to the UK, Charles Grant noted that “in dealing with Russia for example ... it would be useful if the EU speaks with one voice because we have more leverage” (Q C76). His argument was therefore that where the UK decided to work through the EU, then it needed “effective institutions to represent that EU position”. The Service would also be very helpful to small countries because they often did not have representations in all parts of the world, so the Service could act as their “eyes and ears” (Q C72).

The organisation and functioning of the Service

- 7.88. Most of the details of the organisation and functioning of the European External Action Service still remain to be worked out. The Treaty only clarifies that it will “work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States”. Once the Treaty enters into force, the Service will be established by a decision of the Council, acting by unanimity, i.e. the UK will have a veto. “The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission” (new Article 27 TEU).
- 7.89. There are “various scenarios” regarding the structure and functioning of the Service (Q C39), but some ideas have already been put forward. What appears likely is that the Service will be constructed around a headquarters element and an external representation element. A first question that arises is: which elements of the current Council and Commission resources (human resources and other assets), both at headquarters and in external representations, will be integrated into the Service?
- 7.90. Within the headquarters of the Commission, the Service will probably incorporate most if not all of what is currently the External Relations Directorate-General (DG) in the European Commission. However, there is much more uncertainty about whether parts or the whole of other DGs, especially the Development and Humanitarian Aid DG and the Enlargement DG, will also form part of the Service. Within the Council Secretariat, it is likely that the DGs dealing with foreign, security and defence policy will be integrated into the Service, but beyond that it is less clear. Other headquarters assets, such as the Council’s Situation Centre and Policy Unit, and the Commission’s Crisis Monitoring Centre, may also become part of the Service. However, in the view of one witness, the Service is not expected to play a role in intelligence cooperation (Grant, Q C77).
- 7.91. There appears to be wide consensus that the Union delegations will form the external representation element of the Service (Q C6, Q C72, p C29), although it is possible that not all staff of the delegations will be members of

the Service. The role of these Union delegations will be to represent the EU in third countries and at international organisations, under the authority of the High Representative and in cooperation with the missions of the Member States (new Article 221 TFEU).

- 7.92. However, this does not mean that the EU will be creating a vast new infrastructure, since there are currently about 5000 Commission staff²⁰⁰ working in 128 Commission delegations (QQ C15, C39), who already carry out analysis, aid programming and representative functions. This number is not likely to expand significantly as a result of the Treaty (Q C39). These Commission delegations will be reinforced to become Union delegations. They will have to take on the additional responsibilities set out in the Lisbon Treaty, including putting forward the position for the European Union on matters of CFSP (Q C6) where the EU has adopted such a position (Q C5). (Any such position would have to be adopted by unanimity.)
- 7.93. In addition to the existing Commission delegations, Charles Grant explained that the EU Special Representatives (EUSR) and their offices—who report to the Council through the High Representative—would probably play an important role in the Service (Q C72). The double-hatting of Commission heads of delegation with the EUSR posts in Macedonia (FYROM) and Addis Ababa indicates that an integrated EU presence can work in practice and bring practical benefits (a position advocated in our report, *Europe in the World*)²⁰¹.
- 7.94. The Council Secretariat also has a small number of delegations to international organisations such as the United Nations, and we expect that they will be incorporated into the External Action Service.
- 7.95. The external representation and reporting function of the Union delegations will be important assets for the Service, because at present the High Representative and his team have to rely on a variety of direct and indirect sources of information, each with their own advantages, limits and caveats on use. However, it is still to be established whether all or only some of the staff of the Commission delegations—who at present mainly deal with aid and trade matters—will be integrated into the Service.
- 7.96. Professor Dashwood confirmed that he had no legal concerns about the provisions on the External Action Service (Q C79). Charles Grant expressed a political concern, that the “British Government will not seize the opportunity that the establishment of the EAS offers to play a leading role in building it” (Q C79). However, the Minister for Europe confirmed that in his view it would be to the advantage of the United Kingdom to ensure that able and competent people were seconded to the Service and that it was given the resources and political support it needed to be effective (Q S287). There are currently five Foreign and Commonwealth Office Seconded National Experts working in the EU institutions, one of whom is seconded to the Commission, whereas there are 112 Seconded National Experts in total in all EU institutions from all Whitehall Departments (p S78).
- 7.97. Although there are uncertainties about the exact shape the service may take, John Palmer emphasised that ultimately much will depend not on the

²⁰⁰ Of which approximately 1000 are based in Brussels at Commission headquarters and 4000 are locally employed in the overseas Commission delegations, according to Graham Avery (Q C15).

²⁰¹ 48th Report of Session 2005–06, HL Paper 268.

provisions of the Treaty but on the political will of the Member States to make it work. He expressed optimism in this respect, noting the “remarkable degree of consensus” among the 27 Member States about the critical importance of making the new system work (Q S21).

- 7.98. **The creation of an External Action Service is an important institutional innovation of the Lisbon Treaty. The Service is intended to provide the High Representative and the EU with analysis and support, as well as improve the consistency of the EU’s representation in third countries and at international organisations.**
- 7.99. **The Treaty of Lisbon leaves most of the details on the structure and functioning of the External Action Service to be decided upon by the Council acting unanimously after entry into force of the Treaty. The UK has the experience to play a leading role in elaborating a concept for the Service in a methodical and systematic way. And we would expect the Diplomatic Service and the EAS to work closely together.**
- 7.100. **Parliament should have an opportunity to scrutinise the draft concept for this Service well in advance of any political agreement being reached on its structure, functioning and financing. It is a matter that the Committee may want to come back to at a later date. In the meantime, we look forward to being kept informed by the Government of progress being made in the negotiations on the establishment of the Service.**
- 7.101. **The Government are committed to engage positively with the UK’s EU partners in building an effective External Action Service. We would welcome assurances from the Government that, where it is in line with UK policy, they will contribute to providing the Service with high quality personnel with the necessary language skills, including secondees, and adequate financial resources.**

Holding the Service to account

- 7.102. Although it is clear that the Service will support and be accountable to the High Representative, it is not yet clear whether and how far the European Parliament will exercise administrative and budgetary control over the Service, as is currently the case with regards to the Commission delegations. Graham Avery thought that this would probably be the case under the scenario he envisaged (Q C13).
- 7.103. **Effective mechanisms should be put into place at the appropriate time to exercise parliamentary oversight over the Service at the national level.**

Cooperation with Member States’ missions

- 7.104. Our witnesses clarified the relationship which the Union delegations will have with the diplomatic services of the Member States. Open Europe expressed concern that the Treaty could lead to the establishment of EU embassies and consulates. It has also been argued that the Treaty will provide for the EU delegations to subsume the embassies of the Member States. However, Graham Avery refuted this assertion, explaining that: “The Treaty says, *expressis verbis*, that the task of these Union delegations is to cooperate with the missions of Member States in non-Member countries. The object is absolutely not to take over their role” (Q C5). In addition, he

thought that the creation of these delegations would not in any way prejudice the activities of export promotion of contracts for British firms (Q C4).

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

The Common Security and Defence Policy

- 7.106. In the area of defence, the Lisbon Treaty introduces two new provisions and codifies two areas of current practice. The other changes are minor and serve the purpose of streamlining and clarification. The European Security and Defence Policy (ESDP) is renamed the Common Security and Defence Policy (CSDP), but this name change does not, of itself, materially change the policy. The CSDP will continue to be an “integral part” of the CFSP.
- 7.107. Some of the evidence we received suggested that the defence provisions in the Treaty were not particularly significant. This was the view held by Charles Grant (Q C108). He pointed out that in European defence matters the position of leading countries such as the UK, France and the United States will continue to be more important than the actual text of the Treaties.

The Relationship between the CSDP and NATO

- 7.108. According to the Government, the Treaty did not introduce changes that could affect the specific character of the UK’s defence policy, in particular the central role of NATO. The paragraph in the TEU (Article 17(1)) which recognises the importance of NATO for Member States like the UK will be retained, without substantive amendment, under the new Treaties (Article 42(2) TEU). It specifies in particular that the provisions of the amended TEU on the CSDP “shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO) ...”.
- 7.109. The mutual assistance clause, which is examined below (new Article 42(7) TEU) is even more forthright, as it states that NATO remains the “foundation” of the collective defence of those Member States who are members of it and the “forum for its implementation”. It further states that commitments and cooperation under the CSDP “shall be consistent with commitments” under NATO. This is a new provision and represents a strengthening of the reference to the role of NATO in the Treaties.
- 7.110. In addition to these Treaty articles, Declaration 13 concerning the CFSP states that “the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States”. Although this Declaration is not part of the Treaty itself, it is a political document agreed by the representatives of all the Member States and can act as a guide to the interpretation of the Treaty. The Government’s view is that the Treaty meets the UK objectives for the development of a flexible, militarily robust and NATO-friendly CSDP. The Government underline that the principle of unanimity will be preserved for decisions coming under this policy area, and that the Treaty maintains the prerogatives of the Member States for defence and security issues²⁰².

²⁰² Government Explanatory Memorandum, para 25.

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

Towards a common defence?

7.112. The Lisbon Treaty, basing itself on language which first appeared in the Maastricht Treaty, also states that “the common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides” (new Article 42(2) TEU). The only difference under the new Treaties is that in one case, the wording “this might lead” becomes “this will lead”. What will not change is that a unanimous European Council decision will be necessary before the EU moves to establish a common defence. Any such decision will have to be adopted by the Member States “in accordance with their constitutional requirements” (new Article 42(2) TEU), as is already the case under the present Treaties.

Mutual Assistance in the Case of Armed Aggression

7.113. The Lisbon Treaty introduces a new provision on mutual assistance (new Article 42(7)), which provides that:

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter²⁰³. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”.

7.114. The provision reflects the assumption that EU Member States would come to the aid and assistance of other Member States in the unlikely event that they were the victim of armed aggression on their territory. EU Member States who are not also members of NATO are now committed to the aid and assistance of their fellow Member States, to the potential benefit of the UK.

7.115. The Minister for Europe explained the provision in detail (p S82). He stated in particular that:

“The provision does not provide a basis for the development of an EU collective defence organisation to rival NATO. The obligation to provide assistance falls on individual Member States, not the EU. It goes on to provide that for Member States which are also NATO members, NATO

²⁰³ In full, article 51, Chapter VII, reads:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

remains the foundation of their collective defence and the forum for the implementation of the mutual defence provision. It therefore confirms NATO's role as Europe's only collective defence organisation...".

7.116. For the Director of the Council Legal Service, Mr Jean-Claude Piris, who acted as Legal Adviser to several inter-governmental conferences, the mutual assistance clause introduces an obligation on Member States to give aid and assistance²⁰⁴, but it "does not transform the EU into a military alliance". Rather, this provision is "of the utmost symbolic and political importance for the EU" but at the same time "does not amount to a mutual defence clause and does not change anything about the respective position of each Member State *vis-à-vis* NATO". A similar view was expressed by Charles Grant, who said, "the general view of governments is that European defence policy is about the Petersberg tasks ... I have not heard anybody argue that the EU should become a collective defence organisation" (Q C85). He also remarked that "the perception of the clause amongst governments is that what matters is NATO's Article 5 rather than this mutual assistance clause ... I think it is desirable that we should help countries that are threatened by attacks ... but the one that people really care about is NATO Article 5" (Q C84). The view of Open Europe was that the clause was "essentially a mutual defence commitment" (p C35).

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

The Solidarity Clause

7.118. Finally, it is worth noting that the Lisbon Treaty also introduces a "Solidarity Clause", according to which the Member States and the Union would offer their assistance to any Member State that was the victim of a terrorist attack or a natural or man-made disaster, at the request of its political authorities. This clause has some defence implications but is dealt with in the section on civil protection (in Chapter 6).

Permanent Structured Cooperation in Defence

7.119. The Lisbon Treaty introduces a new provision allowing for a form of institutionalised cooperation between EU Member States, called Permanent Structured Cooperation. Its exclusive focus is the development of the military capabilities of the Member States, which is "a key UK objective". It should not be confused with the provisions on "enhanced cooperation" in

²⁰⁴ Jean-Claude Piris (2006) *The Constitution for Europe—A legal analysis*, Cambridge University Press, Cambridge, p.161. Mr Piris' analysis is on the mutual assistance clause as it appeared in the European Constitutional Treaty (Article I-41(7)), the text of which is identical to that in the Lisbon Treaty.

the current Treaties (Article 27a–d TEU), which specifically exclude “matters having military or defence implications”²⁰⁵.

- 7.120. As stated in the preamble of the Protocol, the EU should be able to assume fully “its responsibilities within the international community”, including in response to requests from the United Nations which have grown more frequent. Despite efforts to improve the capabilities that Member States can make available to the EU, it has struggled to deploy even modest forces to theatres of operations such as the Democratic Republic of the Congo and Chad. The objective of Permanent Structured Cooperation is to improve these capabilities. As set out in Article 2 of the Protocol, Permanent Structured Cooperation covers a number of different areas, such as investment in defence equipment. The European Defence Agency (EDA) will have a role in contributing to the regular assessment of participating Member States’ contributions with regards to capabilities (Article 3 of the Protocol), reflecting its current role in capability development.
- 7.121. Andrew Mathewson, Head of the Directorate for Policy on International Organisations at the Ministry of Defence, explained that the existing Battlegroups initiative, which provided the EU with a rapid reaction capability, could be considered a form of Permanent Structured Cooperation. The Lisbon Treaty would formalise and build on this initiative by creating specific provisions setting out in detail the conditions of participation, and its objectives and procedures. The new provisions permitted a deepening of cooperation but did not represent a major departure from current practice. Permanent Structured Cooperation was a “device for encouraging nations to do more by way of developing capability” (Mathewson, Q C40). This should serve to improve the military capabilities available to both the EU and NATO.²⁰⁶
- 7.122. Charles Grant thought Permanent Structured Cooperation would be a good thing if it encouraged other Member States to spend more on defence (Q C80). Nick Witney, formerly a senior MoD official and until recently the Chief Executive of the European Defence Agency, believed that Permanent Structured Cooperation could give a “powerful impetus” to the building of better defence capabilities and a stronger defence technological and industrial base in Europe (p C40). He expressed the view that Permanent Structured Cooperation, by introducing a new political dynamic and creating new small-group combinations, could be a “key means for stimulating a more imaginative and energetic Member State input to the increasingly urgent task of raising Europe’s game on defence” (p C40).
- 7.123. New Article 46 TEU sets out the rules for the launching and functioning of Permanent Structured Cooperation. The general rule is that decisions will be taken by QMV, including on launching Permanent Structured Cooperation and on determining the list of participating Member States²⁰⁷. This has provoked concern in some quarters²⁰⁸ that the UK could be either sidelined

²⁰⁵ Government Explanatory Memorandum, para 26.

²⁰⁶ See also evidence given by Secretary of State Des Browne MP and MoD officials to the House of Commons Defence Committee on 8 January 2008, especially Q 318.

²⁰⁷ See the written evidence from the Minister for Europe, Jim Murphy MP, in which he explains the rules on QMV in detail (p S81).

²⁰⁸ For example, Bernard Jenkin MP, *A Defence Policy for the UK: Matching Commitments and Resources*, Conservative Way Forward, London, November 2007.

at the outset if it decides not to participate, or outvoted if it does decide to participate. In evidence to the House of Commons Foreign Affairs Committee, Dr Javier Solana, High Representative for the CFSP, expressed the view that Permanent Structured Cooperation “would be inconceivable without the United Kingdom, which is at the core of our security and defence capabilities ... it will not happen without [the UK]. That is very clear to me”.²⁰⁹ Open Europe expressed concern about the provisions on QMV in the Lisbon Treaty, including those on structured cooperation (pp C37–38), but these concerns were not shared by our other witnesses.

- 7.124. The Government’s view was that the use of QMV in this context was in the interest of the UK since it prevented an individual Member State from blocking the establishment of Permanent Structured Cooperation, from blocking another Member State from subsequently joining, or from blocking the suspension of a non-performing Member State. Capability development amongst EU Member States was a key UK objective and it was “likely that [the UK] would hope to launch [Permanent Structured Cooperation] as soon as practicable after entry into force of the Reform Treaty, in cooperation with other like-minded Member States” (p S82).
- 7.125. The possibility of recourse to QMV will ensure that no other Member State, acting on its own, will be able to veto a subsequent UK application to join. Any decisions regarding the substantive implementation of Permanent Structured Cooperation will be by unanimity of the participating Member States.
- 7.126. **Permanent Structured Cooperation is a form of enabling framework allowing the Member States who so wish to cooperate more closely in the area of defence capabilities development. Permanent Structured Cooperation is not a major departure from current practice. Rather, it represents a continuation and deepening of current forms of cooperation. Its objective is to create a political dynamic among Member States towards the improvement of European defence capabilities. Most of these new capabilities should be available to both NATO and the EU and could therefore serve to strengthen both organisations. While recognising that under Permanent Structured Cooperation some decisions will be taken by qualified majority voting, all decisions of substance will be taken unanimously by the participating Member States. Furthermore, the new Treaties will provide that “national security remains the sole responsibility of each Member State” (new Article 4 TEU).**

Areas where the Lisbon Treaty codifies current practice

- 7.127. The first area of codification is the introduction into the Treaties of a specific legal basis for the European Defence Agency (EDA) (new Article 42 & 45 TEU). The EDA already exists under a CFSP Joint Action, and the Lisbon Treaty will codify what the Agency is doing on the basis of its current mandate. Decisions regarding the EDA are currently taken by unanimity by the representatives of the Member States, apart at present from Denmark, meeting in the EDA Steering Board. The Lisbon Treaty, of itself, will not

²⁰⁹ Q 616, evidence given by Dr Javier Solana, High Representative for the CFSP, to the House of Commons Foreign Affairs Committee, 8 January 2008. *Foreign Policy Aspects of the Lisbon Treaty*, 3rd report of Session 2007–08, HC 120-I.

have an impact on this. However, the Treaty provides that the Council, acting by QMV, will adopt a decision defining the Agency's statute, seat and operational rules.

7.128. The Treaty also codifies the scope of the crisis management operations that can be undertaken by the EU (Q C83). In addition to the types of operations that the EU can carry out under the current Treaties the so-called Petersberg tasks)²¹⁰, new Article 43 TEU introduces into the Treaty the tasks that were agreed by EU heads of state and government in the European Security Strategy of 2003, namely: joint disarmament operations, military advice and assistance tasks, conflict prevention tasks, and post-conflict stabilisation. The Treaty further stipulates that "All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories". This new language also reflects the evolution of practice in UN peace support operations, which the EU is often called upon to support or implement.

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

²¹⁰ The Petersberg tasks set out in current Article 17(2) TEU are: Humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peacemaking.

CHAPTER 8: SOCIAL AFFAIRS

Employment and Social Affairs

What the Treaty does

Social Security “Emergency Brake”

- 8.1. The social security “emergency brake” was one of the Government’s “red lines”. Measures in the field of social security for migrant workers and their dependants are currently adopted by unanimity (Article 42 TEC), but will move to qualified majority voting under the Lisbon Treaty. In order to maintain Member States’ financial autonomy, the UK negotiated an “emergency brake” whereby any Member State is able to request that a proposed measure be referred to the European Council should the Member State believe that it would affect important aspects of its social security system (Article 48 TFEU).

Competence

- 8.2. The Lisbon Treaty states that social policy (as defined in the Treaty) will be an area of shared competence between the Union and the Member States (Article 4(b) TFEU). The Union has a duty to take measures to ensure coordination of the employment policies of the Member States (Article 5(2) TFEU) and it may take initiatives to ensure coordination of Member States’ social policies (Article 5(3) TFEU). These provisions clarify rather than extend the current situation, which is outlined in Articles 3(1)(i), 3(1)(j) and 136–145 TEC. For a further discussion of competences, see Chapter 2.

Social Dialogue

- 8.3. Article 152 TFEU introduces a specific reference to social partners as such, social dialogue and the Tripartite Social Summit²¹¹. The TEC refers to consultation of, and dialogue between, management and labour (Article 138 TEC).
- 8.4. Article 137(3) TEC currently provides that a Member State “may entrust” management and labour, at their joint request, with implementing Directives adopted in the specific areas laid down in Article 137 TEC. By way of an amendment to the current Article 137(3) TEC (Article 153(3) TFEU), this possibility is extended to Council Decisions codifying agreements reached between the social partners under Article 139 TEC, which becomes Article 155 TFEU.

²¹¹ The “social partners” are representatives of management and labour. Council Decision 2003/174/EC of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment (OJ L 70, 14.3.2003, pp.31–33) formalised the annual summit process, which has now been explicitly recognised in the Treaty.

Coordination and monitoring

- 8.5. In the areas referred to in Article 156 TFEU²¹² (Article 140 TEC), the Commission's possible actions are clarified as relating in particular to "initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation". Declaration 31 on Article 156 TFEU confirms that the policies described in Article 156 fall essentially within the competence of the Member States.

The Charter of Fundamental Rights

- 8.6. As regards the Charter of Fundamental Rights, see Chapter 5.

*Evidence**Social security "emergency brake"*

- 8.7. The Department for Work and Pensions (DWP) noted that experience would be required to gain a full appreciation of how the social security "emergency brake" would work in practice but the DWP indicated its belief that the mechanism maintained the UK's ultimate control over any changes to social security measures for migrant workers (pp G26–27).

Competence

- 8.8. The Federation of Small Businesses (FSB) expressed the view that Article 2 (sections 1, 2 and 3) of the TFEU passed control of employment policy to the EU. They regarded this supposed development with apprehension in the light of their view that the developing body of EC employment law had created regulations and restrictions that were both costly and complex, which had reduced flexibility, had borne disproportionately upon small businesses and had ignored the principle of subsidiarity. The FSB cited problems surrounding the Working Time Directive as evidence that Community legislation was difficult to amend once it was in place even if problems had arisen from it (pp G30–31). In fact, as is made clear in Chapter 2 of this report, Article 2 of the TFEU (together with Articles 3 to 6) sets out for the first time a description of the categories of competence. It implies no extension of EU competence in the field of employment.

Social dialogue

- 8.9. The DWP believed that the reference to the social partners, social dialogue and the Tripartite Social Summit simply provided a Treaty base for the formal meetings that had taken place on the eve of European Councils since 1997 between the Council Presidencies, the two subsequent Presidencies, the European Commission and the European "social partners" (pp G26–27).
- 8.10. The National Farmers Union (NFU) welcomed the principle of tripartite dialogue but believed that the impact of such dialogue on labour relations in the agricultural sector was, at best, "marginal" (p D15). Dr Richard Parrish (Centre for Sports Law Research, Edge Hill University), on the other hand,

²¹² Employment, labour law & working conditions, basic & advanced vocational training, social security, prevention of occupational accidents & diseases, occupational hygiene and the right of association & collective bargaining between employers and workers.

suggested that the expanded provisions on social dialogue could provide a mechanism through which discussions of European sports' issues with the social partners could be conducted, and legal conflicts mitigated (pp G33–34).

- 8.11. The FSB regretted that, whilst recognising and promoting the role of the social partners, the Lisbon Treaty did not give any status to small businesses, “even though 99% of EU businesses are SMEs whose needs are crucial, but who are denied a voice” (pp G30–31).
- 8.12. As regards small business involvement in the social dialogue, we recommended in our 2007 EU labour law report that “the Government should support UK small business organisations in finding means to ensure that social dialogue in the EU includes a wider representation of interests, in particular representatives of the small business sector.”²¹³ In response, the Government noted that the European level organisation representing SMEs, UEAPME, has recognised Social Partner status but the Government remains “unaware of any intentions by UK small business organisations to join UEAPME”²¹⁴.

Coordination and monitoring

- 8.13. Monika Mura (Department of Politics, University of Bristol) considered that the clarification that the Commission would coordinate the exchange of best practice and the monitoring of progress in various aspects of employment policy was unlikely to have a significant impact. She stated that this provision should be seen against the wider background of the EU economy and the fact that any type of coordinated intervention to tackle unemployment was subject to the rules of economic and monetary union (pp G32–33). The DWP considered that this clarification reflected the existing practice of the Open Method of Coordination²¹⁵ (pp G26–27).

Conclusions

- 8.14. **The “emergency brake” negotiated by the UK Government as regards social security measures for migrant workers and their dependants is significant and we are satisfied that, if required, it will achieve the purpose for which it is designed.**
- 8.15. **The increased emphasis on social dialogue is also significant, but we are concerned that there is insufficient involvement of UK small business. We trust that UK small business organisations along with their colleagues in Brussels can resolve this matter to their mutual satisfaction and thereby ensure the proper involvement of the UK small business sector.**

²¹³ Paragraph 200, European Union Committee, 22nd Report (2006–07): *Modernising European Union labour law: has the UK anything to gain?* (HL 120)

²¹⁴ Page 11

www.parliament.uk/documents/upload/Pat%20Mcfadden%20to%20Lord%20Grenfell%20pb2809.pdf

²¹⁵ The Open Method of Coordination was a methodology agreed by the Lisbon European Council in March 2000. In a relatively informal manner, the Member States agree to share best practice and then to set common objectives and common indicators to assess the achievement of those objectives.

Education, Vocational Training and Youth

What the Treaty does

- 8.16. As regards youth policy, an addition to the 5th indent of Article 165(2) TFEU (formerly Article 149(2) TEC) states that Community action shall now also be aimed at encouraging the participation of young people in democratic life in Europe. This links to the new provision on democratic principles in Articles 9–12 TEU and, in particular, to Article 10(3) TEU on participation in the democratic life of the Union.
- 8.17. Under Article 3(3) TEU, as amended, the Union shall promote the protection of the rights of the child. Also of relevance to education and to rights of the child are the new horizontal Articles 9 and 10 TFEU relating to adequate social protection, the fight against social exclusion, a high level of education and training, and the combating of discrimination based on age as well as sex, racial or ethnic origin, religion or belief, disability or sexual orientation.
- 8.18. The Council will be able to adopt Recommendations in the field of vocational training (Article 166(4) TFEU).

Evidence

Youth Policy

- 8.19. The Department for Innovation Universities and Skills (DIUS) and the Department of Children Schools and Families (DCSF) stated simply that the addition regarding the participation of young people in democratic life in Europe built on activity already undertaken by mutual agreement under the Open Method of Coordination (pp G25–26). Monika Mura indicated that it might provide an additional source of funding with which to finance relevant UK programmes (pp G32–33). Louise King of Save the Children suggested that the UK Government could use its positive experience with the *Every Child Matters* agenda²¹⁶ to show the EU institutions how it was possible to engage children in policy-making (Q G22).
- 8.20. The DIUS and the DCSF noted that the inclusion of rights of the child in Article 3(3) TEU was a departure from the current Treaties. The Departments pointed out that the UK had ratified the United Nations Convention on the Rights of the Child (UNCRC), with some reservations on migrant children and juvenile justice (pp G25–26).
- 8.21. Kathleen Spencer Chapman of the NSPCC concluded that “the Treaty is a step forward for children” (Q G2) and NSPCC *et al*²¹⁷ judged that the new Article 3(3) TEU was the most significant change for children’s rights introduced by the Lisbon Treaty. They noted that this did not create new powers for the EU but, in other policy areas, it would enable actions to be taken specifically to protect children’s rights. As part of this process, a child rights impact analysis of EU policies could be undertaken (pp G1–2).

²¹⁶ <http://www.everychildmatters.gov.uk/>

²¹⁷ Joint submission by NSPCC, Save the Children, Barnardo’s, NCH, 4 Children, the Children’s Society, National Children’s Bureau and the Children’s Rights Alliance for England

- 8.22. Ms King explained that the lack of a formal objective encompassing children's rights meant that other considerations had taken precedence when drawing up EU legislation in the past. She cited a number of examples, including the Dublin II Regulation²¹⁸ which had caused problems in relation to children separated from their families (Q G3). Ms Spencer Chapman noted that the European Parliament was proposing to set up an internal unit to coordinate actions for children's rights "in accordance with the Lisbon Treaty". This indicated, she judged, "that, without this Treaty, it is very unlikely that this kind of unit or coordinating mechanism could be set up to make sure that children's rights are better integrated" (Q G3).
- 8.23. Both Ms Spencer Chapman and Ms King expressed the view that the inclusion of children's rights in the TEU would help to ensure that issues such as arrangements for children in institutional care were taken into account during accession negotiations (QQ G9–10).
- 8.24. Ms Spencer Chapman also drew attention to the horizontal Articles 9 and 10 TFEU because "children and young people are vulnerable to the effects of poverty and social exclusion, they are vulnerable to discrimination and public health, and education issues, of course, impact on children" (Q G8). She felt that these Articles might help to avoid difficult battles in the future similar to that required to exclude social services from the scope of the Services Directive²¹⁹.
- 8.25. According to the NSPCC *et al*, a specific EU policy area of relevance to the protection of children is Freedom, Security and Justice. They stated that child trafficking and sexual exploitation of children are already dealt with in EU activities to combat cross-border crime, but the Lisbon Treaty will help to make sure that a stronger children's rights perspective is integrated in these activities (pp G1–2). See Chapter 6.

Vocational Training

- 8.26. The DIUS and the DCSF considered that the Council's new power to adopt Recommendations on vocational training was a change of legislative procedure and not substance, aligning Articles 165 and 166 TFEU with each other. Recommendations are not binding upon Member States (pp G25–26).

Education

- 8.27. The DIUS and the DCSF had some concerns about the potential impact of the provisions in the Charter on the right to education. See Chapter 5.

Conclusions

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

²¹⁸ Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.02.2003, p. 1)

²¹⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p.36–68)

- 8.29. **The new Articles 9 and 10 TFEU may be of particular assistance to children.**
- 8.30. **The inclusion in the Treaty of a specific provision on the participation of young people in democratic life in Europe does not amount to a significant extension of EU competence beyond action that is already taking place.**
- 8.31. **The new provision relating to vocational training does not amount to a significant extension of EU competence.**

Sport

What the Treaty does

- 8.32. The Lisbon Treaty introduces sport as a new area of EU competence (Article 165 TFEU). The Treaty emphasises that the Union must take account of the specificity of sport and its social and educational function. According to Article 6(e) TFEU, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of Member States in this policy area. Any harmonisation of the laws and regulations of the Member States is excluded by Article 165(4) TFEU.
- 8.33. Sport is a policy area that has been developing at the EU level over several years. A non-binding Declaration was annexed to the Amsterdam Treaty in 1997²²⁰ and the December 1999 Nice European Council adopted conclusions giving a mandate for sport to be examined at Community level²²¹. The European Commission issued a White Paper on Sport²²² in July 2007.

Evidence

The special nature or “specificity” of sport

- 8.34. The CCPR (Central Council for Physical Recreation) expressed the view that “sport desperately needs to have its status within EU law clarified” (pp G9–10). They argued that the “specificity” of sport related to the need, because of its special nature, for sport to have partial exemptions from some of the general principles of Community law, such as free movement and competition. The CCPR referred to a range of ECJ rulings that have, on the one hand, accepted the “autonomy” of sport governing bodies and the “specificity” of sport but, on the other, applied principles of Community law equally to sport as they might be applied to other sectors. In *Meca Medina*²²³, the ECJ ruled that sporting cases must be ruled on a case-by-case basis, a position which does not assist in clarifying the position of sport with respect to EC law.

²²⁰ Treaty of Amsterdam—Declarations adopted by the Conference—Declaration (No. 29) on sport (OJ C 340, 10.11.1997, p. 136).

²²¹ Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies:
http://ec.europa.eu/sport/action_sports/nice/docs/decl_nice_2000_en.pdf

²²² White Paper on Sport, COM (2007) 391 11.07.2007.

²²³ Case C-519/04P *Meca Medina v Commission*, ECR 2006, p. I-6991.

- 8.35. A number of examples of sport-related ECJ judgments were cited by witnesses. James MacDougall (European and International Officer, CCPR) referred to the *Koch and Walgrave* case²²⁴, where the ECJ ruled that the formation of national teams was purely a matter of sporting interest to which the free movement rules of the Treaty did not apply (Q G29). In *Meca Medina*, it was established that drugs bans did not impinge on the freedom to provide a service (pp G9–10). Dr Parrish cited the *Bosman* judgment²²⁵ as an example of the “insensitive application of EC law to sporting contexts” (pp G33–34). In that case, restrictions on the number of non-nationals playing in a club team within a Member State were ruled to be in contravention of the Treaties. On the other hand, he explained, in *Meca Medina*, the Court established a methodology for applying competition law to sport, allowing rules inherent to sport to be removed from the scope of EU competition law.
- 8.36. In the light of the case-law, both the CCPR and Dr Parrish emphasised that an EU legal base for sport would allow the ECJ and the other European institutions to recognise the “specificity” of sport more systematically than had been the case thus far (pp G9–10, G33–34). Dr Parrish explained, “it can be envisaged that the Treaty Article could be invoked in the context of justifying measures otherwise contrary to free movement or competition law”.

The autonomy of sport

- 8.37. Mr MacDougall explained the concept of “autonomy” and its close link with “specificity”: sporting organisations should “have the autonomy to actually choose how they want to develop their sport for the good of the sport as well, and without the specific nature within EU law, they do not have that and they do not have the guarantees to actually do that” (Q G31). By way of example, were the EU to recognise the specificity of sport, he explained, the EU would be able to permit home-grown player quotas (the issue at the heart of the *Bosman* ruling) and therefore sporting organisations would have the autonomy to be able to regulate their sports in the interests of securing vibrant international competition between countries and between clubs (Q G32). He emphasised that the issue of quotas applied to sports ranging from football to chess (Q G34).
- 8.38. The British Olympic Association (BOA) were not convinced that “autonomy” was sufficiently protected in the Treaty, since there was no reference to the autonomy of sports organisations in the revised articles. According to the BOA, “this could, potentially, have far-reaching implications for sporting organisations” (pp G16–17). They cited the President of the International Olympic Committee, Jacques Rogge, who explained that “sport can play its unique role thanks to its autonomy, and this role would be seriously compromised if the governing bodies of sport are subject to public interference” (pp G16–17).

Funding for sport

- 8.39. Another important issue is that of providing a legal base to support funding streams specific to sport. The Department for Culture, Media and Sport

²²⁴ Case 36–74 *Koch and Walgrave v International Cycling Union and others*, ECR 1974, p. 1405.

²²⁵ Case C-415–93 *Belgian Football Association v Bosman*, ECR 1995, p. I-4921.

(DCMS) stated that the Treaty would provide the basis for a dedicated EU budget line (pp G23–24). In one case, referred to by Dr Parrish, the ECJ did in fact annul a Commission decision on grants due to a lack of a legal base²²⁶ (pp G33–34), and the CCPR noted that the current lack of a dedicated sport funding stream meant that “sporting projects must be sculpted to meet other aims and not developed for sport’s sake” (pp G9–10). As an example, Richard Hanson (Head of Policy, CCPR) mentioned a case in Austria and the Czech Republic, where “they managed to pull together a Nordic skiing centre based on a funding stream directed at tourism” (Q G40).

Coherent sport policy and the role of sport in society

- 8.40. Dr Parrish felt that the Lisbon Treaty served to establish “a formal rolling institutional agenda to replace the informal, and legally questionable, activity of the institutions in sporting contexts. The formalisation of that agenda is likely to lead to increasing coherence and continuity in European sports policy and enhance the visibility of sport in EU policy making” (pp G33–34).
- 8.41. Mr Hanson gave two recent examples of EU legislation that might have led to unintended consequences for the sport sector. First, the Temporary Work at Height Directive²²⁷ would, if applied to rock climbing instructors as was initially proposed, have forced instructors to teach according to an industrial ropes method rather than the normal climbing procedures, which are considered safer. Second, the Bathing Waters Directive²²⁸ concerning the cleanliness of bathing waters would, if applied to sailing, rowing and yachting as was proposed, have meant that rowing would not have been possible on the River Thames (Q G30).
- 8.42. The DCMS argued that the competence would enable the Commission to develop a sports programme, following on from the White Paper on Sport, and that sport was likely to be taken into greater consideration when developing other relevant policies such as health and education (pp G23–24). DCSF was of the view that the new Treaty provision was valuable in promoting the health and education of young people (pp G25–26).
- 8.43. The broader function of sport was highlighted by other witnesses too. Dr Parrish referred to the Declaration that was annexed to the Amsterdam Treaty, which emphasised “the social significance of sport, in particular its role in forging identity and bringing people together” (pp G33–34). The BOA described sport as “the biggest social movement in Europe”, noting that it “accomplishes important societal tasks in the fields of integration, education and health” (pp G16–17). The wider benefits brought by sport were due in part to grassroots sports. Indeed, the CCPR considered that the Commission needed to appreciate better “the link between professional and grassroots sports” (pp G9–10).

²²⁶ C-106/96, *Commission v UK*, ECR 1998, p. I-2729. Case regarding the legality of budgetary appropriations for measures with no legal base in the area of social exclusion.

²²⁷ Directive 2001/45/EC of the European Parliament and of the Council of 27 June 2001 amending Council Directive 89/655/EC concerning the minimum safety and health requirements for the use of work equipment by workers at work (OJ L 195, 19.7.2001, p. 46–9).

²²⁸ Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ L 31, 5.2.1976, p. 1–7).

Restrictions on Union action

- 8.44. The CCPR emphasised that the Union would only have competence to take actions that supported, coordinated or complemented Member States' actions (pp G9–10) and the DCMS stated that “activity in this area ... can be supported only where clear value is added to existing national policy” (pp G23–24).

Conclusions

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

*Culture**What the Treaty does*

- 8.50. Culture is already a Community competence by virtue of Article 151 TEC and will remain so under Article 167 TFEU. Any harmonisation of the laws and regulations of the Member States continues to be excluded. The Lisbon Treaty (Article 167(5) TFEU) states that the Council should take decisions on culture under QMV rather than by unanimity. This represents a removal of the national veto.
- 8.51. In the past, EU action in the field of culture has included the development of funding streams such as the Culture Programme, which runs from 2007–13 and is the successor to Culture 2000. The majority of this Programme supports cross-border cooperation, an example of which has included EU-wide information sharing among music ensembles dedicated to the development of new electronic technologies in the field of music²²⁹.

Evidence

- 8.52. The DCMS noted that the impact of the Treaty change was that no single Member State would be able to veto European Union initiatives on cultural programmes. This would have the positive effect of simplifying the decision-

²²⁹ http://ec.europa.eu/culture/eac/culture2000/pdf/projets2005/PA_A2_2005.pdf

making process in an area that had consistently proven to be in the UK's interest (pp G23–24).

- 8.53. The DCMS emphasised that culture remained an issue to be dealt with in individual Member States but the EU was able to develop programmes such as the Culture 2000 Programme and its successor, which had been beneficial to UK cultural organisations (pp G23–24).

Conclusion

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

Public Health

What the Treaty does

- 8.55. An addition to the first paragraph of Article 152(4) TEC (Article 168(4) TFEU) provides that measures should be adopted in the area of public health “in order to meet common safety concerns”. This represents a restriction on Union action because the existence of common safety concerns will now have to be clear.
- 8.56. Under the Lisbon Treaty, it will be possible for the Union to seek to harmonise standards of quality and safety in relation to medicinal products and devices (Article 168(4)(c) TFEU). It should be noted that measures have already been adopted in this area relying on the internal market legal base²³⁰.
- 8.57. The Union will be able to adopt “incentive measures” in relation to cross-border health threats, tobacco and alcohol abuse (Article 168(5) TFEU). Such “incentive measures” should not seek to harmonise the laws and regulations of the Member States. Action along these lines has already been undertaken through, for example, the EU Strategy to support Member States in reducing alcohol-related harm²³¹ and the Green Paper “Towards a Europe free from tobacco smoke: policy options at EU level”²³².
- 8.58. A reference to “mental health” is introduced into the Treaty by replacing the phrase “human health” with “physical and mental health” (Article 168(1) TFEU).
- 8.59. Article 168(7) TFEU expands the current Article 152(5) TEC concerning the limits of the EU's role in the field of public health. With reference to the provision that Member States will be responsible for the definition of health policy and the delivery of health services, the Article now specifically states that the responsibilities of the Member States shall include the management of health services and medical care and the allocation of resources assigned to them.

²³⁰ Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ L 169, 12.7.1993, p. 1–43).

²³¹ COM (2006) 625, 24.10.2006.

²³² COM (2007) 27, 30.1.2007.

Evidence

- 8.60. The Department of Health considered that the changes to Article 152 TEC (Article 168 TFEU) “will not change the role of the EU institutions, the UK Government or interested stakeholders in relation to the formation of policy” in the new areas of health introduced (pp G24–25). The DH felt that the wording of Article 168(7) TFEU provided clarity with regard to the role and responsibilities of Member States (pp G24–25).
- 8.61. The DH warned, however, that harmonised requirements which affected the provision of health services might be generated under other existing articles of the Treaty. By way of example, the ECJ had been active recently in relation to patient mobility and, as a result, European Commission proposals on cross-border health services were expected shortly (pp G24–25).

Conclusions

- 8.62. **The Lisbon Treaty strengthens the provision on the limits of EU action in the field of public health policy. However, in practice, the application of this provision could be influenced by differing perceptions across the EU of the scope of public health policy.**
- 8.63. **The new measures on which action can be taken do not represent an extension of EU competence beyond action that is already taking place. However, the explicit reference to mental health in the Lisbon Treaty is significant, reflecting the importance of the issue and the work undertaken on it by the European Commission and Member States.**

Consumer Protection*What the Treaty does*

- 8.64. The Lisbon Treaty states that consumer protection will be an area of shared competence between the Union and the Member States (Article 4(f) TFEU). This is a clarification of the current situation.
- 8.65. The existing Article 153(2) TEC, which provides that consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities, is given greater prominence as the new Article 12 TFEU.

Evidence

- 8.66. Malcolm Harbour MEP (a member of the European Parliament’s Internal Market and Consumer Protection Committee) recalled that consumer protection had now been specifically singled out as an area of shared competence between the EU and the Member States (Q B1). Mr Harbour expressed his contentment that consumer protection was now much more clearly identified in the Treaty (Q B11).
- 8.67. The Department for Business, Enterprise and Regulatory Reform (DBERR) stated that there were no significant changes to the consumer protection provisions of the Treaty (pp G21–22).

Conclusion

8.68. **The new prominence given to consumer protection by the Lisbon Treaty is of limited significance.**

CHAPTER 9: FINANCE AND THE INTERNAL MARKET

Finance

- 9.1. We identified certain financial provisions of the Treaty of Lisbon which warranted investigation, and took evidence from Angela Eagle MP, Exchequer Secretary to the Treasury, on these. The principal items are the multi-annual Financial Framework²³³ and annual budget, contributions to the Common Foreign and Security Policy Start-Up Fund, the Protocol on the Eurogroup, and the sharing of the financial implications of migration flows.

The EU Budget

- 9.2. The Minister said that the Lisbon Treaty would not “introduce changes to the means by which the European Union is funded or the size of the UK’s contributions” (Q A3). She confirmed that changes to the Own Resources Decision would require ratification by a vote in both Houses of Parliament²³⁴.
- 9.3. The size of the Budget is not changed by the Treaty. But the concept of compulsory expenditure²³⁵ has been removed in Article 314 TFEU. As a consequence, the European Parliament has a stronger role in the annual Budget process as it will no longer be excluded from examination of budget areas that hitherto formed part of the compulsory expenditure. For discussion of the significance of this, see Chapter 10. The Minister welcomed the fact that all of the institutions would be able to scrutinise all parts of the Budget (Q A21).
- 9.4. The Minister informed us that the UK Government had also “argued quite strongly” for the inclusion of Article 312 TFEU, which provides the Treaty basis for the multi-annual Financial Framework (Q A19). The Government were content that the formalisation of the Framework would not preclude adjustments to budget ceilings if such a change was necessary due to unexpected budget items.

Other expenditure

- 9.5. We have examined the provisions within the Lisbon Treaty for expenditure outside the normal budget process. Article 41 TEU introduces a “Start-Up Fund” for Member State contributions to the Common Foreign and Security Policy²³⁶. We noted concerns that the amounts paid to the Fund will be decided by QMV (as opposed to unanimity as at present) although the establishment of the Fund itself will be subject to unanimity. The Minister stated that the Government did not expect a “huge financial drain” from this Article and that any contributions would be discussed, agreed and budgeted

²³³ The multi-annual Financial Framework is an existing budget mechanism which sets ceilings for EU spending over a 5–7 year period.

²³⁴ The Own Resources Decision is the agreement between Member States which sets the size and nature of the contributions to the EU Budget. The change to the Decision, agreed at the European Council in June 2007, was given effect by the European Communities (Finance) Act 2008.

²³⁵ Expenditure whereby the underlying principle and the amount are legally determined by the treaties, secondary legislation, conventions, international treaties or private contracts.

²³⁶ The Policy is examined in detail in Chapter 8. The start-up fund will be for preparatory activities for tasks as referred to in Articles 27(1) and 28 TEU, and will vary in size for each action it is used for.

for well in advance of the use of the Fund (Q A7). The Minister also stated that the Start-Up Fund would not be used instead of funding from the Foreign Policy lines in the main EU Budget.

- 9.6. We are concerned that the Government do not expect monies paid into the CFSP Start-Up Fund to be audited as a matter of course (Q A8). We would support the Government if it were to argue for prior agreement on financial management and audit procedures for the Start-Up Fund (QQ A12–14).
- 9.7. The amendments made to Article 78(3) TFEU remove the six-month limit on measures introduced to benefit a Member State suffering from an emergency situation due to a sudden inflow of nationals of third countries. The Minister explained that as the Article referred to “provisional” measures, these would be legally required to be time-limited (QQ A15–17). The Minister confirmed that the UK had an opt-out from Article 80 TFEU, which requires Member States to share financial implications of actions taken under the Chapter on Border Checks, Asylum and Immigration²³⁷ (Q A18).
- 9.8. Article 213 TFEU gives the Council power to grant urgent financial assistance to a third country without consulting the European Parliament. This is existing practice which has taken place until now under Article 308 TEU.

Trade Policy

- 9.9. Trade Policy is expanded in the new Article 207 TFEU and, in a reflection of current practice, international negotiations on trade in services, intellectual property and foreign direct investment are included in the Community competence. The Treaty, however, makes clear that unanimity will still apply when the Council considers the negotiation and conclusion of agreements on these matters. There is also a new requirement upon the Commission to report to the European Parliament on the progress of negotiations.

The Eurogroup

- 9.10. The Protocol on the Eurogroup grants recognition to the meetings of Finance Ministers of Eurozone Member States usually held informally before meetings of ECOFIN. The Minister noted that the Protocol described the Eurogroup as an “informal grouping” and that it narrowed the Group’s scope for “mission creep”; she did not see the grouping as a threat to ECOFIN now or in the future (QQ A22–25, A33–34).

Other measures

- 9.11. We also note changes to the Articles relating to the Broad Economic Policy Guidelines and the Stability and Growth Pact and the formal inclusion, for the first time, of the Union’s institutions, offices, bodies and agencies in anti-fraud provisions. We do not expect the changes to have any significant impact on the operation of these policies. Other minor changes to the budget procedure largely reflect current practice and consequently we do not expect them to have significant impact²³⁸.

²³⁷ The UK will be required to contribute “small administration costs” (Q A18).

²³⁸ The changes are a revision of Article 273 TFEU setting out the procedure if the budget has not been agreed by the start of the financial year, and changes to Article 284 TFEU which now notes the shared role

Conclusion

- 9.12. **The formalisation of the Eurogroup has historical significance but no impact on the operation of ECOFIN. We are content that the Lisbon Treaty has no significant impact in the area of financial affairs or trade policy²³⁹.**

*Internal Market and Competition**Background*

- 9.13. Unlike the current TEC, the TFEU would not include a commitment to undistorted competition in its principles or objectives. During the negotiations it was decided that the words “free and undistorted competition”, which had been part of the Constitutional Treaty, should be removed from the draft text of the Treaty. It was agreed to include a reference to “ensuring that competition is not distorted” in a Protocol on the internal market and competition.
- 9.14. The rules on competition contained in previous treaties would be unchanged by the Lisbon Treaty. Articles 101–103 of the TFEU are the same as Articles 81–83 of the TEC. They give the EU power to legislate to combat practices “which have as their object or effect the prevention, restriction or distortion of competition”.

Distorted competition?

- 9.15. Some of our witnesses expressed concern about the implications of the commitment to free competition being moved to a Protocol. Lord Leach of Fairford described the move to the Protocol as a “symbolic downgrading” which he feared may open “new avenues for legislation” (Q S47). Malcolm Harbour MEP raised a concern that this potential downgrading might be reflected in future European Court judgments (Q B6).
- 9.16. Other witnesses stated that moving the commitment to undistorted competition to the Protocol was of no significance. The Commission argued that the recasting of the legal format “does not change anything”, and that the Commission’s competition powers would not be affected (Q B51). Lord Brittan of Spennithorne made a similar point (Q S381). The Government supported that sentiment. They stated that the Protocol, which has the same legal status as the Treaties, would not result in a change to UK or EU competition policy (p B22).
- 9.17. Sir Stephen Wall, in response to the question of why the commitment to undistorted competition had been moved, said, “Whether there was a more nefarious intent behind it, I do not know. But if there was, then I think it has been negated by the Protocol” (Q S232).

Conclusions

- 9.18. **We would be concerned if any possible symbolic downgrading were translated into efforts to depart from the principles of free**

of the Commission and Member States (who previously were not mentioned) in the discharge of the Union budget.

²³⁹ The impact on employment law is considered in Chapter 8.

competition that have formed the cornerstone of the internal market. However, Article 51 of the TEU gives equal weight to the Treaty Articles and Protocols and Articles 81–83 of the TEC will remain the same as Articles 101–103 of the TFEU. Therefore, the change does not appear to be significant.

Intellectual Property

Background

- 9.19. The Treaty of Lisbon contains some specific provisions on intellectual property (IP). Most significantly it adds a new Article 118 to the TFEU which provides for the creation of EU IP rights under the ordinary legislative procedure.
- 9.20. The history of European IP rights is a long and complex one. Currently there exist a number of European (although not necessarily EU) rights. Community trade marks and Community design rights already exist. There is also a system allowing a “basket” of national patents to be acquired through a single application to the European Patent Office in Munich. This system centralises the process for acquiring patents in several European countries but does not provide a single European patent. This is a crucial difference when a patent is challenged as each national patent can be challenged individually before the relevant national court. It has been argued for some time that a Community patent with a single or coordinated point of redress would be beneficial to the Single Market but this has yet to be achieved. This report does not look in detail at these issues but simply at what impact the Treaty of Lisbon might have on them.

New legal base

- 9.21. Witnesses have argued that although the new Article 118 provides a specific mandate for the creation of IP rights, it is simply restating the existing situation. Legislation on Community trade marks and design rights was created under Article 308 of the TEC. Professor Chalmers stated that “This is another area where there is codification. Since 1997, there has been legislation on intellectual property rights and the court has interpreted those. It did that under a single market jurisdiction” (Q S29). In addition, Article 229A of the current TEC states that the EU will have the power to “confer jurisdiction, to the extent that it shall determine, on the Court of Justice in disputes relating to the application of acts adopted on the basis of this Treaty which create Community industrial property rights”²⁴⁰.
- 9.22. Malcolm Harbour MEP suggested that the inclusion of this new article was more significant than simply a recasting of existing powers. It was a “major step forward” as “over the next 12 months we may actually see a rather more focused political priority given to this crucial piece of legislation” (Q B8). Kevin Mooney of Simmons & Simmons noted that the creation of a Community patent had already been made a priority in the Lisbon Agenda²⁴¹ (Q B44) but this had not resulted in a draft regulation for a Community patent being agreed.

²⁴⁰ Industrial and intellectual property rights are synonymous (Q B49).

²⁴¹ An EU agenda for economic growth and employment, not to be confused with the Lisbon Treaty.

QMV and language issues

- 9.23. One aspect of the new Article 118 is that it would move measures to create IP rights into ordinary legislative procedure, whereas Article 308 of the TEC required unanimity. Although at face value this would appear to be a potentially significant alteration of powers, Kevin Mooney argued that in practice it would have no effect in the context of the proposed Community patent. The issue on which previous Community patent negotiations have failed is language arrangements, i.e. which claims of the Community patent need to be translated into which official languages and the legal effect of such translations. Article 118 would keep these arrangements subject to unanimity. Mr Mooney went on to say that even if language arrangements were subject to QMV, in practice unanimity would still be required on these issues (Q B40).

Conclusions

- 9.24. **The new Article 118 of the TFEU is a restatement of existing powers. Although the Treaty of Lisbon would not confer addition IP powers on the EU, it marks a statement of political intent and a commitment to achieving the Community patent. The move to QMV, in itself, is not significant.**

Energy

Background

- 9.25. The Treaty of Lisbon gives the EU a clearer and more explicit competence in energy policy. Article 4 of the TFEU notes that energy policy is a shared competence.
- 9.26. The addition of a new Title on energy, which includes a new Article 194 TFEU, places energy within the context of the internal market and of protecting the environment. It also moves energy policy into the ordinary legislative procedure. The aims of the EU energy policy are to be to:
- ensure the functioning of the energy market;
 - ensure security of energy supply in the Union;
 - promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
 - promote the interconnection of energy networks.
- 9.27. Article 194(2) states that the new Article “shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choices between different energy sources and the general structure of its energy supply”.
- 9.28. A further reference to energy is made in the amended Article 122 of the TFEU which allows the Council to enact measures in “a spirit of solidarity” if severe difficulties of supply arise, particularly within the energy sector.

New competences?

- 9.29. Witnesses argued that the EU had had influence on energy policies for some time through single energy market and environmental legislation (AEP

p B18, Professor Chalmers QQ S42–43, BERR p B25). The Commission had brought forward proposals in all these areas, even without a specific legal basis in respect of energy, by using other provisions in the TEC. Similarly, it was argued that the inclusion of energy in the list of shared competences “does not significantly change the balance” between Member States and the EU (BERR p B25).

Solidarity

- 9.30. The new Article 122(1) of the TFEU states that “without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between member states, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy”. Apart from the specific reference to energy, this reflects the current Article 100(1) of the TEC. Article 2 of the TEC also already includes the task of promoting solidarity between Member States.
- 9.31. The Association of Electricity Producers argued that this new clause “reflects concern ... about energy dependency on external suppliers” (p B20). We also received evidence that thanks to the solidarity clause the EU would be better configured to send a strong message when Member States’ energy supply was threatened (Business for New Europe p B21). The Government stated, however, that it was not yet clear what difference the solidarity clause would make in practice (p B25).

A political gesture?

- 9.32. BERR argued that rather than being an attempt to increase the powers of the EU in this area, the amended articles represented a recognition of “the growing importance of energy as a political and economic issue in the EU and of the connected policy areas of climate change, sustainability and the environment” (p B25).

Conclusions

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

Services of General Interest

Background

- 9.35. The issue of how and by whom Services of General Interest (SGIs) should be provided has been the subject of much discussion. The Services Directive makes a distinction between Services of General Economic Interest (SGEIs) and Non-Economic SGIs. SGEIs are services which fulfil the criteria of being of general interest and subject to public service obligations but which are also offered on the market. The provision of energy is an example of such a

service. Non-Economic SGIs are services provided or commissioned by the state which may not be available on the market in the same way as SGEIs, such as education. Under the Services Directive SGEIs are subject to competition rules whereas Non-Economic SGIs are exempt. What the Services Directive does not do is lay out in detail which services should be considered of economic interest and which are non-economic. This ambiguity has caused an ongoing debate about whether a clarifying framework should be set out or whether the precise distinction should evolve on a case by case basis.

- 9.36. The Treaty of Lisbon makes reference to SGIs in two principal areas. Article 14 TFEU describes the role of the EU in ensuring that such services are provided and enables the EU to legislate to establish the principles and conditions that should regulate their provision; and the Protocol on Services of General Interest emphasises “the essential role and the wide discretion of national, regional and local authorities” in the provision of SGIs.

SGEs and Non-Economic SGIs

- 9.37. The provisions of the TFEU and the Protocol reflect the existing ambiguity between SGEIs and Non-Economic SGIs. Professor Michael Waterson of Warwick University stated that “with Services of Non-Economic General Interest I think the position is quite clear, that is left up to the individual states. It is where we come to Services of General Economic Interest that matters become more complex ... Some nations within the Community take the view that particular services should be provided through a market mechanism, others would be rather antipathetic to that” (Q B13, see also Harbour Q B1).

The Treaty and the Protocol

- 9.38. We have considered why provisions relating to SGIs have been split across the TFEU and the Protocol. BERR said that “No particular significance should be attached to the references to SGEIs being split between the Treaty itself and the Protocol ... Article 14 gives the EU greater powers to put in place EU-level legislation on SGEIs, however it is balanced by the Protocol, which underlines the primary role of Member States in organising SGEIs on their territory” (p B23).

New competences?

- 9.39. One thing that witnesses all agreed on was that, because the TFEU maintains the ambiguity about which services are SGEIs and which are non-economic, there is no “fundamental change of direction emerging from the Treaty” (Harbour Q B1).

Conclusions

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

Tourism

What the Treaty does

9.42. The Lisbon Treaty introduces a new Article 195 TFEU enabling the Union to complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of the businesses involved. In the current Treaty, “measures in the sphere of tourism” are foreseen (Article 3(1)(u) TEC), as provided in the Treaty, but there is no further reference.

Evidence

- 9.43. The DCMS suggested that the recent Commission Communication, “Agenda for a sustainable and competitive European Tourism”²⁴² provided some pointers as to what measures the EU might choose to adopt on the basis of the new explicit legal base (pp G23–24). In that Communication, the Commission indicated that its role might include mobilising relevant financial instruments and incorporating tourism considerations into applicable Union policies.
- 9.44. The Government explained that the Communication recognised “the importance of the development of a competitive economic activity and the need to balance this with environmental and social aims”. Furthermore, the Communication recognised the decentralised nature of tourism in many countries and the importance of taking a bottom-up approach that respected the principle of subsidiarity (pp G23–24).
- 9.45. When considering the Communication, we expressed the view that the tourism industry is “an area of commercial enterprise in which individual Member States need to establish, to the degree that suits their own circumstances, the extent to which the activities of the industry are supported by government intervention or are constrained by the social and environmental aims of the Member State” (pp G17–18).
- 9.46. In response, the DCMS agreed and emphasised the Commission’s recognition of the voluntary nature of stakeholders’ engagement with the process (pp G17–18). The DCMS also expressed the view that “there is no need for a [Treaty] competence in the field of tourism” but that, having taken further legal advice, “we are confident that the new competence within the Reform Treaty excludes any harmonisation of national laws”.
- 9.47. The Minister for Europe further explained that “the EU’s competence is limited to supporting, coordinating or supplementing the action of Member States. EU support can complement national action, for example on upgrading skills in the tourism sector and building links between national or regional tourism initiatives” (Q 1, p S79).

Conclusions

- 9.48. **The Treaty amendment in the area of tourism represents a small but significant expansion of competence. We see the tourism industry as an area of commercial enterprise in which individual Member States need to establish, to the degree that suits their own circumstances,**

²⁴² COM (2007) 621 19.10.2007.

the extent to which the activities of the industry are supported by government intervention.

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

General conclusion

- 9.50. **The impact of the Treaty of Lisbon on the Single Market will be limited.**

CHAPTER 10: ENVIRONMENT, AGRICULTURE AND FISHERIES

Environment

Changes introduced by the Lisbon Treaty

- 10.1. The Lisbon Treaty states that environmental policy shall be an area of shared competence between the Union and the Member States (Article 4(2)(e) TFEU). This confirms the *status quo*.
- 10.2. Climate change is explicitly mentioned in the Treaties for the first time. Union policy on the environment should contribute to the pursuit of a number of objectives, one of which will henceforth be the promotion of measures at international level to combat climate change (Article 191(1) TFEU).
- 10.3. Intimately linked to climate change is the new article on energy (Article 194 TFEU), which will allow action to be taken to promote energy efficiency and energy saving and the development of new and renewable forms of energy. See also Chapter 9.
- 10.4. Of potential relevance to environmental matters are provisions on solidarity and on civil protection. A solidarity clause is introduced by Article 222 TFEU. This provides that the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. Article 196 TFEU introduces provisions on civil protection, stipulating that the Union shall encourage cooperation between Member States in order to improve the effectiveness of the systems for preventing and protecting against natural and man-made disasters. See Chapter 6 for further discussion of the civil protection and solidarity clauses.
- 10.5. There is also a procedural change to decision-making on nationally sensitive environmental measures (such as town and country planning, quantitative management of water resources, land use, with the exception of waste management, and a Member State's choice between different energy sources). Under the current Treaties (Article 175 TEC), the Council adopts most environmental legislation by QMV and under the co-decision procedure. Certain nationally sensitive measures, however, are adopted by unanimity after consultation of the European Parliament (Article 175(2) TEC). At the moment, the Council may, acting unanimously, switch to QMV on some or all of these measures. The Lisbon Treaty lays down that the Council may (still acting unanimously) decide to switch some or all of the relevant measures to the ordinary legislative procedure rather than simply to QMV (Article 192(2) TFEU). This change will have the effect of expanding the role of the European Parliament, should the Council choose to make use of this *passerelle* clause. For more on *passerelle* clauses see Chapter 3.
- 10.6. It should be noted that the European Union (Amendment) Bill provides that parliamentary approval must be given before a Minister of the Crown is able to vote in the Council in favour of the application of the ordinary legislative procedure to a nationally sensitive environmental measure.

Evidence

- 10.7. DEFRA (Department for Environment, Food and Rural Affairs) emphasised that, for the first time, climate change was recognised as “an important strategic challenge and as a specific objective of EU policy” (p D2). The European Commissioner for the Environment, Stavros Dimas, explained that “whilst this will not result in a change in the legal basis for any future action which the EU may wish to propose, the amendment provides a clearer recognition of the importance of tackling climate change at the international level” (p D13). Lord Rooker (DEFRA Minister) agreed that there was no legal difference but suggested that its inclusion was justified politically because climate change was a major issue on which the EU had taken a leading role by being the first to adopt key legislation, such as the Emissions Trading Scheme (Q D2).
- 10.8. Commissioner Dimas also referred to the new articles on energy and on civil protection. He welcomed the new article on energy “given that action to promote energy efficiency and renewable energies is crucial for the EU’s efforts to combat climate change” (p D13). He emphasised that action had already been taken by the EU in both energy and civil protection but the new Treaty provided the EU “with clearer powers to propose and adopt measures in these two policy areas, whilst at the same time setting out the limits of those powers”.
- 10.9. Commissioner Dimas welcomed the opening up of decision-making in nationally sensitive environmental policy areas as it provided “a possibility for a more inclusive decision-making process whilst maintaining the control of the Council in these nationally sensitive areas”.
- 10.10. Lord Rooker chose to emphasise the fact that the UK Parliament would have to give its approval to any use of the *passerelle* clause in this instance. He felt that Parliament’s enhanced role was “a good thing” (Q D8).

Conclusions

- 10.11. **The introduction into the Treaty of a specific reference to climate change is of strategic rather than legal significance.**
- 10.12. **The provision to support, coordinate and supplement the action taken by Member States in the field of civil protection may have some significance in reducing the vulnerability of the Member States to environment-related disasters.**
- 10.13. **Under the European Union (Amendment) Bill, Ministers will have to secure the approval of both Houses of Parliament before agreeing to any change of procedure affecting a nationally sensitive environmental policy measure.**

Agriculture, Fisheries and Animal Welfare

Summary of changes introduced by the Lisbon Treaty

- 10.14. This section focuses on four main changes across the agriculture, fisheries and animal welfare policy areas. These are:
- the application of the ordinary legislative procedure (co-decision) to agriculture and fisheries;

- the revised budgetary procedure, increasing European Parliament involvement in decisions on agricultural spending;
- the explicit statement that the Union shall have exclusive competence over the conservation of marine biological resources under the Common Fisheries Policy;
- and the integration, with some changes, of the existing animal welfare protocol into the body of the Treaty.

10.15. The Lisbon Treaty introduces two other changes which are of symbolic rather than practical importance. First, it states that agriculture and fisheries, excluding the conservation of marine biological resources, shall be areas of shared competence between the Union and the Member States (Article 4(2)(d) TFEU). This reflects current practice.

10.16. Second, under the existing Treaties references to “agriculture” include fisheries. The Treaty gives greater prominence to fisheries by making explicit references to it throughout the revised “Agriculture and Fisheries” Title of the TFEU (Articles 38–44 TFEU).

The application of the ordinary legislative procedure (co-decision) to agriculture and fisheries.

Details of the change introduced by the Lisbon Treaty

10.17. Under Article 43(2) TFEU the default decision-making procedure applying to agriculture and fisheries will be the ordinary legislative procedure, rather than the consultation procedure. This has the practical effect of making the European Parliament and the Council equal partners in the decision-making process.

10.18. Exceptions to the application of the ordinary legislative procedure to agriculture and fisheries are measures on fixing prices, levies, aid and quantitative limitations and on the allocation and fixing of fishing opportunities (Article 43(3) TFEU). An example of agricultural legislation where the exceptions would apply is the Council Regulation governing the milk market²⁴³, which provides for: the setting of intervention prices for butter and skimmed milk powder; the application of levies on producers who over-produce; aid for private storage; and tariff quotas for imports.

10.19. An example of legislation in the agricultural sector where the default procedure (co-decision) would apply is the 2003 Regulation²⁴⁴ reforming the Common Agricultural Policy (CAP), which provides a framework for policy and does not fix specific prices, aids, levies or quotas.

10.20. Measures on the allocation and fixing of fishing opportunities are also exempted from the application of the co-decision procedure and will therefore be decided on solely by the Council. This will continue current

²⁴³ Council Regulation (EC) No 1255/1999 of 17 May 1999 (as amended) on the common organisation of the market in milk and milk products (OJ L 160, 26.6.1999, p. 48).

²⁴⁴ Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ L 270, 21.10.2003, p. 1–69).

practice under Article 20(1) of Council Regulation 2371/2002²⁴⁵, which does not provide for consultation of the European Parliament on such decisions. However, co-decision will in future apply to framework legislation (e.g. long-term cod recovery plan²⁴⁶), which sets the boundaries within which decisions on the allocation and fixing of fishing opportunities are taken²⁴⁷.

Evidence

- 10.21. The RSPCA (Royal Society for the Prevention of Cruelty of Animals) welcomed the move to co-decision. In their view, it “will bring more openness and accountability to these decisions, and will enable organisations like the RSPCA to be able to discuss concerns about proposed legislation in a more considered and constructive way” (p D16).
- 10.22. Professor Wallace agreed that the move would increase the transparency of decisions. She believed that, in the past, ministers of agriculture “have been able to operate as a collusive club with rather little external scrutiny and in a way which was not very easy for national parliaments to get any handles on either” (Q S182). Lord Rooker agreed that the process had been opaque (Q D15).
- 10.23. Lord Rooker also emphasised that it would be easier to assess the possible impact of the move to co-decision once the composition of the agriculture and fisheries committees after the 2009 European Parliament election was known. The policy direction of the European Parliament might be influenced in one particular direction if producer interests were strongly represented in the committees (Q D1).
- 10.24. Lord Rooker explained that DEFRA was not concerned about the move to co-decision for two reasons. First, the Department had had positive experiences in working with the European Parliament on environmental dossiers under the co-decision procedure. He cited the chemicals regulation, REACH²⁴⁸, as an example of a dossier on which the negotiated outcome was closer to the UK position due to the involvement of the European Parliament. Second, he felt that there would be more discussion and therefore more opportunities for the UK Government to explain their reform agenda (Q D9).
- 10.25. The Scottish Fishermen’s Federation (SFF) considered that it was not clear whether the procedural change “will be an advantage or a hindrance”. On the one hand, there was likely to be more thorough consideration with an extended chance to challenge, modify or support proposed measures. On the other hand, the timescale for the introduction of measures might be extended beyond that which was desirable for the timely management of fisheries (p D16).

²⁴⁵ Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L358 p. 59–80).

²⁴⁶ Council Regulation (EC) No 423/2004 of 26 February 2004 establishing measures for the recovery of cod stocks (OJ L 70, 9.3.2004, p. 8–11).

²⁴⁷ This refers to total allowable catches and to effort limitation. The 2007 fishing opportunities were set by Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (OJ L 15, 20.1.2007, p. 1–213).

²⁴⁸ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006 p. 1–849).

- 10.26. The National Farmers' Union (NFU) agreed that the procedural change might "result in a longer decision-making process". They considered that the policy impact was more difficult to ascertain, noting simply that outcomes might "suit more closely the needs of farmers" but, on the other hand, it might "water down action and increase political compromises" (p D15).
- 10.27. The Chair of the European Parliament's Agriculture Committee, Neil Parish MEP, suggested that in his personal view there would be "some flexing of muscles" from the European Parliament²⁴⁹. He emphasised that the Parliament would need to be more cooperative in its dealings with the other institutions than it had been in the past. He was sceptical as to whether the change would assist the process of agricultural policy reform²⁵⁰.
- 10.28. In a similar vein, Neil O'Brien argued that, over the last few years, "the Parliament has tended to be a brake on reform of the agricultural policy and the fisheries policy" (Q S81) and therefore that co-decision "will effectively give protectionist interests a second line of defence in the negotiations" (Q S85).
- 10.29. On the other hand, Professor Hix suggested that surveys of MEPs had shown that there was in fact an overwhelming majority in the European Parliament in favour of reforming the CAP and that the move to co-decision may therefore enable the CAP to be further reformed via the EP (p S145).
- 10.30. Professor Chalmers agreed that the change could lead to further reform. He felt that it "will shift power away from the farmers towards food safety policy and consumers in the sense that at the moment it is agricultural ministries and the European Commission Agriculture Directorate-General who run agriculture". He thought that "there will be MEPs with urban constituencies who will be much more interested in having a say, so it might lead to an ideological shift" (Q S22).
- 10.31. Lord Rooker warned, however, against assuming that urban-based MEPs would be supportive of further reform. He took the view that there might be urban MEPs who "are very much with the psyche of the culture of farming and agriculture" (Q D9).
- 10.32. In suggesting that the application of the ordinary legislative procedure would assist the process of CAP reform, Sir Stephen Wall alluded both to the new budgetary arrangements and to the diminishing economic significance of the agricultural sector: "it is hard to see over time that a policy where the European Parliament has to take responsibility for expenditure will lead to that Parliament trying to take decisions which kind of fly in the face of what is going on in the countries from which the MEPs come" (Q S221). Lord Rooker agreed that the approach of the European Parliament was likely to change once it had been given "a degree of ownership and accountability" for decisions (Q D10).
- 10.33. European Commissioner for Financial Programming and Budget, Dalia Grybauskaitė, anticipated that the extension of co-decision elements "will make the Council's life more difficult"²⁵¹.

²⁴⁹ Q 631 of oral evidence given to Sub-Committee D on the Future of the CAP, 05.12.07.

²⁵⁰ Q 635 of oral evidence given to Sub-Committee D on the Future of the CAP, 05.12.07.

²⁵¹ Q 676 of oral evidence given to Sub-Committee D on the Future of the CAP, 06.12.07.

- 10.34. The SFF noted that the exception for fixing and allocating fishing opportunities “will be necessary to achieve the required timescale for decision-making” (p D16). The SFF referred to the time pressure on the decisions taken by fisheries ministers each December on the fishing opportunities for the following year. Scientific advice on which Commission proposals are based is normally only available in October, and the Commission proposals follow in November, thus rendering very difficult the application of the ordinary legislative procedure if a decision is to be taken in December.
- 10.35. Lord Rooker confirmed that the need for all of the exceptions was purely a timing issue. He explained that co-decision would not necessarily slow things down but “it can be weeks and months” rather than “hours and days”, which was the timescale required for decisions under these exceptions (Q D18).

Conclusions

- 10.36. **The move to co-decision in agriculture and fisheries is significant. It will bring more transparency and accountability to the policy-making process, allowing third parties to raise concerns more easily with policy makers and facilitating national parliamentary scrutiny of agricultural and fisheries decision-making.**
- 10.37. **We urge the European institutions to ensure that the application of the ordinary legislative procedure does not unduly extend the length of the decision-making process. As regards fisheries, particular efforts may need to be made to ensure that the more complex procedure does not hinder the timely management of fisheries.**
- 10.38. There is a range of views on the likely policy impact of the move to co-decision in agriculture and fisheries. Some witnesses took an historical approach, arguing that the European Parliament had not been reform-minded in the past and that this was unlikely to change in the future. Other witnesses analysed the underlying political trends in the Parliament and argued on that basis that the Parliament was likely to be increasingly reform-minded once the power of co-decision had been granted.
- 10.39. **The future policy impact of the move to co-decision is not clear. Much depends on the European Parliament itself, but the weight of the evidence suggests that the agriculture and fisheries committees of the European Parliament will in future represent, and be closely overseen by, a wider range of interests than the narrow producer interests that have historically dominated those committees. For these reasons, we expect that the change is likely to assist rather than impede further reform of both the common agricultural and fisheries policies.**
- 10.40. **Maintaining the various exceptions to co-decision, while justified in the light of the required timescales, may be significant as important decisions will continue to rest solely with the Council. We would urge the Commission to publish its annual proposals on the fixing and allocating of fishing opportunities as early as possible each year in order that the European Parliament can be informally consulted and allowing time for national parliaments to scrutinise the proposals more effectively.**

The amended budgetary provisions

Details of the change introduced by the Lisbon Treaty

10.41. New budgetary provisions will increase the role of the European Parliament with respect to agricultural spending as the current distinction between “compulsory” (predominantly agricultural) and “non-compulsory” expenditure will be abolished. At present, the European Parliament has an advisory role in respect of compulsory expenditure. Under the Treaty, the European Parliament and Council will have to come to a final agreement on the whole budget, including agricultural spending (Article 314, TFEU).

Evidence

10.42. Sir Stephen Wall welcomed the abolition of the distinction between compulsory and non-compulsory expenditure. In his view, the European Parliament had in the past been able to use its power over non-compulsory expenditure as “leverage to ratchet up agricultural expenditure anyway”, without having to take responsibility (Q S196). The change would therefore “make the European Parliament make a responsible choice” (Q S198).

10.43. The Chairman of the European Parliament’s Budget Committee, Reimer Boege MEP, agreed that the change would force the European Parliament to act more responsibly²⁵². He explained that there would be a range of pressures applied to MEPs as a result of their increased role and therefore “to find a balance for the agricultural sector, including the budget, including these elements of sustainability and food production at a level of high quality and acceptable prices, is a new challenge and a real challenge for the institutions”²⁵³.

10.44. David Heathcoat-Amory MP expressed concern that giving the European Parliament “any further powers over the budget will probably be treated with considerable alarm in the treasuries of all Member States” (Q S87). On the other hand, the European Parliamentary Labour Party opined that the change would make the way that the EU spent its money “more open and balanced” (p S139).

Conclusions

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

Exclusive competence for the conservation of marine biological resources under the Common Fisheries Policy

Details of the change introduced by the Lisbon Treaty

10.46. Article 3(1)(d) TFEU provides that the conservation of marine biological resources under the Common Fisheries Policy will be an exclusive

²⁵² Q 607 of oral evidence given to Sub-Committee D on the Future of the CAP, 05.12.07.

²⁵³ Q 608 of oral evidence given to Sub-Committee D on the Future of the CAP, 05.12.07.

competence of the European Union. The principle of exclusive competence in this area was first established by the European Court of Justice over 30 years ago²⁵⁴ and reiterated subsequently²⁵⁵. The Treaty therefore reflects current practice. In the 1976 joint ruling, the Court concluded that “the Community has at its disposal, on the internal level, the power to take any measures for the conservation of the biological resources of the sea, measures which include the fixing of catch quotas and their allocation between the different member states.”

Evidence

10.47. DEFRA considered that “the Treaty provisions are intended to codify previous case-law relating to competence” (p D2). Lord Rooker added that the codification “should not make any difference to the existing position on future domestic marine legislation or to regional fisheries management” (Q D23). The SFF believed that the practical implications of this were not clear but the development sounded “worrying” (p D16).

Conclusion

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

Animal Welfare

Details of the change introduced by the Lisbon Treaty

10.49. Article 13 TFEU brings into the Treaty the wording of the existing Protocol (No. 33) on Protection and Welfare of Animals annexed to the TEC. The wording is amended to add a reference to fisheries, technological development and space policies. A reference to animals as sentient beings is also incorporated into the body of the article. The wording of the Protocol already balanced the need to pay full regard to the welfare requirements of animals in the prescribed areas against the need to respect the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage. This wording is maintained.

Evidence

10.50. CIWF (Compassion in World Farming) believed that the incorporation of the animal welfare Protocol into the body of the Treaty would give greater weight to the recognition of these issues (p D12). The RSPCA was pleased to see that the recognition of animals as sentient beings had been supported in this Treaty, having previously been included in the Protocol. The RSPCA felt it important that animal welfare issues were considered fully when formulating and implementing any policy in the EU and in individual Member States. It cited recent Eurobarometer surveys indicating public support for such a position (p D16).

²⁵⁴ Cases 3, 4 and 6/76 *Kramer et al* (ECR 1976 Page 01279).

²⁵⁵ Case 804/79 *Commission v UK* (ECR 1981 Page 01045).

- 10.51. Lord Rooker stated that there would probably be more debate of animal welfare issues in the European Parliament as a result of the application of co-decision to agricultural policy. He hoped that this would assist the UK in getting the rest of the EU to catch up with what the UK had done in terms of imposing welfare conditions on food producers, thus ensuring a level playing field across the European Union (Q D30). CIWF also referred to the increased powers that the European Parliament would have as regards agriculture, commenting that “the Parliament has traditionally been more helpful on animal welfare than the Council” (p D12).
- 10.52. DEFRA stated that there was wide consensus on the sentience of vertebrates, although less so as regards invertebrates. In this light, DEFRA explained that the Animal Welfare Act 2006 covered vertebrates kept by man but that the Treaty wording would extend to some invertebrates used for fisheries (i.e. shellfish) and also the catching of vertebrate fish (p D2).
- 10.53. The SFF considered that the inclusion of fisheries in the new Article 13 TFEU was unfortunate and that “the potential for advanced silliness in policy making is clearly apparent” (p D16).
- 10.54. DEFRA took the view that the implications of the scope of the Treaty would need to be considered in relation to the exemptions provided for matters such as religious rites, cultural traditions and regional heritage (p D2). Lord Rooker explained that this related, for example, to exemptions allowing for the production of religiously slaughtered meat (Q D39).

Conclusions

- 10.55. **The new Article 13 TFEU re-affirms the European Union’s commitment to animal welfare. It will help to ensure greater consistency across the EU as regards animal welfare.**
- 10.56. **We acknowledge the concerns of the fishing industry and draw attention to the potential consequences of applying the provisions on animal welfare to commercial fisheries given the nature of death to which netting and landing can lead.**
- 10.57. **We note that the possibility of allowing exemptions from animal welfare rules on grounds of religion, cultural tradition and regional heritage is included in the current animal welfare Protocol. The new Treaty article does not therefore amend the *status quo* in this regard.**

CHAPTER 11: NATIONAL PARLIAMENTS—THE DEMOCRATIC CHALLENGE

Background

11.1. It is one of the explicit aims of the Lisbon Treaty, set out in its Preamble, to enhance the “democratic legitimacy of the Union”. This has been a theme of the whole process leading up to the Treaty, beginning with the Laeken Declaration in December 2001. The Treaty includes a new section of the TEU, Title II *Provisions on Democratic Principles*. This contains provisions for EU citizenship (see Chapter 2), and new provisions designed to improve the connection between the EU institutions and society at large. New Article 11 TEU creates a requirement in general terms for dialogue with civil society. It also provides for citizens’ initiatives, whereby a million citizens can put an issue on the Commission’s agenda (see also Article 24 TFEU). Article 17 TFEU provides particularly for dialogue with churches and similar bodies.

11.2. In this context the Lisbon Treaty presents substantially new provisions concerning national parliaments. These are set out below, in order of appearance in the Treaties.

General statements

11.3. First, the Lisbon Treaty includes some general statements about national parliaments. “National Parliaments ensure compliance with the principle of subsidiarity” in accordance with the Protocol on the application of the principles of subsidiarity and proportionality (new Article 5 TEU). “National Parliaments contribute actively to the good functioning of the Union” in certain specified ways (new Article 12 TEU).

11.4. Those specified ways are:

- Receipt of information and draft legislation direct from the EU institutions (discussed below)
- Ensuring compliance with the subsidiarity principle (discussed below; see also new Articles 5 TEU, and 69 TFEU in respect of the area of freedom, security and justice)
- Taking part in evaluation of EU policies in the area of freedom, security and justice (see also new Article 70 TFEU)
- Monitoring and scrutiny of Europol (see also new Article 88 TFEU)
- Involvement in evaluation of the activities of Eurojust (see also new Article 85 TFEU)
- Taking part in any future Treaty revision (discussed in Chapter 3)
- Being notified of applications to join the EU (see also Article 49 TEU as amended)
- Interparliamentary cooperation both with other national parliaments and with the European Parliament (discussed below).

11.5. The first of several new Protocols to the Treaties is the Protocol on the role of national parliaments in the EU. This is to replace a Protocol of the same name which formed part of the Treaty of Amsterdam and is currently

Protocol No. 9 to the TEU and TEC. According to the Preamble to the current version, Member States desire “to encourage greater involvement of national parliaments” in EU activities, and to enhance their ability to express views. The Lisbon Protocol repeats this sentiment, and specifies that the views in question may be on draft legislative acts as well as other matters.

Receipt of documents and time for scrutiny

11.6. The Protocol on the role of national parliaments in the EU provides more detail on other aspects of national parliaments’ contributions to “good functioning” under new Article 12 TEU. First, it spells out their extended right to receive documents direct from the Commission (or other originating institution) rather than having to wait for deposit by government. Under the current Protocol, this applies already to Commission consultation documents. The Lisbon Protocol extends it to:

- the annual legislative programme and other “instruments of legislative planning or policy”
- “draft legislative acts”, including initiatives from a group of Member States
- Council agendas and minutes
- the Court of Auditors’ annual report.

11.7. In a bicameral parliament this right will apply to both Houses.

11.8. The current Protocol prescribes a period of at least six weeks between publication of draft EU legislation “in all languages” and placing it on a Council agenda for decision, to give time for scrutiny by national parliaments. The new Protocol strengthens this provision. There are to be at least eight weeks “between a draft legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure”. There are then to be at least 10 days between placing on the agenda and the adoption of a position. There is provision for exceptions “in urgent cases for which due reasons have been given”.

Interparliamentary cooperation

11.9. The current Protocol put on a Treaty footing the Conference of European Affairs Committees of national parliaments, founded in 1989 and known as COSAC²⁵⁶. The Lisbon Protocol goes further, to provide a Treaty basis for cooperation between national parliaments and the European Parliament. National parliaments and the European Parliament “shall together determine the organisation and promotion of effective and regular interparliamentary cooperation”. And there is to be “a conference of Parliamentary Committees for Union Affairs”—currently COSAC—with certain rights and duties. The conference:

- may communicate with the European Parliament, the Council and the Commission
- may not bind national parliaments or “prejudge their positions”

²⁵⁶ *Conférence des organes spécialisés dans les affaires communautaires.*

- “shall” promote exchange of information and best practice
- may organise interparliamentary conferences.

11.10. The first two of these attributes already apply to COSAC in the current version. The other two are new, and formalise activities which COSAC is already undertaking.

Subsidiarity, proportionality and the yellow and orange cards

11.11. The principles of subsidiarity and proportionality entered the EU Treaties with the Maastricht Treaty. General statements of these principles are currently in Article 5 TEC and will be preserved in new Article 5 TEU. The new versions are as follows:

- Subsidiarity—“In areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level” (the words in italics are new)
- Proportionality—“*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*” (again, the words in italics are new).

11.12. The Amsterdam Treaty added a Protocol on the application of the principles of subsidiarity and proportionality, currently Protocol No. 30 to the TEC. This expands on the principles; it sets out in considerable detail what effects they do and do not have; and it gives guidelines for judging whether they have been observed. It also lays down procedural requirements. The Commission must:

- consult widely before legislating
- justify its proposals with regard to subsidiarity, using qualitative and if possible quantitative indicators
- make an annual report on the application of the principles.

11.13. The Lisbon Treaty rewrites this Protocol, deleting everything except the procedural requirements. These however are considerably extended. Commission consultation is to “take into account the regional and local dimension”. Justification is to cover proportionality as well as subsidiarity, and is to include financial and regulatory impact assessment.

11.14. The Lisbon Treaty introduces new procedures known as the “yellow and orange cards”. These give national parliaments the right to express concerns on subsidiarity directly to the institution which initiated the proposed legislation. Within eight weeks from “the date of transmission of a draft legislative act in the official languages of the Union”, any parliament or chamber may submit “a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity”. A voting system then applies, with two votes for each national parliament. In a bicameral parliament each chamber has one vote, and they may be operated independently. With 27 Member States at present, the total number of votes available is 54.

- 11.15. If at least one third of available votes (currently 18) are cast against a proposal in this way, the institution which made it must review it. For proposals on judicial cooperation in criminal matters and police cooperation, the threshold is one quarter of votes (i.e. 14 at present). Following review, the institution which proposed the draft legislative act may maintain, amend or withdraw it; it must give reasons for its decision. This is the “yellow card” mechanism. Since 2005, COSAC has organised pilot subsidiarity checks, whereby committees from all national parliaments have been asked to assess selected proposals against the subsidiarity and proportionality principles within the time allowed and to report on their conclusions.²⁵⁷
- 11.16. The “orange card” mechanism applies only to the ordinary legislative procedure. It involves a higher threshold and more stringent consequences. If a majority of available votes (currently 28) are cast against a proposal, the Commission must review it. They may then maintain, amend or withdraw it. If they maintain it, they must give reasons. Before the end of first reading, the European Parliament and the Council must consider the proposal against the subsidiarity principle, in the light of the reasoning offered by national parliaments and by the Commission. If the Council, by a majority of 55%, or the Parliament, by majority of the votes cast, find against the proposal, it falls.

Article 308

- 11.17. Article 308 TEC is the “flexibility clause”, providing a Treaty basis for action at EU level which is necessary to attain a Community objective but for which there is no other Treaty basis. The Lisbon Treaty rennumbers it 352 and makes the following changes:
- The objectives of the Community/Union referred to are reformulated (they are now set out in the TEU—see Chapter 2 above).
 - Article 308 currently applies only to the Community (first pillar). As amended, it will apply to the Union—but not to the CFSP.
 - Article 308 can currently be used “to attain, in the course of the operation of the common market, one of the objectives of the Community”. As amended, it will be able to be used “within the framework of the Policies defined in the Treaties, to attain one of the objectives set out in the Treaties”.
 - The new Article will not be able to be used to harmonise national laws “in cases where the Treaties exclude such harmonisation”.
 - The Council is currently required to consult the European Parliament. The amended Article will require the Parliament’s consent.
 - The Commission is to “draw national parliaments’ attention” to proposals adopted under the amended Article, using the yellow and orange card procedure.

²⁵⁷ This was proposed by the Chairmen of the Lords and Commons Scrutiny Committees, who held the Presidency of COSAC at the time. See 15th Report (2005–06) *Scrutiny of Subsidiarity: Follow up Report* (HL 66).

Devolution

11.18. In the UK, the “national parliament” is the Westminster Parliament. It does not include the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly. According to the new Protocol on subsidiarity and proportionality, before voting for a yellow card national parliaments may consult regional parliaments “where appropriate”. Consultation with the devolved institutions is discussed in Chapter 6.

European Court of Justice

11.19. There is one further procedure, prescribed in less detail. The ECJ will have express jurisdiction to enforce the subsidiarity principle. Actions may be brought by Member States; or may be “notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof”. The Court can currently judicially review legislation adopted to check compliance with subsidiarity under Article 5 TEC, and has done so.²⁵⁸ To the best of our knowledge, however, it has never struck down a piece of EU legislation on the basis that it infringes subsidiarity.

Putting these provisions in context

11.20. These provisions build on foundations laid over several years. COSAC was founded in 1989. In 1992 the Maastricht Treaty articulated the principles of subsidiarity and proportionality. The Amsterdam Treaty in 1997 went further on these two principles, created a formal opportunity for scrutiny of draft EU legislation by national parliaments (the six week period described above), and put COSAC on a Treaty basis. The House of Commons opened a UK National Parliament Office in Brussels in 1999, to improve contact with the EU institutions and input to COSAC; a member of the staff of this House joined the Office in 2005.

11.21. In 2006 the Commission launched the “Barroso initiative” for direct dialogue with national parliaments.²⁵⁹ It began to send documents to national parliaments directly, and for the first time opened a formal pathway for national parliaments to respond with views on these documents. We have also, on our own initiative, sent to the Commission those of our reports which recommend action by the Commission, and in each case the Commission has responded.²⁶⁰

11.22. Cooperation between parliaments has also grown. The parliament of the Member State holding the Presidency currently organises a number of joint committee and joint parliamentary meetings with the European Parliament to which representatives from all national parliaments are invited.

²⁵⁸ See, for example, case C154/04 and C-155/04 judgment of 12 July 2005 para 99 onwards.

²⁵⁹ The initiative was proposed by Commission President Barroso at an interparliamentary meeting in Brussels in May 2006, and welcomed by COSAC later the same month. It is embodied in *A Citizens' Agenda—Delivering results for Europe* Commission communication to the European Council, COM(2006)211, 10.5.06, and welcomed in the Conclusions of the European Council of 15–16 June 2006.

²⁶⁰ In 2006–07 the Commission received a total of 155 opinions from 24 national chambers on 76 different documents. The four chambers which sent the most were the French Senate, the German Bundesrat, the House of Lords and the Czech Senate. The French Senate's Delegation for the EU has recently published a report on its own contribution: *Dialogue with the European Commission on Subsidiarity*, No. 88 2007–08, available in English.

11.23. This Committee has reported several times on the yellow card procedure at various stages of its evolution. Our most recent report was based on the now defunct Constitutional Treaty, and was published in April 2005; but most of what it said still stands. The main points are summarised in Box 4.

BOX 4

Our report on the yellow card of 2005—main points

The report went into detail on the meaning and history of the subsidiarity principle, and the emergence of the proposal for the yellow card. It recorded different views as to the effectiveness of the subsidiarity principle to date.

We considered in detail how the procedure should operate in this House. We recommended that the vote should be cast by the House, on the basis of a report from ourselves. We recommended that exceptionally, if the deadline for decision fell in recess, the House could delegate the decision to this Committee. We recommended that, if either House voted for a yellow card, the Government should not support the proposal in question in the Council without first giving reasons to Parliament; the Government agreed “in principle”. While we envisaged close communication with the Commons, we reckoned that in the end the two Houses were entitled to take different views.

The Government submits an Explanatory Memorandum (EM) on every EU document deposited for scrutiny in Parliament, including a view on subsidiarity. It is meant to do so within two weeks of deposit. Given the short time allowed for the yellow card procedure, we recommended that, if the EM were delayed, the subsidiarity analysis should be presented separately. The Government undertook to present it “as early as possible”.

The report considered how devolved assemblies could play a role in the new procedure. It also considered the provision allowing national parliaments to invoke the ECJ.

We also considered how the procedure would play out beyond Westminster. We examined the readiness of each chamber around the Union to operate the new procedure, and we strongly advocated cooperation between national parliaments in doing so. But we came out against tactical voting; national parliaments should vote on the merits of each case, not on the basis of the prospect of reaching the threshold for a yellow card. We noted that adverse votes would exert political pressure, even if the threshold were not reached.

Strengthening national parliamentary scrutiny of the EU—the Constitution’s subsidiarity early warning mechanism, 14th Report 2004–05, HL 101

Government response published in *Scrutiny of Subsidiarity: Follow up Report*, 15th Report 2005–06, HL 66

Evidence

Obligations on national parliaments

11.24. The original draft of the Lisbon Treaty stipulated in what is now Article 12 TEU that “national parliaments shall contribute ...” This was translated in French, which has no direct equivalent of the English mandatory “shall”, as “*Les parlements nationaux contribuent ...*” This can be translated literally, “national parliaments contribute”. However this does not mean that the French version is necessarily devoid of mandatory connotation.

- 11.25. Following representations by the EU scrutiny committees of both Houses²⁶¹, the English version of Article 12 TEU has been amended to delete “shall”; but in other languages the drafting has not changed. The Government insist that there are no obligations (e.g. Explanatory Memorandum on the Treaty of Lisbon para 15), and in September 2007 both Kim Darroch, UK Permanent Representative to the EU, and Christian Leffler of the Commission, told us that no obligation was envisaged when the Treaty was drafted (*Work in Progress*²⁶² para 30). Mr Darroch said, “There is no mandatory sense in the French”. Responding to *Work in Progress*, the Government said, “That position has been acknowledged by all Member States and by the Presidency; Portuguese Foreign Minister Amado wrote to the Foreign Secretary to confirm that: ‘this article imposes no obligation on national Parliaments and is purely declaratory in nature’”.²⁶³ The point is however arguable: see Appendix 4.²⁶⁴
- 11.26. “Shall” was also removed from Article 5 TEU and Article 69 TFEU, both of which deal with national parliaments ensuring compliance with subsidiarity. It survives in the Protocol on the role of national parliaments, in Article 9 on interparliamentary cooperation (see above). The Government explained that this “refers to the need for the European Parliament to cooperate with national Parliaments”.
- 11.27. Andrew Duff MEP, a supporter of the Treaty, saw Article 12 TEU as merely a useful description (p S138). The European Parliamentary Labour Party welcomed it, on the basis that it “formalises” the right of national parliaments to be involved in EU law-making (p S140). On the other hand, the Campaign against Euro-federalism, quoting it in its original form, considered that it “underlines the subordinate role of national parliaments” (p S125). The Democratic Party²⁶⁵ felt the same, and were not comforted by the deletion of “shall” (p S157).
- 11.28. The correspondence about the Treaty which we received from the general public sometimes complained that national parliaments were marginalised by the EU (i.e. “Erosion of national competence under so many areas will make Westminster redundant”—e-mail from Nick Atkinson p S120). But we received no such correspondence complaining about the imposition of obligations.

Receipt of documents

- 11.29. The provisions for national parliaments to receive additional documents direct are not a subject of widespread comment, perhaps because the Commission are already sending legislative proposals direct as part of the Barroso initiative. The European Parliamentary Labour Party saw this as a “key innovation” (p S139); Professor Peers regretted that it did not go further (p S155).

²⁶¹ See House of Commons European Scrutiny Committee 35th Report (2006–07): *European Union Intergovernmental Conference* (HC 1014).

²⁶² 35th Report (2006–07): *The EU Reform Treaty: work in progress* (HL Paper 180).

²⁶³ Letter from Jim Murphy MP to Lord Grenfell, 14 January 2008.

²⁶⁴ See also House of Commons European Scrutiny Committee, 3rd Report (2007–08): *European Union Intergovernmental Conference: follow-up report* (HC 16–iii).

²⁶⁵ A political party registered in Great Britain.

Yellow and orange cards

- 11.30. Mr Nymand Christensen of the Commission considered the Treaty provisions on national parliaments in general, and the yellow and orange card procedures in particular, to be a significant step forward, which “advances the democratic quality of the EU”. Subsidiarity “is an important principle for the Union and should be brought to the fore”. He hoped that national parliaments would “wake up” to their new role (Q S322).
- 11.31. John Palmer agreed that the yellow and orange card provisions were important (p S15). In his view their impact would depend on the capacity of national parliaments to exploit them, and to co-operate with one another (Q S34). He advocated involving MEPs in the process of national parliamentary scrutiny. Likewise Professor Wallace saw them as a “window of opportunity being opened”, which this House was well placed to exploit (Q S189). Sir Stephen Wall supported the changes; he advised Parliament to organise itself to move fast, particularly over recesses, and to improve coordination with other parliaments (Q S228). The National Farmers’ Union welcomed these provisions; they would ensure that the EU “only acts in areas where it adds value” (p D15). They were likewise welcomed by the Coalition for the Reform Treaty (p S130).
- 11.32. The Law Society of Scotland and Sir David Edward drew attention to the special challenge of operating the yellow card procedure in the particular context of criminal justice. In the UK this is a devolved matter, where Scotland has its own law and institutions. This is discussed in more detail in Chapter 6.
- 11.33. Lord Leach of Fairford, speaking as Chairman of Open Europe, called the cards “tokenist” (Q S47). Neil O’Brien and David Heathcoat-Amory MP explained the reasoning behind this position (QQ S98–102). The yellow card could only make the Commission think again, which national parliaments can do already. For the orange card, the bar was set so high that, if it were reached, the proposal would in any case be blocked in the European Parliament or the Council. Even the orange card only required the Commission to explain itself better. What was missing was a red card, allowing national parliaments to block a proposal altogether (see also Peers, p S155).
- 11.34. As evidence that the cards would be ineffective, Mr O’Brien referred to the first COSAC pilot, on the 3rd railway package in 2005. 14 chambers raised subsidiarity issues, but the package was passed regardless in 2007 (Q S100).
- 11.35. Brendan Donnelly agreed that the yellow card only formalised political reality (p S134). The Commission was not likely to promote a proposal which numerous national parliaments would find offensive to subsidiarity; and if they did, and those parliaments protested, the Commission would think again. A red card would have been impractical, and would also have offended the theory that the main role of national parliaments was to control national governments, leaving democratic control of the Commission to the European Parliament.
- 11.36. The Centre for European Policy Studies, Egmont and the European Policy Centre (in “the Joint Study”)²⁶⁶ agreed that the cards would not have a big

²⁶⁶ *The Treaty of Lisbon: Implementing the Institutional Innovations*, joint study by the Centre for European Policy Studies, Egmont and the European Policy Centre, November 2007.

impact, for several reasons. They addressed the wrong target: subsidiarity was more often violated not by EU legislation, but by the implementation of legislation in comitology procedures or by the Commission or Council. The cards lacked teeth, since the Commission might react by maintaining its proposal. The provision in the orange card procedure that a majority of 55% in the Council or a simple majority in the European Parliament killed a proposal (Protocol on Subsidiarity, Article 7.3(b)) was a statement of the obvious. And the record of engagement by national parliaments in EU affairs was generally so poor that regular use of the cards would require a “revolution”.

- 11.37. Richard Corbett MEP regarded the card procedures as an important safeguard, but not one which would be used very often (Q S330). The procedures applied only to proposals as introduced; “the violation of subsidiarity is often with the knobs that are added as you go through Parliament and Council, and especially the Council sometimes” (Q S331).
- 11.38. The yellow card covers proposals not just from the Commission, but also from other EU institutions with powers of initiative.²⁶⁷ The orange card covers only Commission proposals. The Commission told us in September 2007 that this was an oversight (*Work in Progress* fn 12), and that non-Commission proposals were rare and specialised.
- 11.39. It is interesting to speculate whether national parliaments will be independent of national governments in their use of the card procedures, or whether the decision to vote for a card will in reality be made by the government using its parliamentary majority. The British Government, responding to a recent report of the European Scrutiny Committee of the House of Commons, said, “It is unlikely that the Government would be ‘whipping’ on the use of the yellow or orange cards”.²⁶⁸
- 11.40. What might be the consequences of not playing the yellow card? In our report of 2005, we considered its effect on the procedure for a national parliament to invoke the ECJ. We concluded that “failure to raise the yellow card might cast doubts on the merits of a challenge where the substance of the act in question has not changed and thus have a prejudicial effect on the chances of success of a challenge”. Sir David Edward suggested that, if national parliaments did not raise subsidiarity objections at the yellow card stage, then it might be harder for any party to run subsidiarity arguments later (QQ S148–151).

Proportionality

- 11.41. The Protocol covers proportionality as well as subsidiarity; but the cards can be played only on the ground of subsidiarity. We asked the Government why. They replied,

“Subsidiarity involves the assessment of whether the objectives of a particular measures can be sufficiently achieved by Member States, either at central level or regional and local level. It is therefore particularly important, and appropriate, that National Parliaments are

²⁶⁷ In certain cases, the European Parliament, European Court of Justice, European Central Bank, European Investment Bank, or a group of Member States have a right of initiative.

²⁶⁸ First Special Report (2007–08), *European Union Intergovernmental Conference: Government Responses*, HC 179, p.4.

given a direct role in relation to this assessment. Compliance with the principle of proportionality is assessed and enforced on the same basis as other general principles of EU law.” (p S81)

Eight weeks

11.42. Eight weeks is longer than the six envisaged in the draft Constitution. John Palmer called this “useful” (p S15); but Professor Chalmers considered it was still not long enough (p S16). He observed that it was the bare minimum allowed for general Commission consultations. He also observed that, following the 2004 enlargement, most dossiers were now agreed at first reading in the European Parliament, rather than later; in such cases, national parliaments’ views submitted towards the end of the eight week period would only affect the EU legislative process if the prescribed threshold had been reached to trigger the formal review mechanisms in the Protocol. He recommended that national parliaments should deal with this by strengthening their position upstream in the process, in dialogue with the Commission and with the committees of the European Parliament.

European Court of Justice

11.43. The Joint Study raised the possibility that some national parliaments, frustrated by the ineffectiveness of the cards, might make systematic use of the power to invoke the Court. Sir Francis Jacobs expected subsidiarity and proportionality to be raised more often with the Court in any case, and possibly with more success. If the Court began to have more regard to subsidiarity, whether at the behest of individual national parliaments or not, the legislative process could be affected (p S148).

Article 308

11.44. Lord Pearson of Rannoch expressed concern about Article 308 TEC (renumbered 352 TFEU), the “flexibility clause” (p S151). He drew our attention to recent reports on this subject by the European Scrutiny Committee of the House of Commons. In their 29th Report for 2006–07,²⁶⁹ they discussed two approaches to the interpretation of the Article: the “literal” approach and the “purposive” approach. Application of the literal approach led to the view that Article 308 was not an appropriate legal base for a measure if it did not have a substantive connection with the operation of the common market. The Committee noted, however, that the usual approach of the ECJ was to interpret the EC Treaty to give effect to what the Court understood to be its purpose. If the purposive approach were applied to Article 308, “in the course of the operation of the common market” might impose little or no constraint on the use of the Article. But the Committee also noted that the ECJ had not been asked to rule on the interpretation of the words and so the interpretation remained arguable. Accordingly, while recognising the weight of opinion in support of the purposive interpretation, the Committee concluded that it would be premature to dismiss the literal approach.

11.45. The Lisbon Treaty will settle this question in favour of the purposive interpretation. According to Mr Nymand Christensen of the Commission, “The new Article 308 is largely the article we know today”. The one big

²⁶⁹ HC 41–xxix.

change was that the European Parliament would acquire a veto, making the Article less likely to be used than at present (Q S326).

Consulting civil society, citizens' initiative

- 11.46. Professor Chalmers described the Treaty material on representative and participatory democracy as having “a certain symbolic input” (Q S2). He speculated that citizens’ initiatives might proliferate, taking up the Commission’s time and capturing the agenda (Q S28).
- 11.47. Mr Nymand Christensen of the Commission did not share these concerns. Initiatives would act as an “electric shock”. The procedure would “motivate a debate about what Europe should be doing”, and lead to “a stronger, more participatory democracy in Europe” (Q S324).
- 11.48. The provisions on consulting civil society, and for citizens’ initiatives, were welcomed by the NSPCC and Save the Children (p S150). They envisaged that the million citizens required to trigger a citizens’ initiative might include children. This will presumably depend on the regulations for citizens’ initiatives to be drawn up under Article 24 TFEU. The NFU likewise welcomed the citizens’ initiative provisions; they noted that proposals arising this way would be subject to the same level of scrutiny as proposals arising more conventionally (p D15).

Conclusions

Obligations on national parliaments

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

Yellow and orange cards

- 11.50. **The yellow and orange card procedures are a useful innovation. It may be that they will seldom be invoked, but this is true of many of the sanctions available to scrutineers in a democracy. The existence of a sanction gives scrutiny teeth, while making it less likely that the sanction will need to be deployed. The Commission can disregard adverse votes from national parliaments and maintain its proposal; but this may be politically difficult, and if an orange card has been played the proposal is unlikely to find the necessary majority in the Council.**
- 11.51. **The extension of the period allowed for scrutiny from six to eight weeks makes the yellow and orange card procedures significantly easier for national parliaments to operate than would otherwise be the case. In practice this Parliament may have even longer, since English is usually the first language to emerge from the Commission translators, and it is typically another month before the last language emerges and the formal scrutiny period begins. Nonetheless it will be**

challenging even for this Committee to reach a considered view on subsidiarity within this time, particularly if, in the case of an adverse opinion, time needs to be factored in to put a motion to the House, and particularly if much of the period falls in recess.

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

Article 308

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

Impact on the procedures of this House

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

CHAPTER 12: SUMMARY OF CONCLUSIONS

Chapter 1: Introduction

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

Chapter 2 General provisions: foundations of the Union

The structure of the Treaties

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

Values and objectives

- 12.3. The statement of Values in Article 2 TEU closely follows the statement of “principles” set out in Article 6(1) of the current TEU. “Respect for human dignity” and general “equality” have been added, and the Values are placed in the context of other values assumed to prevail in the Member States, such as tolerance and justice. We agree that these other values are accepted among the Member States. Respect for human dignity and equality have been recognised as general principles of EC law in the case-law of the European Court of Justice, so their addition does not, in our view, amount to a significant change (see paragraph 2.15).
- 12.4. The statement of objectives in Article 3 TEU replaces the one found in the current TEU. While the new statement covers much of the same ground, the formulation of the objectives differs from the present provisions, and some objectives are removed and some are added, such as references to the development of “a highly competitive social market economy” and to promoting “social justice and protection”. The differences are likely to have some effect on the way in which other provisions of the Treaties are interpreted, not only by the European Court of Justice but also by the other institutions when undertaking their tasks. In certain cases, notably Article 352 TFEU (the revised version of the current Article 308 TEC, sometimes known as the “flexibility clause”), the statement of objectives will be directly relevant to the scope of Treaty provisions. In other cases the effects of the change will be felt only at the margins, in particular, to resolve uncertainty in interpretation of other Treaty provisions. Whether the changes will mean that proposals that would not be made under the existing Treaties will be brought forward, or that potential proposals will not emerge, remains to be seen (see paragraph 2.16).

Citizenship

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

Competences

- 12.6. The TEU sets out for the first time a clear statement that the Union may only exercise such competences (powers) as the Member States have conferred on it—the principle of conferral (Articles 4 and 5). All other competences remain with the Member States, which may decide to reduce the competences of the Union (see Article 48(2) TEU). The significance of these provisions lies in the articulation of these principles; their content has always been implicit in the Treaties (see paragraph 2.42).
- 12.7. The TFEU sets out, for the first time, categories of competences—exclusive, shared and supporting (Articles 2 to 6 TFEU)—and refers to competences in the descriptions of each category by more or less broadly-defined areas. The categories reflect the provisions of the TEC setting out the competences and the conclusions of the ECJ as it has examined those provisions over the years. Most areas of EU activity are defined as shared competences, where the list is illustrative, not exhaustive. In the case of the supporting competences, Union action “shall not entail harmonisation of Member States' laws or regulations”. The listing of areas of competences should not be regarded as determining the precise nature of the competences. For the detailed provisions relating to every competence, reference must be made to the subsequent provisions of the TFEU (see Article 2(6)) (see paragraph 2.43).
- 12.8. The TFEU (Article 2(2)) sets out that when the Treaties confer on the Union a competence that is shared with Member States, the Member States may only exercise their competence “to the extent that the Union has not exercised its competence” (see paragraph 2.44).
- 12.9. We consider that setting out the categories and the listing of areas of competence is a useful clarification (see paragraph 2.45).

Legal personality

- 12.10. The Lisbon Treaty confers legal personality expressly on the EU, giving it the capacity to enter into legal relationships with other parties in its own right. But the European Community (in relation to the first pillar) has always had express legal personality and the European Union implicitly has had legal personality to the extent that it has the power to enter into international agreements under Articles 24 and 38 of the current TEU. Conferring legal personality expressly on the Union will have the effect that the other attributes of such status, such as the ability to join international organisations or to take, or be subject to, proceedings in international tribunals, will apply to the EU in the areas currently covered by the second and third pillars (see paragraph 2.58).
- 12.11. The conferral of legal personality does not itself affect the EU's competences, including its powers to enter into international agreements, or

the relative competences of the EU and its Member States (see paragraph 2.59).

Size of the Union

- 12.12. The amended TEU provides expressly for the European Council to set conditions of eligibility for states aspiring to become members of the EU. This codifies existing practice under which the current “Copenhagen criteria” were agreed (see paragraph 2.67).
- 12.13. It is significant that the Lisbon Treaty adds to the Treaties a clause confirming the right of a Member State to withdraw from the Union, and also sets out the procedure it could use to negotiate a withdrawal (see paragraph 2.68).

Chapter 3 Simplified Treaty revision and the *passerelles*

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

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

European Council

- 12.16. The Lisbon Treaty makes highly significant changes to the European Council, the purpose of which is to make the European Council work better. It will become part of the EU’s formal institutional framework and expressly subject, for the first time, to the jurisdiction of the ECJ. It will be given a more explicit leadership role in the EU (see paragraph 4.33).
- 12.17. The creation of a full-time European Council President, in place of a six-monthly rotation among heads of government, is a significant move, and is likely to make the European Council more effective at creating direction and action. This could mean a more active/activist European Council—a consequence which would be welcomed in some quarters but not in others (see paragraph 4.34).
- 12.18. The European Council President will have two broad roles: the primary one of leading the European Council, and also ensuring the external

representation of the Union on issues concerning the CFSP at his or her level and without prejudice to the High Representative (see paragraph 4.35).

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

Council of Ministers

- 12.20. The extension of the use of qualified majority voting (QMV) to more than 40 new areas is a significant change. Qualified majority voting becomes the default voting method in the Council of Ministers. Where there is a move from unanimity to QMV, if the UK wishes to block legislation it will have to construct a blocking minority rather than use a veto; the UK's share of a blocking minority goes from 32 per cent to 35 per cent. Equally, the extended use of QMV may help to advance UK interests in some cases. The extension of QMV, because it does not depend on consensus, may result in faster decision-making (see paragraph 4.69).
- 12.21. The new system for calculating a qualified majority is more equitable and takes more account of population than the current QMV rules, and the revision is significant. The UK's voting weight increases from 8 per cent to 12 per cent (see paragraph 4.70).
- 12.22. The provision requiring the Council of Ministers to meet in public when it legislates is important. The Council of Ministers will continue to meet in private when it is discussing and voting on non-legislative matters. We believe that the proceedings of the public meetings of the Council of Ministers should be recorded and published for public consumption (see paragraph 4.71).

European Commission

- 12.23. The Commission will have a clearer role in justice and home affairs following the merger of the first and third pillars. The Commission retains its near-monopoly of legislative initiative (see paragraph 4.107).
- 12.24. The reduction in the size of the College of Commissioners is an important change, and is intended to enable the Commission to function more effectively. If this is not the outcome, the European Council will be able to rethink its composition. The provision that seats be allocated on a strict rotation basis will mean that each Member State will not have a Commissioner of its nationality in the College for five years out of every 15. Although Commissioners ought not to be regarded as national representatives, the concern that a Member State without a Commissioner is disadvantaged will undoubtedly be raised, whether or not it is justified. The rotation rule will also be an arbitrary influence on the College's membership, and will restrict the candidates available for the posts of President of the Commission and High Representative (see paragraph 4.108).
- 12.25. The Treaty states that the European Council will need to take into account the elections to the European Parliament in nominating its candidate for

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

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

European Parliament

- 12.27. The Lisbon Treaty considerably increases the powers of the European Parliament—in particular because of the extension of co-decision to a substantially larger range of areas, including agriculture, fisheries, transport and structural funds, in addition to the whole of the current “third pillar” of justice and home affairs—to the extent that the European Parliament will become co-legislator for most European laws. This will have an effect on the balance of power between the institutions (see paragraph 4.138).
- 12.28. The number of MEPs will be reduced from 785 to 751. (The number of UK MEPs will increase by one from 2009.) Also, Members of the European Parliament will be described as “representatives of the Union's citizens” instead of “representatives of the peoples of the States brought together in the Community”, which has a symbolic significance for some. The Treaty will not otherwise have a significant impact on the composition or membership of the European Parliament (see paragraph 4.139).
- 12.28. Oversight by the European Parliament and Council of Ministers of the Commission's delegated legislation powers will be reinforced (see paragraph 4.140).

European Court of Justice

- 12.29. The Treaty significantly expands the role of the ECJ. The Treaty's most important impact on the ECJ is that it will gain jurisdiction over the justice and home affairs area as a result of the merger of the third pillar with the first. The impact of the Court's jurisdiction on the UK will differ from that on other Member States to the extent that the UK uses its opt in/out from all justice and home affairs legislation (see paragraph 4.175).
- 12.30. The ECJ's jurisdiction will not be extended to the Common Foreign and Security Policy except in two clearly defined areas. However, in exercising its oversight in a case of conflict of competence involving foreign and security policy, a decision that the competence lay elsewhere, bringing it into the Court's jurisdiction, might lead to charges that the Court was extending its role (see paragraph 4.176).

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

Overall impact on institutional balance

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

Chapter 5: Fundamental Rights

Protection of fundamental rights in the existing EU legal framework

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

Fundamental rights protection under the Treaty of Lisbon

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

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

12.36. Article 28 of the Charter does not create a free-standing right to strike: it is clear that within the Community framework, the right to collective action, including the right to strike, is already recognised as a general principle of law. Furthermore, Article 28 clearly stipulates that workers and employers have the right to collective bargaining "in accordance with Union law and

national laws and practices” and the ECJ, in its December judgments, has indicated the significance of this limitation (see paragraph 5.36).

- 12.37. To the extent that Article 13 (freedom of the arts and sciences) is indeed an enforceable “right” and not merely a guiding “principle” it is difficult to assess whether it is a new right without further clarification as to its content. The language of Article 13 is vague and one could conclude from the Explanations that the right is limited to freedom of artistic and scientific expression. If it extends further than freedom of expression itself, then, given that the rights in the Charter are derived from international obligations binding on the Member States, Article 1 of Protocol 1 to the ECHR, which provides a right to protection of property, Article 19(2) of the ICCPR and Article 15 of the ICESCR will very probably be important in ascertaining the scope of the right in practice (see paragraph 5.47).
- 12.38. While there is not an exact symmetry between the terms of Article 14 of the Charter and those of the three instruments from which the Explanations indicate that this article is principally derived, it seems clear from the language used that the Charter right to education does not either create a new right or extend by its terms the existing right. The various components of the right to education set out in Article 14 derive from aspects of the right to education expressly included in international agreements which are legally binding on the United Kingdom (see paragraph 5.53).
- 12.39. The origins of the right to a free placement service are clearly set out in the Explanations. The language of the Charter does not indicate that a new right has been created here (see paragraph 5.55).
- 12.40. In summary, we have examined articles of the Charter which are regarded as the most controversial. On that basis, and taking account of the comments of the majority of our witnesses, we are not persuaded by suggestions that the Charter itself creates or contains new rights which differ from those in the underlying national and international instruments and documents from which it indicates that its provisions are derived. The scope of the Charter rights, as is the case with the scope of all rights, will ultimately be a matter for the courts. However, the broad rights and the language in which they are expressed in the Charter reflect existing national, EU and international obligations (see paragraph 5.56).
- 12.41. It is clear from Article 51(1) of the Charter that it does not apply to situations involving purely domestic law. For the Charter to be directly relevant, there must be a link to Union law. It remains of course quite conceivable that national courts applying domestic law might, in some cases, find an analogy or some inspiration in EU law, but that would not be an unusual process (paragraph 5.60).

The Charter’s new status

- 12.42. It may appear somewhat anomalous to give legally binding status to an instrument which self-avowedly records rights deriving from other sources. However, whatever the legal effect of this change, declaring the Charter to be legally binding will send a clear message to all institutions and citizens within the Union about the EU’s commitment to uphold the rights set out in the Charter (see paragraph 5.68).
- 12.43. Leaving aside the UK/Polish Protocol, the effect of declaring the Charter to have the same legal value as the Treaties is likely to preclude any argument

that the rights and principles “reaffirmed” do not already exist as fundamental rights and principles in the area of EU law. We doubt whether this represents any great change from the position as it is and would anyway prove to be, having regard to current and emerging ECJ jurisprudence. Declaring the Charter to be legally binding will of course be likely to encourage and probably to speed the development of such jurisprudence (see paragraph 5.72).

- 12.44. Since we consider that the Charter reaffirms rights and principles which already substantially exist, albeit in many cases only at an international level, we expect the effect of the change in the Charter’s status to be limited. Courts at both national and EU level will continue to refer to international treaty obligations to interpret the scope of fundamental rights and identify those fundamental principles which are general principles of EU law, whether or not the Charter becomes legally binding. We expect that reference to the Charter would, if the Treaty of Lisbon enters into force, be likely to become more frequent, as the Charter’s legally binding force would make it more straightforward for individuals to enforce rights which they are guaranteed under international law (see paragraph 5.80).
- 12.45. Accession of the Union to the ECHR would greatly reduce the risk of inconsistencies, and provide a means of redress if they did occur, by making the Union and its institutions subject to the jurisdiction of the European Court of Human Rights. (see paragraph 5.83).

The UK and Polish Protocol

- 12.46. The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol (see paragraph 5.87).
- 12.47. We see the broad legal effect of the Protocol as follows:
- (a) Article 1(1) reflects the fact that the Charter does not create new rights— if a national law is inconsistent with a provision of the Charter then it is also inconsistent with an EU or international norm. This also reflects Article 51 of the Charter.
 - (b) Article 1(2) is in line with the frequent references in the Title IV rights to national laws and practices and also with Article 52(5) of the Charter which sets out the approach which should be taken to “principles” in the Charter. But it also brings some welcome clarity to Title IV. Article 52(5) read in the light of the Explanations could have led to a conclusion that some Title IV “rights”, such as Article 33, represent enforceable rights which could be relied upon directly before British courts. The Protocol appears to put beyond doubt that this would not be possible. In these circumstances it must be regarded as very unlikely that the ECJ would, in interpreting the Charter, hold that Title IV involved justiciable rights in relation to any Member State, but Article 1 paragraph 2 of the Protocol would in our view preclude it making such a ruling in relation to the United Kingdom. However, Title IV reflects principles which could, we think, still bear on the interpretation, or even the validity, of legislative and executive acts under Union law, as provided by the last sentence of Charter Article 52(5), and so indirectly affect individual rights. We have also noted that, to the extent that the Union legislates in

areas which are within its competence quite apart from the Charter, national legislators and courts will anyway be subject to that legislation.

- (c) Article 2 reflects a common-sense interpretation of those articles in the Charter which refer to national laws and practices and of Article 52(6) of the Charter, which stipulates that “full account” is to be taken of national laws and practices where there is a reference to them. But it is a useful clarification of what might otherwise have been open to argument. Again, however, we think it unlikely that Article 2 of the Protocol precludes the use in relation to the United Kingdom and Poland of any relevant Charter articles in the way contemplated by the last sentence of Charter Article 52(5), when interpreting or ruling on the validity of legislative or executive acts taking place under Union law on the basis of a Union competence not connected with the Charter.
- (d) The Protocol should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States. But to the extent that the Explanations leave some ambiguity as to the scope and interpretation of the Charter rights, and as to the justiciability of the Title IV rights especially, the Protocol provides helpful clarification. We would not be surprised if, in considering the scope of the Charter in future, EU and domestic courts had regard to the terms of this Protocol in order to assist interpretation of the Charter’s horizontal articles, even in cases where the United Kingdom and Poland were not involved. Indeed, given that, despite media reports, it is an interpretative Protocol rather than an opt-out, it is perhaps a matter of regret, and even a source of potential confusion, that it was not expressed to apply to all Member States (see paragraph 5.103).

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

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

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

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

Accession to ECHR

12.52. We have in the past identified strong reasons for supporting EU accession to the ECHR. The Strasbourg Court would then be recognised as the final

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

Chapter 6: Area of Freedom, Security and Justice

The Pillar Structure

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

Changes to legislative procedure

- 12.55. The move to QMV in almost all areas of FSJ is a significant change. Notwithstanding the already existing spirit of compromise in the JHA Council, the move is likely to speed up decision-making in the Council and prevent legislation being adopted at the level of “lowest common denominator”. It is likely that one effect of the change will be an increase in Union activity and the volume of legislation agreed in this area (see paragraph 6.27).
- 12.56. The change will remove Member States’ vetoes in respect of criminal law and policing and legal migration. This means that it will be possible for the UK, in some cases, to be bound by a measure in the area of criminal law or policing against its will, although the likelihood of this happening will be greatly reduced by the existence of a general right not to opt in for the UK. The corollary of this is that one Member State, or a small group, will no longer be able to block measures supported by the UK, subject to the possibility of using the emergency brake (see paragraph 6.28).
- 12.57. The involvement of the European Parliament in new areas of FSJ is likely to impact on the adoption of measures in this field. We would expect the European Parliament to focus on protection of citizens’ rights and to take an active role in shaping measures in the area of criminal law and policing (see paragraph 6.35).
- 12.58. We welcome the steps being taken by the European Parliament to address the issues raised by first reading deals. We stress the need for transparency particularly in an area of such considerable interest to citizens as FSJ (see paragraph 6.36).
- 12.59. The retention of unanimity in matters of family law will provide an important safeguard to ensure that family law measures agreed at EU level

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

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

The emergency brake and enhanced cooperation

- 12.61. The introduction of an emergency brake is a noteworthy development which is of particular importance to Member States which do not have the right not to opt in to FSJ measures. Although it is unlikely to be frequently used in practice, it is likely to impact on negotiations in the Council through the possibility of its use (see paragraph 6.53).
- 12.62. We see no reason why the UK should not be able to use the emergency brake but in practice the UK's right not to opt in to individual measures is likely to diminish the occasions where use of the emergency brake will even arise for consideration in the United Kingdom (see paragraph 6.54).
- 12.63. The emergency brake is provided for in the Treaty itself and has the same legal value as any other Treaty provision. We consider the prospect of a challenge before the ECJ to a Member State's use of the emergency brake to be remote (see paragraph 6.55).
- 12.64. The Treaty of Lisbon facilitates enhanced cooperation in relation to judicial cooperation in criminal matters within Articles 82(2) and 83, the creation of a European Public Prosecutor (Article 86) and police cooperation within Article 87(3). It is not clear whether this will have a significant impact in practice. The procedure has not been used to date despite circumstances arising in which it may have been appropriate. However, there are diverging views on the extent of the need for cooperation in this area across the Member States and the negotiation of this flexible procedure suggests that some, at least, anticipate having recourse to it (see paragraph 6.61).
- 12.65. Enhanced cooperation may lead to a patchwork of legislation but is a necessary element of flexibility in a Union of 27 Member States (see paragraph 6.62).
- 12.66. The Union would have external competence derived from a measure which had been adopted internally under the enhanced cooperation provisions but this would only extend to those Member States party to the enhanced cooperation (see paragraph 6.66).

Jurisdiction of the European Court of Justice

- 12.67. The increase in the jurisdiction of the ECJ is a significant development. It replaces the complex existing regime of jurisdiction with a clear and uniform

rule and is likely to increase consistency and legal certainty in the application of EU law. If the Lisbon Treaty enters into force, the ECJ will have jurisdiction over all new Title V TFEU measures (see paragraph 6.88).

- 12.68. For the first time, Member States will be able to be taken to the Court for failure to implement properly EU legislation in the area of criminal law and policing. This is likely to encourage them to implement more effectively measures agreed in this area. Ultimately, the question of the interpretation of an EU instrument will be a matter for the Court and its rulings will be binding on the United Kingdom. As a result it is important that any special features of UK law in this area be taken into account by the Court and in this regard, the right of Member States to intervene in any action before the Court is significant (see paragraph 6.89).
- 12.69. The ability of the ECJ to handle its existing workload, and in particular the time taken to dispose of preliminary references by national courts, is already a matter of concern. The CILFIT criteria established by the ECJ give national courts and the ECJ no real scope for declining to make or hear a reference in any case open to any doubt (see paragraph 6.94).
- 12.70. The existing preliminary reference jurisdiction under Title IV and Title VI has not given rise to a large volume of cases. But the Treaty of Lisbon would open the way, even though probably only over a period, for an increase in the volume of preliminary references which could prove detrimental to both European and national legal systems and to individual litigants. The new accelerated procedure for cases where an individual is in custody represents only a limited amelioration in one particular sphere. This may not be sufficient to resolve the problems that arise in jurisdictions with limitations regarding the time spent in custody before trial or limitation periods for the conclusion of criminal proceedings. The question of delay is a general one relevant to all criminal and civil proceedings in the area of FSJ. Member States are bound under Article 6 of the ECHR to ensure that both criminal and civil proceedings are determined fairly and within a reasonable time (see paragraph 6.95).
- 12.71. The expansion of the ECJ's jurisdiction over criminal and civil matters is over time bound to be matched by an expansion in the range of the legal issues coming before it. The ECJ to date has had limited experience of ordinary criminal and civil proceedings and it has not been necessary for Member States to nominate judges with any such experience (paragraph 6.99).
- 12.72. The Treaty of Lisbon will continue to provide for one judge per Member State (which in practice means nominated as a candidate by that Member State) and for any judge to be "appointed by common accord of the governments of the Member States" for a six-year, renewable period. The creation of the new panel under Article 255 "to give an opinion on candidates' suitability" is a welcome step, but it is unclear how far, if at all, such a panel will be able to influence Member States to nominate for consideration candidates having particular expertise or experience which it would benefit the ECJ to have (paragraph 6.100).
- 12.73. Further, the unchanged six-year, renewable tenure appears in principle undesirable. The manner and tenure of appointments and the general working of the ECJ are all matters which may require revisiting (paragraph 6.101).

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

Passerelles in FSJ

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

National parliaments and devolved administrations

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

Borders, asylum, immigration and visas

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

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

Civil justice

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

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

parliaments to police the subsidiarity principle may be particularly important (see paragraph 6.141).

Police and judicial cooperation in criminal matters

- 12.81. The new Article 82(1) confers a more specifically defined power to adopt measures of judicial cooperation in criminal matters in a more extensive but exhaustive list of areas. In particular, the new Article makes specific reference for the first time to measures to settle as well as prevent conflicts of jurisdiction and to measures to support the training of national judiciaries and their staff. The new Article replaces an existing power under Article 31(1)(a) to (d) which is of uncertain and controversial width, not least because the list of areas of potential action given is both vague and non-exclusive. Overall, the clarification and definition of power in this field by the Lisbon Treaty is unlikely to involve any significant expansion of jurisdiction, although it may encourage a more active role for the EU in the listed areas (see paragraph 6.152).
- 12.82. The extent of the Union's existing competence in the area of criminal procedure under the existing Article 31 with its non-exhaustive list of areas of potential action is one of the matters of uncertainty and controversy already mentioned. The new Article 82(2) contains a specific and exhaustive list of three areas of potential action (concerning evidence, procedure and victims' rights). Other areas can only be added by unanimous Council decision after obtaining the European Parliament's consent (see paragraph 6.160).
- 12.83. Action in any of these areas is for the first time expressly limited to the extent necessary to facilitate mutual recognition of judgments and decisions and police cooperation in criminal matters "having a cross-border dimension". The three specific areas listed are all areas where in practice the Union has been seeking in recent years to promote measures (see paragraph 6.161).
- 12.84. The new Article 83(1) contains an exhaustive list of areas of particularly serious crime with a cross-border dimension, which is on its face more extensive than the existing non-exhaustive list of three areas (organised crime, terrorism and illicit drug trafficking) in which Article 31(1)(e) currently gives the Union power to adopt minimum rules concerning the definition of criminal offences and penalties. However, the new exhaustive list reflects areas in which the Union has in practice already adopted measures under the current Article with its non-exhaustive list and may therefore be regarded as simply recognising the *status quo*. While the Treaty of Lisbon clarifies and defines the Union's power to harmonise criminal offences and sanctions in a manner which will preclude further expansion, there is room for argument and uncertainty about the scope of some of the offences now for the first time specifically mentioned, e.g. sexual exploitation, corruption and computer crime (see paragraph 6.175).
- 12.85. Different views were expressed to us on the question whether the new Article 83(2) in Title V supersedes the competence to establish minimum rules relating to criminal offences recognised, to date only in environmental contexts, by the Court in Cases C-176/03 and C-440/05. The answer is important because it is only in respect of measures proposed under Title V that the United Kingdom has a right not to opt in (see paragraph 6.187).

- 12.86. Our view is that Article 83(2) constitutes a *lex specialis*, which is framed and apt to subsume and supersede any competence which would otherwise exist under articles outside Title V. Its language is the language of conferral of competence (“directives may establish minimum rules ...”), not the language of procedure. Further, since the competence recognised in Cases C–176/03 and C–440/05 did not extend to the power to set minimum sanctions, Article 83(2) must in that respect go beyond procedure, and it seems implausible to suggest that the Treaty drafters intended there to be two overlapping articles conferring differing degrees of criminal competence, according to which was chosen as the base. The emergency brake introduced by Article 83(3) with express reference to Article 83(2) also seems clearly designed to apply to the exercise of criminal competence such as that recognised in Cases C–176/03 and C–440/05. The natural meaning of the language is, in short, that the competence recognised in those cases is being subsumed within Title V. On that basis the UK’s right not to opt in is preserved (see paragraph 6.188).
- 12.87. In the last analysis, even if we were to be held wrong in the views expressed about the UK’s opt-in in the previous paragraphs, it is clear from the language of Article 83(3) that the United Kingdom would retain the benefit of an emergency brake, in the event that a draft directive were promoted adopting minimum rules with regard to the definition of criminal offences and sanctions outside Title V in terms the UK considered would affect fundamental aspects of its criminal justice system (see paragraph 6.189).
- 12.88. There are already moves to reform Eurojust and to grant it a greater role in enhancing cooperation between national authorities. New Article 85 may facilitate more ambitious developments in the longer term (see paragraph 6.196).
- 12.89. Proposals for a European Public Prosecutor are not new, but this is the first time the structure for implementing this idea has been included in the Treaties. The inclusion of Article 86 in the TFEU makes it more likely that this post will one day be created. Any proposal to establish an EPP or subsequently extend its scope would require unanimity, and the UK’s opt-in would apply to such a measure. In the absence of unanimity, a group of Member States could proceed by enhanced cooperation (see paragraph 6.209).
- 12.90. If the UK were not to participate in the creation of the EPP, then it should not be affected by it. Although UK citizens living abroad could be subject to the EPP’s jurisdiction, the EPP could have no jurisdiction in the UK itself. Any obligation on Member States to recognise European Arrest Warrants issued by the EPP would have to be provided for in EU legislation under Title V, and the UK’s right to opt in would apply. If it did not opt in, then it would not be obliged to recognise European Arrest Warrants issued by the EPP (see paragraph 6.210).
- 12.91. The inclusion of an express reference to the principle of mutual recognition in the criminal field by the Treaty of Lisbon lends some support to the view that cooperation is, wherever possible, to be preferred to harmonisation. But the new Article 82(1) includes within mutual recognition the approximation of laws and regulations under Articles 82(2) and 83. In reality and in the light of the Union’s activity to date in the criminal field, we doubt whether the introduction of general and unexplained references to mutual recognition will prove to have much significance (see paragraph 6.218).

- 12.92. The new provisions on police cooperation in Article 87 TFEU reflect the existing provisions in Article 30 TEU (see paragraph 6.221).
- 12.93. The reason for urgently continuing the current negotiations on the proposed Decision on Europol is, we assume, to prevent the European Parliament having powers of co-decision in relation to the constitution and functions of Europol as an agency. We regard it as unfortunate that the Member States should be attempting to override the effect of a provision of a Treaty they have just signed (see paragraph 6.226).

Issues of “cross-border”

- 12.94. Attempts by the Commission to use the existing Treaty competence in respect of cross-border measures to affect purely internal procedures have been rejected by the Member States. It seems clear that there is no support for an expansive construction of “cross-border” in EU legislation at present. There is no reason why the Lisbon Treaty should add any impetus to such an expansion (see paragraph 6.233).
- 12.95. There are, however, difficulties in defining “cross-border”. As we highlighted in our Report on the European Small Claims Procedure, this will be a matter to be resolved on a case-by-case basis. We reiterate our conclusion that any definition of “cross-border” must be suited to the aim and requirements of the particular proposal. In the event of a dispute, the ECJ will be the final arbiter, but this is another area in which the new powers of national parliaments to police the subsidiarity principle may be particularly important (see paragraph 6.234).

National security and internal security

- 12.96. It may be significant that the Treaties for the first time make clear that national security is a matter solely for the Member States (see paragraph 6.242).
- 12.97. It is unfortunate that a number of provisions of the Treaties refer to “internal security” when the meaning of that expression is unclear (see paragraph 6.243).

The UK opt-ins

- 12.98. The opt-ins in the amended FSJ and Schengen Protocols will together apply to the whole area of FSJ, including those matters which currently fall within the Third Pillar and require unanimity. The right given to the UK to choose whether or not to opt in is, in certain respects, more flexible than the existing opt-in arrangements (see paragraph 6.257).
- 12.99. The extension of the FSJ Protocol to the entire area of freedom, security and justice will allow the UK to decide, on an individual basis, whether to opt in to any proposed measure in the field. The inclusion of Article 4a confirming that the opt-in provisions will apply also to amending measures is a welcome clarification (see paragraph 6.261).
- 12.100. The amended FSJ Protocol differs significantly from its predecessor insofar as it permits the other Member States to eject the United Kingdom from an existing measure where it declines to participate in an amending measure. However, the right to eject the UK is subject to an important restriction: the UK’s non-participation in the amending measure must render the system

“inoperable”. This is intended to set a high threshold and we would expect that some form of technical inoperability would, in practice, be required. We expect such cases to be rare (see paragraph 6.267).

- 12.101. The test for requiring the UK to bear costs of non-participation is a strict one: costs must be “necessarily and unavoidably” incurred as a “direct” consequence of the cessation of UK participation (see paragraph 6.269).
- 12.102. The extension of the opt-in arrangements puts the UK (and Ireland) in a special position. For those who support full UK participation in EU FSJ measures, this is likely to be viewed as an undesirable development. Those who have fears regarding the effect of a move to QMV in this area on national sovereignty, on the other hand, can see the opt-in as providing some reassurance. An extended right not to opt in for the UK is different from a veto under unanimity and, where the UK chooses not to opt in, other Member States will be able to adopt measures without UK participation. This may change the negotiating dynamic in the Council (see paragraph 6.274).
- 12.103. At present there is no systematic parliamentary scrutiny of UK decisions on whether or not to opt in to particular FSJ measures. The House of Commons European Scrutiny Committee has recently drawn attention to this, in the context of the Lisbon Treaty. We do so too, and we intend to give the matter further consideration (see paragraph 6.275).
- 12.104. Like the FSJ Protocol, the Schengen Protocol increases the UK’s flexibility to choose whether to participate in Schengen-related measures. It is clear that the UK will no longer be bound, as it is at present, to take part in Schengen-building measures where it participates in the underlying *acquis*. However, nothing in the Lisbon Treaty changes the position as regards the UK’s right to opt in to Schengen-building measures where it has not opted in to the underlying *acquis*. In such cases, the Council may continue to refuse the UK’s request to participate (see paragraph 6.279).
- 12.105. Article 5(3) of the Schengen Protocol is an important new addition as it provides for a mechanism whereby the UK can be ejected from participation in parts of the underlying Schengen *acquis* which it has accepted if it declines to participate in a Schengen-building measure. This is the understandable *quid pro quo* of the UK’s new freedom to choose not to participate in such measures. Again, we expect such cases to be rare in practice (see paragraph 6.282).
- 12.106. In order for costs to be imposed on the UK as a result of the cessation of its participation in a Schengen-building measure, such costs must be “direct financial consequences” which are “necessarily and unavoidably incurred”. This is a strict test (see paragraph 6.283).
- 12.107. Under the FSJ and Schengen Protocols the UK cannot be forced to participate in an FSJ measure against its will. If the UK takes the view that a proposed measure has features which cannot be accommodated within a Common Law system or are otherwise unsuitable for application to the UK, the UK is free both to refuse to opt in and, if it wishes, to play no further part at all in relation to the proposal. However, as outlined above, a decision by the UK not to participate in an amending measure or a Schengen-building measure may have particular consequences for the UK. In a case where the UK is threatened with ejection from an existing measure, the Government will have to make a judgment as to which course of action best serves the UK

interest. As we have already said, we do not expect such cases to arise frequently (see paragraph 6.287).

- 12.108. The apparent success of the UK approach to the Rome I negotiations should not be regarded as a one-off or non-repeatable occurrence. It seems likely that there will be further cases where the other Member States have a clear interest in securing UK involvement and will be prepared and willing for the UK to take an active part in negotiations into which the UK has for the time being not opted (see paragraph 6.292).
- 12.109. The suggestion that the UK, having opted in to a proposal, could argue that its opt-in did not extend to fundamental amendments of the proposal during negotiations raises an interesting legal question. But the question is unlikely to arise since the Government appear to accept that this would not be possible. In some areas of criminal law and policing, a dramatic change during negotiations may permit the UK to use the emergency brake to halt a measure's progress. In other cases, the UK may end up bound by a measure with which it does not fully agree; this is the nature of QMV. The risk of this situation arising will presumably be considered before the UK elects to opt in (see paragraph 6.296).
- 12.110. It is important to maintain a proper balance between liberty and security. We share witnesses' concerns that a pick-and-choose approach by the UK might result in the UK participating in the bulk of coercive security-based measures while eschewing rights-based measures and urge the Government to take a balanced approach to participation in this area (see paragraph 6.305).
- 12.111. We note the possibility that the Commission may propose coercive and rights-based measures in one instrument thus requiring the UK, if it wishes to participate in the coercive measure, to participate in the rights-based measures as well. Packaging measures in this way is unlikely to be possible in most cases but it may be feasible in some areas and would require the United Kingdom to take a view on whether this was desirable and acceptable (see paragraph 6.306).
- 12.112. Decisions by the UK to opt in to measures in the areas of civil and criminal law and policing will impact in a special way on devolved administrations, but particularly Scotland. The extension of the opt-in under the Lisbon Treaty to cover criminal law and policing is significant. The need for cooperation between administrations is clear. We expect the Government to consult closely with the Scottish Executive when deciding whether to opt in to measures in these areas, and we understand that this already occurs (see paragraph 6.308).
- 12.113. If concerns regarding a possible West Lothian question arising in the EU parliamentary context develop, they will no doubt receive further consideration by Member States and the European Parliament itself. If the question is seen as raising a real problem here, it will also exist in cases of enhanced cooperation. But we do not consider that the UK should or will be likely to be influenced by such concerns in its decision whether to opt in (see paragraph 6.311).

Transitional arrangements

- 12.114. We would expect the Commission to introduce measures to convert some of the more significant Title VI instruments, such as the European Arrest

Warrant, soon after the Treaty of Lisbon enters into force. We would not be surprised if the Commission adopted a “repeal and replace” approach in order to ensure legal certainty (see paragraph 6.323).

- 12.115. It seems unlikely that the Commission will seek to convert all Title VI measures. We urge the Government to liaise closely with the Commission to ensure that measures which require redrafting or renegotiating are the subject of amendment measures before the end of the transitional period (see paragraph 6.324).
- 12.116. Any proposals brought forward to convert existing Third Pillar instruments into First Pillar measures would have to be made under Title V of the amended TFEU. Upon adoption, such proposals would come within the ECJ’s jurisdiction immediately and would not be subject to a five-year transitional period. The United Kingdom would be able to use its opt-ins and could, if it wished, choose not to participate in an amendment or a “repeal and replace” measure (see paragraph 6.325).
- 12.117. The question of what constitutes an “amendment” under the Transitional Protocol proved controversial among our witnesses. But in our view it will be clear which proposed measures are “amendments” and Article 10(2) is unambiguous: any amendment, however small, will bring the amended act under the ECJ’s general jurisdiction and within the Commission’s enforcement powers (see paragraph 6.330).
- 12.118. We do not share the Commission’s interpretation of Article 9 of the Protocol. Article 9 says that the acts’ legal effects are “preserved until those acts are repealed, annulled or amended”. The obvious conclusion is that when those acts are repealed, annulled or amended, their legal effects are no longer preserved. It is difficult to understand how Article 9 can be read as meaning that only the amended parts of the act will have direct effect. If that were the meaning of Article 9 then the qualification in that article regarding repeal, annulment or amendment would be obsolete: insofar as amendments are introduced on a new Title V TFEU legal base they will be capable of having direct effect by default (see paragraph 6.331).
- 12.119. In practice, both of these issues will be circumvented if the Commission adopts a “repeal and replace” approach (see paragraph 6.332).
- 12.120. The Transitional Protocol leaves unclear from what date an amendment has the effect described in the Protocol. This ambiguity may be a reason for the Commission to prefer a “repeal and replace” approach whenever an amendment is contemplated (see paragraph 6.334).
- 12.121. The possibility under Article 10(4) of the Transitional Protocol of exercising a block opt-out protects the UK’s right to choose whether to participate in new measures in the FSJ field. However, we expect that the Government will be fully engaged with the Commission and other Member States to ensure that measures which might prompt them to use the block opt-out are amended before the expiry of the transitional period. Article 10(4) provides an emergency exit for the UK where the amendment of a controversial measure has not proved possible within the available time (see paragraph 6.339).
- 12.122. Provided that the Government undertake the task of sifting through existing Title VI measures in good time, they will be less likely to find themselves in the position of having to use the block opt-out and the

question of costs will not arise. If the block opt-out is used, then, as with the costs provision in the FSJ and Schengen Protocols, we consider that the test for imposing costs is set at a high level (see paragraph 6.342).

12.123. The right under Article 10(5) of the Transitional Protocol for the UK to opt back in to measures will ensure that, if the UK at the end of the five-year transitional period uses its block opt-out in relation to those Title VI measures which are not by then amended or re-enacted, the UK may immediately thereafter choose to opt back in to particular Title VI measures covered by that block exemption (see paragraph 6.344).

12.124. But the Treaty does not leave open the option of retaining the *status quo* in respect of Title VI measures after the transitional period. At the end of that period at the latest, the UK must either accept the Commission's enforcement powers and the ECJ's jurisdiction in respect of such measures or exercise its block opt-out, again accepting that if it chooses to opt back in to any particular existing measure, the Commission's enforcement powers and the ECJ's jurisdiction will apply (see paragraph 6.345).

Civil Protection

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

Chapter 7: EU Foreign, Defence and Development Policies

External action of the EU

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

The Common Foreign and Security Policy (CFSP)

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

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

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

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

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

Development Cooperation and Humanitarian Aid

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

Consular protection

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

The High Representative

12.134. The creation of a High Representative for Foreign Affairs and Security Policy/Vice-President of the Commission represents an important institutional innovation of the Lisbon Treaty, which could have a significant impact on the way the EU formulates and implements its external policies. In light of the evidence, the post could bring additional coherence and effectiveness to the EU's external action, but much will depend on the way the High Representative exercises his powers, as well as his working relationships with the Member States, the President of the European Council, and the President of the Commission (see paragraph 7.75).

12.135. The post brings together three functions that exist under the current Treaties (the Council Presidency, the Commissioner for External Relations and the High Representative). The chairing of the Foreign Affairs Council by the High Representative is a key innovation which will give the incumbent a further degree of influence over decision-making in the area of CFSP. This could lead to a change in the way the Member States interact with the High

Representative and contribute to EU policy-making in this area (see paragraph 7.76).

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

The European External Action Service

- 12.137. The creation of an External Action Service is an important institutional innovation of the Lisbon Treaty. The Service is intended to provide the High Representative and the EU with analysis and support, as well as improve the consistency of the EU's representation in third countries and at international organisations (see paragraph 7.98).
- 12.138. The Treaty of Lisbon leaves most of the details on the structure and functioning of the External Action Service to be decided upon by the Council acting unanimously after entry into force of the Treaty. The UK has the experience to play a leading role in elaborating a concept for the Service in a methodical and systematic way. And we would expect the Diplomatic Service and the EAS to work closely together (see paragraph 7.99).
- 12.139. Parliament should have an opportunity to scrutinise the draft concept for this Service well in advance of any political agreement being reached on its structure, functioning and financing. It is a matter that the Committee may want to come back to at a later date. In the meantime, we look forward to being kept informed by the Government of progress being made in the negotiations on the establishment of the Service (see paragraph 7.100).
- 12.140. The Government are committed to engage positively with the UK's EU partners in building an effective External Action Service. We would welcome assurances from the Government that, where it is in line with UK policy, they will contribute to providing the Service with high quality personnel with the necessary language skills, including secondees, and adequate financial resources (see paragraph 7.101).
- 12.141. Effective mechanisms should be put into place at the appropriate time to exercise parliamentary oversight over the Service at the national level (see paragraph 7.103).
- 12.142. The Lisbon Treaty states that the Union delegations will work closely with the missions of the Member States, and not replace them. The Government should encourage the Diplomatic Service to engage positively with the External Action Service (see paragraph 7.105).

The Common Security and Defence Policy

- 12.143. The central role of NATO in the defence policy of certain Member States such as the UK will continue to be recognised under the new Treaties (see paragraph 7.111).
- 12.144. Under the new Treaties all the EU Member States, including the six Member States of the EU which are not also members of NATO, will have an obligation to come to each others' aid and assistance if one of them is attacked on their territory. However, this obligation will fall on each EU

Member State individually, and not on the EU and its institutions. As regards the EU Member States, such as the UK, which are also members of NATO, the Lisbon Treaty will not change the current situation with regards to their collective defence, which will continue to be organised and implemented in the framework of NATO (see paragraph 7.117).

- 12.145. Permanent Structured Cooperation is a form of enabling framework allowing the Member States who so wish to cooperate more closely in the area of defence capabilities development. Permanent Structured Cooperation is not a major departure from current practice. Rather, it represents a continuation and deepening of current forms of cooperation. Its objective is to create a political dynamic among Member States towards the improvement of European defence capabilities. Most of these new capabilities should be available to both NATO and the EU and could therefore serve to strengthen both organisations. While recognising that under Permanent Structured Cooperation some decisions will be taken by qualified majority voting, all decisions of substance will be taken unanimously by the participating Member States. Furthermore, the new Treaties will provide that “national security remains the sole responsibility of each Member State” (new Article 4 TEU) (see paragraph 7.126).
- 12.146. The provisions on the European Defence Agency and on crisis management missions are a codification of current practice and will therefore have little impact on the European Security and Defence Policy/Common Security and Defence Policy (see paragraph 7.129).

Chapter 8: Social Affairs

Employment and Social Affairs

- 12.147. The “emergency brake” negotiated by the UK Government as regards social security measures for migrant workers and their dependants is significant and we are satisfied that, if required, it will achieve the purpose for which it is designed (see paragraph 8.14).
- 12.148. The increased emphasis on social dialogue is also significant, but we are concerned that there is insufficient involvement of UK small business. We trust that UK small business organisations along with their colleagues in Brussels can resolve this matter to their mutual satisfaction and thereby ensure the proper involvement of the UK small business sector (see paragraph 8.15).

Education, Vocational Training and Youth

- 12.149. The inclusion amongst the Treaty’s objectives of the protection of children’s rights will have an important impact by making future legislative instruments subject to an assessment of their impact on children’s rights (see paragraph 8.28).
- 12.150. The new Articles 9 and 10 TFEU may be of particular assistance to children (see paragraph 8.29).
- 12.151. The inclusion in the Treaty of a specific provision on the participation of young people in democratic life in Europe does not amount to a significant extension of EU competence beyond action that is already taking place (see paragraph 8.30).

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

Sport

12.153. The inclusion of a legal base for sport builds on action already undertaken by the Community, which has recognised the role of sport in forging identity and bringing people together. It is nonetheless significant (see paragraph 8.45).

12.154. The provision of a legal base for sport within the Treaty is intended to permit the special nature or “specificity” of sport to be recognised by the European institutions (see paragraph 8.46).

12.155. The provision of a legal base for sport is also intended to ensure that EU legislation does not impose unintended consequences upon sporting activities and that the ability of sport to play an important role in European society is recognised (see paragraph 8.47).

12.156. A legal base for EU action on sport is intended to provide a transparent basis for EU-level funding of sporting projects (see paragraph 8.48).

12.157. Action in this area cannot go further than supporting, coordinating or complementing Member States’ actions and we urge the Government to ensure that the European institutions adhere to this provision (see paragraph 8.49).

Culture

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

Public Health

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

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

Consumer Protection

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

Chapter 9: Finance and the Internal Market

Finance

12.162. The formalisation of the Eurogroup has historical significance but no impact on the operation of ECOFIN. We are content that the Lisbon Treaty

has no significant impact in the area of financial affairs or trade policy (see paragraph 9.12).

Internal Market and Competition

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

Intellectual Property

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

Energy

12.165. The new provisions in the Lisbon Treaty may raise the profile of the issue of energy but they do not constitute a major innovation. However the extension of QMV may be seen as significant (see paragraph 9.33).

12.166. The insertion of Article 194(2) is important as it helps to define the boundaries between EU and Member States' competence by making clear that Member States retain sovereignty over national energy resources and have the right to determine their energy mix and the structure of their energy supply (see paragraph 9.34).

Services of General Interest

12.167. The impact of the Treaty of Lisbon on Services of General Interest is not significant (see paragraph 9.40).

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

Tourism

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

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

General conclusion

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

Chapter 10: Environment, Agriculture and Fisheries*Environment*

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

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

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

Agriculture, Fisheries and Animal Welfare

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

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

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

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

12.179. The abolition of the distinction between compulsory (agricultural) and non-compulsory expenditure is a significant step alongside the application of the ordinary legislative procedure to agriculture policy. The change will make

the agricultural budget-setting process more transparent, open and balanced (see paragraph 10.45).

- 12.180. The clause on exclusive competence for the conservation of marine biological resources under the Common Fisheries Policy represents a codification of ECJ case-law (see paragraph 10.48).
- 12.181. The new Article 13 TFEU re-affirms the European Union's commitment to animal welfare. It will help to ensure greater consistency across the EU as regards animal welfare (see paragraph 10.55).
- 12.182. We acknowledge the concerns of the fishing industry and draw attention to the potential consequences of applying the provisions on animal welfare to commercial fisheries given the nature of death to which netting and landing can lead (see paragraph 10.56).
- 12.183. We note that the possibility of allowing exemptions from animal welfare rules on grounds of religion, cultural tradition and regional heritage is included in the current animal welfare Protocol. The new Treaty article does not therefore amend the *status quo* in this regard (see paragraph 10.57).

Chapter 11: National Parliaments—The Democratic Challenge

Obligations on national parliaments

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

Yellow and orange cards

- 12.185. The yellow and orange card procedures are a useful innovation. It may be that they will seldom be invoked, but this is true of many of the sanctions available to scrutineers in a democracy. The existence of a sanction gives scrutiny teeth, while making it less likely that the sanction will need to be deployed. The Commission can disregard adverse votes from national parliaments and maintain its proposal; but this may be politically difficult, and if an orange card has been played the proposal is unlikely to find the necessary majority in the Council (see paragraph 11.50).
- 12.186. The extension of the period allowed for scrutiny from six to eight weeks makes the yellow and orange card procedures significantly easier for national parliaments to operate than would otherwise be the case. In practice this Parliament may have even longer, since English is usually the first language to emerge from the Commission translators, and it is typically another month before the last language emerges and the formal scrutiny period begins. Nonetheless it will be challenging even for this Committee to reach a considered view on subsidiarity within this time, particularly if, in the case of an adverse opinion, time needs to be factored in to put a motion to the House, and particularly if much of the period falls in recess (see paragraph 11.51).

- 12.187. A well-founded reasoned opinion may be ineffective for lack of the necessary supporting votes from other chambers within the eight weeks. The success of the card procedure will depend on coordination between national parliaments (see paragraph 11.52).
- 12.188. The increasing trend towards “first reading deals” makes it all the more important that there should be a period for parliamentary scrutiny. It has consequences for parliamentary scrutiny beyond the question of subsidiarity, making it more important for national parliaments to make their views known upstream. The burden is on national parliaments; those which leave it to the end of the eight weeks to express a view, or even later, risk being too late to make any difference. We do not however consider that this undermines the yellow and orange card procedures: during the eight weeks allowed for playing the card, no formal legislative step can be taken, save in case of urgency (see paragraph 11.53).
- 12.189. The card procedures apply only to the principle of subsidiarity, and not to proportionality. National parliaments will continue to police the proportionality principle by the other means at their disposal (see paragraph 11.54).
- 12.190. We expect the playing of a yellow or orange card to be a rare event. That being so, we caution the Commission and the European Court of Justice against drawing any inference from the non-playing of the cards. The absence of a yellow or orange card will not signify that national parliaments support a proposal (see paragraph 11.55).
- 12.191. Article 352(2) TFEU, which applies the yellow card procedure expressly to measures under Article 352 (the “flexibility clause”, currently Article 308 TEC), does not add anything of substance. Proposals adopted on the basis of Article 308 are no different from other proposals and fall under the subsidiarity monitoring procedures without any special article. Article 352(2) seems chiefly political, because of the sensitivity of Article 308 proposals (see paragraph 11.56).
- 12.192. The novelty of the card procedures, and their prominence in the Treaty, should not give rise to overestimation of their importance. Breaches of the subsidiarity principle in draft legislative acts are quite rare. National parliaments will no doubt take the new procedures seriously, but they should not distract attention from scrutiny of policy. Nonetheless, a beneficial consequence of the new procedures will be an intensification of day-to-day cooperation between national parliaments. This will bring advantages in areas wider than the monitoring of subsidiarity (see paragraph 11.57).

Article 308

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

Impact on the procedures of this House

- 12.194. The Lisbon Treaty will have consequences for the procedures of this House and our Committee. The Committee’s terms of reference and the Scrutiny Reserve Resolution will require amendment; the House will need to decide whether to delegate its vote in the yellow and orange card procedures

to the Committee; and a solution will be needed to the problem which will arise if most of the time allowed by those procedures for parliamentary scrutiny falls in recess. More broadly, we will need instructions from the House as to how far and how formally we should widen our focus, from the traditional dialogue with UK Ministers in Whitehall, to engagement with other national parliaments, EU institutions and the UK's devolved assemblies. There may be resource implications; and it will be desirable to consult the House of Commons. If the European Union (Amendment) Bill is passed, we will put these matters to the Procedure Committee (see paragraph 11.59).

APPENDIX 1: LIST OF MEMBERS

Select Committee on the European Union

Lord Blackwell
 Baroness Cohen of Pimlico
 Lord Dykes
 Lord Freeman
 Lord Grenfell (Chairman)
 Lord Harrison
 Baroness Howarth of Breckland
 Lord Jopling
 Lord Kerr of Kinlochard
 Lord Maclennan of Rogart
 Lord Mance
 Lord Plumb
 Lord Powell of Bayswater
 Lord Roper
 Lord Sewel
 Baroness Symons of Vernham Dean
 Lord Tomlinson
 Lord Wade of Chorlton
 Lord Wright of Richmond

Declaration of Interests

Lord Blackwell

Non-executive Director, SEGRO plc
Non-executive Director, Standard Life plc
Chairman, Interserve plc
Non-executive Board Member, Office of Fair Trading
Special Advisor, KPMG Corporate Finance
Shareholder, 4C Associates Ltd (business consultants)
Chairman and Director of the Centre for Policy Studies (Independent 'Think Tank')
Chairman and Director of Global Vision (independent campaign group)

Baroness Cohen of Pimlico

Non-Executive Director of the London Stock Exchange Plc

Lord Harrison

Former Member of the European Parliament 1989–1999

Lord Jopling

Owner of land and property in North Yorkshire
Partner in farming business in North Yorkshire
Member of National Farmers' Union (Past member of National Council)
Member of Country Land and Business Association
Former Minister of Agriculture, Fisheries and Food
Former Member of EEC Agriculture and Fishery Councils (President of both during UK Presidency)

Lord Kerr of Kinlochard

Secretary-General of the Convention on the Future of Europe 2000–03

Lord Maclennan of Rogart

House of Lords representative on the Convention on the Future of Europe 2002–03

Lord Mance

Member of the Lord Chancellor's advisory committee on private international law

UK representative judge on Council of Europe's Consultative Council of European Judges, Chair 2000–03

Member, Advisory Council of European Law Academy, Trier

Lord Plumb

Member of European Parliament from 1979–99

Chairman of the Agricultural Committee—1979–82

Chairman of the European Democratic Group—1982–87

President of the European Parliament 1987–89

President—Joint Assembly EU/ACP 1990–99

Chairman PRM Consultancy—Brussels 1999–2006

Baroness Symons of Vernham Dean

President, International Committee of the British Red Cross

Member of Board, British Airways

International adviser to DLA Piper, international lawyers

International adviser to CCC

Member of board, Caparo

Chairman, European Atlantic Group

Lord Tomlinson

House of Lords representative on the Convention on the Future of Europe 2002–03

Former Member of the European Parliament 1984–1999

Lord Wade of Chorlton

Chairman of the following commercial organisations:

Midas Capital Partners Ltd

NIMTECH Ltd

RisingStars Growth Fund Ltd

Rocktron Ltd

Choulton Services Ltd

Country Pubs Ltd

William Wild & Son (Mollington) Ltd

International Open View Exchange Ltd

Chairman of Trustees, Children's Safety Education Foundation

Patron, Society of Dairy Technology

Sub-Committee A (responsible for paragraphs 9.1–9.12)

Baroness Cohen of Pimlico (Chairman)

Lord Giddens

Lord Haskins

Lord Kerr of Kinlochard

Lord MacLennan of Rogart

Lord Moser

Lord Renton of Mount Harry

Lord Steinberg

Lord Trimble

Lord Watson of Richmond

Lord Woolmer of Leeds

Declaration of Interests

Lord Giddens

Project member, Policy Network (2006–2007)

Lord Kerr of Kinlochard

Chairman, Council of Imperial College

Deputy Chairman, Royal Dutch Shell plc

Director, Rio Tinto

Director, Scottish American Investment Company

Member, Advisory Board of Scottish Power

Secretary General, European Convention (2002–2003)

UK Permanent Representative to the European Union (1990–1995)

Lord Moser

Consultant for Askonas Holt Ltd

Board Member, Open University of Israel

Board of Governors, LSE

Trustee, Paul Hamlyn Foundation

Trustee, Rayne Foundation

Board member, Menuhin School

Advisory Council Member, London Symphony Orchestra

Trustee, Jewish Museum

President, Playhouse Theatre, Oxford

Chairman of Executive Committee, Jerusalem Music Centre

Chairman, Music at Oxford

Alzheimer Society

Wigmore Hall

London Zoo

Lord Watson of Richmond

Patron, European Movement

President, Richmond in Europe Association (twinning between Richmond, Constanza and Fontainebleau)

Sub-Committee B (Internal Market) (responsible for paragraphs 9.13–9.50)

Lord Bradshaw

Lord Dykes

Lord Freeman (Chairman)

Lord James of Blackheath

Lord Mitchell

Lord Paul

Lord Powell of Bayswater

Lord Rowe-Beddoe

Lord Walpole

Lord Whitty

Declaration of Interests

Lord Freeman

Consultant, Pricewaterhouse Coopers

Chairman, Thales Holdings UK plc (and chairman or director of a number of wholly owned subsidiaries of Thales Holdings UK plc including pension trustee companies)

Director, Thales SA

Chairman, Parity Group plc
Director, Global Energy Development plc

Lord Powell of Bayswater

Chairman, LVMH (Moët-Hennessy Louis Vuitton) UK
Chairman, Magna Holdings
Director, Caterpillar Inc
Director, Mandarin Oriental Hotel Group
Director, Textron Corporation
Director, Yell Group Limited
Director, Schindler Holdings
Director, Northern Trust Global Services
Chairman, Rolls-Royce International Advisory Board
Member, Advisory Board of the European Advisory Group GMBH
Member, International Advisory Board of ACE

Sub-Committee C (Foreign Affairs, Defence and Development Policy)
(responsible for Chapter 7 except paragraphs 7.42–7.50)

Lord Anderson of Swansea
 Lord Boyce
 Lord Chidgey
 Lord Crickhowell
 Lord Hamilton of Epsom
 Lord Hannay of Chiswick
 Lord Jones
 Lord Roper (Chairman)
 Lord Selkirk of Douglas
 Lord Swinfen
 Baroness Symons of Vernham Dean
 Lord Truscott

Declaration of Interests

Lord Hannay of Chiswick
Chair, United Nations Association UK
Member, Advisory Board, Centre for European Reform
Member, Advisory Board, European Foreign Affairs Review

Sub-Committee D (Environment and Agriculture) (responsible for Chapter 10)

Earl of Arran
 Lord Brooke of Alverthorpe
 Viscount Brookeborough
 Lord Cameron of Dillington
 Earl of Dundee
 Lord Greaves
 Baroness Jones of Whitchurch
 Lord Palmer
 Lord Plumb
 Lord Sewel (Chairman)
 Baroness Sharp of Guildford
 Viscount Ullswater

Declaration of Interests

Earl of Arran

Married to farmer in Devon

Trustee of certain family trusts associated with farming

Viscount Brookeborough

Farms in Northern Ireland and has received an EU grant several years ago for diversification

Runs a farm based Tourist business

Lord Cameron of Dillington

Farmer and Landowner and has commercial property interests in the countryside

Member of the National Farmers' Union

Member of the Country Land and Business Association

Member of the Campaign to Protect Rural England

Member of the National Trust

Member of the Council of the Royal Bath and West Society

Earl of Dundee

Farmer and owner of farmland and forestry

Director of farming company in Scotland

Lord Palmer

Member of the National Farmers' Union Scotland

Member of the Scottish Rural Property and Business Association

Farmer (in receipt of Single Farm Payment and other rural Stewardship Scheme Payments)

President of British Association for Bio Fuels and Oils

President of Transport Division of the Renewable Energy Association

Residual beneficiary of banana growing estate in West Indies

Involved in rural tourism

Lord Plumb

Farmer and property owner in Warwickshire

Member of the National Farmers' Union

Member of the Country Land and Business Association

President of the National Sheep Association

President of the Royal Agricultural Benevolent Institute

President of the International Training Programme

Past President and Member of the International Policy Council on Food, Agriculture and Trade

Hon Trustee of the Royal Agricultural Society of England

Fellow of the Duchy College, Cornwall and the Royal Agricultural College, Cirencester

Former Master of the Worshipful Company of Farmers

Viscount Ullswater

Director of farming company in Cumbria (Directors Fees)

Trustee of landed estates in Cumbria and Devon (Expenses)

Member of the Country Land and Business Association

Sub-Committee E (Law and Institutions) (responsible for Chapter 5, and Chapter 6 except paragraphs 222–6, 235–243 and 346–349)

Lord Blackwell

Lord Bowness

Lord Burnett

Lord Jay of Ewelme
 Baroness Kingsmill
 Lord Lester of Herne Hill
 Lord Mance (Chairman)
 Lord Norton of Louth
 Baroness O’Cathain
 Lord Rosser
 Lord Tomlinson
 Lord Wright of Richmond

Declaration of Interests

Lord Blackwell

Non-executive Director, SEGRO plc
Non-executive Director, Standard Life plc
Chairman, Interserve plc
Non-executive Board Member, Office of Fair Trading
Special Advisor, KPMG Corporate Finance
Shareholder, 4C Associates Ltd (business consultants)
Chairman and Director of the Centre for Policy Studies (Independent ‘Think Tank’)
Chairman and Director of Global Vision (independent campaign group)

Lord Bowness

Solicitor, Streeter Marshall
Member of the Law Society
Notary Public (fees)
Partner, P & J Consultants (legal consultants)

Lord Jay of Ewelme

Vice Chairman of Business for New Europe (BNE)

Lord Lester of Herne Hill

Council Member of JUSTICE
Governor, British Institute for Human Rights
Hon President and Board Member of INTERIGHTS (International Centre for the Legal Protection of Human Rights), Centre for European Law, King’s College, London
Member of Advisory Board, Institute of European Public Law, University of Hull

Lord Mance

Member of Lord Chancellor’s Advisory Committee on Private International Law (the North Committee)
“Stakeholder” expert representing UK judiciary in respect of European Commission’s Common Frame of Reference (CFR)

Sub-Committee F (Home Affairs) (responsible for paragraphs 6.222–6, 6.235–243, 6.346–349 and 7.42–50)

Lord Dear
 Lord Harrison
 Baroness Henig
 Lord Hodgson of Astley Abbotts
 Lord Jopling (Chairman)
 Lord Marlesford
 Lord Mawson

Lord Teverson
Baroness Tonge
Lord Young of Norwood Green

Declaration of Interests

No relevant interests declared.

Sub-Committee G (Social Policy and Consumer Affairs) (responsible for Chapter 8 and paragraphs 9.42–9.50)

Lord Eames
Baroness Gale
Baroness Howarth of Breckland (Chairman)
Lord Kirkwood of Kirkhope
Lord Lea of Crondall
Baroness Morgan of Huyton
Baroness Neuberger
Baroness Perry of Southwark
Lord Trefgarne
Baroness Uddin
Lord Wade of Chorlton
Baroness Young of Hornsey

Declaration of Interests

No relevant interests declared.

A full list of Members' interests can be found in the Register of Lords Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence; those without gave written evidence only.

Select Committee on the European Union

- D. Adams
- Nick Atkinson
- * Paul Berman, Legal Adviser, Foreign and Commonwealth Office
- M. Boardman
- * Rt Hon Lord Brittan of Spennithorne, QC, DL, a member of the House
- * Elmar Brok MEP, IGC Representative, European Parliament Committee on Constitutional Affairs
- Business for New Europe
- Campaign Against Euro-federalism
- * Professor Damian Chalmers, Professor in European Union Law, London School of Economics and Political Science
- Coalition for the Reform Treaty
- * Richard Corbett MEP, Lisbon Treaty *Rapporteur*, European Parliament Committee on Constitutional Affairs
- Sally DeBono
- Brendan Donnelly, Director, Federal Trust
- Andrew Duff MEP
- * Professor Sir David Edward KCMG QC, Honorary Professor at the School of Law, University of Edinburgh
- European Parliamentary Labour Party
- Federal Union
- * David Heathcoat-Amory MP
- Professor Simon Hix, Professor of European and Comparative Politics, London School of Economics
- Rt Hon Sir Francis Jacobs KCMG, QC
- * Timothy Kirkhope MEP, Vice-Chairman, European Parliament Committee on Constitutional Affairs
- * Lord Leach of Fairford, a member of the House, Chairman of Open Europe
- * Pascal Lefevre, Secretariat General, European Commission
- * Jo Leinen MEP, Chairman, European Parliament Committee on Constitutional Affairs
- * Shan Morgan, Director, EU, Foreign and Commonwealth Office
- Christopher Mowbray

- ★ Jim Murphy MP, Minister for Europe
National Society for the Prevention of Cruelty to Children
- ★ Jens Nymand Christensen, Director of Directorate E of the Secretariat-General, European Commission
- ★ Neil O'Brien, Director of Open Europe
- ★ John Palmer, formerly European editor of the *Guardian* and political director of the European Policy Centre
Lord Pearson of Rannoch, a member of the House
Professor Steve Peers, University of Essex
Malcolm Chisholm MSP, Convenor of the Scottish Parliament's European and External Relations Committee
- ★ Martin Shearman, Head, Common Foreign Security Policy Group, Foreign and Commonwealth Office
Geoff Southall and Michael Clark, The Democratic Party Limited
Frank Vibert, Director, European Policy Forum
- ★ Sir Stephen Wall GCMG LVO, Vice-Chair, Business for New Europe
- ★ Professor Helen Wallace CMG FBA, Centennial Professor, European Institute, London School of Economics and Political Science
Margot Wallström, Vice-President of the European Commission and Commissioner for Institutional Relations and Communication Strategy
J. A. Wheatley

Sub-Committee A (Economic and Financial Affairs)

The following witnesses gave oral evidence.

- ★ HM Treasury

Sub-Committee B (Internal Market)

The following witnesses gave evidence. Those marked ★ gave oral evidence.

- Association of Electricity Producers
- Business for New Europe
- Department for Business, Enterprise and Regulatory Reform
- Department for Innovation, Universities and Skills
- ★ European Commission
- ★ Malcolm Harbour MEP
- ★ Simmons & Simmons
- ★ Professor Michael Waterson, Warwick University

Sub-Committee C (Foreign Affairs, Defence and Development Policy)

The following witnesses gave evidence. Those marked ** gave both oral and written evidence; those marked * gave oral evidence only; those without asterisk gave written evidence only.

- * Graham Avery, Secretary General of the Trans European Policy Studies Association
British Overseas NGOs for Development (BOND)
- * Patrick Child, Head of Cabinet of the EU Commissioner for External Relations, Benita Ferrero-Waldner, DG RELEX
Sir Brian Crowe, Deputy Chairman of Chatham House
- * Professor Alan Dashwood, Cambridge University
- * Charles Grant, Director, Centre for European Reform
- ** Andrew Mathewson, Head of Directorate for Policy on International Organisations, Ministry of Defence
Open Europe
Nick Witney

Sub-Committee D (Environment and Agriculture)

The following witnesses gave evidence. Those marked * gave oral evidence.

- Compassion in World Farming
Stavros Dimas MEP
Food Security
National Farmers' Union
- * Lord Rooker, Minister of State for Sustainable Food and Farming, and Animal Welfare, Department for Environment, Food and Rural Affairs, a member of the House
Royal Society for the Prevention of Cruelty to Animals
Scottish Fishermen's Federation

Sub-Committee E (Law and Institutions)

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Julia Bateman, Justice and Home Affairs Policy, Law Society of England and Wales
- * Philip Bradbourn MEP
Brethren Christian Fellowship
- * Tony Bunyan, Statewatch
- * Michael Cashman MEP
Centre for European Reform

Professor Damian Chalmers, Professor in European Union Law, London School of Economics and Political Science

- ★ Scott Crosby, partner at Crosby, Houben & Aps
- ★ Professor Alan Dashwood, Bar Council
- Torquil Dick-Erikson
- Brendan Donnelly, Director of the Federal Trust
- Andrew Duff MEP
- ★ Claire-Françoise Durand, Acting Director-General, Commission Legal Services
- Professor Jacqueline Dutheil de la Rochère, University Paris II (Panthéon-Assas)
- Professor Sir David Edward KCMG QC, Honorary Professor at the School of Law, University of Edinburgh
- ★ Rebecca Ellis, lawyer, Ministry of Justice
- EUROJUST
- DG Justice, Freedom and Security, European Commission
- Fair Trials International
- Maria Fletcher, Lecturer in European Law, University of Glasgow
- ★ James Flynn QC, Bar Council
- Freedom Association
- ★ Florian Geyer, Centre for European Policy Studies
- ★ Jane Golding, EU Committee, Law Society of England and Wales
- ★ Professor Elspeth Guild, Centre for European Policy Studies
- ★ Stephen Hockman QC, Bar Council
- ★ Martin Howe QC
- JUSTICE
- Professor Maria Kaiafa-Gbandi, Aristotle University of Thessaloniki
- ★ Dr Clemens Ladenburger, Commission Legal Services
- Law Society of England and Wales
- Law Society of Scotland
- ★ Klaus-Heiner Lehne MEP
- ★ Baroness Ludford MEP, a member of the House
- ★ Manuel Medina Ortega MEP
- Dr Valsamis Mitsilegas, Queen Mary University of London
- Baroness Nicholson of Winterbourne MEP, a member of the House
- ★ Kevan Norris, lawyer, Home Office
- Anne Palmer JP
- ★ Professor Steve Peers, Statewatch

- * Professor Jo Shaw, University of Edinburgh
- * Rt Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice
- * Diana Wallis MEP

Sub-Committee F (Home Affairs)

The following witness gave written evidence:

Jim Murphy MP, Minister for Europe

Sub-Committee G (Social Policy and Consumer Affairs)

Those marked * gave oral evidence.

- Barnardo's
- British Olympic Association
- CBI
- * Central Council of Physical Recreation
- Chartered Institute of Personnel and Development
- Children's Rights Alliance
- Department for Business Enterprise & Regulatory Reform
- Department of Children Schools and Families
- Department for Culture, Media and Sport
- Department of Health
- Department of Innovation Universities and Skills
- Department for Work and Pensions
- Andrew Duff MEP
- European Trade Union Confederation
- Federation of Small Businesses
- 4 Children
- Monika Mura, Department of Politics, University of Bristol
- National Children's Bureau
- NCH, the children's charity
- * National Society for the Prevention of Cruelty to Children
- Dr Richard Parrish, Centre for Sports Law Research, Edge Hill University
- Dr Eve Sariyiannidou
- * Save the Children
- Professor J R Shackleton, Dean of Westminster Business School
- The Children's Society
- Trades Union Congress

In addition the following gave written evidence which has not been printed, but is available for inspection at the Parliamentary Archives (020 7219 5314).

Select Committee

Thomas Aldridge

Gary Blakely

Alan Cox

David Cox

Peter Davison OBE

Eric Edmond

R. P. I. Hopkins

James McCulloch

R. J. McDonald

Christopher Mowbray

K. Perry

J. A. Sleep

Linda Upham

J. C. Whiffen

Sub-Committee C

The Federal Trust

Mr Alan Johnson

Mr Stephen Nash

Mrs Anne Palmer

Sub-Committee E

Matthew J Browning

The Democratic Party Limited

A S Hamlin

Lesley D McDade

Kenneth and Doreen Perry

Jess and Margaret Thompson-Hughes on behalf of UKIP Yeovil Branch

Sub-Committee F

Mrs Anne Palmer

APPENDIX 3: STRUCTURE OF THE TREATIES—A ROUGH GUIDE TO WHAT GOES WHERE

	What the Title is in the TEU	What happens to it	What the Title is in the amended TEU
Title I	“Common Provisions”	Stays, as amended	“Common Provisions”
Title II	“Provisions Amending the Treaty Establishing the European Economic Community With a View to Establishing the European Community”	Replaced by new Title and articles	“Provisions on Democratic Principles”
Title III	“Provisions Amending the Treaty Establishing the European Coal and Steel Community”	Replaced by new Title and articles	“Provisions on the Institutions”
Title IV	“Provisions Amending the Treaty Establishing the European Atomic Energy Community”	Replaced by new Title and Article containing what were the provisions of Title VII as amended	“Provisions on Enhanced Cooperation”
Title V	“Provisions on a Common Foreign and Security Policy”	Amended and renamed	“General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy”
Title VI	“Provisions on Police and Judicial Cooperation in Criminal Matters”	These articles move to Title V TFEU, as amended. Replaced by what was Title VIII, as amended	“Final Provisions”
Title VII	“Provisions on Enhanced Cooperation”	These articles move into the new Title IV, as amended, and the Title is deleted	(Not used)
Title VIII	“Final Provisions”	These articles move into the new Title VI, as amended, and the Title is deleted	(Not used)

	What the Part/Title is in the TEC	What happens to it	What the Part/Title is in the amended TFEU
Part One	“Principles”	Stays, as amended	“Principles”, including new Title I, “Categories and Areas of Union Competence”, and new Title II, “Provisions Having General Application”
Part Two	“Citizenship of the Union”	Amended and renamed	“Non-Discrimination and Citizenship of the Union”
Part Three	“Community Policies”	Amended and renamed	“Union Policies and Internal Actions”
Part Three Title I	“Free Movement of Goods”	Becomes Title II, as amended, following the insertion of new Title I, “The Internal Market”.	“The Internal Market”
Title II	“Agriculture”	Becomes Title III, as amended and renamed	“Free Movement of Goods”
Title III	“Free Movement of Persons, Services and Capital”	Becomes Title IV, as amended	“Agriculture and Fisheries”
Title IV	“Visas, Asylum, Immigration and Other Policies Relating to Free Movement of Persons”	Becomes Title V, expanded to take in current Title VI TEU, as amended and renamed	“Free Movement of Persons, Services and Capital”
Title V	“Transport”	Becomes Title VI, as amended	“Area of Freedom, Security and Justice”
Title VI	“Common Rules on Competition, Taxation and Approximation of Laws”	Becomes Title VII, as amended	“Transport”
Title VII	“Economic and Monetary Policy”	Becomes Title VIII, as amended	“Common Rules on Competition, Taxation and Approximation of Laws”
Title VIII	“Employment”	Becomes Title IX, as amended	“Economic and Monetary Policy”
Title IX	“Common Commercial Policy”	Moves to Part Five	“Employment”

Title X	“Customs Cooperation”	Moves into Title II, “Free Movement of Goods”	See below
Title XI	“Social Policy, Education, Vocational Training and Youth”	Amended and divided into three Titles X–XII	Title X, “Social Policy”, Title XI, “The European Social Fund”, and Title XII, “Education, Vocational Training, Youth and Sport”
Title XII	“Culture”	Becomes Title XIII, as amended	See above
Title XIII	“Public Health”	Becomes Title XIV, as amended	“Culture”
Title XIV	“Consumer Protection”	Becomes Title XV, as amended	“Public Health”
Title XV	“Trans-European Networks”	Becomes Title XVI, as amended	“Consumer Protection”
Title XVI	“Industry”	Becomes Title XVII, as amended	“Trans-European Networks”
Title XVII	“Economic and Social Cohesion”	Becomes Title XVIII, as amended and renamed	“Industry”
Title XVIII	“Research and Technological Development”	Becomes Title XIX, as amended and renamed	“Economic, Social and Territorial Cohesion”
Title XIX	“Environment”	Becomes Title XX, as amended	“Research and Technological Development and Space”
Title XX	“Development Cooperation”	Moves into Title III of Part Five, “Cooperation with Third Countries and Humanitarian Aid”, as amended.	“Environment”
Title XXI	“Economic, Financial and Technological Cooperation with Third Countries”	Moves into Title III of Part Five, “Cooperation with Third Countries and Humanitarian Aid”, as amended. Replaced by new Title	“Energy”
		New Title added	Title XXII, “Tourism”
		New Title added	Title XXIII, “Civil Protection”
		New Title added	Title XXIV, “Administrative Cooperation”

Part Four	“Association of the Overseas Countries and Territories”	Stays, as amended	“Association of the Overseas Countries and Territories”
Part Five	“Institutions of the Community”	Becomes Part Six, renamed “Institutional and Budgetary Provisions”, and amended	New Part Five: “External Action by the Union”
Part Five Title I	“Provisions Governing the Institutions”	Becomes Title I of Part Six, as amended. Replaced by new Title	“General Provisions on the Union’s External Action”
Title II	“Financial Provisions”	Becomes Title II of Part Six, as amended. Replaced by new Title	“Common Commercial Policy”
		New Title added	Title III, “Cooperation with Third Countries and Humanitarian Aid”
		New Title added	Title IV, “Restrictive Measures”
		New Title added	Title V, “International Agreements”
		New Title added	Title VI, “The Union’s Relations with International Organisations and Third Countries and Union Delegations”
		New Title added	Title VII, “Solidarity Clause”
Part Six	“General and Final Provisions”	Becomes new Part Seven, as amended	New Part Six: “Institutional and Budgetary Provisions”
		New Title added	Title I, “Provisions Governing the Institutions”
		New Title added	Title II, “Financial Provisions”
		New Title added	Title III, “Enhanced cooperation”
		New Part Seven added	Part Seven: “General and Final Provisions”

APPENDIX 4: “SHALL”: THE DRAFTING OF ARTICLE 12 TEU

In the case of all versions of the Lisbon Treaty the original is in practice drafted in French, from which all other texts are translated. The Lisbon Treaty inserts in the Treaty on European Union a new Article 12. In the English text considered by the Committee in its report *The EU Reform Treaty: work in progress* this read: “National Parliaments shall contribute actively to the good functioning of the Union ...” The original French text read: “*Les parlements nationaux contribuent activement au bon fonctionnement de l’Union ...*”

These remained the English and French texts in version CIG 1/1/07 REV 1 of 5 October 2007. In that version the German, Italian and Spanish texts read:

“*Die nationalen Parlamente tragen aktiv zur reibungslosen Funktionsweise der Union bei, indem sie ...*”

“*I parlamenti nazionali contribuiscono attivamente al buon funzionamento dell’Unione: ...*”

“*Los Parlamentos nacionales contribuirán activamente al buen funcionamiento de la Unión, para lo cual: ...*”

In the texts of 3 December 2007, CIG 14/07, which in all five languages were (in the case of this provision) unchanged before signature, the English text had been amended to read: “National Parliaments contribute actively to the good functioning of the Union ...” i.e. “shall” had been omitted.

The French, Italian and Spanish were unchanged. The German had been amended to read: “*Die nationalen Parlamente tragen aktiv zur guten Arbeitsweise der Union bei, indem sie ...*” The change from “*reibungslosen Funktionsweise*” to “*guten Arbeitsweise*” is irrelevant for present purposes.

There is no equivalent in French to the English mandatory “shall”. In legal texts the present tense is used in French to convey that meaning. The same is true of the German and Italian, which are in the present tense. The Spanish is in the mandatory future.

There are of course cases where the present tense is used in the original French in a descriptive sense, and the English is also in the present, e.g. Article 2 TEU: “The Union is founded on the values of ...”

However, whenever the French present is used in a mandatory sense, the word “shall” is used in English, e.g. “*L’article premier est modifié comme suit*” is translated as “Article 1 shall be amended as follows”, even though in this particular case the present would suffice in English, and would be used in English domestic legislation.

Articles 14–19 TEU impose duties on the institutions of the Union. Each begins in French with the mandatory present which is translated into English using “shall”, e.g. Article 16, where the original French reads: “*Le Conseil exerce, conjointement avec le Parlement européen, les fonctions législative et budgétaire. Il exerce des fonctions de définition des politiques et de coordination conformément aux conditions prévues par les traités*”, which is translated as: “The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.”

It is very unlikely that the Court of Justice would ever have to interpret Article 12 of the amended TEU. If it did, while an argument could be made that Article 12 imposes duties on national Parliaments, it is highly unlikely that such an argument would succeed, having regard to the context and the understanding of the Member States as to its interpretation (mentioned in Chapter 11 of this report).

APPENDIX 5: THE UK'S POSITION UNDER THE NEW QMV RULES

These calculations show how the UK's share of the overall voting weight and the UK's share of a blocking minority will change under the Lisbon Treaty's new QMV rules, and what the UK's influence on the use of the Ioannina-II mechanism will be.

The calculations below are based on Eurostat data as of 1 January 2006.

The table below shows the situation that the UK is currently in if it wishes a measure initiated by the Commission to be approved under QMV²⁷⁰:

For a measure initiated by the Commission to pass, the proposal needs:	The UK:	So the UK has, out of what it needs to gather to get the measure passed:
A majority of Council members (i.e. 14 Member States),	Represents one Council member (3.7%)	7.1% of the Council members it needs
255 out of 345 votes, and	Has 29 votes (8.4%)	11.4% of the votes it needs
62% of the Union's population	Represents 12.3% of the Union's population	19.8% of the population it needs

The table below shows the situation that the UK will be in under the Lisbon Treaty's QMV rules, if it wishes a measure initiated by the Commission to be approved under QMV:

For a measure initiated by the Commission to pass, the proposal will need:	The UK:	So the UK will have, out of what it will need to gather to get the measure passed:
55% of Council members (i.e. 15 Member States), and	Represents one Council member (3.7%)	6.7% of the Council members it will need
65% of the Union's population	Represents 12.3% of the Union's population	18.9% of the population it will need

Each Member State has equal weighting in terms of the number of Council members (one in 27) and the change (from 7.1 per cent to 6.7 per cent) will be exactly the same for all Member States. Once this is discounted, the most important term under the current voting rules is the share of the votes that each Member State holds—in the UK's case, 8.4 per cent—as the population term is rarely, if ever, invoked. Under the Lisbon Treaty, the important term will be the

²⁷⁰ For simplicity's sake, these calculations are based on a vote on a measure initiated by the Commission in which all Member States are taking part.

share of the population that each Member State represents—in the UK’s case, 12.3 per cent. Some therefore hold that the UK’s voting power will increase from 8.4 per cent to 12.3 per cent.

The other side of the coin is how the Lisbon Treaty affects the ease with which the UK can gather a blocking minority to stop a measure that it considers to be against its interests.

The table below shows the situation that the UK is currently in if it wishes a measure initiated by the Commission to be blocked under QMV²⁷¹.

Minimum needed to block a measure initiated by the Commission:	The UK:	So the UK has, out of what it needs to gather to block a measure:
14 Council members, or	Represents one Council member (3.7%)	7.1% of the Council members it will need
91 out of 345 votes, or	Has 29 votes (8.4%)	31.9% of the votes it needs
More than 38% of the Union’s population	Represents 12.3% of the Union’s population	32.3% of the population it needs

The table below shows the situation that the UK will be in under the Lisbon Treaty’s QMV rules, if it wishes a measure initiated by the Commission to be blocked under QMV. The UK would have to gather the minimum number of Member States representing more than 35 per cent of the Union’s population, plus one Member State.

Minimum that will be needed to block a measure initiated by the Commission:	The UK:	So the UK will have, out of what it will need to gather to block a measure:
13 Council members, or	Represents one Council member (3.7%)	7.7% of the Council members it will need
35.1% of the Union’s population ²⁷²	Represents 12.3% of the Union’s population	35.0% of the population it will need

The UK’s share of the minimum blocking minority (i.e. the blocking minority including the smallest number of Member States required to back up the UK) will therefore increase from 31.9 per cent (in terms of weighted votes) or 32.3 per cent (in terms of population) under the current Treaties to 35 per cent (in terms of population) under the Lisbon Treaty.

²⁷¹ For simplicity’s sake, these calculations are based on a vote on a measure initiated by the Commission in which all Member States are taking part.

²⁷² As the extra Member State could be any Member State, including Malta, Luxembourg, or Cyprus representing (according to Eurostat) just 0.1 per cent of the Union’s population, the UK will have to gather a minimum of 35.1 per cent of the Union’s population, as long as this includes at least four states.

It is also important to consider how easily the UK will be able to gather together enough Member States to implement the “Ioannina-II” mechanism, if the UK wishes to suspend a decision for long enough to find an acceptable solution. There is no similar provision in the current Treaties.

The table below shows the situation that the UK will be in between 1 November 2014 and 31 March 2017 if it wishes the “Ioannina-II” mechanism to be used:

Minimum that will be needed to implement the “Ioannina-II” mechanism:	The UK:	So the UK will have, out of what it will need to gather to use the mechanism:
75% of the 13 Council members (10 members), or	Represents one Council member (3.7%)	10% of the Council members it will need
75% of the 35% of the Union population necessary to form a blocking minority (i.e. 26.3% of the Union’s population)	Represents 12.3% of the Union’s population	46.9% of the population it will need

The table below shows the situation that the UK will be in between after 1 April 2017 if it wishes the Ioannina-II mechanism to be used:

Minimum that will be needed to implement the “Ioannina-II” mechanism:	The UK:	So the UK will have, out of what it will need to gather to use the mechanism:
55% of the 13 Council members (8 members), or	Represents one Council member (3.7%)	12.5% of the Council members it will need
55% of the 35% of the Union population necessary to form a blocking minority (i.e. 19.3% of the Union’s population)	Represents 12.3% of the Union’s population	63.9% of the population it will need

Between 1 November 2014 and 31 March 2017, the UK will be able to invoke the “Ioannina-II” mechanism if it has the agreement of Germany alone, or of other states adding up to 14.0 per cent of the Union’s population. After 1 April 2017, the UK will be able to implement the “Ioannina-II” mechanism if it has the agreement of any of Germany, France, Italy, Spain, or Poland alone, or of several other smaller states adding up to 7.0 per cent of the Union’s population.

APPENDIX 6: GLOSSARY

This glossary describes the current situation, not the situation which would be created by ratification of the Lisbon Treaty.

Acquis: the *acquis communautaire* encompasses the whole range of principles, policies, laws, practices, obligations and objectives that have been agreed within the EU. See also Schengen.

CAP: Common Agricultural Policy.

Charter of Fundamental Rights: the Charter sets out the fundamental rights, freedoms and principles applicable at EU level and was first proclaimed by the Presidents of the Council, Parliament and Commission at the Nice European Council in December 2000. It is a political document, not a legally binding one.

Co-decision procedure: introduced by the Treaty of Maastricht and modified by the Treaty of Amsterdam, this procedure is set out in Article 251 of the EC Treaty and now applies to many areas of Community legislation. Under it, a Commission proposal can only become law if both the Council and EP agree it.

Commission: an EU institution comprising 27 Commissioners, one from each Member State. It has the tasks of ensuring the Treaties are correctly applied, of proposing new legislation to the Council and European Parliament for approval, and of exercising implementing powers conferred on it by the Council.

Common Foreign and Security Policy (CFSP): an area of intergovernmental activity within the Union, but outside the European Communities, created by the Treaty of Maastricht. The CFSP covers all areas of foreign and security policy, including the progressive framing of a common defence policy.

Competence: a term describing the powers conferred by the Member States on EU institutions under the EU Treaties to undertake specific action or propose legislation in a particular policy area.

Consultation (of the European Parliament): a procedure which requires the Council to consult the EP and take its views into account before voting on a Commission proposal.

Council of Ministers: this is the principal decision-making institution of the Union. It meets in a variety of configurations (e.g. the General Affairs and External Relations Council, the Economic and Financial Affairs Council) attended by the relevant national ministers and is chaired by the Presidency. Working Groups and COREPER prepare the Council's work. It is supported by the Council Secretariat.

Court of Justice: the Court of Justice, also known as the ECJ, is based in Luxembourg and comprises 27 judges (one from each Member State) assisted by eight Advocates-General. Its broad task is to ensure that the law is observed in the interpretation and application of the Treaty. It has jurisdiction in the first, or Community, Pillar, more limited jurisdiction in the third Pillar (police and judicial cooperation in criminal matters) and no jurisdiction in the second Pillar (CFSP). There is also a Court of First Instance (CFI) to deal with certain specified issues.

European Community: the present name for what was originally called the European Economic Community (EEC). The EEC was established by the Treaty of Rome but was renamed the European Community by the Treaty of Maastricht.

European Communities: this term refers to the three founding Treaties. The first, the European Coal and Steel Community (ECSC Treaty), was signed in Paris in 1951 and entered into force in 1952. It expired in July 2002. Two further Treaties, signed in Rome in 1957, established the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). Both Treaties entered into force in 1958.

European Council: a meeting of Heads of state or government of the Member States, their Foreign Ministers and the President of the Commission. The European Council meets twice during each six-monthly Presidency in Brussels. Its meetings are sometimes referred to as European Summits. The European Council provides the EU with strategic direction and necessary impetus for its development. It operates by consensus and will normally agree “Conclusions” signalling the future course of EU action. It does not exercise legislative functions.

European Court of Justice (ECJ): see Court of Justice.

European Parliament (EP): the EP is currently composed of 785 members (MEPs—72 from the UK) directly elected every five years in each Member State by a system of proportional representation. See Table 3. Originally a consultative body, successive Treaties have increased the EP’s role in scrutinising the activities of the Commission and Council and extended its legislative and budgetary powers through co-decision. The EP meets in plenary session in Strasbourg and, occasionally, in Brussels.

European Security and Defence Policy (ESDP): the ESDP seeks to strengthen Europe’s capability for crisis management through NATO and the EU. The policy is designed to give the EU the tools to take on humanitarian and peacekeeping tasks where NATO as a whole is not engaged.

European Union: the European Union was created by the Treaty of Maastricht. It consists of three “Pillars”. The First Pillar comprises the pre-existing European Communities (the European Community, Euratom and the ECSC) and covers largely, though not exclusively, economic business. The Second Pillar is the Common Foreign and Security Policy. The Third Pillar, after amendment by the Treaty of Amsterdam, covers certain police and judicial cooperation in criminal matters. Under the First, or Community, Pillar most legislation is proposed by the Commission and adopted as law by the Council and EP. Inter-governmental procedures apply under the Second and Third Pillars. Member States, as well as the Commission, have the right to propose policies or laws for approval by the Council.

EU Treaties: these refer principally to the Treaty establishing the European Community (TEC), and the Treaty on European Union (TEU or Treaty of Maastricht) and acts or treaties supplementing or amending them, notably the Single European Act, the Amsterdam Treaty and the Nice Treaty.

High Representative: the representative of the Council of Ministers for Common Foreign and Security Policy matters, who is also Secretary-General of the Council and, as such, head of the Council Secretariat. The current High Representative is Javier Solana.

Internal Market: refers to policies facilitating the free movement of goods, services, persons and capital, thereby opening up markets and removing obstacles to free trade. Also referred to as the Single Market.

JHA: cooperation in the fields of Justice and Home Affairs, introduced by the Maastricht Treaty as the third inter-governmental Pillar. Police and judicial

cooperation in criminal matters remain in the third Pillar but the Amsterdam Treaty transferred some areas of JHA cooperation, such as asylum and immigration, to the first or Community Pillar.

Legal base: the legal base refers to the Article or Articles of the Treaties giving the Union power to act. The relevant Article describes the voting requirements and type of legislative procedure (e.g. co-decision) that should be used for a proposal to be made into an EU law. EU laws must clearly state the legal base on which the Union is acting.

Member State: a country that is a member of the European Union.

MEP: Member of the European Parliament.

Passerelle: A Treaty provision enabling procedural requirements to be reduced, or other adjustments made, without formal Treaty revision. Literally “a bridge”.

Pillars: there are three “Pillars”. The first Pillar refers to the Community or EC Treaty (TEC). The second and third Pillars refer to the two areas of inter-governmental cooperation established by the Maastricht Treaty. These are the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (the latter amended by the Amsterdam Treaty to include only police and judicial cooperation in criminal matters).

Presidency: this refers to the Member State chairing meetings of the Council and European Council. The Presidency rotates every six months among the Member States.

Qualified majority voting (QMV): this is a voting mechanism in the Council under which a proposal can be adopted without every Member State agreeing to it. New QMV arrangements agreed in the Nice Treaty came into force on 1 November 2004. 255 votes are needed for a qualified majority out of a total of 345 weighted votes. The weighting of votes refers to the allocation of votes to each member state and roughly reflects population size. In addition, the votes in favour of a proposal have to be cast by a majority (or in some cases a two-thirds majority) of Member States, and at least 62 per cent of the Union’s population. See Table 2.

Schengen Agreement: a separate agreement originally outside the EU Treaties between some Member States (not the UK or Ireland) on the gradual elimination of border controls at their common frontiers. The “Schengen *acquis*” refers to the original agreement, concluded in Schengen, Luxembourg in 1985, and subsequent measures building on the agreement. The *acquis* was incorporated into the EU Treaties by the Treaty of Amsterdam in 1999. The UK and Ireland secured opt-outs to enable them to maintain their own border controls but participate in the police and judicial cooperation elements of the Schengen *acquis*.

Subsidiarity: the principle that action should only be taken by the Community or Union if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore be better achieved at European level.

TEC: the Treaty establishing the European Community as amended by subsequent Treaties up to and including the Treaty of Nice.

TEU: the Treaty on European Union, also known as the Maastricht Treaty, as amended by subsequent Treaties up to and including the Treaty of Nice.

Unanimity: a form of voting in the Council. A proposal requiring unanimity must have no Member State voting against (abstentions do not prevent the adoption of acts requiring unanimity).

APPENDIX 7: MINUTES OF PROCEEDINGS OF SUB-COMMITTEE C ON CHAPTER 7 OF THE REPORT

Thursday 31 January 2008

Present:

L. Anderson of Swansea

L. Boyce

L. Chidgey

L. Crickhowell

L. Hannay of Chiswick

L. Jones

L. Roper (Chairman)

L. Selkirk of Douglas

L. Swinfen

L. Truscott

The Sub-Committee considered the draft Report.

Paragraphs 1–4 were agreed to, with amendments.

It was moved by Lord Crickhowell, after paragraph 4, to insert—

“We agree with the House of Commons Foreign Affairs Committee’s conclusion in its recent report on the “Foreign Policy Aspects of the Lisbon Treaty” that ‘there is no material difference between the provisions on foreign affairs in the Constitutional Treaty which the Government made subject to approval in a referendum and those in the Lisbon Treaty on which a referendum is being denied’. We feel that this statement also applies to defence matters.”

The Sub-Committee divided:

Contents	Not-contents
	L. Anderson of Swansea
	L. Boyce
	L. Chidgey
	L. Hannay of Chiswick
	L. Jones
	L. Truscott
	L. Roper (Chairman)

The amendment was disagreed to accordingly.

Paragraphs 5–124 were agreed to, with amendments.