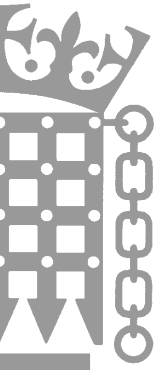

HOUSE OF LORDS

European Union Committee

10th Report of Session 2007–08

The Treaty of Lisbon: an impact assessment

Volume II: Evidence

Ordered to be printed 26 February 2008 and published 13 March 2008

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 62-II

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Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE A)

MONDAY 21 JANUARY 2008

Present	Cohen of Pimlico, B (Chairman)	Steinberg, L
	Giddens, L	Trimble, L
	Kerr of Kinlochard, L	Woolmer of Leeds, L
	Moser, L	

Examination of Witnesses

Witnesses: ANGELA EAGLE, a Member of the House of Commons, Exchequer Secretary to the Treasury, MR PETER CURWEN, Director, Europe, MR ANDREW OLIVE, EU Policy Official, and MR STUART GLASSBOROW, EU Policy Official, HM Treasury, examined.

Q1 ***Chairman:*** Welcome and thank you all very much for coming. You know the form, we are on air and, indeed, on television. I do not mean national television, we are on the parliament website and everything you say will be written down and you will be offered an opportunity to look at the transcript afterwards. I have a feeling that we may be interrupted by a division and, if so, I am afraid we may have to go and vote. If I may, I will get started. Minister, it is very good of you to come, particularly since it is not your subject and you are having to bat for all sorts of other people. Would you like us to start on the questions or is there an opening statement you would generally like to make?
Angela Eagle: I have a brief opening statement if that will assist the Committee or if you prefer just to get on with the questions if you are going to vote, it is entirely up to you.

Q2 ***Chairman:*** Try the opening statement; it will probably be as illuminating as the answers to the questions.
Angela Eagle: Thank you for inviting me to assist the Committee with its inquiry into the impact of the Treaty of Lisbon. I would like the three Treasury officials who are here with me today just to introduce themselves to you.
Mr Curwen: I am Peter Curwen, I am HM Treasury Director of Europe.
Mr Glassborow: I am Stuart Glassborow. I am an EU policy official working in Peter's directorate.
Mr Olive: I am Andrew Olive. I am also a policy expert on the EU budget.
Angela Eagle: The Prime Minister signed the Lisbon Treaty on 13 December and today, of course, marks the start of the Second Reading of the European Union (Amendment) Bill in the House of Commons, which contains the necessary institutional reforms to accommodate a European Union of 27 Member States. The Bill includes the safeguards we have negotiated to protect the national interest, the so-called "red lines". The Lisbon Treaty will enable the enlarged European Union to work more effectively and efficiently. This amending treaty provides the Union with a stable and lasting institutional framework which will allow the European Union and its Member States to respond positively to the challenges of globalisation. The United Kingdom has secured full and watertight safeguards on each of the red lines set out by the Government ahead of the June 2007 European Council which include a protocol on the Charter, a declaration on foreign policy, an opt-in on criminal law and police co-operation initiatives and protection on social security measures. I understand that the Committee is exploring the detail of these issues with other ministerial colleagues as well as outside experts. The noble Lords will know that agreement on the Lisbon Treaty marks the culmination of several years of discussion on institutional questions. I think it is also worth noting the agreement at the December European Council that Member States: "expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead". These challenges were set out in detail by the Government in a document *Global Europe*, which was published on 22 October last year. Many of these challenges and the priorities for the European Union and Member State action to address them may be of interest to members of this particular Sub-Committee: growth and employment, promoting external openness, tackling climate change and energy security, and tackling global poverty and development. The Prime Minister elaborated on these points in his speech on British Priorities for a Global Europe on Monday. To address these challenges, the Government is committed to pursuing reform of the European

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Community budget in the forthcoming budget review. The Commission's budget review consultation is now underway and the next step will be the publication of a Commission White Paper this or next year, likely to describe a set of possible high-level visions for a future budget. The White Paper will be followed by a Council response and then a period of negotiation for the next Financial Perspective due in 2011-12. The Economic Secretary to the Treasury has agreed, I believe, to come to see you to discuss the budget review. The *Global Europe* pamphlet sets out the Government's early priorities: the key message is that the fundamental review of the EC budget provides an important opportunity to progress towards a reformed European Union.

Q3 ***Chairman:*** Thank you very much, Minister. We are confining ourselves very much to the financial implications of the Treaty and some of our questions may strike you as slightly man on the Clapham omnibus but we have felt it necessary, as it were, to take the man on the Clapham omnibus into our consideration on this Committee and to ask perhaps his questions about it. May I start with a question which is, can you confirm that the Reform Treaty will not introduce any changes to the means by which the EU is funded or the size of the UK contribution?
Angela Eagle: Yes, I can confirm that is the case. The Reform Treaty does not introduce changes to the means by which the European Union is funded or the size of the UK's contributions and Article 269 confirms this. Own Resources decisions continue to be made by unanimity through a Council decision and then approved by all Member States.
Chairman: Thank you very much.

Q4 ***Lord Kerr of Kinlochard:*** "Approved by all Member States". Could I ask the Minister, I think the language that is in the new Treaty is the language in the old Treaty and it also includes a requirement that approval should be given by member states "according to their own constitutional requirements", which in our case means that there could be no change to the ceiling on the EU's income without an affirmative vote of both Houses of Parliament.
Angela Eagle: That is my understanding of the case, yes.

Q5 ***Lord Kerr of Kinlochard:*** Thank you. Could I ask about a much smaller point which is about the CFSP and the Start-Up Fund? Having gone from huge sums like the UK contribution we are now down to the very small sums, but it is the requirement on this Sub-Committee to have a look across the board. How do you envisage that the Start-Up Fund contributions would be agreed among Member States? It is by definition outside the budget, so the normal procedures would not apply. How would they do this?
Angela Eagle: Lord Kerr, you are quite right to observe that we have gone from the very, very big sums to the very small sums. The Treaty as it is written at the moment does not specify how contributions will be weighted. It does not by definition go into that kind of detail. It states that: "The amounts allocated to the Start-Up Fund and the applicable procedures for financial control and administration are to be agreed by the Council acting by QMV on a proposal from the High Representative of the Union for foreign affairs and security policy." We suspect that this will be pretty similar to the arrangements that have been in place for these occasions so far. We are not expecting there to be any change.

Q6 ***Lord Kerr of Kinlochard:*** Obviously one cannot give a concrete answer, I quite understand that, because, as you have explained, the Council will be waiting for proposals from the High Representative, Mr Solana, but would you expect that he would be proposing procedures which would require contributions from Member States not contributing to the CFSP operation in question or would it be, in effect, a whip-round among those engaged in the operation in question?
Angela Eagle: I think it is probably worth saying at this point that the Common Foreign and Security Policy can have civilian or military actions and that civilian and military actions are funded differently. Expenditure arising from civilian actions is generally funded by the EC budget and tasks having military or defence implications cannot be charged to the EC budget and, therefore, have to funded by I suppose what you have just referred to as a whip-round, which would be the way to talk about it. It would depend what the action was, how it split into civilian and military, as to how it might be assumed or suggested by the High Representative that it be paid for. You can see from that that it is done on a case-by-case basis and in general sense prevails, people do not try to force EU countries who perhaps do not want to get involved in particular issues to have to pay for them. It is all done in general by agreement. I am not aware that we have had massive controversy in the past in the nine different examples we have had of actions, both military and civilian, under this heading in coming to conclusions about how to fund them.

Q7 ***Lord Kerr of Kinlochard:*** So you, Minister, speaking not just for the Government but for the Treasury, are perfectly happy with this Start-Up Fund provision in the Treaty and are waiting to see

what the High Representative will propose for the detail but are not waiting in fear and terror? You are not worried?
Angela Eagle: We certainly are not waiting in fear and terror and we do not have any nightmares that it will somehow turn into some huge financial drain that comes from nowhere. We see these things coming along the track, they are discussed. The High Representative will not just come up with his or her favourite thing to do for next month, we get sight of it very early and get involvement in it very early and we can decide whether we wish to participate or not and do our budgeting accordingly. We are not expecting big surprises or huge sudden liabilities to land on our lap as a result of the Start-Up Fund.
Lord Kerr of Kinlochard: Thank you very much.

Q8 ***Lord Moser:*** A couple more points on the Start-Up Fund. One is whether there is a risk that the work undertaken during the normal budget negotiations to reduce the size of the Common Foreign and Security Policy, or a Member State's net contribution, might be undermined by the existence of the Fund, by negotiations about it. It is the relation between work on the Fund and the existence of the Fund and the normal budgeting negotiations. Secondly, related to that, will the Start-Up Fund be subject to the same controls and inspections by the Court of Auditors that apply to normal budget expenditure?
Angela Eagle: I suspect that the Start-Up Fund is outside of the budget, so I do not expect that the Court of Auditors would have a role to play independently in auditing amounts of money that are outside of the budget. I presume it could do so if members wished and pulled it in, but since it is outwith the budget I do not think there is a link between the Court of Auditors looking at it and the use of the money. In terms of your first question, I am not quite sure what you are trying to get at with respect to the budget, Lord Moser. What was the question that you were asking?
Lord Moser: Other people here are more expert than I am, but the main point I suppose is the form of control and inspection of the Start-Up Fund.

Q9 ***Chairman:*** If I may, Lord Moser, the question that I think was not entirely understood was if you negotiate out some of the CFSP funds in the main budget negotiations, is there a risk they will pop up as Start-Up Fund?
Angela Eagle: No, I do not think so. The Common Foreign and Security Policy is supported by the Government and we consider that it represents value for money. The Start-Up Fund is there to finance preparatory activities only for tasks, not charged to the European Union budget, which have military or defence implications, so there should not be an impact on the Common Foreign and Security Policy budget within the EC budget or, therefore, by definition the UK's net contribution to the European Community budget. There should not be duplication since one is off budget and is designed to be precisely what it says it is, start-up funding. On the Common Foreign and Security Policy budget itself which is within the EC budget, I presume some process once preparations had been agreed unanimously, might take over, but the two do not coincide.

Q10 ***Chairman:*** The analogy that struck me was that the Treasury, for example, funds the defence budget and anything really beyond Trooping the Colour is funded off the special Treasury budget and one has always wondered whether the one leaks into the other.
Angela Eagle: That is not the way it is designed. The Start-Up Fund is designed to be preparatory and off-budget, the Common Foreign and Security Policy has its own recognised chunk of the European Community budget and it would be pretty bad form for the one to leak into the other and I do not see any reason why that should come to be the way that things happen informally. I do not see what benefit that would confer.

Q11 ***Lord Kerr of Kinlochard:*** Minister, would you not think it slightly implausible? In their budget negotiations the pressures to increase spending tend to come from the European Parliament and the Commission and it is the Member States in Council who tend to be exerting a downward pressure on the budget. Here we have a CFSP operation which by definition is run by the Member States with no role for the European Parliament and no role for the Commission, so it seems rather unlikely that they would be using it to get round what they have just been doing in a budget negotiation.
Angela Eagle: I agree with you. I have not found it often the case that the Council of Ministers connives to break its own budgetary rules. I do not think that happens very often, if ever.

Q12 ***Chairman:*** I accept logically the Court of Auditors will not audit this, but does anybody audit the Start-Up Fund? Are there any provisions for auditing?
Angela Eagle: I do not think I know of standing provisions for audit. In most of these instances there would be the normal budgetary disciplines that each country would have with respect to its own contributions, but I do not think that I know of a standing audit procedure which would go across all of them. In Council discussions on financial control procedures the UK would certainly join with likeminded Member States in making the case for a

sound and adequate financial management procedure to be put in place. The ad hoc nature of the Fund at the moment means there has not been one, but that does not mean to say we should not have that.

Q13 ***Lord Kerr of Kinlochard:*** I agree with the Minister, particularly with the Minister's first answer. I think there are precedents—Mostar was one of them—where the Court of Auditors was involved on an ad hoc basis at the request of the Member States. Because it is not the Community budget, the Start-Up Fund expenditure would not, as the Minister has explained, be directly and normally in the purview of the Court of Auditors, but I would imagine there is nothing to stop the Member States asking for further *ad hoc* scrutiny by the Court. Is that right, Minister?
Angela Eagle: That is right, and presumably all the Member States' own audit capabilities are brought to bear on their particular parts.

Q14 ***Chairman:*** On their contributions, yes.
Angela Eagle: But clearly there is also an argument for having some arrangement at some stage to look at the overall efficiency of expenditure in a particular case.

Q15 ***Lord Woolmer of Leeds:*** Good afternoon, Minister. As you know, in the Treaty and in the amended treaty provision is made for Member States that are faced by an emergency situation arising from a sudden inflow of migrants from outside the European Union for financial support for those Member States. In the Treaty before it was amended this was limited to a six month period but now that limitation has been reduced. Could I ask two questions on that? First of all, as it is an emergency situation and emergency support, what is your expectation of how long emergency funding might last because it now takes away any constraints?
Angela Eagle: Well, it takes away the old provision, you are quite right, of a six month limit but it makes it clear that measures taken under this Article 63(3) will be taken on a provisional basis, which is still temporary but it is not as rigid as saying six months. Presumably if there were an emergency with respect to a sudden inflow of migrants which went on longer than six months this would give the flexibility to continue the emergency assistance, or perhaps even for a shorter period. We think this leaves more flexibility in the system but there is a clear statement that such expenditure should be taken on a provisional basis and our understanding of that legally is that it is time limited. There is a loss of the rigidity of six months and nothing else. Say an emergency had lasted seven months, under the old procedures one would have had to stop the support after six, which did not seem to make much sense.
Chairman: Lord Woolmer, we have a division and I think, therefore, if the Minister will excuse us, we will suspend for the minimum time possible.
The Committee suspended from 3.39pm until 3.46pm for a division in the House.

Q16 ***Chairman:*** Minister, I am sorry for that interruption but here we are again. You and Lord Woolmer were halfway through.
Angela Eagle: Yes. I was just talking about the shift from the six month limit in the old Treaty to this provisional arrangement. I was mentioning that the Government understands "provisional" as meaning that any measures agreed will be strictly time limited.

Q17 ***Lord Woolmer of Leeds:*** So not in this policy itself but in the funding there is no inherent danger that provision could become quite a long time, in effect it is around readdressing priorities within the normal budgetary process?
Angela Eagle: No, that is not likely to happen. The change in wording does mean that should something go on longer than six months in an emergency there is at least the flexibility to continue to address it.

Q18 ***Lord Woolmer of Leeds:*** One final question on the Chapter dealing with border checks, asylum and immigration. The UK has an opt-out for policies in this Chapter. Would this extend to an opt-out on the fair sharing of financial implications described in Article 63B, which is effectively saying that policies are set out in the Chapter and implementation should be governed by the principle of solidarity and fair sharing of responsibilities, including financial implications? How does the opt-out from the Chapter relate to our financial obligations?
Angela Eagle: The Treaty does actually allow us an opt-out. Article 5 of the Protocol means that unless we specifically opt-in we will not bear any financial consequences of decisions taken with one notable exception, and that is we will be liable for some admin costs, but the admin costs under that area of freedom, security and justice policy I am told are eight per cent of total spending. So we may be liable in some instances to small amounts of administrative money but we certainly would not have to pay for issues or the financial consequences of anything that was agreed that we had not opted into.
Lord Woolmer of Leeds: Thank you very much.

Q19 ***Chairman:*** I would now like to ask about Article 270a. Is the Government content that Article 270a gives the institutions sufficient flexibility to renegotiate a Financial Framework in the event of unforeseen circumstances which require new budget

lines? The only example I can think of at the moment is the Galileo Project.
Angela Eagle: We argued quite strongly to get Article 270a in because it provides a Treaty basis for the multi-annual Financial Framework which has become the norm in agreeing budgets over the five to seven year period and we wanted that reflected in the Treaty, so we are pleased it is in. We do think it is the case that any revision of the Financial Framework should only be agreed in exceptional circumstances and after all attempts have been made to reprioritise budgets. The fact that the Galileo Project was one such example of that demonstrates how rare it is, in fact. We are quite happy with the powers that Article 270a grants the institutions. We think it is the right balance between flexibility and maintaining budget discipline over the period of the Financial Framework.

Q20 ***Lord Trimble:*** Turning to the procedure with regard to the budget, I understand the concept of "compulsory expenditure" has now disappeared and I am curious about the likely consequences of that. You mentioned earlier the way in which the European Parliament regularly supports increased expenditure and is likely to continue to do so. I cannot think of any situation where the European Parliament is likely to be in favour of reducing expenditure. Is this not going to increase the possibility of the European Parliament suggesting more expenditure and create problems in terms of the upper limit? Could it also have the interesting effect that the European Parliament, if you hold down on the limit, might be displaced sideways and, as most Members of the European Parliament represent urban areas rather than rural areas, this could result in some pressure on the CAP, could it not?
Angela Eagle: Certainly on CAP we hope we will be able to renegotiate the way the CAP works in the EU Budget Review. We have published quite radical approaches to how we want to see that work. If you asked me even to bet, I would think pressure on the European Union CAP budget is more likely to come from issues of reform in that process than from the European Parliament because the way that the Common Agricultural Policy budget is decided is really hardwired into the Treaty. It is not subject very easily to changes that the European Parliament can effect simply because of the way that agricultural support works. It is connected to food prices, and whether support needs to be given or not rather depends on what is happening to food prices, whether they are going up or down, so that hardwiring is something that has always ensured that the Common Agricultural Policy remains a massive 42 per cent, I think, of the EU budget. That is one thing to say.

Q21 ***Lord Trimble:*** I was not trying to defend CAP, by the way.
Angela Eagle: There are fewer and fewer people who do and that encourages us all. On the abolition of the distinction between compulsory and non-compulsory expenditure, we think that is a good thing simply because it means that the Council of Ministers also can have a view of the non-compulsory expenditure which is, of course, a growing part of the budget. Abolishing the distinction means that all the institutions can look across the piece of the budget rather than having their scrutiny confined artificially to one bit of it and we think that is the right way to go.

Q22 ***Lord Giddens:*** The Eurogroup has now got formal recognition, something which did not exist before. Can you confirm that is a purely formal thing with no implications for expanded powers?
Angela Eagle: Actually, the Eurogroup obviously is mentioned in a Protocol to the Treaty but I do not regard that as formal recognition. I think it is informal recognition because the Protocol actually says that the Eurogroup is an informal grouping and it sets out what it should talk about. In an odd way we see that as emphasising its informal nature—

Q23 ***Lord Giddens:*** Downgrading it.
Angela Eagle: —and narrowing its scope for mission creep.

Q24 ***Lord Giddens:*** Do you think that might be wishful thinking?
Angela Eagle: Time will tell, but I do not think we are too worried. We are confident in our ability to discuss the things that need to be discussed under the Treaty in Ecofin. We see that there is a good reason for those who are in the single currency meeting to talk about some of the implications of that before or after Ecofin and we are fairly relaxed about that.

Q25 ***Lord Giddens:*** So you do not think it has bleak implications for the UK by giving greater confidence to the Eurozone members?
Angela Eagle: No. All legislative decisions which would impact on those who are out of the euro and issues affecting the European Union in its 27 Member States are discussed in the relevant formation of the Council and Ecofin. I hope that members of the Eurogroup are not intimidated or worried by the fact that we are in the G7, the G8 or the Commonwealth.
Lord Giddens: Thank you.

Q26 ***Lord Steinberg:*** Minister, can I talk to you about relationships between those governments that are inside the euro and those that are outside. Usually when one talks about relationships it is generally a question of either money, trade or both. As we have

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got quite a number of countries inside the Eurozone, some of whom have got quite weak economies and outside the Eurozone we have a strong economy here in the United Kingdom, how are those going to relate to one another?
Angela Eagle: Certainly there is now a majority of EU States in the Eurogroup and I think Slovakia is expected to join next. Again, we do not have an issue with this since we manage in Ecofin itself to deal with the issues on economics that we deal with at EU level and obviously there is the Growth and Stability Pact and increasingly issues of climate change and issues which have economic implications. We do not see a problem with the Eurogroup existing or meeting. We have not discovered that there are any disadvantages to not being at that group. I suppose there is always the question that they might meet early caucus and try to bounce, but we are confident enough in the way that we handle ourselves as negotiators in Ecofin itself that we can look after our own economic wellbeing and our own economic interests within Ecofin itself. We are relaxed about it.

Q27 ***Lord Steinberg:*** That is now, but what about the future because undoubtedly weak economies generally stay weak for a much longer time and strong economies stay strong. We have now got something new happening and that is the euro is so much stronger and has become stronger and stronger against the pound. There is obviously going to be some strain, is there not, on the relationship between them? If you say that you do not see any signs of that now, I am suggesting to you that they may be below the surface but they are going to appear.
Angela Eagle: I think our job as 27 Members of the European Union, one of the reasons why the European Union exists, is to help spread economic stability and prosperity and to help make Europe able to renew its economic relevance to the world and strengthen it. Some of that is to do with how we engage together in the European market, which is the third largest in the world after China and India in population terms, how we can reform our own economic institutions, make the single market work more efficiently so we can do more trade with each other, and actually help to make those weaker economies stronger. I do not see that there is too much of an issue of principle in how you do that whether you are in the euro and are part of the single currency or not. Clearly there are changes and differences in how interest rates are set but there is no reason why the main work we have to do in the Lisbon process, rather than the Lisbon Treaty, should not go on whether you are in or out.

Q28 ***Lord Steinberg:*** You suddenly relegated the United States when you mentioned India and China.
Angela Eagle: As individual Member States we have to relate to our other trading partners. We also have to relate to the other major economic powers in the world. The point of the European Union and some of the value added of the European Union is how it reforms the market in Europe so that we can strengthen our own economies and help each other grow and prosper. When we look at the achievements that have been made, particularly with enlargement in stabilising and modernising often weak economies, we have a good record to talk about there.

Q29 ***Lord Steinberg:*** Just one final point, if I may. It has become more noticeable in recent years that swings are occurring in reserve currencies and undoubtedly the dollar has become a lot weaker and the euro has become a lot stronger. Have you any comment to make on how that might affect relationships?
Angela Eagle: As a Treasury Minister I am not going to comment on relative currency strengths or weaknesses, and you would not expect me to. We are all economists and we can see what effect that might have and work it out for ourselves, but I am not going to pontificate about it today.

Q30 ***Lord Trimble:*** Minister, you were very confident about good relationships within the European Union and you talked about promoting stability and all the rest of it, but one of the consequences of the United Kingdom being outside the euro is in the last couple of months the pound has devalued against the euro by a percentage equivalent to Harold Wilson's devaluation. That might enhance our competitiveness with regard to countries inside the euro and it might result, surely, in there being some resentment among those countries at our ability to do this while they are stuck with that particular rate and they cannot respond to our competitive devaluation.
Angela Eagle: The currency is floating free so there has not been any decision to devalue competitively or otherwise. The values of currencies are actually decided by market decision and that is what has happened. Therefore, it would be rather narrow minded, and I do not think we have come across it, for there to be resentment in what world markets have decided to do to our various currencies. We have to concentrate on what we can affect directly and that is how we can make the single market work more effectively, how we can trade with each other and how we also interact with the emerging economies, particularly of the east as well as our old trading partner across the Atlantic.

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Chairman: This is, of course, taking us a bit outside the ambit of the Treaty as you suggest, Minister. Can I drag us back to the Treaty and the Eurogroup?

Q31 ***Lord Kerr of Kinlochard:*** I am tempted to follow Lord Trimble. The scale of the devaluation of sterling against the euro is quite sizeable now, on a par with the early 1990s devaluation. One of the effects of that was a degree of jealousy at the greater competitiveness of British business and accusations of social dumping against the British in 1993 and 1994. It seems to me not implausible that what Lord Trimble speculated about might happen. Perhaps it would not be sufficient to say the market has decided the rate: people might say that interest rates are set by Central Banks, and have some effect on what the market decides to do. Has that phenomenon started? Have we started to see criticism? I would have thought there was a risk that if it has not started it will start. But I agree with you, Minister, I think Ecofin is the right place to deal with it and the fact of the existence of the Eurogroup is neither here nor there to this.
Angela Eagle: It has not started to date and clearly we will have to see what happens with various currency movements and valuations or revaluations of the euro and other currencies, not only our own. Clearly we have to focus on the things that we can affect properly. Those that are in the euro have made a decision to go in, the institution that sets their interest rate is the European Central Bank, there are ways that they can discuss and, in fact, the head of the Central Bank comes to Ecofin and probably pops into the Eurogroup occasionally, I would have thought, so these discussions can be had. The most important thing is to concentrate on what we can affect and that is widening and deepening the Lisbon process, seeing whether we can make our markets more effective so that we can try to focus on achieving higher rates of prosperity for the citizens of Europe.

Q32 ***Lord Giddens:*** I cannot quite see what the Lisbon process has got to do with that actually because it does seem to me that there is a clear sign here that the Eurozone has an identity and it has a kind of legal personality, if you like, and the proportion of states in the Eurozone is set to grow. I find it a bit too relaxed to say you are relaxed about it because I would say it is something that should be kept under pretty close scrutiny. You can think of other scenarios beside the ones which Lord Trimble and the noble Lord Kerr mentioned which could rebound either to the advantage or disadvantage of the British because the British will become more and more isolated as more Member States join up with the euro. I find it a bit odd to say that you are just relaxed about it.
Angela Eagle: We always keep our own options with respect to whether we should join the euro or not under review. We have five tests. We have work that is being done to deal with some of the issues that were identified in 2003 as being barriers to us considering joining the single currency and that work is ongoing. Clearly all of these things are kept under review. It is purely speculative but if we were to see some emergence of hostility or resentment or our own isolation because we are not in the single currency then we would think of ways to engage and deal with that, but we have not seen the emergence of any such resentment at the moment. We continue to keep all of our options on joining the euro under review and there is not a lot of sense in my saying much more at this juncture because until we are faced with a particular situation it is all speculation. All I could say is that the close working that we have come to expect in Ecofin continues and that has helped us deal with a lot of economically challenging situations and I am sure we will be able to deal with any that come up in the future.

Q33 ***Lord Giddens:*** I do not want to keep you here indefinitely but I was not asking about whether the UK would join the euro, I take it for granted it will not join the euro in the near future, but you can see an implicit power system potentially emerging which the new clauses might add some strength to and, therefore, you can see certain things which you should be worried about rather than saying you are relaxed.
Angela Eagle: I would like to emphasise again that the mentioning of the Eurogroup in a Protocol explicitly says it is an informal grouping and the Treaty makes no change at all to the fact that all of the issues economic, financial services, economic reform and otherwise, which affect the 27 Member States are decided in Ecofin where we have a presence. It is unlikely that there will be any further changes to the Treaty for quite a long time, so I think we are in an institutionally stable position where the Eurogroup is recognised but stated to be informal, it is no more than any other corpus in that sense that anyone is entitled to create. I think we just have to be confident in our own negotiating efforts and our own position to expect that on many occasions we will be able to get what we want out of Ecofin meetings. Our record here is good, UKREP and the representatives that we have in the European Union are amongst the best, I would trust them very much, and that is why I was saying that we are relaxed and confident that we can still argue our corner in Europe whether the Eurogroup exists informally or not.

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Q34 ***Chairman:*** I think what we were picking away at, Minister, was were you feeling paranoid about the Eurogroup and clearly not.
Angela Eagle: No, we are not feeling paranoid.

Q35 ***Chairman:*** That does not of itself change anything. Colleagues, we have kept the Minister for quite a long time. Have I managed to suppress anybody's question and, if so, would you like to ask it? Minister, do you or your officials have anything that has not been said that you would like to say?
Angela Eagle: No, only should you think of any questions after we have all gone please feel free to contact us with them and we will do our best to be as helpful as we can.
Chairman: Thank you very much, Minister. Thank you very much for coming, it has been most helpful. Thank you all.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE B)
MONDAY 3 DECEMBER 2007

Present	Freeman, L (Chairman)	Powell of Bayswater, L
	James of Blackheath, L	Walpole, L
	Mitchell, L	Whitty, L
	Paul, L	

Examination of Witnesses

Witness: Mr Malcolm Harbour, a Member of the European Parliament, examined.

Q1 ***Chairman:*** Good afternoon. Welcome to the Committee, Mr Harbour. Thank you very much for coming to assist us. Would you like to describe your present position in the European Parliament and perhaps make an opening statement?

Mr Harbour: Thank you very much indeed for the invitation to come and meet your Committee again. We have had a number of very useful exchanges of view over the last few years. I am one of the British Conservative members of the European Parliament and I am a member of the Internal Market and Consumer Protection Committee. I also have the overall responsibility in that Committee, what is called a coordinator for the centre right political fraction of the European Parliament, the European People's Party and European Democrats. Essentially I am responsible for managing the team of EPP-ED members on the Committee which is the largest group in the Parliament—a not insignificant group—for planning our political response to everything that is referred to the Committee, for appointing rapporteurs and shadow rapporteurs; essentially anything that happens on the Committee is basically on my watch so I keep a very close eye on those activities. I have also, in parallel to that, been involved with policy work on the evolution of the Single Market and we submitted to you on behalf of members of the group some written evidence in your review of the Single Market for the 21st Century document so I am very happy to talk about some of those aspects. That is a bit of introduction and if I may now address the prime question that you asked me to come here for, which is around questions surrounding the Treaty and I welcome the opportunity to do that. I think it is fair to say, first of all, that the working committees on the European Parliament in areas like mine on Internal Market have so far had very little engagement with the impact of the Treaty. I think that is primarily because, in terms of the basic Treaty articles that govern the promotion and management of the Internal Market, we do not see any fundamental change of direction emerging from the Treaty; but with one significant danger point which I will refer to a bit later on, the question of competition. We see that the core articles of the Treaty on our main areas of responsibility, which relate to the Internal Market and customs and consumer protection, remain substantially unchanged. We do note that consumer protection has now been specifically singled out as separate area of shared competence between the European Union and the Member States on the same basis as the Internal Market. The creation of our Committee which, for the first time, brought those two areas together from 2004 onwards—previously consumer protection was the responsibility of the Environment and Public Health Committee—I think has already sharpened our work in that direction anyway and I also observe that since January 2006 we have had a dedicated commissioner for the Internal Market, Mrs Meglena Kuneva, who is doing an outstanding job in my opinion and that has significantly raised the profile. I just make those points as observations because I think in a way we have anticipated the additional prominence on consumer protection that will be given to us in the Treaty. I think there are a number of other areas in this Treaty which we observe with interest, if you like, as focussing importance—or more importance—on some of the things we have already been working on, particularly how to make the Internal Market function better. There are some new Treaty provisions in terms of co-decision work where I think there is some new description of our co-legislative role in the Treaty which I have not quite got round to, but let us call it co-decision, where we share responsibility with the Council on freedom of establishment, free movement of services, particularly aspects relating to the freedom of self-employed people to go and offer their services in other parts of the European Union and the removal of obstacles generally to the functioning of the Internal Market and particularly areas like mutual recognition of qualifications. As you will be aware

from the evidence you have taken from me twice now on the Single Market for services, these are areas which have been a major preoccupation of this Committee and I think the importance of these provisions in the supply of services, on the whole need to ramp up the service economy in the context of the Single Market and encouraging particularly smaller enterprises to access those markets are well reflected in this Treaty, so that is a part of it that we welcome. The other area which I know your Committee is particularly interested in is this complex and interesting question which, under the somewhat heavy title of Services of General Interest and Services of General Economic Interest (and I think we discussed those in the context of the Services Directive), relate to the relative competences of Commission Member States in the mechanisms that are provided for the delivery of public services in the round, and of course that includes a huge range of services ranging from social services, health and transport right through to energy and electronic communications. The Commission has been under pressure from some political quarters—particularly from the left wing of the Parliament, from socialist groups and from the other left wing groups—to come up with some sort of framework directive which defines the competencies and roles of Single Market legislation in the context of delivery of public services. We have argued from my side of the House very strongly against that proposal and I think that the provisions in the Treaty, in terms of the article plus the protocol, clearly support our position on that. I would also draw the attention of your Committee to the working document that was annexed to the Single Market for the 21st Century paper that you may have seen which further amplifies that position. What the Commission has said is that the whole area about delivery of public services is an area which is extremely complex but, in the round, remains predominantly the responsibility of the Member States. The style, organisation and management of delivery of public services, particularly those that are very close to the citizen like personal services, social services, health, education, must remain the competence of Member States. Where services are funded entirely through public expenditure and the private sector is not involved, these are entirely the responsibility of Member States, although of course it is possible—and probably increasingly now—for there to be a mixed economy in those areas so that a service delivery may include both services delivered through the public purse directly and also private contractors being involved in that. As the Commission points out, tendering for public contracts will come under the provisions of the Single Market legislation on public procurement. Similarly competition issues, free movement of services issues and non-discrimination against service providers from other countries remain in force despite the fact that those public services are contracted out as part of an overall bundle of services, in other words there will be a mixed economy. However, the Commission cautions—quite rightly in my view—against any sort of overarching solution by saying that this is an immensely complex area but the basic provisions of the Internal Market Treaty Articles will apply where private enterprises are involved in contracting and delivering public services. There have been some important test cases recently around this, particularly in Germany, and there is a lot of sensitivity in this area from my German colleagues, so perhaps I will just pass that on to you. I visited Germany earlier this year and I had the opportunity to talk to local authorities and there was a great deal of interest in more consolidation of services between local authorities. For example, you might find adjacent local authorities pooling their service delivery maybe in health, education or transport. The question is that if you then pool that services delivery are you then required to essentially tender out again the whole of that operation or can you actually allow the pooling of the existing consortium to take on that responsibility without the need for external tenders? So far the Court of Justice has found that by and large there should be competitive tendering in those circumstances. This is the sort of difficult area where the Commission has said that it is prepared to provide guidance to contracting parties and public authorities where there are perhaps some more difficult cases in this area about how public service requirements cut across the requirements for open tendering. I think that is an area where I believe the protocol has moved us in the right direction, but I am not convinced that we need further legislation on that topic. I think that covers primarily the articles of the Internal Market aspects of the Treaty. I did want to mention one final point which is a much more fundamental point, which is the change to the base articles in the main Treaty of the European Union. What we have been talking about here is the second Treaty which is the Treaty about the implementation of requirements. I cannot remember what it is called now; I am afraid I am not so familiar with it but as you know there are the two treaties. I want to talk about the article in the foundation Treaty about undistorted competition which is currently I think, in the present Treaty, article 3(1)(g). As you will know that phrase, a provision on an Internal Market on the basis of undistorted competition has now been removed from the opening articles from the new head Treaty. There is a protocol that covers that which I know that your Lordships have read and looked at. I think our concern remains that if you look at the jurisprudence of the Court of Justice and if you look at some of these seminal cases that relate to

competition issues in the Single Market and the basis of the Community legislation in ensuring undistorted competition, you will see that there are a number of direct references in some of the key judgments to the current article in the existing Treaty. Our concern remains that if this is now relegated to a mere protocol the basic principles of EU competition law in the round could be significantly undermined when it comes to the first judgments under this new Treaty. This, I think, is one of these areas—and I observed this in a more broader context and other areas which I know your Lordships are interested in, which is how regulation is made and I think it is remarkable that for all the huffing and puffing that goes on in Member States about the need for the European Commission to improve impact assessments and pre-legislative reviews, when it comes to a fundamental change like that it appears out of the blue, overnight in a summit, without any proper assessment or analysis of its impact and is agreed by the prime ministers. I do not believe this is in any way a satisfactory practice. Generally, we observed more broadly—this is another subject—and have argued very strongly with Council on a number of occasions—and I know you addressed some issues about how Council performs in this area—that Council is conspicuously ignoring the inter-institutional agreement on better regulation by not actually subjecting amendments that it makes to Single Market legislation to a proper impact assessment and review. That is a subject you may want to take up on another occasion. I suspect I have probably spoken for a bit too long but perhaps I can go on for just a couple of minutes on the Commission's recent communication on the Single Market for the 21st Century. I observe as a first point—this is somewhat ironic I think—that we now have new consistency within the treaties on the description of the Internal Market and the Commission is now proposing that we should refer to it from now on as the Single Market; not a terribly coordinated approach one might think. I happen to agree with the Commission, by the way, because I think the Single Market is much more user friendly and a phrase that I think in communicating what we do to our electors is actually a much more apt description of what we are trying to achieve. We have been involved in the evolution of this report for some time; we also submitted evidence to the Commission on this. I think the Single Market for the 21st Century is an important document and I very much welcome the fact that we now have the Single Market put firmly on the agenda as an absolutely central plank of economic reform but also the competitiveness of the European Union in the global economy. I think it is a major advance in this document that it really sets out clearly that if the European Union is going to sustain and develop its competitive position the completion of the Internal Market is a crucial weapon in doing that. Setting the Single Market in the context of open trade is extremely welcome and I think also the clear calls in this document against protectionism in any form are extremely welcome. I think the other strand which is crucial relates to what I said earlier about consumers and consumer protection. I think the Commission has done an important job of setting the Single Market very clearly in the context of delivering benefits for all Europe's consumers. By having a highly competitive market, enhancing choice, innovation, investment, all of those areas we are doing a good job for consumers but we need to articulate that much more than we do because actually we need to sustain much more public support for the Single Market as a concept. That leads me onto the third point because I think that the Commission clearly sets out the importance of the shared work and responsibility in delivering the Single Market that lies between the Community institutions—or I should say now the Union institutions—and the Member States. The Member States on the ground are largely responsible for delivering aspects of the Single Market and, as you will remember from our discussion on the Services Directive, we attach great importance to the role of member governments in promoting the Single Market, providing things like single points of contact which we argued very strongly for in the services directive and which we are considering to follow through to ensure that the Member States do that. Also linked to that are, I think, some imaginative and important ideas about better tools for monitoring the Single Market rather than just relying on the current Single Market scoreboard which I think has become rather a stale instrument in simply recording the transposition of Single Market legislation. We need much better indicators about how competitive markets really are across the European Union so we really can point our finger and see how instruments like public procurement are really working out in the field and on the ground. Again there was an important working document published for the Single Market review which spells out some ideas. My concluding point is that I really welcome the importance attached to small enterprise and the access of small enterprise to the Internal Market. I think there are some very interesting ideas about encompassing those in a so-called Small Business Act which will bring together maybe legislative but other instruments to really encourage SMEs to access the small market and also deal with some of the issues about the excessive legislative burden that is imposed on small enterprises. All of these I think are imaginative and useful and in broad terms I very much welcome the Single Market for the 21st Century document. My absolutely final point to make is just to advise you that the European Parliament will be holding its annual meeting with

national parliaments on the Single Market on 11 and 12 February 2008 when this document will be one of the key items on the agenda, as will energy. I was pleased to remind Lord Walpole that I had met him on a previous occasion because he had represented your Lordships probably at the first meeting which was three or four years ago, but we would obviously very much welcome a strong representation from your Lordships' House and maybe from this Committee in discussing these important issues.

Q2 ***Chairman:*** Mr Harbour, thank you very much indeed for a very clear, very helpful opening statement. May I just say, before I turn to members of the Committee with some of their questions, because of the pressures of time it may not be sensible to try to get through all the questions which we have sent you, but if you feel moved to send us in writing subsequently any specific comments—we have had a chance, you and I, to discuss these and some of these you feel outside your direct field of competence—anything we can put on the record will be helpful. May I just start by asking a question in relation to Services of General Interest? When the Treaty is finally signed what difference will it make in terms of the powers of the Commission and the relative sharing of responsibilities between the Council and the Commission and indeed parliaments, in relation to Services of General Interest? I put my finger specifically on postal services because the evidence we have already heard is that actually not much has changed; the Commission will try, when it brings forward to justify either further legislation or further action in relation to its competence in relation to certain services that are partly economic, partly paid for by the consumer, partly provided by the private sector, but can you put your finger on specific examples of how the Treaty will make a change?
Mr Harbour: I am not sure that the Treaty of itself will actually make much change at all because I think this issue was already absolutely in the centre of public debate. Again I draw your attention to the paper that the Commission has issued about the whole interpretation of its role with regard to Services of General Interest and General Economic Interest which was written under the provisions of the existing treaties. I think it will perhaps confirm the view that I have just set out to you, that the Commission does not have a broad interest in introducing any sort of overarching legislation to define roles and responsibilities because this is an immensely complex area which varies significantly from state to state. On the broader question about those areas of Services of General Economic Interest, of Services of General Interest—but it is primarily General Economic Interest—where there is a community framework (like electronic communications, for example) then those are areas which the Member States have decided need a Community framework because of their specific character. That is true, as you know, for both postal services and for energy which really come within those categories. I remark also—since I have been doing a lot of work on electronic communications and the upcoming reform which I hope your Committee will take an interest in—that there are specific provisions in the Directive on Universal Service which essentially provide a consistent mechanism for allowing Member States to support universal service within the framework of the overall legislation but do it in a way which does not discriminate against private sector providers, in other words the universal service provision has to be open to tender from any of the communication service providers that are offering service in that market.

Q3 ***Lord James of Blackheath:*** Asked in a state of ignorance and for better understanding, I am trying to get some examples of what constitutes a service company in this particular context. Is Air France a service company, as an airline, within the definitions you have been giving?
Mr Harbour: I am not sure, Lord James, whether this is actually a particular issue as far as the Single Market is concerned.

Q4 ***Lord James of Blackheath:*** The reason I ask it is because I am trying to find an example of a service company because the real question that would come behind it is as to what impact all this will have on the rules concerning the non-allowance of financial assistance to a service company.
Mr Harbour: The provisions on state aids which come under competition law would apply to any company whether it was a service company or a manufacturing company. Since those distinctions are being increasingly blurred these days it seems to me it is actually related to the nature of the activity and the competitive environment which is being delivered. I do not think there is anything here that we have talked about that will make a significant difference. Similarly it relates to my answer on the question about Services of General Interest and essentially they are defined by the Member States concerned. Some of them may well deliver through the public sector and some they may contract out to the private sector, but that will be their responsibility. Water, for example, is clearly a Service of General Interest; in this country it is delivered through private companies under an independent regulator and in other countries it is delivered by national or regional water companies that may well come under the control of the local authorities concerned, so there will be very different ownership models within that structure.

Q5 ***Lord James of Blackheath:*** The thrust of my concern is that I suspect from what I read and hear there is a very arbitrary approach being taken by Europe as to when it allows state aid and when it does not, which sometimes appears to be completely contradictory from one jurisdiction to another, from one national entity to another. Is anything happening which is going to affect or resolve that or make it more consistent?

Mr Harbour: That is a bit outside my remit but I will give you my personal views. Competition policy is not specifically our area but what I would say is that the state aid rules, as part of European competition policy—at a European level, a Community level—I think that if Mrs Kroes, the Competition Commissioner were here—I am sure she would be delighted to give evidence to you—she would argue quite strongly that they do apply them consistently and also that they have been toughening up the criteria on state aid and in certain conspicuous sectors—transport is an interesting one; my own background is in the motor industry—like the motor industry which has hitherto been subject to quite a lot of competitive bidding by countries in order to attract new car plants that the Commission has dramatically tightened up on that and the criteria for state aid are being quite significantly tightened up and implemented pretty rigidly. I think you would need to ask her about that but I think so far as the Treaty is concerned my main concern would be whether the proposed change around undistorted competition might affect that when it came to a challenge to the Commission's state aid. What will happen is that there will be a Court of Justice decision on a challenge by a company or a government to a community state aid ruling.

Lord James of Blackheath: My Lord Chairman, I am content with the answer as I have heard it today but I would ask for guidance from the Chair and the secretariat to this Committee as to whether we could have more information on this because I think there is a question there that I have not entirely got to fully, and certainly not to the understanding I would want to have.

Chairman: Certainly. We will pursue this after the Committee if we may and make sure that correct evidence and advice is offered to the Committee. Can we now turn to some colleagues?

Q6 ***Lord Powell of Bayswater:*** On your point on undistorted competition—we have had some discussion on this already—like you I feel a bit anxious about the way this has got shuffled around. But I was also reading the recent letter from the Director General of the Commission's Legal Service which reminds us all that actually undistorted competition never was an objective in the original Treaty, it was simply a means of achieving objectives, and those means are now safeguarded by the new protocol and therefore there is no substantial difference. To a rational mind that is understandable but nevertheless may not be how a European Court would interpret it. We have seen some strange judgments in the European Court when it comes into this area of competition. Also one has to think about the motives of those who wanted removal of the reference to free and undistorted competition. Do you really see this as a set back to the efforts to have effective competition in Europe? Or do you think actually it is just playing with words and shifting things around it will all come out in the wash and all will be for the best?

Mr Harbour: I think it is a potential danger which distinguished lawyers—I am not a lawyer, as you have probably gathered—have pointed to how the absence of that reference to undistorted competition (even as a tool it is not referred to at all now) might affect a key judgment if the judgment, for example, was balancing other issues like employment or the social market side of the economy which is still of course firmly written into the lead articles of the Treaty. I think that is how I would put it. I do not see that it will be an immediate set back but nevertheless we are dealing with an area where community law and community law cases have in many cases have had a very significant effect—the seminal cases have had a significant effect—on how competition law is applied. It remains one of the most important and powerful instruments in the creation of an effective and operating Internal Market.

Q7 ***Lord Powell of Bayswater:*** My worry would be that when free and undistorted competition was originally encapsulated in the text of the Treaty we were in a world which is moving generally in the direction of liberalising and opening up markets. Now we seem to be entering a different world where world trade organisation negotiations are faltering, where countries are now imposing more protectionist measures. I think there is a risk surely that the way these matters are now provided for in the Treaty could actually encourage those who would like to see more protectionism to pursue their course. Perhaps you would agree that this is a move against a true Single Market in which free and undistorted competition is allowed to be the guiding principle.

Mr Harbour: I agree. I think that is the substance of my argument as well but you put it rather more elegantly than I did.

Q8 ***Chairman:*** Can I ask a question about intellectual property? I know it is not specifically the remit of your Committee in Brussels but this Committee attaches some importance to the Treaty's statement on intellectual property because it does seem to open up the prospect of a single redress by an

aggrieved party within Europe. At the present time, although you can register your patent throughout Europe in all Member States that are part of the current agreement, there is no single point at which or to whom you can apply for redress. I think this Committee might be pursuing this matter. Could you just comment about the significance of the particular article in the new Treaty?

Mr Harbour: I think it is an important step forward in the tortuous route towards trying to get a properly integrated patent system that will cross the whole of the European Union. Indeed, as the Commission points out in the Single Market document, this is absolutely crucial for an innovative economy but, as your Lordships will know because I think you have done previous reports on it, the original concept of a community patent now seems to have foundered completely and we do not detect a great deal of enthusiasm behind that at the moment within the Council, although there are some people who are keen to revive it. I think that the issue around jurisdiction of the patent system which you raised is now the major stumbling block. I think we have now moved to resolve the language difficulty which was a previous stumbling block. I understand, for example, that the French Government has recently signed the London Agreement within the existing European Patent Convention which provides for a much more restrictive range of translations when you apply for a patent and I think that we are now moving towards finding a role for national patent courts within an overall system of jurisdiction and looking at the possibility of mutual recognition of judgments and so on. Insofar as this addition to the Treaty provides a legal base for doing that, I think it will be a major step forward. I rather hope that over the next 12 months we may actually see a rather more focused political priority given to this crucial piece of legislation. It also relates very much to our role in the global economy that I mentioned earlier as well because we know that the US Congress now has a number of bills before it to reform the US system. There are major issues about intellectual property in our relations with China that we do need to resolve and I am pleased that the Commissioner, Peter Mandelson, is now putting intellectual property protection much higher up his negotiating demands with China. I think with other emerging economies the same thing will apply. It seems to me to be helpful in that context.

Q9 ***Lord Whitty:*** I declare an interest as Chair of the National Consumer Council. I apologise that I was not here for the beginning of your remarks, however I was very interested in something you were saying towards the end which related to the role of the Single Market/Internal Market being, at the end of the day, for the benefit of the consumers of Europe and contribution to their well-being. Given that that is so and given that such terms were not perhaps so current when the original treaties were spelt out and in a sense taking a slightly different view from Lord Powell about whether free and undistorted competition is a means or an end, the end of this is to improve the lot of European consumers through competition but also through other measures which may apply when competition is not of itself sufficient; it may be necessary, but not sufficient. Do you regret that the re-drafting of the treaties has not made this rather more explicit in the terms of the Treaty itself, particularly given that there are other initiatives coming out of the Commission which do put the consumer as such more central to their concerns, including the current re-assessment of the consumer acquis and the documents the Commission came out with a couple of weeks ago? You have a very valid point that we have to sell this to the citizens of Europe as something they understand. At the moment much of this is not understood and although words in a treaty or a constitution do not make a huge amount of difference to the man in the supermarket, they do make a bit and we seem to have missed an opportunity here. Would you agree?

Mr Harbour: I am not sure I would because I think that consumer protection is now ranked on an equal basis with the Internal Market in the treaties. I think that is an important step forward in actually highlighting consumer protection as being one of those elements. Just looking through the provisions of this Treaty I do not detect the fact that the Commission, in working with us in co-decision with the Council, lacks powers under the treaties to be able to implement or initiate and implement consumer protection instruments. Certainly the Commission has not suggested that it has any lack of powers in those areas. I am very familiar with the work you talked about because that is squarely within the remit of our Committee. I think the work that we are now doing and is now underway to provide a common basis and a common set of rights for consumers in key areas across the European Union so that consumers feel more comfortable with shopping cross-border and exercising their rights in the Single Market and companies also know that they have one set of requirements to deal with, for example in terms of dealing with unfair commercial practices and contract terms (we will get the contract terms legislation next year), those are important advances which have basically been developed within the existing treaties. I think I am content with the fact that consumer protection is now much more clearly identified there and it may well be, as there have been if you look at some of the jurisprudence of the Court of Justice where consumers have been cited also in competition cases, where it has been averred that action needs to be taken or supported because lack of competition is bad for consumers. I also note that the

Competition Directorate in the Commission, as one of Mrs Kroes's initiatives, has actually taken on consumer policy specialists, particularly in dealing with merger cases. Mrs Kroes has started coming to our Committee as well; this is a new initiative that we have taken to invite her to come and talk to our Committee because she believes that much of their work is very central to consumers' interests.

Q10 ***Chairman:*** Some of us will shortly be going to take evidence from Commissioner McCreevy. Your Committee has produced a report on the Commission's internal review ahead of us. Bearing that in mind and bearing what has happened recently in terms of statements by the commissioners responsible for energy, telecommunications and financial services, are there any particular issues that you think we should take up with the Commissioner?
Mr Harbour: I think there is quite a long list so I will try to be fairly brief. To set the context, our Committee has not yet actually done a report on the Single Market in the 21st Century. What we did do was to produce our own strategy report in the summer which my colleague Jacques Toubon was a rapporteur for which was actually voted on by us in September (I am sure you had a copy) which set out our views about what should be in a Single Market for the 21st Century communication. I think we have been gratified that quite a lot of our ideas have already found their way in there. The second point that I would make is that one of the really important things about the Single Market of the 21st Century document is that it is not exclusively a document produced by Mr McCreevy or the Directors-General for the Internal Market. The Single Market of the 21st Century document has actually been produced by the Secretary General of the Commission reporting to the President, Jose Manuel Barroso, because it is an all-embracing document. Essentially the Single Market operates in so many areas and this is a true integrating document showing the importance of market and competitive activity across the whole spread of activities. In relation to Charlie McCreevy's areas I think some of the things I talked about; about the tools for monitoring the Internal Market which he is responsible for managing; his view about progress in implementing the Services Directive and how that is proceeding; issues relating to public procurement instruments where we are awaiting some additional provisions to clarify some issues, particularly around concessions in certain areas, concession instruments, public/private partnerships and his view about the enforcement of those; our mutual recognition of professional qualifications where our reform of that is now being implemented and I think this is going to become more and more important; also patents and intellectual property for which he is directly responsible. I think you have probably got a reasonable agenda there. If I were really daring I would suggest you also raise with him the issue about gambling in the Internal Market because, as the Irish Commissioner he is very interested in that but I know that he regards this as somewhat of a delicate and sensitive area but I think if you were ambitious you might also mention that as well.
Chairman: We will try our Irish luck. Mr Harbour, thank you very much indeed. This part of the evidence session is now closed and we will move almost directly to the second part. Thank you very much.

MONDAY 10 DECEMBER 2007

Present	Freeman, L (Chairman)	Walpole, L
	James of Blackheath, L	Whitty, L

Examination of Witnesses

Witness: Professor Michael Waterson, Professor of Economics, University of Warwick, examined.

Q11 ***Chairman:*** Good afternoon. May I welcome Professor Michael Waterson; thank you very much indeed for coming to help us in our inquiry into the impact of the EU Reform Treaty in relation to Services of General Interest. I know that you would like to make a brief observation to begin with.
Professor Waterson: I should admit to a certain amount of trepidation in this topic. Obviously I am an economist not a lawyer, and to me at least the Treaty looks to be quite a difficult document to follow and the way it is set out I find it quite tricky to work around. I am pleased to see that you are seeing a lawyer later on today so hopefully he will be able to help you where I cannot. I have had some discussion with a colleague of mine, Professor John McEldowney, about aspects of the Treaty and he shares my view that it is quite difficult to understand. In looking at the possible questions that were sent to me I felt that the very general ones I am not particularly competent to judge but the later ones I felt more able to make some comments on. I am very willing to help you in your process and I am just apologising in advance if I am not able to help you a great deal with some of the things.
Chairman: We will see how we get on. Any help that you can provide will be welcome because I think we find the new Treaty in relation to the workings of the Internal Market and its impact somewhat difficult to understand. I am going to ask Lord Walpole to start the questioning.

Q12 ***Lord Walpole:*** This is a general question which you do not want to answer, I suspect, and that is: Does the Reform Treaty and its Protocol strike a clear balance between European involvement and Member State competency on the issue of Services of General Interest?
Professor Waterson: I guess implicitly I would say that my answer has to be that no; it is not straightforward because at least to me it does not seem to be clear. Both are mentioned in ways which do not completely disentangle the respective competencies. To the extent that I am able to answer I would say that it is unclear, there are rather unclear boundaries.

Q13 ***Chairman:*** Could I follow that question by asking, with all this ambiguity and lack of clarity, what do you think the impact is likely to be in terms of how states provide or ensure there is provision on Services of Economic and also non-Economic Interest? What are the practical consequences?
Professor Waterson: First of all I should say with Services of non-Economic General Interest I think the position is quite clear and that is that that is left up to the individual states. It where we come to Services of General Economic Interest that matters become more complex. I suppose this is because different nations have different views about the way of life that they pursue. 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. I would imagine that there is some compromise here. There is, as I understand it, an opportunity to define particular Services of General Economic Interest as being within the competence of the European Union as a whole, but I suspect it will take some time for that to come about.

Q14 ***Chairman:*** Could you give us some examples that you think are blindingly obvious of Services of Economic Interest?
Professor Waterson: I would say, for example, that provision of electricity and gas would be examples of Services of General Economic Interest where many—perhaps all—countries would view that as being provided essentially through a market mechanism, controlled in some way by the state rather than being provided by the state itself.

Q15 ***Chairman:*** Postal services?
Professor Waterson: Quite possibly, yes, although that may be an example where different states would have different views and where it might take some time for a general view to come about. I suspect that postal services will move towards a market mechanism.

Q16 ***Lord Whitty:*** That does leave an awful lot of ambiguity really between what constitutes Services of General Interest and the value between economic and non-economic and it effectively leaves it to the Member States to sort out. You could say that this is a commendable piece of subsidiarity applying but, on the other hand, is it not going to lead to differential activity within each Member State and therefore what is supposed to be a unifying push towards the Single Market being differentially applied. If a Member State decides on one significant sector as

being within the definition and another one was out, then the degree to which, for example, market liberalisation is being pursued with pressure from the European Union authorities will differ from state to state because of the state's own interpretation. This seems to me a recipe for confusion rather than a recipe for clarification of what the Single Market means. Governments who are responsible for these individual services or the framework nationally which surrounds them will want to know whether there is a view as to whether that should be classified within a view from Brussels, whether than can be classified in one box or the other. At the moment we can be vague, but will it not be pretty rapid before we are going to have to make some more definite definitions?
Professor Waterson: Yes, I think so. As I understand it, the Union, can, through the qualified majority voting system, determine that particular services definitely are of general economic interest, so I think it will be natural for that to happen. I think inevitably it is ambiguous at the moment.

Q17 ***Lord Whitty:*** The example the Chairman gave of the postal services really are regarded differently in different Member States. Are you saying that that process could resolve that one way or the other?
Professor Waterson: Yes, I think it could do. Given that it is a qualified majority then I think it could do, yes.

Q18 ***Lord Whitty:*** In many of the areas the state provides some of the services and the definition does not actually differentiate in terms of ownership, but if we are to move into the box where the normal competitive rules should apply then clearly a state enterprise moving into that or a partially liberalised sector could lead to different outcomes in different economies. There are different patterns here and it is not entirely clear whether everything stems from the definition or whether, once you have the definition, then you can still have a thousand flowers blooming.
Professor Waterson: I think it is interesting here, as a comment on what you have just said, that the word "provide" is used in Protocol 9: "national, regional and local authorities in providing, commissioning and organising Services of General Interest". I am not clear what the word "provide" means compared with the word "commissioning". "Provide" implies to me that the public authority does more than just commission but actually, as you say, produces the service itself. Then that seems to me to conflict with Protocol 6 on the Internal Market and competition of ensuring that competition is not distorted. If the state is providing the service then how is it ensuring that competition is not distorted between it as a provider and someone else? It then depends which of those views prevails; is it Protocol 6 or Protocol 9 which prevails? I do not see any problem about the elements of commissioning and organising services because that is just arranging the way that the market mechanism operates; it is this use of the word "providing" which seems to me potentially to conflict with Protocol 6.

Q19 ***Lord Whitty:*** If you take postal services in the UK you could argue that that is largely provided by a state organisation although there are elements of competition at the edges and government policies to push it further. Nevertheless, that is clearly a provider role at the moment and in most states is nearly a hundred per cent provider role. If you take water however, is that a commissioning role?
Professor Waterson: Yes, I would say so.

Q20 ***Lord Whitty:*** In the UK it is a private one but it is a private one which is, within any given area, a monopoly one, subject to a very small bit of competition.
Professor Waterson: Yes, but I would put that very much in the commissioning category.

Q21 ***Lord Whitty:*** For the consumer the effect of those is roughly similar. You are dealing with something which is a big body maybe owned by the state in one case but appointed or commissioned by the state in another.
Professor Waterson: I would distinguish between a body which always inevitably provides the service and a body which is providing it subject to potential competition or competition for the field. If you think about rail services, for example—I know that transport is not particularly relevant here but we can use it as an example—then at any one time there may be only one operator but the operator is changed from time to time and so we have commissioning and provision, but not providing in the sense of providing forever. That is why I am slightly surprised at seeing the word "providing" which seems to me necessitates an absence of competition which seems to cause some conflict.

Q22 ***Chairman:*** Could I just mention new Article 14? I will just read it out for the benefit of the Committee. This is only dealing with Services of General Economic Interest. What it says is that "Care should be taken that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions". These principles will be set by the European Parliament and the Council acting by means of regulations in accordance with the ordinary legislative procedures. Can you help us with what these principles are? We can guess at what some of them are, or are we into yet another area of ambiguity?

Professor Waterson: I am afraid it does seem to be somewhat ambiguous. I am sorry not to be able to offer more clarification. I am not able to help a great deal on that.

Q23 ***Chairman:*** Clearly the implication is that these principles will be established in due course.
Professor Waterson: Yes.
Chairman: We can only surmise and guess what they might be. Lord James?

Q24 ***Lord James of Blackheath:*** There has been a degree of contention in the past concerning the application or Brussels' attitude towards allegations of state aid. I am concerned as to how far this might be either clarified or improved for further administration in the future. Given the ambiguity of the definitions of the Services of General Interest, what is a Service of General Interest in this context and where will any changes of attitude by Brussels be taken as to when or when not state aid is provided? As a broad example of a peg on which to hang it, consider perhaps the airline industry which has been a very contentious area in the past.
Professor Waterson: I can see very much your point. It is certainly clear that Services of General Economic Interest are not defined in the Treaty. However, they are defined in the White Paper on Services of General Interest. There is at least a moderately useful definition of these, the moderate definition being services provided by the big network industries such as transport, postal services, energy and communications. Then unfortunately there is vagueness when it says, "However, the term also extends to any other economic activity subject to public service obligations". There are network aspects to some parts of the airline industry, for example the provision of the air traffic control system, but other aspects I would argue do not necessarily have a network element and so it is there where the vagueness comes in.

Q25 ***Lord James of Blackheath:*** The vagueness has been extremely prejudicial to competition interests in the past. At times the manner of the financial support has been quite direct. There have been huge subsidies given to at least two of the major European airlines by their national governments which appear to run completely counter to the spirit of the Treaty as it has stood in the past and which must surely to be in breach in the future, but which have been sanctioned and allowed according to the biggest at winning their arguments to the detriment of the smaller. Is anything going to happen as a result of the Treaty in its new form which is going to bring about any elimination of that unfairness and bring us all back to a standard on which we can trust and understand transparently from the beginning?
Professor Waterson: My understanding is that Commissioner Neelie Kroes is very interested in working hard in this particular area of state aid and sees it very much as a competition issue like you do. I would have thought that in carrying out the activities of ensuring a constant competitive market that her office will be determined to pursue these things. However, I think, as I see it, the Treaty does not provide any particular comfort in that area.

Q26 ***Lord James of Blackheath:*** I am going to push the envelope slightly further if I may on a very sensitive area. I want to try to put it in terms of not the sort of case we are talking about where we have one airline competing with another across its own national boundaries with another. We can all visualise that quite easily. What about the case where there is a one-off industry, a one-off company, almost trading exclusively in an industry within a national boundary. This is an actual case; I am not going to identify it because I do not want to pin us down to discussion on the specific, so I depersonalise it. You have a one-off company trading which is in government ownership and the government wants to sell it. On what basis does Brussels, under the Treaty as it stands and the Treaty as it will emerge, claim the right to intervene to dictate the price at which that one-off company may be disposed of by the government concerned, even though it serves a local national interest so to do? This is an actual case; I will not name it.
Professor Waterson: One of the problems which may arise in this case is what the notion of the market price may be.

Q27 ***Lord James of Blackheath:*** Yes, except for the fact that the government has expressed satisfaction with the price but has been overruled by Brussels as to what that price should be because of its perception of the fact that there ought to be competition where there is not in fact competition because it is the only company trading in that field in the country concerned at the time.
Professor Waterson: In a sense if something is offered for sale and it is clear what is offered for sale and yet it only attracts one bid, then that is essentially the market price.

Q28 ***Lord James of Blackheath:*** In this case it actually attracted five bids but one was considered acceptable by the government concerned until it was overruled by Brussels to the extent that it was not an acceptable bit, and yet it was the best and only bid that they wanted to take. I think that is interference beyond the level of competition because it serves no competition process.

Professor Waterson: As long as the criteria of the competition were clear I would agree with you. It depends how the criteria of the competition were drawn up.

Q29 ***Lord James of Blackheath:*** I think the bad news in your answer to me is that if it was wrong before it is going to be wrong in the future because nothing is going to change.
Professor Waterson: I would say that, yes.
Lord James of Blackheath: I am dismayed. Who should we press buttons with to see whether there can be some re-think?

Q30 ***Chairman:*** Can I suggest that our trip to Brussels on Thursday might generate some heat and I think we might get some light. If I may I will just try to sum up because we are coming to the end of this particular session. This has been very helpful because you have confirmed what I think the Committee was already beginning to feel, that in this issue—Services of General Interest, both economic and non-economic—there are a great number of ambiguities and what the Treaty does not say is probably more significant than what it does say. You have outlined five and for the record and perhaps for the Committee's benefit, you pointed out that there is not perhaps a clear difference between Services of General non-Economic and Economic Interest. We know that there is not great clarity about how the shared responsibility between Member States and the organs of the European Union will operate, who shares responsibility. Thirdly, we have dealt with the principles of regulation of Services of General Economic Interest and they are to be set but we do not know precisely what they are. Lord James has dealt with the key issues of state aid and competition and whether the Treaty makes any difference to what is an unacceptable state of affairs in certain sectors of the European economy. Finally, although we have not dealt with it, perhaps you might end with any comment on the perverse effects of those countries that are already liberalised or planning to liberalise and seeing perhaps the exercise of legitimate responsibilities of the European Union in terms of Services of General Economic Interest. They might step back from liberalisation perversely rather than going ahead.
Professor Waterson: Yes, although in that last area it seems to me that countries—I suppose the UK is an obvious example here—in liberalising activities have done so on a sort of 'go-it- alone' basis and therefore by and large have done it on the basis of it being in the interests of that nation as well as, possibly, in the interests of the Community. If it was in the interests of the nation at that time then for the most part I would say it would be unlikely that this coming within the purview of Brussels would necessarily be a bad thing.

Q31 ***Chairman:*** You have helped shine a few lights in dense fog.
Professor Waterson: There is one other thing I could perhaps say. There is one other piece of material from Brussels which may assist a little but, on the other hand, I suspect it does not have any legal force, that is the Handbook on the Implementation of the Services Directive which contains a definition of a service from which, of course, the definition of a Service of General Economic interest is drawn. Given that it is a handbook it is obviously an interpretation of the law rather than the law itself.

Q32 ***Chairman:*** I think we are aware of it. We will refer that to our special advisor to advise us in due course on that specific issue. I must say I was none the wiser with the handbook but perhaps I have read it incorrectly.
Professor Waterson: There was one particular element that helped me and it relates to case law: "The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question. Whether the remuneration is provided for by the recipient of the service or by a third party is not relevant". It then goes onto a "However" but that is, I think, of some assistance in defining the nature of a service and in particular the nature of a Service of General Economic Interest.
Chairman: Thank you very much. That concludes that part of the evidence session. We will be sending you a draft of the session; please correct it and help clarify any issues that remain outstanding. Thank you very much.

Examination of Witnesses

Witness: Mr Kevin Mooney, Partner, Simmons & Simmons, examined.

Q33 ***Chairman:*** May I welcome to the second part of our evidence session Mr Kevin Mooney who is a Senior Partner with Simmons & Simmons, and an expert in this field. Rather than go straight into questions Mr Mooney is going to help the Committee because I think some of us are not wholly up to date on what the present position is on how you register intellectual property in Europe and how you protect it, what the shortcomings are and in general terms what the new Treaty foreshadows in terms of improvement.
Mr Mooney: I am afraid that there are a variety of different intellectual property rights and inevitably the means of obtaining those rights and enforcing them differs significantly. Probably the most important intellectual property right and I think most relevant for our discussion this evening is the patent monopoly. At the moment the means of obtaining a patent are quite complicated. There are in fact two options. A company who makes an invention can apply to a national patent office and obtain a national patent. That is a national right which is enforced through the national courts. Alternatively there is a convention called the European Patent Convention, of which most European states are now members, with one or two exceptions. The inventor, rather than applying to each Member State's patent office can apply centrally to the European Patent Office in Munich. He prosecutes—that means he argues for the grant of the patent—in Munich and if he is successful he then designates which Member States of the European Patent Convention he wishes his patent to have effect in. The patent is treated as an individual national patent in each of the designated Member States. Whichever route you follow—the national patent offices or the European Patent Office—you end up with a national right which has to be enforced nationally in each and every country. That is the patent monopoly. It is different with a trade mark because there now exists within the Community a Community trade mark and it is possible to apply to the Office for the Harmonisation of the Internal Market (which is effectively a Community trade mark office in Spain) for a Community trade mark right. Alternatively, you can get national trade marks. The most important thing is that there is no Community patent right existing at the moment, although they have been trying to create one for 30 years now. I am happy to amplify on that; there are other intellectual property rights but those are the two most important ones.

Q34 ***Chairman:*** If there has been a breach what is open, for example, to a British company that sees that two or three European companies are breaching a patent or exploiting it without permission?
Mr Mooney: The company must enforce its national right in each of those states through the national courts of that state which is obviously expensive, time consuming and some would say unnecessary.

Q35 ***Chairman:*** For the benefit of the Committee, what does the Treaty do in your judgment and what does the Treaty not do?
Mr Mooney: At the moment the Commission under the Portuguese Presidency are working very hard to try to make progress on establishing two things, firstly a central community patent court in which it would be possible to enforce this bundle of patents from Munich in one place; a central patent court in Europe. The Commission, also working with the current Presidency, has now decided to have another go at the creation of the Community patent right. Those are two things that are being actively pursued at the moment. In the past it has failed largely because of language arrangements, which we will talk about in a moment. The current proposal to amend the Treaty will not, I think, have a significant effect on the success or failure of these efforts and I can explain that if you would like me to.

Q36 ***Chairman:*** Yes, please do so; that would be very helpful.
Mr Mooney: Up to now the legal basis for creating new Community rights has required unanimity. The new article, Article 97a, provides for the ordinary legislative procedure in most cases, in other words qualified majority voting. However, as an exception to that the language arrangements—if there are language arrangements—must be passed by unanimity in the Council. The key to both the Community patent and this centralised European court jurisdiction are language arrangements. I am happy to amplify on that if you would like. In effect unanimity will still be required to get the Community patent right through.

Q37 ***Chairman:*** That looks like a major stumbling block in terms of making any progress.
Mr Mooney: Yes, except that the language arrangements which were recently considered by the Community were effectively blocked by a number of countries and it seems to me that even under qualified voting there is at present a blocking majority for what most people want to do.

Q38 ***Chairman:*** Is there any precedent, certainly in commercial law in Europe, if there is a consensus of, say, a majority of states agreeing to the establishment of this patent court and therefore the language provision supporting it simply going ahead with that

small group? That is antipathetic to the history and tradition of the operation of the European Union.
Mr Mooney: There is a procedure called enhanced cooperation and at one time a number of Member States did suggest that it would be possible to take advantage of this procedure (which I am sure Mr Bretz knows better than I) so that a number of likeminded Member States who wanted to set up this centralised court under a three language regime—English, French and German—could go ahead. Unfortunately that was lost as a result of two things. Firstly, the Community legal advisors said that a patent court is an area of mixed competence and the Commission and Community must be involved. Secondly, France, Portugal, Spain and Luxembourg said that they would not agree to a three language regime. For the regime, which a number of countries wished to pursue with a limited language regime, there was a blocking majority.

Q39 ***Chairman:*** In your judgment, if there was to be the chance of unanimity, what is the minimum number of languages that we might be able to get away with?
Mr Mooney: The current Community proposal entitles each Member State of the Community to have a chamber of this court on its own territory and therefore if that happens—to the extent that that happens—the language of that court will inevitably be the national language. The proposal also provides for regional chambers where two or more countries can get together, so to speak, in which case it is for those countries to decide which language will be the language of that regional court. The answer is that we do not know. It is conceivable but unlikely that every Member State will want to have a chamber of this court on its territory in which case we should have all the languages, but the Commission has provided an economic incentive for them not to do that. If they want to set up their own court with their own language then they pay for it. If, on the other hand, a regional court is set up, then the Commission will contribute towards the cost of the court. At the moment it is difficult to say how many languages this court will operate in, certainly 22, 23, 24 official languages would be unfortunate.

Q40 ***Chairman:*** The Committee has yet to consider its observations but I think the Committee would appreciate your comment on one possible observation which is that not much progress is going to be made unless we move to QMV.
Mr Mooney: Given that there is a blocking majority already for a limited language regime, I frankly do not think it matters whether unanimity is required or qualified majority voting. I was chairing a meeting last week and the Commission official responsible for this project was one of my speakers and I did ask the question whether she thought that Article 97a, introducing qualified voting, would assist her and she said it would not. She would need unanimity to get this through.

Q41 ***Lord James of Blackheath:*** I need to declare an interest before I can ask a question and that is that I am currently chairman of a rapidly expanding medical device company, working closely in conjunction with an American research university and therefore hugely dependent upon the integrity of the patents that we can achieve for Europe. In this company at the present moment we are suffering hugely from attacks upon our patents from one particular Member State, and in every case we always win. We are rather in the equivalent of playing a football match where the individual would have had so many yellow cards by now that he would have been suspended for at least the rest of this season, yet there is no such process of discipline applying anywhere throughout the European structure. They get no slap on the wrist and they do not get any national control put upon them to behave better in the future. It is costing us a fortune. We are winning but I would like to think that there is going to be a better system of patent control applied to Europe as an entity that we can all trade with greater confidence.
Mr Mooney: I think we would all welcome that. The advantage of the centralised court would be that you could obtain an injunction for infringement of your patent which would automatically apply throughout the Member States of the Europe Patent Convention, which is most of Europe. The advantage of a Community patent, when it eventually comes, is that it is a unitary right which will apply for the whole of the Community and, therefore, if you get an injunction against your troublesome company again it will apply for the whole of the territory of the Community. That is something which I think the vast majority of companies would welcome; not all, there are some very strange exceptions.

Q42 ***Lord James of Blackheath:*** I can assure you we will be on the doorstep the day they open for business.
Mr Mooney: I must say that not all major industrial companies necessarily see it the same way.

Q43 ***Lord James of Blackheath:*** It is probably because we are device rather than pharmaceutical that I take the view that I do and I think there is a big distinction there.
Mr Mooney: Yes, I do not want to be cynical but I think the pharmaceutical industry enjoys the current anarchy; there are a lot of benefits to it.

Lord James of Blackheath: Sadly I have to agree with that, but thank you for the encouraging direction we may go into, and God speed the day.

Q44 ***Lord Whitty:*** Most of this has been about protecting the patent of a supplier and making sure that we move to a more common definition of the patent and if we are moving to a Single Market that makes sense. However, ultimately the Single Market is for the benefit of the consumer and it is not clear to me in which direction customer protection is going overall. If I take the music sector, clearly there are current arguments about the degree to which you can download music without infringing copyright. The same thing applies in certain areas of patents, not so obviously to the individual consumer. Is the general feeling that as we move, albeit in a stuttering way, to a European definition of patents, copyright and trademarks that that will be more protective or less protective, even in crude terms like the number of years this lasts? In other words, is there going to be a Single Market because it is standardised or is there going to be a Single Market because it is in one sense liberalised?

Mr Mooney: There is an enormous amount of harmonisation that already exists. Let me just concentrate on patents again because that is my field. Under this European Patent Convention I mentioned, patent law throughout Europe was harmonised. What was not harmonised are the court systems and the traditions of those courts. What happens is that you have the same patent effectively being enforced in some countries but not being enforced in others because the court receives different evidence. For example in England you get discovery and disclosure and you get lots of cross-examination; in other countries you do not. We have the rather absurd situation where you have the same patent, you have the same substantive law but you have different outcomes in different courts. That is, with respect, a nonsense given that we are supposed to have an operating single internal market and that is why these two twin exercises of first of all getting a centralised court system and then a Community patent is so important. If you go back to the Lisbon summit in 2000 where they rather grandly said that they wanted Europe to be the biggest knowledge-based economy in the world, number one and number two priority was to have a Community patent and a Community patent enforcement system.

Q45 ***Lord Whitty:*** The Lisbon objective in that context is to ensure the maximum investment and innovation really so there is a real return on innovation. Innovation is of some benefit for the individual citizen but there is a balance between protecting and getting return on the innovation and getting competition less restricted by the fact that there is a patent. I can only give the example of what is the likely destination of the protection period because if it remains at pretty near to whatever it is then clearly it is helpful for the individual consumer to have commonality but they would probably prefer that it was only 15 years and some other company could actually provide an alternative which might be cheaper in the short term. There are conflicting objectives is really what I am saying. There are conflicting objectives of making sure that we are driving through innovation through a return on innovation but also making sure that we are driving a Single Market through competition so that the patent system which is frozen at a common level is not so protective that it does not allow for related competition.

Mr Mooney: I entirely agree with you. I give a lecture every year to postgraduates at Bristol University and I start with a balance sheet. On the left are the good things about the monopoly and on the right the bad things about the monopoly and then we discuss how best to achieve the good things on the left and how best to avoid the bad things on the right. One of the critical things on the right is a limited life and there must be a limited life to enable the innovator to recover his investment but not long enough to distort competition. That is absolutely right. This debate goes on and on and on. Currently it is 20 years for a patent or if you happen to be in the pharmaceutical industry you can add bits and pieces to it. With copyright, we have had the debate whether it should be life plus 50 or life plus 70. These are debates that society has to continue to have.

Q46 ***Lord James of Blackheath:*** Can I just add a point to Lord Whitty's excellent exposition of the problem there, and that is that there is a world of difference between the breach of an existing patent and the process by which a new patent is applied for which is intended to leapfrog past the patent which has been broken and carry the technology forward. It would be a hugely important gain if whatever court process was established within Europe could define the difference between those two clearly and have a better system for disciplinary control on patent breach which is what is missing at the moment.

Mr Mooney: Unfortunately the two mechanisms you mention are quite different. Enforcement will be through the courts; the process of granting patents will remain with effectively the European Patent Office which is quite separate from the court system. The length of time it takes for patents to grant is a matter which is the subject of a convention and it is something which the Community has nothing to do with frankly.

Q47 ***Lord James of Blackheath:*** You will appreciate that the speed with which the process of granting the new patent can proceed is often curtailing the remedy to the breach of the patent in the first place and that is where the problem stems.
Mr Mooney: I could not agree with you more. I use the word advisedly, it is a scandal how long it takes sometimes for oppositions to patents in the European Patent Office to be fully resolved.

Q48 ***Lord James of Blackheath:*** I am glad you used the word "scandal" and not I, and I would only ask whether you can offer any indication as to how we should redress this scandal.
Mr Mooney: Yes, I can. We had a meeting in Venice a few weeks ago with all of the major judges in Europe and one of the people who came to speak to us was Alison Brimelow, a very formidable, very intelligent English lady who is now President of the European Patent Office. She was presented with a number of complaints about the time, and the bureaucracy, that it was taking for patents to be granted. She has promised to go away and do something about it.

Q49 ***Chairman:*** I think I am right in saying that the new Treaty refers to European Union intellectual property rights whereas if you look at previous treaties I think I am right in saying that the reference is to industrial. Could you indicate why there has been this change and is there any significance?
Mr Mooney: Industry property rights is merely the rather old fashioned name for intellectual property rights. When I was a young lawyer I recollect that one of my partners in Simmons & Simmons was invited to chair the Industrial Property Committee for the City of London Solicitors Company. He said, "That's fine, that is right up my street because I am a conveyancer". What he did not realise was that he was going into an area that was probably misnamed.
Chairman: This has been very helpful. Just in conclusion, although we have not followed the script in terms of questions we have had, I think, a much more interesting and productive exchange.
Lord Walpole: We have learned a lot.

Q50 ***Chairman:*** Is there anything else that you would like to add for the record that we have not covered?
Mr Mooney: No. You are absolutely right, the new legal basis, Article 97a, refers to new Community rights. I have spoken about the Community patent because frankly that is the only one that is in prospect and I do not think that the changes will affect whether or not that comes into existence. God willing it will, but I do not think that the current proposals will affect it one way or the other. What other rights the Commission has up its sleeve for the future I simply do not know and therefore it is very difficult to say whether these changes will affect matters one way or the other.
Chairman: Thank you very much indeed. That brings this particular session to a close.

THURSDAY 13 DECEMBER 2007

Present	Eccles of Moulton, B Freeman, L (Chairman) James of Blackheath, L	Paul, L Walpole, L

Examination of Witnesses

Witnesses: Mr Jean-Claude Thebault, Deputy Head of the Cabinet of the President of the European Commission, Mr Michel Servoz, Director, Better Regulation and Co-ordination, Mr Marcel Haag, Head of Unit, Strategic Objective Solidarity, Ms Jacqueline Minor, Director at DG Internal Market for Directorate B, Horizontal Policy Development, and Ms Elizabeth Golberg, Adviser to the Secretary-General, examined.

Q51 ***Lord James of Blackheath:*** We have noted that the Reform Treaty has omitted the words "free and undistorted competition" and that sends a shiver down our spines, I am afraid, because it would seem to us that those very words ought to go to the core of what a single market sets out to be. Why have they gone and how on earth is it going to affect the consequences going forward?

Mr Thebault: I can give you a good answer on this because I had the privilege to be at the European Council when we discussed this. We continue to say that it does not change anything. Why? Because this reference was in the Constitutional Treaty but does not exist in the Nice Treaty. It has been introduced there and so today it is not considered as an objective. Some Member States have said that it is not an objective, it is just an instrument, and it is true, a very important one, but the objective is much more the single market and it is an instrument to enable the single market to work. During the discussion we asked our legal service and those of the Council to make sure that it does not change anything and that, of course, competition policy will not be affected by this, and their analyses were very clear. I know that it has been sometimes misunderstood but our competition policy is still there and we use it and where necessary we open proceedings against Member States, so I can reassure you that there is nothing new there. The novelty was in the Constitutional Treaty.

Q52 ***Lord James of Blackheath:*** You say that it does not alter anything but surely the absence of the words removes a frame of reference within which you could bring to discipline any national governments which allowed a breach of the fairness of competition, or indeed some who might be encouraged to the view that they could go and escape down the route of state aid to assist a favourite business of theirs because it had some national prestige issue attached to it. One thinks, obviously, of airlines where the record of state aid has been seriously disruptive to competition in Europe in the last 20 years, and I speak as somebody who ran an airline for a large part of that time. I would be very concerned about how it would be interpreted locally. You might think it has not changed anything. Others might seek to take the opportunity of making sure it does change something. I am not quite sure what disciplines you are going to be able to control for it.

Mr Thebault: No, I do not think that this is the opinion of all Member States and we have some good examples. We have opened a great deal of state aid cases. We are not against national champions, you understand, but it must not be done in a way which is a sort of protectionism. We do not accept this and the competition rules are applied, I can assure you. I would just like to mention also that the words are not there any more and they were not in Article 3, but, of course the competition policy is still in the treaty, so nothing has disappeared. It was a question of presentation but it has not changed anything for us, I can assure you. Maybe my colleague can give some examples.

Mr Servoz: I just want to say that indeed it could be seen as a symbol that the words have been removed but the reality is different because the reality is that competition law is implemented every day and it is implemented in the same way as it was before these words were present, so I think there is no change. This is not only the opinion of the Commission; this is also the opinion which was voiced by all Member States.

Mr Thebault: One other thing I would say on this is that maybe we have not been as clear as possible in this document. What we must do is explain to citizens but also enterprises that our competition rules are there to protect them against those who do not apply the same rules because in some Member States in particular competition rules are seen as something which is damaging for industry, for people and so on, so we must explain that it is not true. There is no game if there are no rules and so we have more to do and we intend to pursue it in this way.

Q53 ***Lord James of Blackheath:*** I think I have to leave you with the sense that I am still concerned.

Mr Thebault: I am sorry.

Q54 ***Lord James of Blackheath:*** I hear your words and I thank you for your words.
Mr Thebault: But ask, for instance, some Member States what they think about it because there is no change in our policy and in our behaviour, I can assure you.

Q55 ***Lord James of Blackheath:*** I have suffered greatly from this sort of problem in my career. For example, I never ever seem to be able to do business in the heavy engineering end of plant and equipment supply without coming up against a competitor somewhere who has got a soft loan package from his government, which is not always very easy to detect. It is often quite invisible at the point of sale when you are making the final contract negotiations and this is particularly prevalent in sales out of Europe into the Middle East and the emerging countries. I wonder just how you are going to be able to exercise that sort of overview and detailed control to make sure that that sort of abuse of the system does not apply because it almost gives a green light to say, "Yes, you can do it", by removing those words.
Mr Servoz: If you look at the Single Market Review, and this is something that Jean-Claude insisted on very much, we made sure we made a very strong statement in favour of competition rules. If you look at the text you will see a very forceful statement from the Commission saying competition is useful, including for citizens and small businesses, so we have tried to make that very clear indeed.

Written Evidence

Memorandum by the Association of Electricity Producers

1. The Association of Electricity Producers (AEP) represents large, medium and small companies accounting for over 95% of the UK generating capacity, together with a number of businesses that provide equipment and services to the generating industry. Between them, the members embrace all of the generating technologies used commercially in the UK, from coal, gas and nuclear power, to a wide range of renewable energies.

2. The Association welcomes the opportunity to respond to the Sub-Committee's inquiry on the Reform Treaty. EU legislation now has a significant impact on the UK energy sector. AEP is an active participant in the European policy debate both via EURELECTRIC (the European association for the electricity sector) and through direct contacts with the EU institutions. The comments below relate to the Energy Chapter included in the new Treaty (Art. 176a).

Are the Changes in the Treaty new or do they represent Consolidation of previously agreed Directives?

3. The Energy Chapter, which is included in the Treaty for the first time, sets out four elements of an EU energy policy:

- ensure the functioning of the energy market;
- ensure security of supply;
- promote energy efficiency and new/renewable energies; and
- promote interconnection.

4. These new provisions increase the profile of energy as an EU activity but it is debatable how far they give the EU an increased competence in the field of energy. Existing Treaty articles on the single market (eg Art. 95) and on environment (Art. 174-5) already cover two of the three "pillars" of energy policy (competitiveness and environmental protection). Consequently, the EU has had *de facto* influence on national energy policies for some time through single energy market and environmental legislation. As environmental issues, particularly climate change, have risen up the policy agenda in recent years, this influence has become more pronounced.

5. Until now there has not been a specific legislative base for EU measures on security of supply, and the reference to security of supply is probably the most significant element in the new Chapter. Even so, Directives on both gas and electricity security of supply have been agreed in the last few years (2004/67 and 2005/89 respectively). The two Directives above relate primarily to operational (real-time) security of supply and infrastructure investment and not to the important issue of primary fuel choice. However, Art. 176a.2 makes clear that Member States are entitled to determine their own fuel mix, so it is not certain that the security of supply competence will make a significant difference.

6. A Directive on renewables was adopted in 2001 (2001/77) (and will soon be superseded by new proposals. A whole range of measures has been agreed in the field of energy efficiency—Directives on the Energy Performance of Buildings (2002/91), Eco-Design of Equipment (2005/32) and Energy Services 2006/32). Energy interconnection is already covered in the Treaty by an Article on Trans-European Networks, and measures to promote new interconnection form an important part of the Third Liberalisation Package currently being discussed.

7. Consequently, it can be seen that the Commission has been able to bring forward proposals in all these areas even without an Energy Chapter, by using other provisions in the Treaty, particularly the single market and environment articles.

What is the Impact of the Changes on the UK and the EU?

8. While Treaty provisions certainly play a role, the major factor determining the impact of any EU policy is how far national governments are prepared to work together and pool their interests. Any proposals put forward under the Energy Chapter would need to win the support of a qualified majority of national governments.

9. Although progress towards a single energy market has been slow, there are now some signs of increased integration of the European market, particularly in electricity. Energy regulators and transmission system operators are starting to work together more closely and the Third Liberalisation Package will require even greater coordination, particularly in relation to the planning and construction of new interconnectors. The Commission is proposing an EU regulatory agency, which will coordinate the work of national regulators where necessary. As EU Member States become more interdependent in terms of electricity and gas supplies and as cross-border trade increases, they may want to collaborate more closely on security of supply issues, but this will probably be a gradual development.

10. Considerable steps have been taken to harmonise environmental standards across Europe, and much of the framework for tackling climate change and other environmental issues is now set at EU level. Policy initiatives such as the EU Emission Trading Scheme and Large Combustion Plants Directive have a significant effect on national energy policies.

11. On the other hand, individual Member States have very different attitudes to the main energy sources for power generation, i.e. coal, gas, nuclear and renewables. It remains to be seen whether these attitudes will converge over time and whether the aspiration of "speaking with one voice" to external energy-exporting countries will be realised.

12. One impact of the Chapter could be to strengthen the relative position of DG Tren within the Commission: those Directorates which can call on specific Treaty powers are generally regarded as having more influence than those which cannot. Greater consideration of energy impacts within the Commission could be a welcome development, provided that an overly interventionist approach to energy policy is avoided.

13. The impact of the Chapter on the UK will depend on what policies are adopted. In recent times, the EU has promoted market-driven approaches to energy, both through efforts to liberalise markets and through market mechanisms such as the EU Emissions Trading Scheme. While implementation of these policies has sometimes fallen short of expectations, the Association supports the general approach taken (see for instance AEP's recent comments on the Third Package).

14. There are, however, some worrying signs that European policy could become more interventionist and could try to prescribe outcomes. This is a particular concern in relation to the binding renewable energy targets which the Commission is about to propose. While the Association strongly supports the growth of renewable energy, these targets could be set at such a high level that they undermine existing policy instruments such as the EU ETS. This could threaten confusion in public policy and may lead to investment in plant which is less efficient. AEP would have major concerns about any attempts to prescribe the fuel mix centrally or to pick "winning" technologies, whether at EU or national level. It is important that Europe avoids a dirigiste approach to energy policy which could call into question the efficiency gains achieved by competitive energy markets.

What is the Significance of Energy appearing in the Treaty for the first Time?

15. After a long period when energy was regarded as a primarily national issue, there has recently been increased interest in a establishing a more coordinated EU energy policy. This reflects a number of developments:

— growing EU imports of energy, particularly gas, leading to some concerns about future supply vulnerability.

— a number of supply disruptions in the last five years, notably short interruptions of Russian gas supplies and a major power blackout in Italy.

— increasing integration of the EU's electricity and gas markets and the emergence of some pan-European players.

— a tightening of the global energy supply/demand balance leading to higher energy prices and a higher political profile. As a result, energy has become more important in the EU's external relations policies.

In the light of these factors, the European Council held at Hampton Court in October 2005 called for a new European energy policy. The Energy Chapter reflects this new policy environment and is intended to implement the priorities set by the heads of government.

What is the Impact of Shared Competence?

16. As outlined above, EU legislation already has an influence over national energy policies, and this may increase as the EU electricity and gas markets become more integrated. On the other hand, energy supplies are so crucial to the economy that national governments will want to retain some significant energy policy levers. Shared competence for energy is therefore probably inevitable and the question is where the dividing line should be drawn between national and EU responsibility.

17. The Chapter contains an important safeguard for national energy policies in Art. 176a.2. This clause makes 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. The Association regards this clause as important for maintaining a balance in the respective roles of the European Union and individual Member States.

What is the Effect of the new "Solidarity" Clause?

18. The concept of energy "solidarity" is relatively new and remains to be sketched out. The intention is that any Member State falling victim to an energy emergency should be able to call on the assistance of other Members States. The clause reflects concern, particularly in the new Member States, about energy dependency on external suppliers.

19. As cross-border trade in electricity and gas develops, Member States will become more interdependent and scope for mutual support should increase as further infrastructure is built. "Solidarity" arrangements could be helpful in alleviating the impacts of an energy crisis, but the detail will have to be carefully considered. For instance, where a Member State has invested heavily in gas storage facilities, it may take the view that national customers or taxpayers, who have funded the investment, should be the main beneficiaries, rather than others who have not borne such costs.

20 December 2007

Memorandum by Business for New Europe

INTRODUCTION:

— Business for New Europe (BNE) welcomes the opportunity to respond to the House of Lords Internal Market Sub-Committee on the Reform Treaty's impact on issues affecting the Internal Market.

— BNE is an independent coalition of UK business leaders. Our aim is to support the UK's active engagement in Europe, and to promote a reformed, enlarged and free-market EU. We recognise the benefits from cooperation with our European partners. Since our launch in March 2006, we have become a leading pro-Europe organisation in the UK, gaining a good deal of media coverage for our views. We have a number of leading business figures serving on our Advisory Council (for more information, see www.bnegroup.org).

— BNE has submitted a more general response to the Lords committee focusing on issues of institutional reform. It is also part of the Coalition for the Reform Treaty (CRT), which has submitted a response to the committee's general inquiry on institutional reform.

— This response has been prepared by the BNE Executive.

BNE AND THE SINGLE MARKET:

— BNE believes that the European single market is one of the great successes of international economic cooperation in recent times, comparing favourably with any other regional bloc embracing economic integration.

— The Treaty of Rome (1957) identified the European project with four freedoms, namely goods, services, capital and labour—and these have produced significant benefits for the UK and the European economy. In particular, the single market has eliminated tariff barriers, abolished border controls and introduced mutual recognition for product standards.

— The European market has the largest GDP of any economy in the world. The value of the single market was $1.2 trillion in 2005 and it accounts for 40% of global trade. With the EU's enlargements of 2004 and 2007 into eastern Europe, it now reaches almost 500 million consumers.

Reform Treaty and the Single Market:

— As a business-based organisation, BNE welcomes the fact that, with the Reform Treaty, the EU is adapting it institutions to its enlarged membership. Such an exercise would be undertaken by any business which had suddenly doubled it size, as the EU has increased its membership from 15 members in 2004 to 27 members today. In general, business supports attempts to improve the efficiency of EU institutions and procedures

— The agreement reached brings to a close a period of legal uncertainty on the EU institutions, particularly since the defeat in referenda on the European Constitution in France and the Netherlands in 2005. Business requires certainty to invest long-term in European markets. This removal of doubt and uncertainty should be helpful to the single market, which has grown to almost 500 million consumers, and we regard as the fundamental building block of the EU.

— Once the Treaty is ratified in all member states, the EU will be better able to focus on its agenda of policy delivery, a key part of which will be strengthening the single market. The European Commission has been focusing on this recently, publishing its legislative package on the single market in November 2007.

— The reform of institutions is seen by many countries as a pre-requisite before further enlargement can take place. Therefore, the single market has already benefited from recent enlargements, providing new opportunities and markets for British business. We recognise that if enlargement is to continue, the institutional reforms in the Treaty need to take place.

— In all, the Reform Treaty does not have a dramatic impact specifically on the internal market. Most of the areas of EU economic policy, such as the single market and trade, are already subject to QMV, though the changes in some areas affecting business could have some welcoming consequences.

Energy

— The Treaty does not herald a major change on energy policy. The specific section on energy in the Treaty grants the EU a clearer role to secure objectives including proper functioning of energy markets, security of supply and promotion of energy efficiency/renewable energy, which is something we welcome.

— The changes in the Treaty will make it easier for the EU to take decisions on liberalisation and security (however member states will retain control on crucial issues like energy mixes). This is particularly important for the British business community, which has long called for liberalisation of energy markets and met resistance from some protectionist forces on the continent.

— The inclusion of the solidarity clause translates what already exist in the NATO Charter to the field of energy. Since Russia has already shown its willingness to use energy as a political tool against Belarus and the Ukraine, the EU will be better configured to send a strong message when member states are threatened by third parties.

Research and development / Intellectual property:

— This applies the principle of the single market to research. It will enable "researchers, scientific knowledge and technology circulate freely." In this way, the barriers to research will be dismantled.

— One of the challenging aspects of the EU's future economic prospects is the relatively low level of R&D at EU level. For instance, in 2005, only 1.84% of GDP was spent on R&D in the EU27, which is markedly lower than the level for the US or Japan. This is a long way short of the 3% target of expenditure on R&D envisioned in the Lisbon agenda of 2000.

Competition:

— The impact of the change in wording on competition generated a lot of comment, but is likely to be of symbolic rather than substantive significance.

— The protocol on competition has gone a long way to meeting the concern from business.

— A key point is that the status quo has not been altered. The change of wording is one from the defunct Constitutional Treaty to the Reform Treaty.

Concluding Comment:

— BNE believes that, while the Treaty does not impact fundamentally on the single market, it does include some positive changes, which should enable the future widening and deepening of the internal market.

12 December 2007

Memorandum by the Department for Business, Enterprise and Regulatory Reform

EXECUTIVE SUMMARY

The following evidence submission covers the following policy areas covered by the Department for Business, Enterprise and Regulatory Reform's (BERR's) remit.

The submission consists of the following policy areas and where applicable contains responses to questions that Committee is interested in, as part of the Call for Evidence:

— Internal Markets and Rules on Competition (combined)

— Services of General Economic Interest

— Industry

— Energy and

— Common Commercial Policy

For each policy area, the two principal questions, as requested, are also addressed:

— Are the changes in the Reform Treaty new, or do they represent the consolidation of previously agreed Directives into the new consolidated Treaties?

— What is the impact of the changes on the UK and the EU?

INTERNAL MARKET AND RULES ON COMPETITION

1. The Reform Treaty does not change arrangements for the internal market in any significant way. The general provisions covering the free movement of goods and services are unchanged. However, Article 47 of the Treaty does establish QMV for legislation to remove barriers to the taking-up of self-employed to work in other Member States. Other sections of this response deal more specifically with the treatment on Competition and energy in the Single Market.

2. With regards to competition rules, the impact of the Protocol is such that mention of the internal market elsewhere in the Treaty now implicitly contains a reference to a system that ensures that competition is undistorted.

3. The Protocol, which has the same legal status as the Treaties, will not result in a change to UK or EC competition law. The Protocol maintains the full force of European competition rules and EU Competition Commissioner Kroes has confirmed that, "The competition rules which have served European citizens so well for 50 years remain fully in force". The direct reference in the Protocol to the objectives as provided for in Article 3 of the Treaty on European Union, as amended by the Reform Treaty clarifies that the European Union can continue to act under all the powers it has always had in the area of competition policy. This includes action under Article 308 of the Treaty on the Functioning of the European Union.

Internal market & competitiveness question: Is the principle of "free and undistorted competition" sufficiently protected by the wording of Protocol no.6?

4. The Protocol maintains the full force of European competition rules. The direct reference in the Protocol to the objectives as provided for in Article 3 of the Treaty on European Union clarifies that the European Union can continue to act under all the powers it has always had in the area of competition policy. This includes action under Article 308 of the Treaty on the Functioning of the European Union and confirmation of the role of the European Commission as the independent competition enforcement authority for Europe.

SERVICES OF GENERAL ECONOMIC INTEREST

SGEIs Question: What difference does the new legal footing make to the provision of services of general economic interest?

5. The amendments made by the Reform Treaty to Article 16 (which deals with services of general economic interest (SGEIs)) introduce a legal base for a regulation establishing general "principles and conditions" governing SGEIs. The sorts of principles and conditions that the EU might wish to establish are outlined in article one of the protocol on services of general interest and include the following: "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."

6. In practice, given the wide range of activities that could be defined as SGEIs, the Government believes it would be impractical to attempt to establish EU-wide service requirements that could be applied to all of them. Rather, the Government takes the view that it makes more sense to deal with public service obligations in sectoral legislation governing specific areas of activity, as currently happens. The Commission's paper on SGIs which accompanied the Single Market Review indicates that it shares this view. It is therefore likely that Article 16 will provide an additional legal base for sectoral initiatives rather than being used to pursue EU-wide legislation on SGEIs as a whole.

7. In addition to the Article itself, a protocol on services of general interest has been annexed to both EU Treaties. The protocol is intended to assist with interpretation and does not create any additional legal powers. The first article of this protocol is intended to clarify the shared values of the Union in respect of SGEIs. In particular, it underlines the essential role of national, regional and local authorities in organising SGEIs and makes it plain that SGEIs should operate in ways that respect the diverse needs of different users, depending on their various geographical, social or cultural requirements.

8. The second article of the protocol clarifies the position on services of general interest of a non-economic nature. Specifically, it states that the provisions of Treaties do not in any way affect the competence of Member States to provide, commission and organise non-economic services of general interest. In practice, this second article simply clarifies the existing position *vis-à-vis* non economic SGIs ie that they are not subject to the provisions of the EC Treaty and therefore do not need to adhere to competition law. However they do remain subject to basic principles, such as the principle of non-discrimination.

SGEIs Question: What is the significance of references services of general economic interest being split between the Treaty and the Protocol?

9. No particular significance should be attached to the references to SGEIs being split between the Treaty itself and the Protocol. Article 16 of the Treaty introduces a new legal base for the EU to take action in the area of SGEIs. The protocol is intended to provide clarity on a number of issues connected with SGEIs, particularly where confusion has arisen about the scope of Member States to organise SGEIs on their territory and the extent to which the EC Treaty should operate.

SGEIs Question: Has the right balance been struck between promoting competition and respecting the differences between the Member States?

10. Article 16 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. The Government believes the protocol serves a useful purpose in that it makes it plain that only services of general interest of a non-economic nature fall outside the scope of competition law.

11. In the paper on SGEIs which accompanied the Single Market Review, the Commission provided a further explanation of how it intends to interpret Article 16 of the Treaty and the accompanying protocol, and it made it plain that when deciding which services are economic and which are not, it would look only at the service itself, not at the nature of the entity providing it. In practice, very few services are considered to be "non-economic", those that do come into this category include activities such as the police and judiciary and statutory social security services.

Background information

12. The term Services of General Interest (SGIs) is a generic term covering all services that include a public service element—both those that are "economic" and those that are not.

13. Services of General Economic Interest (SGEIs) is not defined in the Treaties. Generally, SGEIs covers services which are economic in nature, that is to say capable of being provided in a competitive market place. Examples include transport services, energy suppliers, postal services and broadcasting.

14. Services of General Interest of a non-economic nature tend to be activities which are purely a function of the state, and which it would be impractical to provide using a market mechanism.

15. On 20 November 2007, the European Commission published a paper on Services of General Interest to accompany the Single Market review. In it, the Commission said that it does not currently intend to propose EU-wide legislation on Services of General Economic Interest. The paper outlined a number of principles that will guide the Commission's work on SGIs and provided a further explanation of how the EU will interpret Article 16, as amended by the Reform Treaty, and the protocol.

INDUSTRY

16. The 1992 TEC (Maastricht Treaty), added industry policy to areas of EC competence in Article 130, later moved to article 157. The Reform Treaty moves Article 157 TEC to Article 176f of the new Treaty on the Functioning of the European Union.

17. The original article enabled the Commission to facilitate co-ordination between Member States for ensuring the conditions necessary for the competitiveness of the Community's industry exist. The relevant article explicitly states that it cannot be used as a basis for introduction by the Community of any measure which could lead to a distortion of competition.

18. The Reform Treaty clarifies the Commission role in developing industry policy, adding that its initiatives to promote co-ordination between Member States include "in particular 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. The European Parliament shall be kept fully informed". This is consistent with the UK view of where Community activity adds value to industrial policy, and is a helpful clarification which may guard against those Member States that would prefer a more interventionist or protective EU industrial policy.

19. The Reform Treaty also restricts the scope of the EU to act under this article. The original article gave the Council power to undertake specific measures to support action taken in the Member States. The Reform Treaty makes explicit that this article excludes any measures for harmonisation of laws and regulations of Member States (ie this Article cannot be used as a basis for harmonisation of Member State laws and Regulations).

New text of article 176f (additions from the Reform Treaty in bold deletions are struck out)

1. The **Union** ~~Community~~ and the Member States shall ensure that the conditions necessary for the competitiveness of the **Union's** ~~Community's~~ industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

—speeding up the adjustment of industry to structural changes,

—encouraging an environment favourable to initiative and to the development of undertakings throughout the **Union** ~~Community~~, particularly small and medium-sized undertakings,

—encouraging an environment favourable to cooperation between undertakings,

—fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, **in particular 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. The European Parliament shall be kept fully informed.

3. The **Union** ~~Community~~ shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of **the Treaties** ~~this Treaty~~. **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure** ~~The Council, acting in accordance with the procedure referred to in Article 251~~ and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, **excluding any harmonisation of the laws and regulations of the Member States.**

This title shall not provide a basis for the introduction by the **Union** ~~Community~~ of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

ENERGY

Energy Question: What is the significance of energy appearing in the Treaty for the first time?

20. The appearance of a separate Energy Article reflects the growing importance of energy as a political and economic issue in EU and of the connected policy areas of climate change sustainability and the environment. Although there were no specific energy articles in previous treaties, a wide variety of other provisions, in particular related to the single market and the environment, have enabled the EU to implement a wide range of measures on energy policy. These include legislation on electricity and gas market liberalisation; security of supply; trans-European networks; renewable energy; energy efficiency and the EU emissions trading scheme.

Energy Question: What is the impact of the EU sharing competence with Member States on energy?

21. As explained above, the current Treaty arrangements already provide shared competence on energy issues: the proposed new Treaty Article does not significantly change the balance. In particular, the new article preserves the rights of a Member State to determine the conditions for exploiting its own energy resources; its choice of energy mix and the general structure of its energy supply.

Energy Question: What is the effect of the new "solidarity" clause relating to the supply of energy?

22. The proposed treaty has frequent references to solidarity between Member States in relation to a range of policy areas. In particular, it has been added both to an existing article (100) related to "severe difficulties" in the supply of certain products (now clarified to refer primarily to energy) and in the chapeau of the new energy article itself. Support for including such a clause was strong among countries of Central and Eastern Europe who have concerns over security of energy supply. It is not yet clear what difference, if any, the solidarity clause will make, in practice, given, in particular, that Article 2 of the Treaty establishing the European Community already includes the task of promoting solidarity between Member States.

COMMON COMMERCIAL POLICY

Introduction

23. The European Community's trade relations are governed by the provisions of the Common Commercial Policy (CCP) set down in the Treaty. In particular, the current scope of the CCP includes: changes in tariff rates, the conclusion of trade agreements with non-EU countries (including trade in services and the commercial aspects of intellectual property), uniformity in trade liberalisation measures, and trade defence instruments such as anti-dumping measures and subsidies.

Summary

24. Under the Lisbon Treaty the CCP forms part of the EU's external action. Within Part V, Title II covers *"the Common Commercial Policy"* and Articles 131 and 133 of the existing Treaty become Articles 188b and 188c respectively. In summary, the key changes in the Lisbon Treaty for the CCP:

— Extend the scope of the CCP to include foreign direct investment;

— Grants the European Parliament a co-legislative role in respect of measures defining the framework for implementing the CCP and imposes an obligation on the Commission to keep the European Parliament informed of the progress of trade negotiations; and

— Removes the requirement for shared competence in respect of certain forms of agreement relating to trade in services but retains the requirement for unanimity.

Detail

Extension of EU competence in trade policy matters

25. Articles 188b and 188c of the EU Reform Treaty extend EU competence. The most significant change is that the definition of the common commercial policy is expanded so as to include "foreign direct investment". This term is not defined but is understood to be capable of covering all matters which would normally be covered in Bilateral Investment Agreements. This will have implications for Member States ability to conclude new bilateral investment agreements with third countries. Furthermore, as the EU develops its relations with third countries in this area, it is likely that Member States existing bilateral investment agreements will be replaced with EU level agreements. Ultimately, any definitive conclusions on the scope of the extension of exclusive EU competence on foreign direct investment issues will need to be taken by the courts.

26. A significant change from the existing position under the CCP is also made in Article 188c(4). The existing requirement for certain agreements on trade in services to be concluded by both the Member States and the Community has been removed allowing the EU alone to enter into such agreements but subject, in certain circumstances, to unanimity in the Council. These agreements cover matters relating to cultural and audiovisual services, education services and social and human health services. This will provide additional scope for the Commission to negotiate trade agreements which cover these areas.

27. Nevertheless, as a matter of general principle, the exercise of competences by the Community in the external sphere cannot go beyond the delimitation of competences in the internal sphere (this is acknowledged in Article 188c(6). Therefore, insofar as some services fall within areas that are expressly recognised by the Treaty of Lisbon as falling within shared competence[1] or indeed principally fall within Member State competence[2] there should be continued Member State competence to conclude international agreements.

Voting Procedures

28. Article 188c(4) reaffirms that the general rule for Council decisions for the negotiation of agreements remains qualified majority voting (QMV). However, the Lisbon Treaty also provides a clear indication of where the Council will be required to take a decision on the basis of unanimity for the negotiation and conclusion of agreements, covered by the CCP. The areas which will require a unanimous decision by the Council are: agreements in the fields of trade in services, commercial aspects of intellectual property, and foreign direct investment where the agreements include provisions for which unanimity is required for the adoption of internal rules, and for certain agreements in the field of social, educational and health services. Unanimity is also required for agreements on trade in cultural and audiovisual services which risk prejudicing the EU's cultural and linguistic diversity.

Role of the European Parliament

29. Article 188c(2) provides for an enhanced role for the European Parliament in the formulation, supervision and control of the CCP. The European Parliament is afforded a stronger role in the negotiation and conclusion of international agreements, but does not acquire any new role in relation to decisions to open negotiations. Article 188c(3) stipulates that the Council remains responsible for the decision to open negotiations on the basis of a proposal submitted by the Commission. However, during negotiations, the Commission is now tasked with ensuring that the European Parliament is kept fully informed of progress.

17 December 2007

[1] *Eg consumer protection, environment certain aspects of health—see Article 4 of the Treaty as amended.*
[2] Tourism, culture (see Article 6 of the Treaty as amended).

Memorandum by the Department for Innovation Universities and Skills

1. The main submission from the Department for Innovation Universities and Skills (DIUS) has been made to Sub-Committee G (Employment and Social Affairs), but a part of DIUS responsibilities fall in the area of Sub-Committee B (Issues Affecting the Internal Market). This submission covers Intellectual Property Rights, Research and Technological Developments and Space.

Intellectual Property

> *What are the implications of article 97A which provides for the creation of European intellectual property rights and the establishment of arrangements for the authorisation and monitoring of such rights?*

2. Article 97A will allow new European (ie European Union) intellectual property rights to be created using qualified majority voting and codecision. European Union (currently "Community") intellectual property rights can be created under Article 308 EC, which requires unanimity and the consultation procedure. This was the legal basis for the Community Trade Mark and Community Design Systems, including arrangements for administering them. However, there is no direct read across to the existing "European" patent system under the Munich Convention of 1973. This is an intergovernmental arrangement outside the EU, which allows for patents to be granted centrally with effect as national patents for specific states.

3. Article 97A provides that language arrangements for European intellectual property rights will continue to require unanimous voting.

4. Article 97A may become relevant to the future work programme of the Commission in following up the Communication: Enhancing the patent system in Europe (Doc 8302/07), in so far as that involves work on the community patent besides the patent litigation system.

Research and technological developments

5. The Treaty seeks to strengthen the development of a European Research Area in which ideas and researchers can flow easily across national boundaries. The UK favours the strengthening of research at EU level though eg the Seventh Framework Programme and the establishment of the European Research Council. The UK will manage carefully those new Treaty provisions which provide for wider legislative action in relation to the mobility of research and researchers.

Space

6. Article 172a refers to Space activities. The Government is not aware of, and does not anticipate, any significant changes in policy as a result of the inclusion of this text in the Reform Treaty, which will specify that EU legislation on space policy shall not entail the harmonisation of Member States' legislation on space. A Framework Agreement between the EU and European Space Agency (ESA) was agreed in October 2003; the European Space Policy was submitted to a joint EU/ESA Space Council in May 2007; a European Space Programme and Implementation Plan are being drawn up and there is a specific space theme in the Framework Programme.

7. The collaboration between the EU and ESA offers promise, and the Government is working hard to make a success of the two European flagship projects, Global Monitoring Environment and Security (GMES) and Galileo.

14 December 2007

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE C)

THURSDAY 22 NOVEMBER 2007

Present	Hamilton of Epsom, L	Roper, L (Chairman)
	Hannay of Chiswick, L	Truscott, L

Examination of Witness

Witness: Mr Graham Avery, Secretary General of the Trans European Policy Studies Association, examined.

Q1 ***Chairman:*** Graham, thank you very much indeed for being here with us today. You are obviously very hard working because you were giving evidence to our colleagues in another place yesterday and we know how much you are writing. Some of us have recently seen the volume which three institutes have produced here on various aspects of the Treaty where, again, you were one of the contributors. We would like today to go through some questions on the Reform Treaty. We have not got too much, so I think it is going to be a question of trying to have rather short questions and the answers being as long as they need to be. We are taking a note of this and we will be publishing our evidence. We will be sending you a copy of the transcript for you to make any changes, but if at any stage you feel you want to go off the record, please, will you let us know and we will not put that part in the recorded material. I wonder whether you would like to give us the rationale for the changes which are proposed in the area of foreign, security and defence policy in the Reform Treaty, and do you believe the Treaty will be able to serve as the basis for a more effective and coherent foreign and security policy for the Union?

Mr Avery: Let me begin briefly by introducing myself: I worked for 33 years in the European Commission in different capacities, and in fact, I worked before that for Her Majesty in Whitehall, so I have seen service on both sides of the Channel. In my last post in the European Commission I was co-ordinating the Commission's preparation for the foreign affairs parts of the Constitutional Treaty, so I have an insider's view of what was going on then. I have to emphasise that I no longer represent the European Commission, and the views I express here today are my personal views, which may be different, probably are different, from the official view of the European Commission. A few days ago I sent to your colleagues a draft article which I wrote on this topic that may be of interest for you, and this morning I took part in the presentation of another publication at the European Policy Centre, and I give you copies of it now, hot off the press this morning. It is the report of a working group at the European Policy Centre on the European Foreign Service to which I contributed a chapter. I will try to reply to your question about the rationale for the changes. My analysis of what I call "the new architecture for foreign policy in the Reform Treaty" is that it is another step along the road in a series of institutional changes which are on the way to the European Union's development of a foreign policy, beginning with Maastricht, and continuing with Amsterdam, which created the High Representative. We now have a rationalisation of the system. It is not a revolutionary change and it probably will not be the last change in the development of the arrangements for the foreign policy, but one of the principal reasons for these changes is the existence of the two pillars: the Community Pillar, which is managed by the Commission on the basis of decisions by the Council and with the consultation of the Parliament, and the second pillar, which is Common Foreign and Security Policy, in intergovernmental mode. The new Treaty changes nothing at the level of decision-making: Common Foreign and Security Policy will still be in the intergovernmental mode and the other things, development policy, trade policy and so on, will still be in the Community mode. What the Treaty does is to bring together the activities upstream and downstream of the decision-making. By upstream I mean the preparation, the formation and the proposal of policies and by downstream I mean the execution of the decisions and the representation of the European Union. Let me put my point in another way. This two-pillar system, the existing institutional structure, is dysfunctional to a certain extent because in the Brussels institutions there is a considerable overlap of activity between the two agencies concerned, the Commission and Council, and, frankly, duplication of work. For what concerns the world outside the European Union, there is a multiplicity of voices: the Union is sometimes represented by the six-monthly rotating Presidency, sometimes by the High Representative, sometimes by the Commission, and sometimes by all three at the same time. What credibility do we expect our partners, the Chinese or the Russians, to give us when

we present ourselves in such disorder? In brief, for me what the Treaty is seeking is coherence and better visibility.
Chairman: Thank you very much. Perhaps I should have said in welcoming you that you have the rather impressive record of having served both in the cabinets of Christopher Soames and Roy Jenkins, so you will have seen different British Commissioners as well as seeing the Commission from the inside, as you say, from the moment of Britain's entry into the Union. Lord Hamilton?

Q2 ***Lord Hamilton of Epsom:*** Would the Common Foreign and Security Policy retain its intergovernmental character? What impact do you think the Treaty may have on the UK's foreign and defence policy?
Mr Avery: On the first part of your question, the answer is very simple, yes. As I explained, the mode of decision-making is not changed in any way. In that sense, the declarations which accompany the Treaty—excuse me, I do not have them to hand—which say it does not affect the rights of Member States are absolutely valid. In response to the second question, what impact would it have on the UK, candidly, it is difficult to predict. I think it is rather for the British Government and the British Parliament to decide how to use this Treaty. As I said, my thesis is that it gives the European Union more coherence and more effective action in the world. It is up to the British Government how far it wants to exploit that. Let me put my point in another way and perhaps in a slightly more provocative mode. I find it quite worrying the extent to which the debate on this Treaty in the United Kingdom focuses on the way in which European Common Foreign and Security Policy can hamper or hinder the United Kingdom. For me the question should really be posed, how can the British use the European instruments in order to pursue more effectively British interests in the world.

Q3 ***Lord Hamilton of Epsom:*** Yes, but when it comes to European embassies, you have got a problem if there are people competing who are trying to win contracts who are all Europeans?
Mr Avery: I am not sure that on the point you make about contracts the Treaty changes anything.

Q4 ***Lord Hamilton of Epsom:*** I am talking about business. How can a European embassy reflect the interests of a British company that is bidding against a French one?
Mr Avery: I do not think these Union delegations which the Treaty creates will have trade promotion functions, they will only have things to say on trade insofar as the European Union itself is competent to speak on trade matters, which is in international negotiations in the World Trade Organisation. I do not think the creation of these Union delegations prejudices in any way the activities of export promotion or contracts by British firms.

Q5 ***Lord Hamilton of Epsom:*** It would if they subsumed the existing embassies in those capitals.
Mr Avery: That is absolutely not the intention. The Treaty says, *expressis verbis,* that the task of these Union delegations is to co-operate with the missions of Member States in non-Member countries. The object is absolutely not to take over their role. The role which will be taken over by these Union delegations outside Europe is, as I mentioned, the role currently exercised by the six-monthly rotating Presidency or by Mr Solana. There will now be a mission, a Union delegation, based in third country capitals which can speak authoritatively with one voice for the Union, but only on those matters where there is a position of the European Union.

Q6 ***Lord Hannay of Chiswick:*** It might help us to understand this better if you were able to give us a rough idea of how many places in the world the European Commission already has offices because, of course, in all those places this will be largely a change of label, it will not mean opening something new. I think I am right in saying they now have offices in a very, very large number of places, do they not?
Mr Avery: The Treaty says that there will be Union delegations and they will report to the new-style High Representative. It does not say they will be in the European Diplomatic Service, but people generally agree that they will form part of the European External Action Service. The Treaty does not explicitly say that these Union delegations will be based on or replace the Commission delegations, that is a decision which remains to be taken, but the vast majority of opinion I have heard is precisely, as you say, that Commission delegations will be abolished and instead the nameplate will say "Union Delegation". Presently, the Commission has something more than 120 delegations accredited to around 150 countries. I do not entirely agree with you that the role of these delegations will be practically unchanged. Since this new service is to include people seconded from national diplomacies, there will be people in these Union delegations coming, I hope, from national capitals, including the British Foreign Service and, in addition, these delegations will do some things which up to now Commission delegations were not supposed to do. They will speak for the European Union on matters of Common Foreign and Security Policy, and that is an important novelty.

Q7 ***Lord Hannay of Chiswick:*** Could we look now for a bit at the High Representative in his new form if this Treaty is ratified and comes into force, that is

to say the double-hatted one, not the present form. I judge from what you said before that you do think it will improve the effectiveness and coherence of the EU's external action. Perhaps you could explain that a little bit. Do you think there are any risks from this double-hatting? At the time it was first put forward in the Convention there were quite strong arguments against it by people like Lord Patten, who did not think it was the right answer at first sight. How will the policy coherence in foreign policy be ensured between the Foreign Affairs Council, which the High Representative is going to chair, and the other formations of the Council, which, it appears, will continue to take decisions with considerable external foreign policy implications? In your view, what is the relationship likely to be—this seems to be the area in which absolutely nothing is written down—between the role of the President of the European Council in the field of external policy, if he has one, and the role of the High Representative?

Mr Avery: I will try to reply to those three questions in reverse order. First of all, the relationship between these two new personalities, I would remind you there is a third personality who comes into the picture, which is the President of the European Commission. What you might call a "foreign affairs triangle" will be created in which the relations between the persons concerned, and good relations, will be absolutely essential. Frankly, it depends on the personalities. This is perhaps not the place to speculate on who the persons will be, but it is rather clear that in the middle of 2009, supposing this Treaty comes into force at the beginning of 2009, there will be three big posts to be filled: the President of the European Council, the President of the Commission and the new-style High Representative. There is no formal structure for their liaison, but I am absolutely certain they will have to develop informal structures. Your second question was about the coherence between the new-style Foreign Affairs Council, presided by the Solana figure, and the other compositions of the Council for domestic and other policies. Again, that is an area where nothing is written in the Treaty, and I am not conscious that in the Council's Secretariat they have come to any clear ideas about how it is to be done. I limit myself to saying that you have this problem in national administrations where foreign secretaries and foreign ministries are faced more and more with the fact that activities of environment ministries, energy ministries, not to mention agriculture ministries, impinge on world affairs, and the interface between the domestic and the international becomes more and more common.

Q8 ***Chairman:*** On that particular question, before you go on, could I raise one issue which does concern us a little bit. In the Reform Treaty, the section setting out the functions of the Foreign Affairs Council makes it clear that it will not legislate, therefore if there is a need for legislation in areas of external affairs, development aid, humanitarian aid and other matters, it would presumably have to be taken either in the General Affairs Council, not presided over by the High Representative, but by the rotating President.

Mr Avery: I am sorry, I am not familiar with the disposition you are referring to.

Q9 ***Chairman:*** I am not sure, I have not got my text on the Treaty.

Mr Avery: I was not aware that the competence, if we may use that word, of the Foreign Affairs Council is limited in such a way. I have always supposed that, for the examples which you mentioned, and also for enlargement, those decisions would be taken in the Foreign Affairs Council.

Chairman: There is this particular clause in the current draft which concerns me and which perhaps I can write to you about because I think it is something we will need to look at.

Lord Hannay of Chiswick: I think we had better ask Jean-Claude Piris.

Chairman: We will ask Jean-Claude.

Q10 ***Lord Hannay of Chiswick:*** I have a feeling we may be misconstruing something.

Mr Avery: On the first question, you asked about the risks and I would say, yes, there are risks of all sorts. One risk is that the Working Hours Directive will be infringed because this poor guy will have to work 24 hours to get his job done! To be more serious, there is already a full-time job which Solana does as High Representative. The job of Vice-President of the Commission is also a full-time job. I want to emphasise this because in analyses of the new architecture the fact that this High Representative will be a Vice-President of the Commission is frequently overlooked. In the Commission he will be responsible for co-ordinating all the external affairs dossiers. That means he will have, let us say, four Commissioners handling fields which he is supervising. In the Commission at the present time there are four Commissioners doing external relations, with a total of six Director Generals of Services and there is a serious need within the Commission to co-ordinate these things better. When Chris Patten was Commissioner for External Relations, although he was not a Vice-President, it was accepted that he had a co-ordinating function for external affairs in the Commission. In the present Commission the co-ordination is undertaken by the President, and despite the many capabilities of José Manuel Barroso, he is President of the Commission and has many other things to do. I want to emphasise that for me a very important part of the task is

handling the Commission, but there is a third hat. This guy will have the two hats, the famous double-hatting we have mentioned, but in addition he will be chairing the Foreign Affairs Council. I have to say, I think the problems of that have been underestimated. Let me put it this way. This person will be at the same time submitting proposals to the Council, both with his CFSP hat and with his Community hat, and then presiding and making the compromises and the arbitrations for the decisions. This is not an easy thing to do, so I think there is a risk of overload. If Solana is a human dynamo, which is certainly the case, then I think his successor will have to be a superhuman gymnast!

Q11 ***Lord Hannay of Chiswick:*** Following that, the third question about the way in which the President of the European Council and the High Representative would interact and you added the President of the Commission, surely this problem is going to be really quite difficult to resolve in the context of the ever increasing number of "summits" at which the EU meets Russia, China, the United States, Latin Americans or whatever it is. What is going to be the EU's representation on such occasions after this Treaty is entered into force? It sounds to me awfully likely that it will be exactly the same as now with some slight shift, that is to say, you will have the President to the European Council, the President of the Commission and the High Representative and they will all be there, except there will not be the rotating Presidency there. How do you think it is going to be handled? It is surely not very straightforward, is it?
Mr Avery: I think you are exaggerating the problem a bit. In a nation state, normally you have a head of state, sometimes a president, you have a head of government, a prime minister, and you have a foreign minister, and they have different interlocutors when it comes to other countries. I do not think this problem is really insoluble. For me, perhaps a more delicate problem is how they get on with each other and how they co-operate and develop policies and decisions within the Union. Who is in charge within the Union seems to me quite a tricky question.

Q12 ***Lord Hamilton of Epsom:*** The Constitution envisage there will be a Foreign Affairs Minister for Europe and now under the Reform Treaty we have a High Representative, how do their roles vary or do they not?
Mr Avery: The roles of what was called the Foreign Minister and what is now called the High Representative, as far as I can see, are identical. The titles are different but the functions are the same. Personally, I think the change from Minister to High Representative is good, despite the fact that it is not very euphonious—from a linguistic point of view, this person's title is impossible, it gets first prize for the world's worst acronym—but for me it was an error to call this person a Minister. "Minister" is borrowed from the vocabulary of a nation state and it gave the impression that the European Union is modelling itself on a nation state, which is simply not the case. The European Union is a *sui generis* formation, therefore I think it is better that he is not called a Minister but something else, even if it is difficult to pronounce.

Q13 ***Lord Truscott:*** Going back to the External Action Service, to a certain extent we talked about the rationale for its existence, but how do you think the Service will work in practice, and how will it relate to the UK diplomatic corps and also other EU diplomatic services? How do you think it will be held to account? Do you think it also raises other issues, like dealing with intelligence, for example, and how those can be held?
Mr Avery: You ask a lot of questions there and, again, I will try and attack them in the reverse order. I will start with intelligence because I think that is the easiest. I have not met anybody yet in the Brussels circuit who thinks that an intelligence capacity should be a priority for this new Service. I think I am right in saying that of the existing 27 Member States only nine have intelligence services anyway, so there are a number of Member States that seem to have conducted foreign policy without the aid of intelligence services. There are arrangements which work quite well for the Member States to share their intelligence with the Council Secretariat, and insofar as this new Service is involved in the sharing, there is no problem about its officials having the necessary security vetting, just as people in the Council Secretariat have. There is a question about how useful this kind of intelligence is. I have to tell you that the European Commission, which does not have spies or anything like that, has invested quite a lot in its open media intelligence, where you analyse what the media is saying, and it is relatively cheap and rather useful. You asked a question about the accountability of this new Service. I think its political accountability must be through its boss, who will be the High Representative/Vice-President. He will be in charge, and they will be working for him. For what concerns their administrative and budgetary accountability, in my scenario the would be subject, just like any other European institution, to the Court of Auditors, the budget procedure and so on. One of the questions which is not decided by the Treaty is the institutional status and location of this new service. It is quite a thorny question. Should it be inside the Commission? Should it be inside the Council? Should it be equidistant between the Commission and the Council? Personally, I do not like the approach which says it should be equidistant because the precise

object of this service is to be as near as possible to the Commission and the Council. For me the preferred form would be to have an agency. There are some interesting examples of agencies here in Brussels which report and work both for the Council and the Commission but keep these activities separate. One is the Interpretation Service and the other is the Anti-Fraud Office, and they succeed in doing this work well. Have I answered your questions or did I miss one?

Q14 ***Lord Truscott:*** I think you have answered how it would work in practice, but how would it relate to existing diplomatic services?
Mr Avery: How it would work in practice is an enormous question because its role is not clearly described in the Treaty. Its fundamental role in the Treaty is to assist the Vice-President High Representative but, of course there is still some uncertainty about how far his role extends. There are no decisions, but there are some ideas about its structure. Most people would agree that this new service needs to have world coverage in the sense of having desks for all the main parts of the world, as foreign services do. The geography is at least as important, if not more important, than the thematic work of a foreign ministry, so this organisation should have geographical desks. Many of us argue that these geographical desks should not be reduplicated in the European Commission and in the Council. If that happens, instead of reducing overlap and duplication, you have magnified it. Those are the remarks I wanted to make about the structure. Plainly, the structure also needs to make the double-hatting real. If this new service consists of two columns, one dealing with Common Foreign and Security Policy, the other dealing with Community policies, we really have not improved anything very much. As for relations with the British Diplomatic Service, I think it is a very interesting question which you will have to put to the Foreign Office, how they envisage it. There will be national diplomats seconded to this service. In the discussions which took place in 2005 all the Member States said, "Yes, we want to participate", but when faced with the question now, "How many do you think you will send?" no-one had a figure. It is very difficult to get an estimate of the total numbers involved. We also posed the question, "Will you send the brightest and best or will you send the people you are really quite happy to see go?" These are also important questions. All the Member States which talked about this two years ago agreed that there would have to be a geographical balance but, of course, there should not be national quotas. That is nothing new and exceptional. In all the institutions we have the practice of ensuring a national balance. It is interesting that the attitudes of Member States to this new service differ. For the smaller Member States it is quite interesting. I was in Lithuania last week talking to them about this and, manifestly, if you are a Lithuanian it is much more attractive to be Head of the Union Delegation in Tokyo than to be Lithuanian Ambassador in Tokyo. So for them it is very interesting to have access to this bigger structure. On the other hand, the small countries are quite afraid that the *Directoire* phenomenon will occur, and that basically the big Member States will run the show. There are also different attitudes according to age. When I talk to the younger diplomats I know, they are really quite enthusiastic. It is an interesting idea to go and serve somewhere in a European organisation and then come back. The people in mid career are not quite so sure about its implications for their careers, but generally the people at the top seem to be rather in favour.

Q15 ***Chairman:*** Could I ask you one supplementary on this. That is the scope of the External Action Service and both ends, both in Brussels and also in the field, and perhaps the answers are in this book you have given us today. In Brussels, we assume it would be most of the people who are dealing with foreign and security policy within the Council Secretariat, presumably quite a lot of the people, if not all of the people, who are working in the Directorate General dealing with RELEX external relations, perhaps the people working in the Directorate General dealing with enlargement and then, with diminishing degrees of certainty, the Directorate General dealing with development and those responsible for humanitarian aid, international trade, et cetera.
Mr Avery: Let me remark that this book which I have given you includes a useful, annex in which there are the reports which were produced two years ago jointly by Solana and Barroso, which already give the outlines of some of these components. To give you orders of magnitude of numbers of persons, everyone supposes that the staff presently working for Solana, which is approximately 300 people of all grades, would normally go into this service. People have supposed that most or all of the Commission's External Relations DG, that is 750 people, would go into it, but in the case of the Commission, it is a bit more complicated than that because there is more to external affairs in the Commission than the one Directorate General for External Relations; there is Development and there is Enlargement. Let me just make a small parenthesis. A very delicate but important question will be the relationship of the Commissioners for External Affairs to the new Service and the new Vice-President. It is sometimes said that the relationship will not work because in the Commission each Commissioner is equal and no-one is superior to the other, but in my interpretation, the

Treaty changes that. The Treaty says that for the first time there will be a hierarchy. In the past, Vice-Presidents may have had big jobs but they were never hierarchically superior. There will be, let us say, four Commissioners subordinate to this new Vice-President; they ought to act as his deputies and they ought to have access to and be working with the Service; if you imagine the alternative, which is that they keep their own troops, the result would be massive duplication. That was a parenthesis, and I was saying that exactly who comes from which part of the Commission is a very delicate question which remains to be decided. Then there are the Commission's delegations. Roughly speaking, they have 1,000 Brussels-based staff of all grades and about 4,000 locally employed staff. Many of these locally employed staff are European nationals, and altogether there are 5,000 bodies. I often say that, if you look at the numbers, the delegations will be the Crown Jewels of this operation. What Mr Solana is lacking in his present position are eyes and ears outside the European Union. That is one of the reasons why there has been a proliferation of Special Representatives—I think there are now nine or ten of them—precisely because he was unable or unwilling to employ the Commission's delegations for that role. Those are my remarks about the general dimensions of the Service.

Q16 ***Lord Hannay of Chiswick:*** In the past, one of the things which has inhibited everyone working, including Solana, with the Commission delegations is their extraordinary inequality of ability and professionalism and the fact that too many jobs have gone to a sort of Buggins's turn rotation and also there has been huge resistance for good people working in Brussels to go and serve out in foreign parts. Is there anything being done to address this quality problem because it does rather seem that if this system is to work at all, it can only be if there is a much more professional approach to the External Service than has been achieved so far?
Mr Avery: In general, people who serve in Commission delegations are not trained for the kind of political reporting, political analysis and all those things, which go with the traditional role of diplomacy. The Commission has tried to do better training. It must try twice and three times as hard. One of the things which I insisted on—it is mentioned in this report which I have given you today—is that a capacity for training for this new service is a priority. I mean that in two directions, not only should people who work in the European institutions—the Commission, Council, Secretariat—learn about diplomacy, but people coming from the national diplomatic services should be adequately informed and trained in how the European Union works and what it is about. Some people propose a European diplomatic academy. I am not in favour of creating a new institution, we have got enough of those already, but we could create a network, a virtual European diplomatic academy, using the very good elements which exist already, and training should certainly be a priority.

Q17 ***Lord Hamilton of Epsom:*** What is the impact of the limited extension of Qualified Majority Voting in areas of common foreign and security policy?
Mr Avery: To be honest, I do not feel very capable of giving you a reply on this. I cannot remember exactly where these extensions are, but wherever they are, I do not think they are likely to have much impact. Why do I say that? In Common Foreign and Security Policy what counts is the political will, not whether there is unanimity or Qualified Majority Voting. For me, the question is where is the political will to make decisions and take common action.

Q18 ***Chairman:*** I wonder if we can move to one of the issues on defence. The Treaty makes provision both for enhanced co-operation to apply to CFSP, but given that enhanced co-operation has not had very much success so far, and given one already has the provisions for constructive abstention anyhow, perhaps that is not the way we go forward. On the other hand, it does have very explicitly these provisions for permanent structure co-operation in defence. Do you feel this does have the potential for the development of more effective EU crisis management capabilities?
Mr Avery: If you will forgive me, I am going to pass on that question because on these military security questions I feel insufficiently qualified to give you useful advice.

Q19 ***Chairman:*** In that case, I will not ask you the question, unless you feel you would like to answer it, on the mutual assistance clause.
Mr Avery: I will pass on that too.
Chairman: Very well.

Q20 ***Lord Hannay of Chiswick:*** I think we have touched on some of these questions already, which is how the High Representative is going to work together with members of the Commission with very well structured and based responsibilities. The most obvious, of course, being trade policy, but there is development co-operation and there are the enlargement negotiations. Is the role of the High Representative going to be just a token? Will the Commissioners responsible for trade policy, development and enlargement really sub-ordinate themselves to an overall strategic view of the High Representative or will things just go on much as before? It is not going to be straightforward. As you said yourself, the question of a man's or woman's

time, the multiplicity of things he or she has to do, but it is also the fact that, for instance, on trade policy, the Commission's role running the European Union's trade policy is now 50 years old. Successive Commissioners for trade policy have not reacted in a kindly way to being told by the Commissioner responsible for external relations, whatever it is, that he should go lightly on country X or Y because we have good relations with them or what have you. There will have to be some fairly major cultural changes if this is to be an effective system, will there not?

Mr Avery: If I may go off the record for a moment. (There followed a short discussion off the record) In the interim report in 2005, to which I have drawn your attention, it was stated that most Member States think trade should be without the remit of the European External Action Service. Nevertheless, the Vice-President would have some supervisory control of what is going on, if only because you cannot separate trade policy from foreign policy. In terms of operational activity, I think trade would be an exception, just as it is in the case of many Member States. Let us look at the other fields. You are quite right to say the force of inertia is considerable, and in the case of the existing members of the Commission there will be reluctance to be involved in this new structure. All I can tell you is if I was a member of the Commission, which is not very probable, I would want to go into this structure and play an active role in it. Let us take enlargement. You cannot possibly handle relations with the Western Balkans, including places like Kosovo, and you cannot handle relations with Turkey, unless you are fully plugged into the CFSP dimension. For me, the logic of having a joined-up approach must mean that the important parts of policy preparation and policy execution in the Commission should be covered by it. One of the problems, which we both mentioned, is the need for deputies. Although the Treaty makes no provision for it, it seems to me that the High Representative/ Vice-President will need deputies, he will need people to represent him, if only because there are meetings all over the place, all over the world, which he cannot go to. Therefore, from my point of view, on a case by case basis it would be rational to use, as senior political representatives or deputies of this new figure, either the Special Representatives if they exist or some of the Commissioners according to the topic.

Q21 ***Chairman:*** If I could stretch that in one particular area, Justice and Home Affairs has increasingly got external dimensions, how do you see that coming into the new arrangements? It will obviously now all be in the First Pillar, but how will this relate to the role of the High Representative and the External Action Service?

Mr Avery: You are quite right to mention these areas of policy which, strictly speaking, are not external but have very important external spillovers. I think I mentioned some others which are very active, like energy policy—you cannot deal with Russia without handling energy policy—environment, and so on. I have already said that I think the Commission should co-ordinate itself better for external affairs in general. It should also co-ordinate better the linkage between the internal policies and the external policies. It does not do that well enough and that is going to be a big challenge for this personality, but it can be overcome. It requires a certain effort of structuring within the Commission and it requires good relations between the Vice-President and, let us say, the Commissioner for Justice and Home Affairs or Energy. Plainly, it will not be the role of this new Vice-President to replace Frattini or his successor. He will have a role, but there will also be a co-ordination task and that co-ordination task can only be done by the new External Action Service. That is one reason why it has to be adequately equipped and adequately placed.

Q22 ***Lord Truscott:*** Looking at EU representation in international organisations, how do you think the EU will be represented in international organisations in the future under the Treaty provisions and also how that will impact on representation in the OSC and whether it might also have implications in terms of the UN Security Council?

Mr Avery: I am not much of an expert on this. There is something in the new Treaty which says that if he is called upon to do so, the High Representative could speak at the United Nations, but only if he is called upon to do so and according to a mandate which he is given. Another dimension to this Treaty is that he gives legal personality to the European Union, which I suppose means the European Union as such could become a member of other international organisations. At the moment it is a member of a number of international organisations, the World Trade Organisation, the FAO and so on, but the simple answer is I do not know exactly what the future holds on that.

Q23 ***Chairman:*** One of the things which might concern us is there are some circumstances where at the moment the country which holds the rotating Presidency of the Union does speak for the Union in bodies of which it is not a member and would that continue or would it not?

Mr Avery: I am sorry, I cannot give you a categorical answer. Generally, it seems to me, for what concerns foreign affairs, this would be taken over by the new High Representative.

Q24 ***Chairman:*** But possibly in some of the international bodies which are not directly foreign affairs, for instance? Let us say that if the EU was not a member of the Food and Agricultural Organisation, given that it would be the rotating Presidency which would be presiding over the Council which deals with agricultural matters, then it might be appropriate for its representative in the FAO to represent the European Union as well as represent itself during the period of its rotating Presidency. I just give this as a "for instance".
Mr Avery: In those cases where the Community has competence, the representation is made by the Commission at the present time and that will continue to be the case. It is a case by case question on which I do not have a universal answer.

Q25 ***Lord Hamilton of Epsom:*** Going back to what you said about the Constitution suggesting there should be a foreign minister, and you said you thought that was a bad idea because it smacked of a European super state, we have seen under successive treaties that have come, we now have a single currency, we have quite a bit of jurisprudence which comes from the European Court of Justice, we have got a lot of talk about a European army and we now see European foreign affairs being brought together in a greater way, the only thing we have not got at the moment is a common language, but that all sort of smacks of a super state to me. What is the end goal of the European project? Is it not to be a super state?
Mr Avery: Some people say we have got a common language and it is English.

Q26 ***Lord Hamilton of Epsom:*** Exactly, I could have mentioned that, but I did not want to!
Mr Avery: That is not met with great acclaim by other language speakers! The question you asked was what is the end goal of the European Union?

Q27 ***Lord Hamilton of Epsom:*** Yes, we have been advancing.
Mr Avery: To that, the answer is we do not know. It is an ongoing process which has been going on for more than 50 years and it has achieved quite a lot but, frankly, it does not help very much to make speculations about what is the ultimate objective. Let us do what is useful for the European Union to do, now and today. This Treaty helps the European Union to do something more useful in foreign affairs. By the way, all public opinion polls suggest that despite the existence of euro-scepticism in a number of Member States, including ours, in general people are in favour of the European governments and the European nations doing things more effectively together in foreign affairs. This Treaty does not change the way in which Member States conduct their national foreign policy, defend their national interests and conduct their national diplomatic services. If it was not sufficient for the legal text of the Treaty to imply that, there are declarations which make it clear. There is absolutely no question that neither this Treaty nor the preceding one replace British foreign policy with something else, and Britain will continue to have an independent foreign policy. On the other hand, how many areas of foreign policy are there in the world where Britain can achieve much by acting alone? For me, the opportunity of the European construction is for the British, if they take the chance, to ensure that Europe functions in a way which effectively pursues British interests. This is something which traditionally the French were supposed to have understood: they ensured that the objectives of many areas of European common policy corresponded largely to French objectives. For me, given the British tradition of diplomacy, its highly effective diplomatic service, of which there are some ex-members around this table, I think that is a challenge to which the British should respond in a positive way.

Q28 ***Lord Hamilton of Epsom:*** To answer your question, an area where there is very distinctive British policy is vis-á-vis the Atlantic Alliance and the relationship with the United States where we have a much closer relationship than either France or Germany or, indeed, any other member of the European Union. If we were bound-in tightly, and I do not envisage that as being inconceivable, we would not be able to take decisions to ally ourselves with the United States if our EU partners did not go along with it.
Mr Avery: If I may say so, I do not think this Treaty has any bearing on that.

Q29 ***Lord Hamilton of Epsom:*** This is the problem, is it not?
Mr Avery: I understand what you are saying.

Q30 ***Lord Hamilton of Epsom:*** It is the grandmother's footsteps all the time?
Mr Avery: I am sorry, I have been asked to give evidence about this Treaty. When you say that Britain has a closer relationship than France or Germany, that may be true or it may be true of the recent past, but we have seen considerable changes of attitude in France and maybe in Germany. These things are not set in stone. National interests react to changes in the world, they react to events and experience, and I would repeat that for me in many areas of world affairs it is plain that the United Kingdom can best obtain its objectives by working with its European partners, by persuading its European partners that the best course of action is precisely the one which corresponds with British national interests. In that context, I think the

construction of a more unified, a more joined-up system of decision-making in Brussels, is an opportunity rather than a hindrance to the pursuance of an effective British foreign policy within the European framework. If you talk to the Americans, they would certainly tell you that they want to see the European Union to be more effective in foreign policy. Naturally they want it to be effective in doing things together with the Americans, but the Americans would far rather in almost all circumstances co-operate with a united Europe than singly with its Member States in disorder.

Q31 ***Lord Hannay of Chiswick:*** In any case, there is surely rather an important distinction between the single market and the single currency and a Common Foreign and Security Policy. It is not purely semantic, it is real. Nobody is talking about a single foreign policy for the 27 Member States covering all aspects of their external policy, which is what you mean when you say a single market or a single currency. A common foreign policy surely covers the bits of foreign policy that together the 27 decide they will work on in common. It is really quite an important distinction I would have thought, would you not?
Mr Avery: Let us take an example, let us take Russia. It is perfectly clear that all Member States, the biggest and the smallest, have bilateral relations with Russia on all sorts of problems. When Russians are assassinated in London, that is nothing to do with the European Union. There is a long tradition of bilateral contacts, but there are many other things where we are much stronger if we engage with Russia on a multilateral Europe-wide basis. The Russians, what do they want? They want markets, they want access, they want membership of the World Trade Organisation and those are things where acting through and with Europe can help us to inflect Russia more effectively than we can possibly hope to do on our own.

Q32 ***Lord Hamilton of Epsom:*** You said that you do not know where the European project is leading to, but I think the founders of the EEC, Monnet and Schuman, had a very clear idea of where it was leading to. They wanted to stop war between the French and Germans and so therefore they would have liked to turn everybody into Europeans. I think they would have been quite clear they did want a super state, would they not?
Mr Avery: No, Schuman said very categorically that states exist, they will continue to exist, and any idea that the European construction replaces them is a fiction. I do not think any respectable founding father expressed the idea of super-state. Many people have said, and I would say myself, that the European Union is on the way to being a super-power—not in military and nuclear terms, but in economic and political terms—it is on the way to being a super-power, but it is not organised as a state, and is not going to replace states. For me, it is an instrument, an architecture, which allows the states to do better than they can do on their own.

Q33 ***Chairman:*** Can I pick up something which Lord Hannay said a moment ago. I find, in fact it was a mistake in Maastricht to use the term "Common Foreign and Security Policy", because for me I thought of the Common Commercial Policy which is a replacement policy, whereas the Common Foreign and Security Policy is an addition, it is a way of providing some value-added to the policies of the individual Member States. I do think there is a problem with the phrase "common" because of other links which common has to replacement policy for those. We have not got the right word, but it is too late. That is a battle which should have been fought at an earlier stage, purely linguistically and not substantially. I heard somebody the other day characterise the foreign and security dimensions of the Reform Treaty as being probably the coal of the Treaty, probably the most important bits of changes which existed in the Treaty. How would you rank the importance of the things which are being done over foreign and security policy, of which we have been discussing this afternoon, in terms of the totality of change which the Treaty, if it is ratified, will bring?
Mr Avery: I would not like to engage in ranking but, nevertheless, for me as an ex-practitioner, it is clear that these changes in what I call the architecture for foreign policy, are the most immediate and, dare I say, most urgent practical, pragmatic steps forward. We have wasted a lot of time with the debacle over the Constitutional Treaty, we have been messing about for about seven years. Out there in the world the Russians, the Chinese, they do not wait for us to get our act together, so I think it is a practical step forward and we should do it as soon as we can.
Chairman: Mr Avery, thank you very much indeed for coming and speaking to us this afternoon. Thank you again for getting us copies of the EPC Working Paper, which seems to have had a strong team of people preparing it. We will look forward to reading it and your other contributions. The Committee will be taking more evidence on this subject, but we are very grateful that at the beginning of our inquiry you have been able to give us such useful answers to questions this afternoon. Thank you very much indeed.

FRIDAY 23 NOVEMBER 2007

Present	Hamilton of Epsom, L	Roper, L (Chairman)
	Hannay of Chiswick, L	Truscott, L

Examination of Witness

Witness: Mr Patrick Child, Head of Cabinet of the Commissioner for External Relations, Benita Ferrero-Waldner, RELEX, examined.

Q34 ***Chairman:*** Good afternoon, Mr Child. Thank you very much indeed for coming to give evidence to us today. We are doing a report on the Reform Treaty and your evidence will contribute greatly to that report. On some readings of the Treaty, where there is a reference to the High Representative as being able to make proposals to the Foreign Affairs Council, both on his behalf and, on occasion, with support for the Commission, it might appear that the Commission was in some way losing its right of direct submission in the foreign affairs area. Of course, it does not have a monopoly, but in the way that, for example like the 27 Member States, it does have an ambassador to the PSC, one wonders whether that position would change in the future?
Mr Child: I am reminded by the way you framed the question of the father who looks at his daughter getting married and says, "I am not losing a daughter but gaining a son". It is important in this discussion to recognise that the Commission is gaining a Vice-President who will be this double-hatted figure with simultaneous responsibility for chairing the Council and external relations work in the Council, but also co-ordinating the external relations responsibilities in the Commission. That will bring significant, potential benefits in terms of the overall coherence of the EU's external action. The fact that we will have the new Commission Vice-President High Representative—to put the order of the title the other way for once—I think will equip the Commission to contribute to the discussion in the PSC, for example, and other aspects of the Council's work in a way which I hope will, rather than being weakened, give us the opportunity to enrich those contributions with more input from the external projection of what we call today "First Pillar Community Policies".

Q35 ***Chairman:*** Therefore, the misgivings which were reported at the time, that Commissioner Patten had when he was occupying the seat now occupied by your boss in relation to an earlier treaty, may not be as serious as has been sometimes suggested.
Mr Child: Personally, I do not recall the position of Lord Patten.

Q36 ***Chairman:*** We thought he was rather concerned about some of the proposals and, in fact, whether it would really be a workable arrangement.
Mr Child: You must ask Lord Patten what he thinks about these things, then and now. The proposal for the basic idea of double-hatting, of bringing together the Commissioner for External Relations with the functions of the High Representative, was something which the Commission, and all the Commissioners, including Lord Patten as Commissioner at the time, came forward with as a better model than some of the alternatives which were perhaps being discussed at an earlier phase of the work of the Convention, and it may be that it was there that the confusion began.

Q37 ***Lord Hannay of Chiswick:*** If you look at the work of the Commission now and quite a lot of the 27 Commissioners, the external dimension of their work has grown very, very much in recent years in relation to the internal dimension. You can look at a whole range of Commissioners, from trade policy through environment through energy through consumer protection and so on, and there is now a very big—development of course—external dimension in their jobs. It is slightly difficult to imagine quite how the Vice-President is going to co-ordinate the external functions of these Commissioners. Perhaps you could say how you think it will work, and how it will impact on a range of people, obviously the Commissioners with the thematic responsibilities. Are they going to need to defer basically to the Vice-President? How is the Vice-President going to relate to the President of the Commission who traditionally, and particularly in this Commission, has exercised the main co-ordinating function?
Mr Child: I think that goes to the heart of the challenge of setting up this new system. The clear responsibility which the Treaty gives to the Vice-President to exercise this co-ordinating responsibility will put him or her in a stronger position than is the case today of the External Relations Commissioner. The very direct relationship which the High Representative Vice-President will have with the work of the Council will also bring a degree of natural authority to that co-ordinating responsibility. It is clear that we will have to develop further the existing arrangements of the group of External Relations Commissioners to bring in, as you rightly say, also those Commissioners who are not primarily External Relations Commissioners, but whose portfolios have an increasing external

component, and you have mentioned a number, in order to make this work. (There followed a short discussion off the record)

Q38 ***Chairman:*** Again, on a specific point, which is arising out of this particular question, if one goes back to the June 2005 discussions, as far as the Commission is concerned, do you envisage that insofar as RELEX is concerned there will be a single room, where the people who are dealing with Russia, whether from the side of the Commission or from the CFSP, will be sitting in the same place? Is that the sort of way the June 2005 ideas were going forward, and is that still a possible model which could go further forward?

Mr Child: It is difficult to say today clearly which model we will come out with, but the 2005 paper identified the right set of questions for the creation of the future External Action Service. It is from there that we will pick up this work when it is appropriate to do so. Of course, the focus today is very much on the signature and ratification of the Treaty and there is a limit to the amount of useful preparatory work that can be done before that process is complete. Obviously the objectives of the Treaty, in terms of greater coherence of our external action, are better served if you have got strong and focused co-ordinating services working, wherever they might be working, in the institutions serving the politicians, but we are not yet ready to give a completely clear answer to that.

Q39 ***Lord Hamilton of Epsom:*** How do you think the External Action Service will be structured, and what problems might arise through the creation of this Service? Do you see an expansion of the number of EU legations, or whatever they are called, around the world?

Mr Child: I think it is still rather early to give a clear answer to the structure of the Service. There are various scenarios ranging from how you bring together most of the services that are working today on external relations issues in the Commission, in the Council, including the functions which are being carried out by much of the present DG RELEX, as well as many of the services in the Council Secretariat. You can also imagine a more narrowly focused Service which would concentrate on the CFSP area. In that scenario, other parts of the Commission and Council services could also be somehow working under the authority of the Vice-President High Representative in the different components of his or her tasks. It is difficult to give a clear answer to that. In terms of the number of Commission delegations that we have today and a possible expansion of the network, we have something in the order of 128 delegations covering a large number of third countries and also a certain number of multilateral organisations, like the UN. I do not see a massive explosion in the numbers or, indeed, any extension in the network driven by the creation of the External Action Service itself. There is a certain organic incremental growth which is naturally going on. For example, in the coming months I hope we will be able to open delegations in Armenia and Azerbaijan given their importance in the European Neighbourhood Policy. I think that if in the coming years we can give more focus to Central Asia, given the importance there of the energy relationship with that region in particular, then that would be a good thing. Those expansions will be justified more in terms of the policy and the political priorities of the Union than something which flowed from the new Treaty and the new institutional set-up as such.

Chairman: Thank you very much indeed. It has been useful to be able to explore some of these issues. We realise that they are all preliminary but, to some extent, insofar as we are preparing a report on the implications of the external aspects of the Reform Treaty, at least it is worth us trying to explore them and see what are the options and perhaps in our report give some view about our preferences among the various options which may exist. We are, as we have been in the past, very grateful that you have been able to come and meet us this morning. Thank you very much indeed.

THURSDAY 29 NOVEMBER 2007

Present	Anderson of Swansea, L	Jones, L
	Boyce, L	Roper, L (Chairman)
	Chidgey, L	Selkirk of Douglas, L
	Crickhowell, L	Swinfen, L
	Hannay of Chiswick, L	Truscott, L

Examination of Witnesses

Witnesses: Mr Andrew Mathewson, Directorate for Policy on International Organisations, Professor Phil Sutton, Director General Research and Technology and Captain Richard Stokes, Assistant Director, Defence Equipment Plan, Ministry of Defence, examined.

Q40 ***Chairman:*** Mr Mathewson, we did give you notice that we are now doing a second study on the EU Reform Treaty and there is one question which I would like to ask you about that because we will not have another opportunity to ask a question to a defence witness. I realise that you may want to reply that you would like to write to me about it, but the question is that one of the innovations in the defence area—the EDA of course is already up and running so that particular part of the Treaty we know about—the other part of the Treaty is the Protocol and the clauses which deal with something called Permanent Structured Cooperation. Would you like to say a little bit about what that is? Is that Battlegroups Plus or is it something quite different?

Mr Mathewson: Thank you for giving the opportunity to write and I will indeed take up your kind offer, my Lord. In principle Permanent Structured Cooperation is a device for raising the bar; it is a device for encouraging nations to do more by way of generating capability. It is a form of peer pressure—I think the Battlegroups can be seen as a form of Permanent Structured Cooperation. Here is a challenge, generate the capacity, raise your level of ability to contribute. I think the forthcoming Presidency—I know the French Presidency in particular—is giving some consideration as to how it can use the provisions for the Permanent Structured Cooperation in order to raise the general level of capability. I think it is a refined form of peer pressure and the generation of some internal pressure to do more.

Chairman: Thank you very much indeed for that answer and we look forward to having something further in writing, which will be valuable.

Supplementary memorandum by the Ministry of Defence Scrutiny Coordinator

The FCO is the lead Department for the Reform Treaty issues. I understand that Jim Murphy, FCO Minister of State provided the Committee with a memorandum on the Reform Treaty on 17 January. I can confirm that MOD officials were consulted and input into the FCO memorandum; the MOD will not be providing separate evidence.

30 January 2008

THURSDAY 6 DECEMBER 2007

Present	Chidgey, L	Roper, L (Chairman)
	Crickhowell, L	Selkirk of Douglas, L
	Hamilton of Epsom, L	Swinfen, L
	Hannay of Chiswick, L	Truscott, L
	Jones, L	

Examination of Witnesses

Witnesses: Professor Alan Dashwood, Cambridge University; and Mr Charles Grant, Centre for European Reform, London, examined.

Q41 ***Chairman:*** Professor Dashwood and Mr Grant, we are very grateful to you for coming to see us this morning. As you know, we have been asked by the Select Committee on the European Union to look at the aspects of the Reform Treaty which deal with foreign external relations and prepare material which will be a component of the report which the Select Committee intends to make to the House before the legislation on the Reform Treaty is dictated in this House, which is likely to begin some time in March. We would be very glad if you would take these questions. Some of them have a primary legal angle and there we are looking to Professor Dashwood, and those which have more of a foreign policy dimension we look forward to hearing from Mr Grant, but obviously feel free to intervene on any question. We have rather a lot so, as I have said to my colleagues, I think it is an occasion for relatively short questions and not too long answers. Could I begin by asking you whether you feel that the Treaty can serve as a basis for a more effective and coherent European Union foreign policy?
Professor Dashwood: The external relations of the EU will still be conducted under two separate sets of institutional and procedural arrangements and that will continue to be a complicating factor. It is not possible to give a clear answer to the question at present. Everything depends on how well the High Representative is able to fulfil his role and how useful the External Action Service will be to him.

Q42 ***Chairman:*** Thank you, we will be coming back to both of those later. Mr Grant?
Mr Grant: I would agree with that. Arguably, the most important set of elements in the new Treaty is the foreign affairs provisions, the foreign policy-making provisions. I think they are absolutely essential and there is a real need for them. The current institutions are deeply dysfunctional and the way they operate is almost shameful—the lack of co-ordination between the Commission and the Council, the ineffectiveness of the rotating Presidency and so on. Therefore this Treaty gives us the opportunity to greatly improve the machinery. As Alan says, that is not guaranteed by just having the Treaty; how they actually implement the Treaty will be crucial in determining whether or not it really improves the way foreign policy is made.

Q43 ***Lord Chidgey:*** Lord Chairman, that moves us very neatly on to the CFSP. I believe our witnesses have already seen the questions so in the interests of brevity, straight to the point: in the context of your reply, will the common foreign and security policy retain its inter-governmental character? Will the Treaty give—and this is the important bit—new competences to the European Union in the area of CFSP? Is there a problem here of any mutual exclusivity between the big Member States' interests in foreign policy and the EU's interests in a common foreign policy?
Professor Dashwood: My answer to the first question would be that the CFSP will retain its present character. I am not certain whether it is quite right to describe it as inter-governmental because there is an institutional dynamic at work, but it is obviously a very different dynamic from the Community model and it will continue to be. Various legal steps have been taken to preserve the particularity of the CFSP. For instance, the CFSP has been kept outside the Treaty on the Functioning of the European Union. It will be in a separate title of the Treaty on European Union (the TEU). This is in contrast to the Constitutional Treaty, where the chapter on the CFSP was juxtaposed with the chapters relating to other aspects of external relations governed by the EC Treaty under the present arrangements. There is also a new provision in Article 11(1) of the Treaty on European Union which refers explicitly to the specificity of the CFSP's rules and procedures, and of the role of the institutions in this area. In addition, the primacy which the Treaty on European Union gives to the so-called first pillar of the European Community will not be reflected in the amended Treaties. There will be a new Article 25 of the TEU which provides for mutual protection against encroachment by the CFSP on other Union competences, and encroachment by those competences on the CFSP; whereas under the present Article 47 of the TEU, there is protection of

Community competences against the CFSP but not the other way about. So the CFSP is being given equal protection under the new Treaties. My answer to the second part of the question, will the Reform Treaty give new competences, is no. I do not think it will give new competences, 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. What will happen, we hope, is that the competences that the Union has will be more effectively examined. The present definition and scope of the CFSP pursuant to Article 11(1) of the TEU covers pretty well all of what you might call the political aspects of external relations, all those that are not governed by the socio-economic provisions of the EC Treaty.

Q44 ***Lord Swinfen:*** Knowing that the EU is a collection of sovereign states, can the EU conclude an international treaty when one or more of its sovereign states disagree?
Professor Dashwood: The Union acts by unanimity for the purposes of the CFSP but there is a procedure which is known as "constructive abstention", (I believe it has never actually been resorted to), that would enable a decision—and I think that must also include a decision on an international treaty—to be taken by the Union, which is not binding upon a Member State invoking the procedure. Recourse to a qualified majority is possible only in a situation governed by a decision that has previously been taken by unanimity; only for the purpose of implementing a decision which had been adopted unanimously.

Q45 ***Lord Swinfen:*** As a corollary to that, does the EU have any sanctions against a sovereign state that concludes an international agreement that is incompatible with an agreement that has already been signed by the EU?
Professor Dashwood: One of its own Member States?

Q46 ***Lord Swinfen:*** One of its own Member States.
Professor Dashwood: It does not, and that is one of the weaknesses of the system, because the Court of Justice has very limited jurisdiction in the area of the CFSP. There would not be any judicial proceedings that could be brought in those circumstances.
Lord Swinfen: Thank you, that is very interesting.

Q47 ***Lord Hannay of Chiswick:*** Could I be a little bit clearer in my mind, you have answered this question from Lord Swinfen on the point of CFSP only, and you carefully kept off questions that related to external obligations centred in pillar one, where some of the negatives that you have given do not apply of course.
Professor Dashwood: Indeed.

Q48 ***Lord Hannay of Chiswick:*** I am not quite sure that Lord Swinfen's questions were limited to CFSP. He spoke about sovereign states, et cetera, but they were not limited to CFSP. I think for the avoidance of misunderstanding it would be as well to be clear that if one of the 27 Member States concludes an agreement that is inconsistent with an international agreement entered into by the EU under pillar one, then that is the AETR judgement, is it not?
Professor Dashwood: It is indeed. I am sorry, I thought that we were focused on the CFSP.
Lord Hannay of Chiswick: So did I but I just wanted to be clear.

Q49 ***Chairman:*** Lord Swinfen asked a supplementary question that in fact went wider than the scope of this particular section of questions because he was dealing not only with international agreements entered into by the European Union under the CFSP but also international agreements entered into by the Union under other matters? At least that is my understanding.
Professor Dashwood: I apologise, my answer was therefore incomplete. There are important fields of external relations, for instance trade and development co-operation, where in the Community as it now is (though under the Reform Treaty the Union will have similar competences) the Council acts by qualified majority. A Member State of the Union could find itself outvoted on that kind of matter, but nevertheless bound by the international agreement; and in those circumstances the enforcement procedure under Article 226(8) of the EC Treaty, which again will be taken over into the TFEU, would apply.

Q50 ***Lord Hannay of Chiswick:*** Perhaps you could just add that none of that is changed one iota by the Reform Treaty; it exists already?
Professor Dashwood: Indeed.

Q51 ***Chairman:*** The other thing which you said—which I would just like to get you to confirm—is that whereas there is within the CFSP an opportunity to use qualified majority voting for the implementation of a decision which is reached by unanimity, this is not distinct from the provision that already existed within the Maastricht Treaty as far as the implementation of a joint action which had been agreed in unanimity, as I understand, so there is no change, although we no longer use the words "joint action", we use the word "decision" for all the actions taken within the CFSP?
Professor Dashwood: Yes, the general principle is that the Council acts by unanimity except when it is taking implementing decisions. There will be one

small new instance of decision-making by QMV, which I can mention now or later. It is a question that relates to Council procedures.

Chairman: We will come back to it. Lord Hannay?

Q52 ***Lord Hannay of Chiswick:*** Some commentators have expressed concern that the changes in the Reform Treaty with regard to external policy will in some way affect the independence of the UK's foreign and defence policy, which has been defined by the Government as one of the UK's "red lines". Are those concerns well-founded when you look at them in the light of the actual provisions in the Treaty or not?

Mr Grant: As far as I can see, those concerns have no grounds for substance because, as Alan has said, key decisions on foreign and defence policy require unanimity and therefore anything that the British Government dislikes it can stop, so I do not see how that could undermine Britain's ability to run its own foreign and defence policy the way it wants to.

Q53 ***Lord Truscott:*** The Treaty provides, as you know, for the post of High Representative for Foreign Affairs and Security Policy who will be both a Vice President of the Commission and Chairman of the Foreign Affairs Council. Do you think that this post will improve the effectiveness and coherence of foreign policy as far as the European Union is concerned, given from what you said earlier, Mr Grant, that any improvement would be welcomed on the current position? Perhaps you would like to expand on that.

Mr Grant: Obviously a lot depends on the people involved, and perhaps something we may get on to is the relationship between the High Representative, the President of the Commission and the President of the Council. If the people do not get on well it is not going to work well, however clever the institutional provisions. Certainly I agree with the implication of your question, the current system is very, very sub-optimal. As it happens, the current High Representative and the current External Relations Commissioner are not particularly close buddies, and the way I see it at the moment, partly because of that and partly for structural reasons, we have two separate bureaucratic machines trying the run EU foreign policy. There has been an enormous lack of co-ordination whether you look at Russian policy, Balkans policy, China policy. The two sides of the House, to use the Brussels jargon, do not really work together or co-ordinate their policies or try and consider how they can pursue common outcomes. It is not quite as bad as that always. There are sometimes joint papers worked on by the relevant officials of the Council and Commission, so some efforts are being made to improve the situation, but I do think that this new person, if it is the right person, together with the External Action Service, which we will come on to, could potentially produce a much more efficient machine. Certainly if the High Representative replaces the rotating Presidency (Foreign Minister of) and the current High Representative and the Commissioner for External Relations, at least Europe will speak with one voice, and if you speak with one voice instead of three you stand a better chance of getting your message across in most parts of the world. Certainly as I travel around to places like Russia and China and the United States, the contempt when I hear people talk about the EU's current institutions, particularly the rotating Presidency and the division between the Commission and Council, is really quite extraordinary. I would hope that this innovation of the new High Rep would have a great potential to improve the EU's image and, more importantly, allow the EU to project its common policies (when it has a common policy) more effectively.

Q54 ***Lord Truscott:*** Even if this does improve co-operation between the Commission and the Council in the area of foreign affairs, do you think there is sufficient co-operation with other parts of the Council and the Commission in other elements, for example on energy policy? Is there sufficient co-ordination and delivery of foreign policy in all the various different parts of the Commission and Council?

Mr Grant: That is a very good question. I do not think, sadly, this new person will solve all the problems of co-ordination. One problem which you alluded to is in the Commission itself there are a number of Commissioners with responsibility for different bits of external relations—humanitarian aid, development policy, trade, enlargement, and so on—and they really do their own thing without talking to each other very much at the moment. On China for example, I think at least half the members of the European Commission in the current Commission have been to China and I do not believe there is much effort to co-ordinate their activities in China to get them to sing from the same hymn sheet. So although the new High Rep job, assuming that his or her responsibilities and those of the External Action Service cover basically the subjects today covered by the policy unit of the Council of Ministers' Secretariat, by the External Relations Directorate General of the Council of Ministers and by DG External Relations in the Commission, and I am assuming that that is roughly the scope of the new provisions, there are a whole load of policy areas like development policy and trade policy and others that will not be covered, and the question of how we co-ordinate or how the different bits of the Commission in particular are co-ordinated together with the new

High Representative is an open question, and that is rather important.

Q55 ***Chairman:*** Will the fact that the High Representative is a Vice President of the Commission—the first time a Vice President (although there have been Vice Presidents in the past) has been formally stated in this way—not give him an opportunity to co-ordinate the other external activities of Commissioners?
Mr Grant: Hopefully that will be seen as part of his or her job. I myself believe that no one individual can do the job of High Representative. At the moment Javier Solana is extremely busy, he works about 100 hours a week, and if you asked him in addition to his current jobs to be Vice President of the Commission responsible for Ferrero-Waldner's portfolio and you ask him to chair the Council of Ministers' Foreign Ministers and to replace the rotating Presidency, there would not be enough hours in the week. He will need two deputies, one in the Commission and one in the Council. Nobody seems to have thought of this as far as I can see. I cannot see how the job can work unless he has a senior deputy in both the Council and the Commission to help co-ordinate it.

Q56 ***Lord Hannay of Chiswick:*** I think you have really answered the question I was going to ask but, just for the avoidance of misunderstanding, what you are saying, with which I would agree, is that a great deal of the effectiveness of these reforms will not depend on what is written on a piece of paper in the Reform Treaty, which does not actually make provision for the departments in the Commission and the Council you have described working together and for the people described in the Reform Treaty to act in a sensible and coherent way, it will depend on the decisions that are taken subsequently to give effect to and to implement those matters. They are not laid down in the Treaty, which is quite proper because these are not the sorts of things you can lay down in treaties, and a lot will depend on how it is put into effect?
Mr Grant: Absolutely.

Q57 ***Chairman:*** You did refer earlier to the fact that we have at the moment three people. Is there not a risk that given that the Chairman of the European Council does have some responsibility at this level for external relations and you have the High Representative, and then Presidents of the Commission sometimes have wanted to have an external dimension to their activities, that you may still have three people; it will just be a different set of three people? Is this necessarily going to be an improvement?
Mr Grant: I think that is a very real worry and concern. I still think even if this triangular relationship does not work perfectly it cannot be worse than the current system—that is impossible! I think it is very important that governments do work out rough job descriptions of the Council President and the High Representative in particular. We know what the European Commission President does and we know what a good one should do. I have heard an opinion from amongst British officials that the way to solve this is to make sure that the so-called High Representative is a rather junior chap, a sort of senior official almost, to make sure that he does not tread on the territory of the Commission President. I think the implication of the comments I have heard from some British officials was that he should not really be a politician at all, more a little servant scurrying around doing things for the Foreign Ministers. I would be a little concerned about that. While it is important to make sure that there is a distinction of roles between the President of the Council and the High Rep, I think the High Rep will not be able to do his job effectively unless he is a figure of some political weight. When he goes to Moscow or Beijing, nobody will talk to him if he is a retired civil servant. I think it should be someone with political clout. I see the distinction as being that he should do the negotiation, the nitty-gritty, banging heads together on Bosnia and Kosovo, talking to other foreign ministers, and the President of the European Council will have a lot to do that is nothing to do with foreign policy. He has got to chair the Council and ensure that decisions are followed up and ensure that it has a good agenda, and he will go in for the big summits with other heads of government when they happen. That is how I foresee the distinction between them, and the most important thing of all is that the two individuals get on with each and can work together whatever their actual job descriptions.

Q58 ***Lord Hamilton of Epsom:*** I thought that Solana was being pencilled in for this job; is that not the case?
Mr Grant: No. I have heard it said that he would like to be considered for the job but I know a number of other individuals who also want to be considered for the job, so I do not think it is a certainty by any means.

Q59 ***Lord Swinfen:*** Will the powers conferred on the High Representative have any impact on the United Kingdom's defence and foreign policy?
Professor Dashwood: If the High Representative uses his powers effectively then more Union positions will be defined and more Union actions will be determined, and there will have to be more systematic co-ordination of national foreign policy with those positions and actions. So I think inevitably the result of a more successful CFSP will be to constrain to

some extent the freedom of action of the Member States. However, that is a choice governments will have made by voting in favour of the decisions that these positions and actions should be adopted. If more is being done, more successfully, at the level of the European Union, there will be some restriction of the scope for unilateral action. But, in a sense, that is what the whole thing is about; it is to ensure that the CFSP becomes more of a success.

Q60 ***Lord Hamilton of Epsom:*** So to re-run the Iraq decision, there would not have been unanimity not to go in because we would have vetoed it and so it would never have got airborne at all?
Professor Dashwood: No.
Mr Grant: I would like to add something to that. My own view is that the most significant new elements in the Treaty are actually on the foreign policy side of things rather than defence policy. There are of course provisions on defence on so-called structured co-operation and they have changed the list of the so-called Petersburg's Tasks, the tasks that the EU may wish to undertake but these are not really going to change very much because the interesting thing about the Treaty on foreign policy is that it does try to bring together to some extent the Commission and the Council of Ministers and their respective machines. Defence remains essentially a purely inter-governmental sort of co-operation with the Commission not being involved at all, and that is not changed by the Treaty. I do not think what is in the Treaty will significantly, or even in minor ways, change the way European defence policy is organised, which is of course a very inter-governmental system with the national veto paramount.

Q61 ***Lord Swinfen:*** Iraq was not really a defence of the Union. It was what one might describe as an extremely "active" foreign policy. Does this change your answer in any way?
Mr Grant: No it does not because the EU did not have a position on Iraq because the Member States disagreed and nobody could suggest a majority vote on it and outvote the British or outvote the French because everybody had a veto, so if the new Treaty had applied at the time of the decision to invade Iraq, it would not have made any difference because on a question like "Should we support the Americans in invading Iraq?" it is a matter of unanimity and the EU States were very, very divided on that.

Q62 ***Lord Crickhowell:*** I look with interest to Professor Dashwood saying that inevitably if you had a more effective co-ordination of European foreign policy it would have an impact on the freedom of individual countries to act. I have in front of me the Government's document on the Reform Treaty and basically its comment on the fact that there has to be unanimity and therefore the veto. It then goes on to say that the provisions on CFSP—and this is in heavy type—". . . will not affect the responsibilities of Member States as they currently exist for the formation and conduct of their foreign policy." Did your remarks earlier not at least produce a qualification of that unequivocal statement? The situation clearly is going to be different if the European Union forms an effective foreign policy-making system. There may be an initial veto situation but the fact that there is a foreign policy will then surely limit the freedom of individual states, including Britain?
Professor Dashwood: I think that what I said was consistent with the Government's position because of the point that Charles Grant made: if it seems good to the governments of the Member States, including the United Kingdom, that they should act collectively in a certain situation, then that is a decision which they have taken as an element of their foreign policies. They would have to follow through the decision, but it seems to me that all the Member States retain control of their foreign policy because they can decide what should be done collectively by the Union and what they would prefer to do individually.

Q63 ***Lord Crickhowell:*** Yes, there is an initial step and that is absolutely true, but the further you develop the policy and that European policy is carried into practice, surely, it follows from your initial remarks, and even what you have said then, there is a growing restraint in a changing world—and the world does move on and circumstances change—when governments will find themselves constrained by the initial commitment? That may be a good thing or a bad thing. I am merely challenging the very unequivocal statement of the Government on the issue which you do seem to me to have put a perfectly reasonable qualification on. I am not challenging your qualification, it seems to be inevitable to me.
Professor Dashwood: Yes, there are certain procedural constraints. The Member States have a duty to consult. Already under the existing Treaties there is quite a muscular duty of loyal co-operation under the present Article 11(2) which will be carried over. I am certain that as each step of a policy is taken—and of course all this will be done under the guidance of the European Council which will be decided by consensus between the heads of state of government—at any stage where a policy decision has to be taken, that will have to be taken by unanimity, and it seems to me that that really does preserve the concern for the freedom of the Member States except when they choose to act together.

Q64 ***Chairman:*** But is not the problem, which I think Lord Crickhowell is hinting at, that there could be some sort of ratchet mechanism and that there would be almost an acquis of foreign policy being developed with a number of decisions being made, and once they had been made would there or would there not be a restraint on the independence of a Member State in exercising its national sovereignty in that area?
Mr Grant: Perhaps I could have a go at that. I genuinely do not see any evidence to support that supposition either in the way EU foreign policy has worked up to now in practice or in the provisions of the new Treaty. Whatever ratchet effect people may believe or fear is there, today, despite 20 or 30 years of trying to build up EU foreign policy, if the British Government does not like policy on Burma or the EU arms embargo on China, it can just wield a veto, and that is the key thing for me, so I do not see any reason to believe in such a ratchet effect.

Q65 ***Lord Hamilton of Epsom:*** Continuing this theme, do you see these policies having a shelf life? If a policy, going back to the ratchet, is decided upon on a rather blanket approach covering a particular area of the world, we do not want to be seen to be non-communautaire (we have seen this before) and so we sign up to that and say we want to be good Europeans, and then suddenly five years later our interests change completely so that suddenly this blanket does not suit us at all and we want to do something entirely different and then we are told, "No, come on, you have signed up to this . . . " God knows how many years ago?
Mr Grant: That is not how it works.

Q66 ***Lord Hamilton of Epsom:*** It is how everything else works in Europe.
Mr Grant: Suppose we did sign up to something just to keep other people happy that we did not actually agree with—

Q67 ***Lord Hamilton of Epsom:*** No, what I am saying is we agreed with it at the time and then five years later our interests have changed.
Mr Grant: Foreign policy is not about law. I would differentiate between legal instruments agreed in the first pillar where I accept that if you sign up to a law and support it and then the world changes that you are stuck with law, and you then need to amend the law, that is perhaps a fair point for the first pillar of the EU, but foreign policy is not about law, it is just about declarations and decisions on embargoes or whatever, and therefore if the world changes and you think the policy should change, you can stop the policy. Just let me take an example of the arms embargo imposed on China imposed after Tiananmen Square in 1989. It was a decision in the Council of Ministers not to sell weapons to China. At some point governments may believe that the world has changed and that decision should no longer apply but unanimity is required to change it.

Q68 ***Lord Hannay of Chiswick:*** I think this is very much the ground that you have just covered in your answer and it is the question: is there anything irreversible about a unanimous decision to have a common policy towards a particular country or part of the world? I think I am right in saying—but perhaps you would confirm—that there is nothing irreversible about that, but that is something from which, at some cost perhaps, a country could break out if that was its decision? It would be very damaging for EU solidarity but if there was not a legal instrument involved then there is nothing here that says that you cannot reverse the position that you agreed to five or ten years before? I think myself the whole of this discussion shows how almost impossible it is to talk about those matters in abstract terms. You have to think about them in practical and precise terms in the context of a particular set of events like the events in Kosovo or the events in Burma or whatever it is. I do not think there is anything that says under CFSP there is no reversibility.
Mr Grant: My earlier answer was not correct in the example about the China arms embargo because if you have an embargo agreed unanimously then you cannot actually change that without everybody agreeing to change it. That would tend to support your question, except that this embargo is a decision which has no legal force, so in fact if a country really did not like it, it could just pull out and say we are going to sell weapons to China. There is more merit in your question than I first acknowledged but because this is talking about CFSP where the European Court of Justice has no jurisdiction, if one country did not like the embargo to China, it could sell weapons. In fact some countries have been selling weapons to China.
Professor Dashwood: There is a perhaps rather detailed point which is that that kind of decision is in practice always time-limited.

Q69 ***Lord Hamilton of Epsom:*** There is a sunset clause?
Professor Dashwood: Yes.

Q70 ***Lord Hamilton of Epsom:*** Really?
Professor Dashwood: I do not know whether the China decision did, but certainly if the Council was getting the right legal advice it would have; and such decisions normally do.

Q71 ***Lord Hannay of Chiswick:*** Could we move on to the External Action Service and perhaps either or both of you could say what the rationale for creating

this service is and to what extent it is indeed a new creation or simply a rebadging of what already exists and how this service is likely to be structured and whether it will work closely and effectively with the diplomatic services of the Member States?
Mr Grant: I think in a way we have covered some of the background for that question of Lord Hannay's. As I have already said, the current system where you have two separate bureaucratic machines in the Council and the Commission does not work at all well and I think it is highly desirable to create a single service that contains, as is the plan, relevant officials from the Council, the Commission and the Member States. It will not solve, as we have already said, all the problems of co-ordination because I think it is highly unlikely it will include development policy and trade policy, so there will still be the question of how you co-ordinate those bits of policy with the External Action Service, but it is certainly a step in the right direction. I do hope that what it will do when it is up and running is provide good analysis to the foreign ministers and to the various EU institutions. I think common analysis is quite important because one of the reasons why we have not had very effective foreign policy with regard to many parts of the world is because we do not agree on what is happening. One has to differentiate between the big countries and the small countries. The big countries have quite clever foreign ministries but a lot of small countries do not, and I think that if the ministers meeting in the Foreign Ministers Council are serviced by good and effective analysis, in addition to their own national foreign ministries, it will help us to help the ministers to develop a common analysis which would help them to develop common policies, and that is one of the benefits that I see coming out of the External Action Service.

Q72 ***Lord Hannay of Chiswick:*** And overseas?
Mr Grant: Yes and overseas, and I would make two points there. I forget how many overseas delegations of the Commission there are, there are 120 or something, so there are a lot of them, but a lot of smaller Member States of course do not have 120 embassies in different parts of the world, so I think particularly for the smaller Member States it would be useful having the External Action Service giving them some consular help and giving them eyes and ears in parts of the world where they simply are unrepresented. I guess the commonly held view of current Commission delegations is that they are very good at things like trade policy, that is what Commission officials are trained to do, but they are not so good on the diplomatic side of foreign policy. If you get an infusion of good officials from Member States working together with the existing Commission officials in these delegations, I think that is important. There is one problem, and I do not know whether it is relevant to some of these questions, which is what happens in parts of the world where the EU is involved in nation-building or state-building. A lot of the discussion on the External Action Service is focused on Brussels and the Brussels institutions but as big a problem, or possibly more important problem as far as I am concerned, is the lack of co-ordination of the different EU bodies in a place like Bosnia. I had a striking conversation with General David Leakey, who was the first commander of the EU peace-keeping forces in Bosnia. He went there reporting to Solana with a military task. When he was there he tried to deal with the problem of organised crime, but he found that the EU police mission was not co-operative, as they had a different mandate. Paddy Ashdown's office was not always as co-operative as it might have been, according to General Leakey, and the Commission thought it had other things to do anyway, so the different bits of the EU machinery in Bosnia were unco-ordinated, and therefore his ability to do the right thing in Bosnia was greatly impaired. I do not know to what extent setting up this External Action Service will help improve co-ordination in places such as Bosnia and also in other parts of the world where the EU is involved such as Kosovo and to some extent Afghanistan. I hope it helps but I think the role of the EU special representatives will be very important. These are the individuals who report to Solana and they have been double-hatted, meaning that they also have a Commission function, as they do in a couple of places like Macedonia and I think they will be double-hatted in Addis Ababa at the African Union office. Double-hatting is important and I hope if double-hatting becomes a more regular procedure, which the British Government has generally resisted until now, it may be easier to ensure that there is co-ordination, and I guess the EU SRs will play a quite important role in the External Action Service reporting up to the High Representative.

Q73 ***Lord Hannay of Chiswick:*** That was the view expressed by this Committee by the way?
Mr Grant: Good.

Q74 ***Lord Hannay of Chiswick:*** And your view, but not the British Government's view.
Professor Dashwood: I suppose the fundamental rationale of the External Action Service is to provide the High Representative with an administrative infrastructure. The big question is how the different elements are going to meld together because some are going to come from the Commission and some from the Council and some from the Member States. The High Representative will need a cabinet which is strong enough to knock heads together. I am very concerned about the links—and this is something which I do not think has been properly thought

through—with activities such as trade and development co-operation, because one of the problems which EU External Relations has recently been encountering is competition between aspects of foreign policy and development co-operation, with the Commission taking a very broad view of what constitutes development. It is my hope that the High Representative will be able to resolve or to avoid this kind of turf war, so that action will be taken within the framework which, in a particular situation, from a practical point of view seems the most appropriate.

Q75 ***Lord Hamilton of Epsom:*** On a wider issue, do you sometimes wonder if the EU is getting rather ambitious in terms of trying to get common goals in foreign policy? We have a very different history and different countries have gone down different colonial paths and I often wonder whether we are trying to reconcile the irreconcilable. You talk about the External Action Service taking over the consulate services of small countries but actually more and more our embassies are commercial organisations where they are advising companies on how they can win contracts, normally in competition with other Europeans. I do not quite see how this can work.
Mr Grant: Well, I do not think Britain is a very small country and—

Q76 ***Lord Hamilton of Epsom:*** I am not saying we are.
Mr Grant: I know you are not but I do not think the purpose of the External Action Service is to replace national foreign offices or overseas representations. My point about small countries is that some small countries will find it particularly useful to have representations in other parts of the world where they do not have people. You may then say why does Britain need the External Action Service? Britain may not need it as much as some small countries would need it, but I do think that it is part of a bigger question which you asked which is do we need sometimes to work through the EU in matters of foreign policy given that we have different traditions, as you say. My answer is to look at it issue-by-issue. There are many issues where we have probably achieved more. In dealing with Russia for example, which is an area which I have done some work on, I think often it would be useful if the EU speaks with one voice because we have more leverage. When the Litvinenko affair erupted last summer, I was very glad to see the statement of solidarity from 26 Member States backing Britain on that. If our relationship with Russia was entirely bilateral, without any element of working through the EU, I think we would be in a weaker position. It depends on the particular issue. I do not think Britain is better off working through the EU on every issue. On Iraq, whatever the rights and wrongs of Iraq were, we were quite right to have our own view. However, on Iran I would say that the British Government had decided, in my view rightly, that we would have more chance of getting the Iranians to do what we want them to do if we work through the EU3 and Solana, which is what we have done, I would say it is a matter for case-by-case analysis and in those subjects where the British Government does decide it is in the national interest to work through the EU—Iran being one of them and I would say it should do more in Russia than it has, although it has been the case largely in the Balkans—then you need effective institutions to represent that EU position. The External Action Service would replace the current institutions we have today in Brussels; it would not replace national foreign offices or national embassies.

Q77 ***Lord Chidgey:*** Staying if I may with the European External Action Service and the overseas aspect of its role rather than Brussels, you mentioned in an earlier comment, Mr Grant, that the EU would benefit from improved analysis which this Service would provide. That brings me to the point that one of the major concerns of our Foreign Service is defence and intelligence. The UK is a major power and therefore attracts major threats, you might argue, more so than some of the smaller countries within the EU, particularly of course in intelligence and military analysis which features high in our overseas service. Many of the smaller EU members probably do not place much significance on that. I think I am right of saying that of the 27 Member States in the EU some nine have intelligence services and consequently for the other 18 it is a lesser priority in their overseas offices than our own. Is there a problem here in mutual exclusivity in interests and priorities if we are pursuing through the European External Action Service the interests of the EU generally rather than the interests of the major powers specifically, who have a different set of priorities for very good reasons in terms of the benefit to and welfare and protection of their own citizens?
Mr Grant: I would not expect the External Action Service to play any role in intelligence co-operation. At the moment there is of course co-operation amongst the intelligence services, mainly the larger ones but also some other European countries because we help each other catch terrorists (and that is rather useful) but it is informal, it tends to be bilateral, and I do not see any role for a big European institution to do that. There is something call the Situation Centre sitting in Brussels. It is a unit reporting to Solana headed by William Shapcott, a British official, and the job of that unit is to gather together intelligence from those Members States who are willing and able to provide it to help feed into the Council of Ministers Secretariat in Brussels views on particular problems. Of course the intelligence services do not give their

most sensitive information to this Situation Centre but I am told it is rather useful. Some countries, like Britain, take a very active role in supplying it with quite useful information and others do not, but it probably helps the people in Brussels to know what is going on in the world. If they are planning a military mission to the Congo or a police mission to Kosovo, or whatever, it can be quite useful. At the level of providing information the Situation Centre is quite important. There is a question as to whether it should be part of the new External Action Service. Different people have different views on that. What I do not think the EAS will do is play any serious role in establishing a big bureaucracy for co-ordinating intelligence. I have not heard anybody suggest that.

Chairman: The Situation Centre is also very useful in the functioning that you referred to earlier in that it does provide a common analysis available to all 27 Member States. When members of the Committee were in Brussels recently, we did have a chance to learn from Mr Shapcott the work it was doing, which is of some importance. Lord Jones?

Q78 ***Lord Jones:*** Just to follow on, Mr Grant, you answered Lord Hamilton and said how beneficial it was in terms of Britain over the Litvinenko affair to have the full backing of the EU States. You also said you were looking at Russia yourself in some of your work. Do you see Russia as a growing and more authoritative power in relation to the EU? Do you see Russia changing and getting stronger?

Mr Grant: As a Russia watcher I do worry about developments within Russia. There is a good thing and a less good thing. The worry is that I see no reason to believe that the Russian political system will evolve in a more liberal direction in the foreseeable future. I think it is becoming a stronger country diplomatically. I believe the economy is not just doing well because of the oil price but is quite successful and Russia is very self-confident and more assertive and sometimes more nationalistic. The reason why I am not entirely depressed in the very long run is that I think the Russians need us as indeed we need them. On energy we are mutually dependent. I think Russian companies want to behave like other Western companies. They want to buy enterprises in other parts of the world, they want to hire the best talent, they want to raise money on the London Stock Exchange, they want to invest all over the world, and frankly, they have to abide by our rules to do that, and if they behave too badly by Western standards they will not be allowed to do those sorts of things. Thus I think we have some cards and some levers we can play against Russia but only if we learn to speak with one voice. We have a pretty poor record in doing that and although there have been some improvements and some steps in the right direction, not as much as I would like to see.

Chairman: Returning to the External Action Service, Lord Swinfen?

Q79 ***Lord Swinfen:*** Do you have any legal or political concerns about the European External Action Service from the United Kingdom's perspective?

Professor Dashwood: I do not have any legal concerns.

Mr Grant: I have a political concern which is that the British Government will not seize the opportunity that the establishment of the EAS offers to play a leading role in building it. I am extremely worried about this. I have spoken to some British officials recently and I think the British are going to foot-drag and they will try and deny it a decent budget, they will not send their best personnel to it, they will see it as a problem to be swept aside. I think that is a great shame because the reality of the way EU foreign policy works—and I can say this and British government officials cannot—is that it is dominated by the big countries. Small countries know this perfectly well, which is why they never liked the idea of a High Representative to begin with. They feel they are better represented in Community institutions. The reality of the machinery around Solana is that the larger countries dominate it because they supply some of the best officials to it and have some of the best networks into his machinery. This EAS, frankly, from a patriotic point of view is a great opportunity. If we give it some of our best people and make sure it has good systems and a decent budget, it will be a vehicle for Britain and France to lead in EU foreign policy. However, from some of the conversations I have had recently in the Foreign Office, I am worried that that is exactly not what the British will do. The Foreign Office does see it institutionally as a rival, which is a mistake in my view. To be fair to the Foreign Office, they are under budget as well as personnel pressure to keep the Treasury happy, they are cutting back right, left and centre and they do not therefore think it is a good idea to send their best and their brightest off to this institution, and I regret that very much.

Q80 ***Lord Jones:*** Mr Grant, I thought you were very helpful in your forthright opening statement and you did use the words "almost shameful lack of co-ordination"—and I do not cavil with it—and a little later and consistently you said "it cannot be worse". Looking at it in that context, the question that we have for you here is: in your view what are the major changes that will be brought about by the Treaty in the area of defence and it follows, what impact will these changes have on the UK?

Mr Grant: As I have already said, I do not think the Treaty provisions on defence are hugely significant. Changing the list of so-called Petersburg tasks—these are the tasks that the European security and

defence policy now undertake and I think they have added a few extra ones, although I forget what they are, it was just humanitarian relief and peace-keeping, it is now a few more—is not really very significant. The structured co-operation provision could become quite interesting from a British point of view but I am not sure that it will. As some of you I am sure are aware, this is about allowing a smaller group of Member States, not all 27, to set up a defence club, the entry criteria being how good your military capabilities are. If establishing this kind of club persuades those governments which do not spend enough money on defence (which is most European governments) to spend more and have more helicopters and more transport aircraft and all the things they should do, then it is a good idea. You could make a parallel with the euro. To get into the euro you had to jump through a few hoops and get your budget deficit under control and so on, and if to get into this defence club you need to have ready and deployable 5,000 chaps who would go off to Africa when they are called for, then that is rather useful. This defence club might be interesting but I do not know what is going to happen and whether it will actually be implemented or not.

Q81 ***Lord Hamilton of Epsom:*** Does Afghanistan not give you a good enough picture that they do not want to go anywhere where anybody is firing live rounds?
Mr Grant: I think that is a fair point and I think Afghanistan is very significant for the future of NATO.

Q82 ***Lord Hamilton of Epsom:*** For the EU as well.
Mr Grant: Yes, not enough countries have been prepared to send troops to the south although, to be fair, others who have not had troops in the south, such as the Germans, have suffered very serious casualties through having troops in other places, and we should acknowledge that, and also people like the French have special forces which are doing extremely useful work in Afghanistan, so I do not think it is a black and white thing. I accept at that the moment not enough countries are willing to send troops there, although of course because we have troops there, we do not send troops to Chad for example and we have almost no troops in the Balkans where other European countries are providing troops, sometimes in dangerous situations, so there is a bit of swings and roundabouts, but I take the broad thrust of your question.

Q83 ***Chairman:*** Going back to something you said a little time ago about additional Petersburg tasks, with all the tasks which have now been put into the Treaty, I think it is in fact a codification of tasks which were referred to in the European Security Strategy which was adopted by the Union a few years ago, so it is bringing it into the formal Treaty and not adding to the range of things which the European Union was already considering doing?
Mr Grant: Yes.
Lord Hannay of Chiswick: It is also updating some of the United Nations work in this area so there is a proper fit in this area if the European Union decides to go into a mission.

Q84 ***Lord Hamilton of Epsom:*** Will the mutual assistance clause, which covers cases of armed aggression on the territory of Member States, undermine NATO and what specific impact will it have on UK defence policy? Could I just extend that. If there were a perception by Russia that the Russian minority in Estonia was being persecuted even more than they are now and they moved troops in there, what do you anticipate would happen then?
Mr Grant: I have the clause in front of me and I am just reading it. Whatever words are in the clause, the perception of the clause amongst governments is that what matters is NATO's Article 5 rather than this mutual assistance clause. Why that is I am not sure and other people have perhaps a more knowledgeable answer than me. I think it is desirable that we should help countries that are threatened by attacks and we should try and help each other; that is a very good idea, but the one that people really care about is NATO Article 5. That is my view.

Q85 ***Lord Hamilton of Epsom:*** You think in a case of Russian aggression against Estonia NATO would be the organisation to take responsibility?
Mr Grant: Yes, the general view of governments is that European defence policy is about the Petersburg tasks, as Lord Roper referred to—it is the peace-keeping, it is the humanitarian relief, it may be peace-making—and that collective defence is a matter for NATO. I have not heard anybody argue that the EU should become a collective defence organisation. People think that is what NATO is for.

Q86 ***Lord Truscott:*** The problem with Article 5 is that it does not apply to all EU Member States because not all EU Member States are members of NATO. I think the question would then be how would the mutual assistance clause be applicable in legal terms to those Member States who are not members of NATO. Is it perhaps more of a reference to the general legal right of every country to protection of its territorial integrity and to call for assistance from other countries?
Mr Grant: Yes, luckily, all of the countries bordering Russia are in NATO, except for Finland, and Finland may join one day.

Q87 ***Chairman:*** Just returning to something which Professor Dashwood referred to earlier, and it is rather important, which is that in the Maastricht Treaty there is this provision that although unanimity is referred to everywhere else there is this opportunity for constructive abstention as far as CFSP is concerned. Does constructive abstention also apply to decisions where military action is intended?
Professor Dashwood: I think it does not.

Q88 ***Chairman:*** If when you check you find that it does not—
Professor Dashwood: I would need to check that for you.[1]
Chairman: It would be useful for us to get it on record. Lord Crickhowell?

Q89 ***Lord Crickhowell:*** We have already touched on structured co-operation and enhanced co-operation. Mr Grant referred to it as perhaps becoming more interesting. There is a different point of view I have seen expressed and I would like some comment on it. What it actually means is that smaller groups of Member States can pursue ES/GDP projects and co-operation. I think such groups would make decisions by qualified majority voting, so either we take part in such a group, let us say if there is a French/German group or any other group, in which case we are subject to qualified majority voting for the activities of that group, or we opt out and we are not part of the group, either way we effectively lose a veto on defence. As we subsequently have to act actively and unreservedly in support of activities in this field, are we not actually entering an area where we can could find ourselves losing control of quite important aspects of defence policy? Let us face it, the French have from time to time taken a very different view of what is the right approach to NATO and everything else and are wanting their own effective grouping and there are signs that they want to do it again. We say, okay, we do not want to be part of this group. You spoke earlier of the opportunities perhaps. Are those who see this as a real danger on to something or not?
Mr Grant: Alan Dashwood can perhaps make some legal points on this, but I think possibly you will need to distinguish between foreign policy and defence policy in that, as far as I understand it, the structured co-operation which may apply to defence is about military missions and military activity, it is not about EU foreign policy, and therefore if you are saying to me a group of EU countries may wish to embark on some military mission, which Britain does not take part in, is that a problem, could that be a problem—no, because that military mission would have to be subordinate to an EU foreign policy which Britain has a veto over. Britain may choose not to take part in the military means of preventing that policy but it certainly has a say over the foreign policy itself, so if a group of countries wants to send off a peace-keeping mission to the Central African Republic, that would have to be compatible with a broader EU foreign policy that Britain had subscribed to. Therefore I do not quite see how structured co-operation could be injurious to British interests.

Q90 ***Lord Crickhowell:*** Except that we could have the development of military structures and organisations which are leading in quite separate directions from the ones which we would like to take part in, notably based on NATO. If there is a potential conflict or duplication of the activities best done by NATO, is this not one way that it might happen?
Mr Grant: I do not think so because President Sarkozy has decided to put France back into NATO's military structures. That is not guaranteed to happen—although I personally believe it will happen—and I think that will lead to a situation where we have less damaging rivalry between the EU machinery and the NATO machinery. The reality of EU defence co-operation is that Britain has to be involved or it does not happen at all. Everybody knows that Britain's Armed Forces are the most effective—even the French know that—and therefore it is not serious to suggest that people are going to do something without the Brits in it, at least in terms of organisation. In terms of a particular mission maybe we do not have any soldiers going to Chad but you do not need structured co-operation to organise that. In terms of organisation, I do not believe anything will actually happen without British participation.
Professor Dashwood: Well, it is difficult at this stage to answer questions about permanent structured co-operation because the details still have to be worked out, but it is certainly not to my understanding that participating in the co-operation necessarily means that a Member State has to allow their troops that are committed for this purpose to be used for every action which is determined by the Council. I think one has to distinguish between the permanent structured co-operation, which is about creating the means for taking effective military action outside the territory of the Member States, and the decisions that will have to be taken on a case-by-case basis as to when those means should be deployed, and the United Kingdom will have a veto over every one of those decisions. Is that correct?

[1] *Note by witness:* "It appears from the wording of the present Article 23 of the TEU that the constructive abstention procedure is available in the case of decisions having military or defence implications. The procedure is laid down by paragraph (1) of Article 23. The exclusion relating to decisions having military or defence implications is provided for by paragraph (2) of the Article and applies only to that paragraph, which is about QMV. The corresponding version of the TEU as amended by the Treaty of Lisbon (Article 15b) will be to similar effect."

Mr Grant: I think so.

Q91 ***Chairman:*** One of the possible confusions is that as well as the proposals for permanent structured co-operation, which is quite new and which did not appear before, the other change in the Reform Treaty is the provisions for enhanced co-operation between a limited number of Member States, which previously did not apply to CFSP and now could apply within the CFSP area, so one has got two different changes occurring which to some extent look a little similar but are in fact distinct.
Professor Dashwood: That is quite correct, Lord Chairman, yes.
Chairman: Lord Jones?
Lord Jones: Again to Mr Grant, I am going back to the topic of Russia.
Chairman: With great respect, we are carrying out an inquiry on Russia but this is an inquiry on the Reform Treaty.
Lord Jones: To help progress let me end that question.
Chairman: Can I now turn to Lord Truscott.

Q92 ***Lord Truscott:*** I think we have covered question 11 earlier in terms of changes to the Treaty. I can pursue it if you like but we have talked about it quite a lot.
Professor Dashwood: I do not know whether it is interesting, Lord Chairman, but I did mention one new possibility for qualified majority decision-making—and that is when the Council acts on a proposal by the High Representative following a specific invitation by the European Council. I do not think that is a significant change because there would have to be consensus within the European Council before the instruction could be given to the High Representative.

Q93 ***Chairman:*** There is also provision in this particular section dealing with the CFSP for the possibility of some sort of passerelle, a rapid change and revision of the Treaty, and of course one of the issues which I think will be considered by both Houses of Parliament is whether the assurance which the Government has given about parliamentary control over such changes in decision-making without a full IGC would apply as far as that particular passerelle is concerned as well as the more general one.
Professor Dashwood: Yes.

Q94 ***Chairman:*** I wonder whether I might go on to ask you a question which is a technical matter about the operation of the Foreign Affairs Council. Do you assume that in those areas such as development co-operation and humanitarian aid, where the external action of the EU requires legislation by the Council on the proposal of the Commission, those discussions and that legislative action would be taken in the Foreign Affairs Council and that it would adopt the necessary instruments, or do you assume that the General Affairs Council will continue to take those responsibilities under the Presidency of the rotating President?
Professor Dashwood: It would certainly be my expectation that decisions would be taken and any legislation adopted by the Foreign Affairs Council. I think this would follow as a corollary from the creation of the post of High Representative because part of the objective is to ensure some kind of co-ordination between these different aspects of foreign policy; political and socio-economic.

Q95 ***Chairman:*** But that is an assumption, it is not absolutely clear from the Treaty where that would take place?
Professor Dashwood: It is not specified in the Treaty, no, but I would be very surprised if any other solution were adopted.

Q96 ***Lord Crickhowell:*** We started a long time ago with the change from the proposal of the Constitutional Treaty which would have just abolished the three-pillar structure and we moved instead to I think what Professor Dashwood described as a more complicated arrangement, under which there were still different duplication treaty arrangements, and we have been told—and I think it has been said in the course of the evidence—that this does not extend the power of the European Court. However, I notice Professor Dashwood's phrase about it was very limited jurisdiction in the area of the CFSP' and we later moved on to talk about matters such as trade and development co-operation and the links between foreign policy and trade policy. As I understand it, under the new single EU the Court has jurisdiction except where it is explicitly excluded, and it would be very difficult to exclude certain areas of these complicated arrangements, particularly as it moves on to what is the legal definition of common foreign and security policy if you started to exclude it. One can think of all sorts of examples. I have one in front of me which is the extradition treaty with, say, the United States. Is that solely a matter of foreign and security policy? Clearly not because it involves justice issues and some of the issues that you yourself referred to—trade policy and so on—so are these not areas where at some point the Court might find itself taking a view that this was really a matter that was within the jurisdiction of the Court and therefore extending its activities into fields that are foreign and security policy?
Professor Dashwood: On the issue of the structure of the Union, I think I would make myself unpopular with some of my academic colleagues by saying I

believe the result of the Reform Treaty will be to create a two pillar structure instead of a three pillar structure. I think that is essentially what will happen. So far as concerns the Court, there is a very specific provision which stands at the beginning of the chapter on the CFSP and which says that the ECJ shall not have jurisdiction with respect to the provisions on the CFSP, with a couple of exceptions. One of those exceptions relates to Article 25, the provision that I mentioned, which protects other competences against the CFSP and the CFSP against those competences. The Court has to have the role and it already has the role—this is not something new—of monitoring the interface between the CFSP and other policy areas simply in order to decide whether an instrument which has been adopted under, say, a development co-operation competence ought rather to have been adopted under a CFSP competence or vice versa. It already has that role and the only change—and this is a change that favours the CFSP—is that the Court must now treat the CFSP and other policies even-handedly. At the moment it is required to protect the first pillar against the second and third pillars. It seems to me that it is inevitable that the Court of Justice should have that role and it is a role that it has already. The other minor jurisdiction is to review the legality of CFSP provisions that are taken providing for restricted measures against individuals. Sometimes it is necessary for a restrictive measure to be adopted which imposes travel restrictions and that sort of thing, on individuals. It is really very unsatisfactory that there should be no way of challenging the legality of such decisions, and that new jurisdiction would be created by the Reform Treaty.

Q97 ***Lord Crickhowell:*** Thank you very much for that. I am aware of the exclusions in 11(1) but we are dealing, are we not, with a term of art rather than a tightly defined legal concept here, and as the Court does very specifically cover trade and similar matters, quite clearly, and as a string of things which by their nature are also part of foreign policy, therefore is it really true that you can keep the Court out of this area? There will be areas where inevitably the High Representative and Council will go down routes where they do want to obscure these separations of definition and in that situation it is not true, as is declared, that the Court is simply out of this. This is an area which you yourself have said is complex and by the very fact that it is complex is there not a possibility that the Court will have to intervene to unravel some of the complexities? I am not a lawyer but I just ask the question.

Professor Dashwood: I think the only role for the Court would be to decide whether a particular measure ought to have been adopted under CFSP competence or under some other competence in the TFEU and, as I have said, it has that jurisdiction already. There is a case before the Court of Justice at the moment in which I am acting for the United Kingdom where the Court has to decide whether a particular measure which was adopted as a CFSP measure ought rather to have been adopted as a development co-operation measure. It was about control of small arms and light weapons in West Africa. It will be interesting to see what happens, because that will be the Court's first opportunity to draw a line between the first and the second pillars. It has had opportunities in the past to draw a line between the first and the third pillars.

Q98 ***Lord Selkirk of Douglas:*** May I ask a question relating to the legal personality of the European Union. What changes do you foresee due to the recognition of the legal personality of the European Union in international organisations and forums, including where the European Community currently is a member or participates, and also where only the Member States are members or participate?

Professor Dashwood: It is my view that the recognition of the legal personality of the European Union is a purely technical change. I think most lawyers would now agree that although the Treaty does not say so, the EU is already possessed of de facto legal personality because our main international partners have been willing to deal with the EU as an entity. This started in a fairly modest way with agreements about EU forces in Macedonia and the other countries where they are present, but we now for instance have an extremely important agreement with the United States about extradition. This was concluded, not under second pillar competence, but under third pillar competence; however the issue of legal personality is the same for the third pillar as it is for the second pillar. So *de facto* the European Union already has legal personality. The present situation, which is quite amusing for lawyers but absurdly complex, is that the European Union considered as a whole has a separate legal personality for the European Community but its own *de facto* legal personality for the purposes of the second and third pillar. Once there is a single EU personality—and the Treaty provides for this—the Union is going to succeed to the EC, so that in international organisations like the WTO where the Community is a member in its own right, the EU will simply step in and take the Community chair. Since legally the Union will be the successor to the EC, I do not think it will be necessary to do more than to write a courteous letter to the Director General. In organisations like the UN where only Member States are members there will not be any change resulting from the acquisition by the Union of legal personality.

Q99 ***Lord Swinfen:*** You say that the EU *de facto* has a legal personality. Does that make it a state?
Professor Dashwood: No it does not. There are many international organisations that have international legal personality. States are in the unique position of being full subjects of the international legal order. That is true only of states, but there are many international organisations that have legal personality for specific purposes. In the case of the European Union, the European Community has legal personality, so does the European Central Bank, so does Euratom. And, as I said, there are many other international organisations which have legal personality and international capacity with respect to the matters for which they are competent.

Q100 ***Lord Selkirk of Douglas:*** It is going to be entering into a Treaty? Does that not require a state?
Professor Dashwood: No.

Q101 ***Lord Hannay of Chiswick:*** Can I just be clear, in each case where the European Union is going to acquire an international legal personality with respect to a particular international instrument, there would be a unanimous decision by the Council to do so? I think that is what the provision says, does it not?
Professor Dashwood: If it is going to enter into an international agreement on a CFSP matter, yes, there would be.

Q102 ***Lord Hannay of Chiswick:*** So if you were to decide that a particular Convention on the law of the sea or torture, or whatever it was, was going to be acceded to by the European Union, then the 27 Member States of the European Union would have to take a decision that that would be so and then the European Union would have legal personality with respect to that Convention, I think I am right in saying?
Professor Dashwood: That is correct. It would be concluded by the Council in the name of the European Union and the Union would be a party to the Convention.

Q103 ***Chairman:*** Would that also apply to those international agreements which it entered into under its competences under the old Treaty on a Community basis?
Professor Dashwood: Yes, for instance the European Union will succeed to the Community's membership of the WTO.

Q104 ***Chairman:*** But for example if there were within the WTO some new Convention negotiated, would it require a unanimous decision of the Council for the European Union to ratify that particular Convention of the WTO?
Professor Dashwood: Yes.[2]

Q105 ***Lord Hannay of Chiswick:*** It has been suggested that in some way or another the UK would lose its seat or diminish its capacity to act in the UN Security Council as a result of the Reform Treaty. Would you perhaps comment on that?
Professor Dashwood: In my view, there is no risk whatsoever that the UK would lose its seat in the Security Council. As you know, there will be an obligation under Article 19(2) of the Treaty on the European Union and on the Member States themselves who are members of the Security Council to request that when the Council is discussing a subject on which the Union has defined a position that that position should be presented by the High Representative. That is something that may happen from time to time. If the precise subject matter which is on the Security Council's agenda is one on which a Union position has been defined by unanimity it seems to me that has no bearing at all on the status of those Member States that are members of the Security Council.
Lord Hannay of Chiswick: And the provision that enabled the Member States to agree collectively that the High Representative should be represented at the meeting of the Security Council is already in effect under the existing Treaties and has already taken place under the existing Treaties, so it is not an innovation here. There are provisions, if I remember rightly, in the Maastricht Treaty about co-operation in the Security Council. It was not quite the same wording but it quite clearly foreshadowed the continuing membership of the permanent Security Council of two members of the European Union because it referred to that.
Chairman: But in practice there are often four or five members of the European Union who are sitting at any time on the Security Council. In addition to the two permanent members, there are two Western European members and one Eastern European member, all of whom may well be members of the European Union.

[2] *Note by witness:* "For the avoidance of misunderstanding, answers given to a question by Lord Swinfen (QQ 44–46) are recalled here. Under the Treaty of Lisbon, international agreements will be concluded by the Council in the name of the Union with respect to CFSP matters, on which, as at present, it will act by unanimity (except when implementing an earlier unanimous decision). In addition, the Council will conclude agreements in the name of the Union with respect to the foreign policy matters that have hitherto fallen within the domain of the Community. Here, the Council's voting rule will be determined by the relevant legal basis. For instance, international agreements on trade or development cooperation will be concluded, as now, by QMV, while association agreements will continue to require unanimity. The WTO agreement was concluded by a unanimous Council decision because it concerns various matters, in particular some service sectors, where unanimity is the prescribed voting rule. Any future agreement within the WTO framework is likely to require unanimity for the same reason, unless it relates specifically to a sector for which QMV suffices."

Q106 ***Lord Swinfen:*** Does a similar position apply to, say, the African Union if situations in Africa are being discussed by the Security Council? If it applies for the European Union when they have an interest, why not the African Union when they have an interest?
Professor Dashwood: I have no idea of the content and the terms of the instrument that established the African Union. I have no idea what they do.
Mr Grant: That is a matter for the African Union to sort out.
Lord Hannay of Chiswick: If I could just help a little bit as I sat on the Security Council for some five years. First of all, there are no African permanent members of the Security Council so the complexities of European involvement are not replicated in the case of Africa at the moment. Secondly, it is of course entirely open to the Presidency of the African Union, whoever it is, to ask the Security Council to decide that in a particular debate their President should be represented and he should come along and speak in the name of the African Union. A decision will then be taken on that under the rules and procedures of the Security Council which permit non-members to participate in debates. It could happen perfectly easily. If the African Union wished it to happen it would happen. That would not mean that the African members of the Security Council at that time handed their powers over to the African Union. It would just mean that they would ask for this gentleman or lady to come along and speak on behalf of the African Union in the name of policies decided by the African Union. I think I am right in saying that can be done even now. It may even have been done in the case of Darfour, I am not sure.

Q107 ***Lord Chidgey:*** Can I ask you this question on development co-operation and humanitarian aid. Are there any important changes in the area of development co-operation and humanitarian aid? Are any of these a cause for concern?
Professor Dashwood: As far as I am aware, the only change is that there will be a new legal basis for humanitarian aid. At one time instruments of humanitarian aid had to be adopted under Article 308 of the Treaties which confers residual competence. I think more recently they have been pretending that it is a form of development co-operation and that does not sit very comfortably with the language on that legal basis. All they are doing is creating a specific legal basis, which I think is entirely the right thing to do.
Lord Chidgey: I see.

Q108 ***Lord Selkirk of Douglas:*** Are there any other important legal or political questions or indeed any other considerations relating to our inquiry which you think should be brought to the attention of our Committee this morning?
Professor Dashwood: This is probably a rather technical sounding point but in the Constitutional Treaty, Article I-6, there was a provision which would have enacted the principle of the primacy of Union law, and there was a great academic debate as to whether, because it was included in Part I of the Constitutional Treaty, this was intended to apply across the whole of the Union's competences, including the CFSP. It was argued by some that on CFSP matters national courts would have to recognise—even though the Court of Justice could not be involved—the primacy of the rules and any decisions taken for the purposes of the CFSP. I think the deletion of that principle from the present Treaty removes that ambiguity and the fact that the CFSP is located in an entirely different Treaty from the other external relations competences, I think makes it quite clear that is it is ring-fenced.
Mr Grant: There is one final point on defence which is not directly relevant to today's questions but perhaps indirectly relevant. I do think that what happens in the defence area, whatever the Treaty says, is much less important than what the governments decide to do and what principally the British and French Governments decide to do. There is a big issue brewing next year, which I am sure your Committee will be interested in, which is, as I have mentioned already, the Sarkozy initiative to rejoin NATO in return for a stronger European defence in some form. I have certainly picked up on a recent visit to Washington genuine concern in the US Administration that the British Government is so reluctant to talk about defence at the moment in the context of Treaty ratification and so unwilling to engage with the French that we (meaning in this context the British and the Americans) may miss an opportunity to effect a quite profound change in the way European defence is organised, namely the full reintegration of France into NATO. I know that is a bit beyond the scope of our discussion but it is indirectly relevant because it makes my point which is that I do not think this new Treaty really changes anything significant in the real world of defence. What is significant is what Britain, America and France decide amongst themselves on these issues.

Q109 ***Lord Hamilton of Epsom:*** I am rather amazed there should be consideration that there should be a price to be paid for France rejoining NATO. If it is in France's interests to rejoin NATO they should rejoin it and if it is not they should not. On a rather wider issue, where do you think the European Project is leading ultimately? What are the end goals of the European Project? This is to Mr Grant, as it is a political issue.

Mr Grant: That question is impossible to answer because the different countries of the EU have different views. One or two countries still subscribe to what I would call a "federalist" view which is that we should create a much closer union, with the Commission becoming the executive government. The Belgians basically support that line; some people in Italy do; some people in Germany do; virtually nobody else does these days. Most people these days have what I call an "instrumentalist" view. They think that the EU is quite a useful tool for achieving outcomes that cannot easily be achieved by single countries working on their own. That pragmatic or instrumentalist view is now the dominant one but because it is a pragmatic view you cannot talk about the final goal. It depends how the world changes. The EU will evolve in response, in my view, to things outside it—the changes in Russia, China, the Middle East, climate change, energy security. These are the issues and the challenges that will make the EU evolve, but you cannot say where it is going because you do not know where those challenges will be in the future.

Q110 ***Chairman:*** Professor Dashwood, did you want to comment on that?
Professor Dashwood: I just want to make one point which is this: I take the view that the European Union is a unique constitutional order and what is unique about it is that it is composed of sovereign states but they have come together in a constitution-like relationship. It seems to me that the uniqueness of the Union order, which does not have statehood in its DNA, is brought out much more clearly by the language of the Treaties as amended than it is by the present Treaties. They make it very clear—as the present Treaties do not—that the Union's competences are conferred by the Member States to enable them to pursue interests that they have in common. There is a lot of language which you do not find in the existing Treaties saving the identity and the fundamental competences of the Member States.

Q111 ***Chairman:*** Is that to some extent a response to what had been called for, a lack of a European Council, which suggested that we ought to move in that direction?
Professor Dashwood: It is that, yes, and most of this language was present in the Constitutional Treaty. That is why I used to describe the Constitutional Treaty as a "sheep in wolf's clothing", because it had called itself a constitution and because there are various flourishes in it like calling the High Representative a minister. This gave an entirely false impression of what it was fundamentally about.

Q112 ***Lord Swinfen:*** I wonder if you could clarify something for me which is not entirely on foreign and commonwealth policy but I am sure you are much more knowledgeable on this than me. Can a sovereign Member State withdraw from the EU without a qualified majority vote allowing it to do so or is the qualified vote that is talked about in some documents the penalties or sanctions against it if it was to be brought?
Professor Dashwood: Under the existing Treaties there is no express right of withdrawal although of course if any Member State chose to withdraw nobody would send an army in to prevent them from doing so. The new Treaty will provide specifically for a right of withdrawal and that is a matter to be decided by the Member State itself.

Q113 ***Lord Swinfen:*** Did you say Member State or Member States?
Professor Dashwood: No, the Member State itself.

Q114 ***Lord Swinfen:*** Singular?
Professor Dashwood: Yes, it does not need to have the agreement even of a qualified majority of the other Member States. Of course, any sensible government would want to negotiate its way out because it would want to have a future relationship with the European Union, but there will certainly be an absolute right to withdraw. Under the new Treaty; this is made clear.
Chairman: Thank you both very much indeed. You have certainly been very helpful in elucidating what is a somewhat complex subject. Not all the discussions which have appeared in public print have been as helpful at elucidating it as you have been this morning. I think there are one or two aspects in the Reform Treaty where one really is only being given powers to do things in the future. We have seen in the discussion both about the External Action Service and the structured co-operation that it will probably be developments that it is implementing in the course of the next year before the Treaty comes into force which will be of importance and of interest. The Sub-Committee may very well want to return to those issues when a little more is known about them and we may well want to call on your advice again when we come to that. In the meantime, thank you very much indeed for what has been a very useful session.

Written Evidence

Memorandum by British Overseas NGOs for Development (BOND)
on the implications of the new EU Reform Treaty on the European Union's development policies

The new EU Reform Treaty presents a series of extremely important opportunities for institutional reform. The creation of the new post of *High Representative of the Union for Foreign Affairs and Security Policy* and the *European External Action Service* mean that there will be new institutional structures in place, which will have a very significant impact on the EU's development policies.

The implementation of the EU Reform Treaty will be the only real opportunity between now and the next Financial Perspectives in 2014 (i) to ensure that there is greater coherence between development cooperation and other EU's external action policies and (ii) to improve effectiveness and impact of EC development cooperation.

Development cooperation and humanitarian aid are dealt with under Title III of the EU Reform Treaty (*Cooperation with third countries and humanitarian aid*). The two main articles that deal with development cooperation and humanitarian aid (Article III-118b and 118j).

— Set the eradication of poverty as the primary objective of development cooperation;

— Call for coherence between EU policies that affect developing countries and development goals; and

— Require member states and EU development cooperation to complement and reinforce each other.

BOND strongly welcomes the proposed legal framework for development policy with poverty eradication as its primary objective, and the legally enshrined principle of the coherence of EU policies with development objectives. However, it is vital that these laudable principles are translated into effective institutional structures, which will allow for effective action and will ensure effective implementation of the commitments made in 2005.

Key Issues Include:

— The creation of a post of *High Representative of the Union for Foreign Affairs and Security Policy.* This new EU foreign policy chief will permanently chair ministerial meetings of the GAERC as well as serve as Vice-President of the Commission, merging the jobs of High Representative and external relations Commissioner. The High Representative will come with *a significant aid budget and staff.*

— The High Representative will be supported by the *European External Action Service* (EEAS) made up of national and EU diplomats and officials from the Commission. The EEAS will have responsibility for providing staff for EU Delegations in third countries. The EU Delegations will replace the existing Commission's Delegations.

— The *number of EU Commissioners* will be reduced by two thirds (from 27 to 18) by 2014.

What are the implications of the changes in the functions of High Representative, who will also hold the position of Vice-President of the European Commission? What political and legal issues arise?

How will the new organisational structure work in practice and what institutional issues need to be resolved?

Will the establishment of a European External Action Service make the EU's external action more coherent and effective? What issues arise with regards to its structure, functioning, mechanisms for accountability and financing?

1. Attempts to consolidate the EU's profile on foreign and security policy risk sidelining commitments on development. The proposal to merge the jobs of High Representative and External Relations Commissioner into a High Representative for Foreign Affairs and Security Policy may be an opportunity to strengthen EU external action and strategic vision, but it must not lead to sidelining commitments on development.

2. The proposal that the High Representative, responsible for the implementation of the Common Foreign and Security policy, also has at his or her disposal a significant aid budget and staff within a European External Action Service suggests a potential danger of increased politicisation of development cooperation or instrumentalisation of development funds for implementing foreign policy objectives.

3. A reduction in the number of Commissioners could mean that there would be no Commissioner for Development.

4. What is at stake is the future political space for development within a new institutional structure (which is to include the European External Action Service). Proposals on the table include incorporating all EU external actions, including development, into the European External Action Service. This would not only blur the division of powers between the institutions but it would also allow development policy to be at the disposal of the High Representative.

Recommendations

5. There should be a dedicated *administrative structure* responsible for EU development policy and its implementation that has a clear focus on development objectives and sufficient capacity. Development Cooperation and Humanitarian Aid should be on equal footing with the Common Foreign and Security Policy (CFSP) within the rest of the Treaty. This separation should be reflected within the structure of the European Commission by maintaining a clear and strong institutional and political place for Development Cooperation, clearly independent from the CFSP. The new Development Service should be able to ensure that other policies are consistent with development objectives.

6. There should be a *Commissioner for Development* who is on equal footing with the High Representative and is in a position to promote the interests of EU development policy within the College and towards the Council. The Commissioner for Development should have a say not only on policy formulation and funding but also in implementation of development policies in order to end the inconsistencies caused by the gap between policy and implementation in the current structure.

7. The Development Service should be responsible for development policy and programming in all developing countries—African, Caribbean, Pacific, Asian and Latin American countries—to avoid current inconsistencies between treatment of the African Caribbean and Pacific Countries (ACP) and other developing countries due to the split between DG Development and DG Relex.

8. EuropeAid should be merged or at least have a strong link with DG Development.

9. The new EU Delegations in developing countries should include development professionals as well as trade professionals and diplomats working on foreign policy. Development officials within the Delegations should report directly to the Commissioner for Development, and work closely with the political desks to ensure coherence. It is important to ensure that development expertise is maintained and strengthened within the Delegations, and the development voice is heard. Heads of Delegations should have responsibility for engaging with civil society (especially in ACP countries).

10. Development policy objectives should be fully reflected in the cooperation with developing countries within the European Neighbourhood and Partnership Instrument (ENPI) zone.

11. It is important to ensure that, if neighbouring countries are going to be under the responsibility of the European External Action Service, the EU Reform Treaty commitments, and international commitments on Official Development Assistance (ODA) apply to ODA destined to neighbouring countries.

December 2007

Memorandum by Sir Brian Crowe, Deputy Chairman of Chatham House, formerly Director General for External and Politico-Military Affairs, EU Council of Minister

The Foreign Policy Implications of the Reform Treaty

1. The founding fathers deliberately excluded foreign policy (although not foreign trade/commercial) policy from the Treaty of Rome. Foreign policy was to remain strictly a matter for the member states. Consequently the institutional framework created by the Treaty for Rome made no provision for it.

2. In subsequent years starting in 1969–70, stretching into decades, the member states took the view that foreign policy cooperation (EPC or European Political Cooperation, as it was called, until it was renamed CFSP or Common Foreign and Security Policy in the Maastricht Treaty in 1992) was a good thing. The member states would wield more influence if they spoke and acted in common than if they continued to act on their own. British governments from the UK's accession in 1973 have consistently taken the same view, at least when not running scared of the Murdoch press and the Daily Mail.

3. But the arrangements for EPC which the member states worked out informally as they went along outside the Treaty framework, little changed in their fundamentals when brought into that framework at Maastricht, have increasingly shown themselves to be inefficient verging on dysfunctional. The management of the CFSP by successive six-monthly rotating Presidencies among countries of differing size, international standing, competence and even interests, with very little provision in the EU budget and patchy representation by Presidency embassies in third countries was confused. That most of the incentives and levers (eg aid and trade) available to the EU were controlled by an institution, the Commission, not answerable to the Presidency only added to the confusion.

4. Palliatives, notably the creation of the post of High Representative for the CFSP and the appointment to it of a high-calibre international statesman (Javier Solana) in 1999, mitigated the worst, but introduced its own dysfunctionalities (two actors, Presidency and Commission, became three with the HR/CFSP). That business got done at all was an achievement.

5. It has been argued that there is no need for reform since the EU has managed perfectly well without it, eg over Iran's nuclear ambitions. This oft-cited example actually demonstrates rather that, while the existing system can sometimes work, it is too fraught and unreliable a process to be a desirable norm. The original EU3 (France, Germany, UK) launched the Iran initiative themselves because launching it within the existing CFSP framework would have meant entrusting the lead to an Italian Presidency they did not trust. Excluding the Presidency meant that they had to exclude Javier Solana. But they found themselves negotiating with Iran relying on incentives which only the EU could provide (aid and trade). There was also much resentment in the rest of the EU. Fortunately the circle was squared, no doubt because all concerned showed good sense, because the stakes were so high and because there was no real policy disagreement. The EU3 with the participation of Solana (but still not the Presidency) were given an EU mandate at the Rome European Council in December 2004) and now Javier Solana leads not only for the EU but also for the three plus three (EU3 plus US, Russia and China).

6. So that is, so far, a success story, but arrived at haphazardly relying on dysfunctional procedures. The changes in the Reform Treaty are an attempt to change this and to make the institutional arrangements for operating the EU's external relations fit for purpose, finally shedding the legacy of the founding fathers' deliberate omission fifty years ago.

7. It does this, and this is a key point, not by bringing any new powers to Brussels from national capitals or by creating new powers. Rather it takes the existing powers and functions and re-allocates them among the foreign policy actors in Brussels (essentially, the Presidency, the HR/CFSP and the Commissioner for External Relations). It replaces the rotating Presidency (which largely disappears from external relations), gives its functions of chairing the Foreign Affairs Council and managing the CFSP to the HR/CFSP, and makes him (renamed EU High Representative, or EUHR) also a Vice President (VP) responsible in the Commission for external relations.

8. It also gives him a so-called External Action Service to assist him in his functions, with the Commission's existing nearly 130 overseas delegations placed under his authority. This is to be his eyes and ears abroad in the same way that national foreign ministers have their embassies. It has been one of Javier Solana's great handicaps that as HR/CFSP he did not have anybody to do this for him (other than the occasional ad hoc special representative he was able to appoint); relying on Presidency embassies was very hit or miss and Commission delegations were generally unavailable because of Brussels institutional rivalries.

9. The EAS is not however a new creation. The nearly 130 Commission delegations (and two Council liaison offices in New York and Geneva), already exist. Re-branding them into the EAS is no more than a common sense adaptation to the new allocation of tasks at the centre, making them too fit for purpose for an integrated EU foreign policy across the board.

10. For this is what the foreign policy provisions of the Treaty are about: the integration of the EU's foreign policy across the board, bringing together, under the coherent leadership of one person, the EUHR, the political objectives established by unanimity under the rules of the CFSP (which remain substantially unchanged by the Treaty) and the economic objectives and instruments established very largely by QMV in the Commission's areas of responsibility (where, unlike in CFSP, the European Parliament has a very substantial role and the ECJ has jurisdiction).

11. The reforms are not perfect. The removal of some fault lines has led to others. The functions of chairing the Council, running the CFSP and managing and coordinating the Commission's actions in external relations have led to tensions in the past which will not go away just because they are now combined in one person. The EUHR's answerability to the Council in some areas (CFSP), the college of Commissioners as VP in others, and both where the two areas of policy come together (which is after all the intention) could give rise to resentments and tensions which will require skill to handle.

12. And the role in foreign policy of the new standing President of the European Council, whose main function is to provide continuity and coherence mostly on the internal side over several Presidencies, is not clear. He is to represent the EU "at his level", which is one thing for attendance at EU summits with third countries, quite another if (as will always be the temptation for former heads of government who are likely to get the job) he seeks to cut a figure on the world stage competitively with the EUHR. It has to be hoped that this will not be allowed to happen when the detailed arrangements are worked out in Brussels.

13. Nor are these reforms anywhere near enough to turn the old EU-foreign-policy banger with many not very careful drivers into a chauffeur-driven Rolls Royce. They are an important contribution. But more important will be the willingness, indeed the will, of the member states to agree to common foreign polices, to support the EUHR in fronting them, to accept (on the part of the smaller member states) that in the real world weight counts and that therefore some larger EU member states must have a stronger role in CFSP than others, and that (on the part of the larger member states) the interests of all must be recognised. And of course the quality of the EUHR and his staff in the EEAS and his ability to work with the important member states (including beyond any question the UK) will be crucial.

14. The UK has always supported foreign policy cooperation with our EU partners. Such cooperation will take place other than on an entirely ad hoc and occasional basis only within a sensible framework so that the necessary discussion, coordination, decisions and implementation can happen. If we want meaningful foreign policy cooperation amounting to common polices and actions among 27 countries, recognizing that alone we carry little weight and dispose of the most limited resources, then it is in the UK's interest to support the arrangements needed to make this possible.

15. The UK has the ultimate safeguard in CFSP that no decision can be taken without its consent, or at least acquiescence (see note below). But there is no need for the UK to think in such defensive terms, rather the contrary. The UK is indispensable to an effective CFSP for all sorts of reasons (just as are also eg France and Germany), and at the core of the EU's Defence and Security Policy. No EUHR could afford to ignore this. So there is a strong mutual interest among all the main players, whether in Brussels or national capitals, in making it work effectively. If it fails for one, it will fail for all. We shall have lost nothing by trying, but a lot by failing

NOTE:

The important decisions will continue under the Reform Treaty to be taken by unanimity. There is provision for implementing decisions to be taken by QMV (actually a provision in the existing treaties but never really used). But there is also the so-called emergency brake, or safety net: if a likely QMV decision would affect a member state's vital interests, no vote can be taken. If no agreement can be reached the issue can be referred to the European Council by QMV, but the European Council decides on the issue itself by unanimity

Another important point relates to the EU's new legal personality. Some people have seen this as giving the EU a new right to reach and sign international agreements committing the UK against its will. It does no such thing. Not only does the EU already have that right (typically now exercised through the Presidency, in future no doubt through the EUHR or, at summit level, the President of the European Council), but more to the point, it can only be exercised (in either case ie with or without formal legal personality) under the authority of a unanimous decision of the Council. So in practical terms it is a distinction without a difference.

3 December 2007

Memorandum by Open Europe

1. *What are the implications of the changes in the functions of High Representative, who will also hold the position of Vice-President of the European Commission?*

While the title "Union Minister for Foreign Affairs" has been replaced by the High Representative of the Union for Foreign Affairs and Security Policy, he or she will have all the same powers as proposed in the original Constitution—against the wishes of the UK.

Despite UK resistance to giving the Commission a direct role in foreign policy since 1992, the current Government accepted that the new minister will be a member (Vice-President) of the Commission, under the terms of the Reform Treaty. This "double-hatting" blurs the distinction between the EU's intergovernmental and "supranational" bodies—giving the High Representative a hand in each. This merging of two positions will provide the new High Representative with the "diplomatic clout of the current foreign policy and security chief, Javier Solana, plus the financial clout of External Relations Commissioner, Benita Ferrero-Waldner,

who currently controls the EU foreign aid budget", as explained by UK Ministers Gareth Thomas and Jim Murphy.[1]

Perhaps one of the most important changes is that when the Council asks the new High Representative for a proposal on a particular subject, once he or she has made that proposal it will be subject to majority voting.

The proposed Article 17(2) TEU stipulates that the Council shall act by qualified majority, "when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request to him or her from the European Council, made on its own initiative or that of the High Representative".

So not only would the High Representative be able to devise proposals, (which has raised debate regarding exclusivity on the right of initiative on military missions) but the majority voting process means the UK would be prevented from vetoing such a proposal.

This change could have important repercussions. EU states could (unanimously) ask the High Representative to devise with a plan but then, if individual states such as the UK don't agree with what he/she proposes, could find themselves in a majority voting situation. For example, in the squabble between NATO and the EU over who will supply air transport to the African Union troops in Darfur, the UK might not be able to block the EU from pointlessly duplicating NATO—if this was proposed as part of a plan from the High Representative.

What are the implications of the High Representative's role in chairing the Foreign Affairs Council?

Despite initial opposition, the UK accepted that the High Representative will chair meetings of the EU General Affairs and External Relations Council. This new role serves to further concentrate power in the hands of the High Representative, and increase his/her representation within and access to various EU bodies. As the Guardian noted: "Britain said the new official should not chair regular meetings of EU foreign ministers, nor take over the resources of the European Commissioner for external affairs. It lost."[2]

What are the implications of the High Representative's role in representing the EU in international organisations?

In addition to the power to appoint EU envoys, 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.

Under Article 19 (2) of the Treaty, "When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be asked to present the Union's position". While the Government has reiterated its point that the UK will not lose its permanent seat at the UN Security Council, UK self-representation will be minimized with the passage of the Treaty.

Although concerns surrounding representation rights may seem premature based on the vague new treaty text alone, they are substantiated by leading EU and Member State officials' statements. Last October, Lord Malloch Brown, then Deputy General Secretary of the UN, told Brussels diplomats that the EU was heading towards representation by a single seat within the UN institutions. He said, "I think it will go in stages. We are going to see a growing spread of it institution by institution. It is not going to happen with a flash and a bang." He added that he hoped that it would happen "as quickly as possible. I'm a huge fan of it."[3]

This is reaffirmed by EU officials, including the European Commissioner for External Affairs, Benita Ferrero-Waldner, who said "Europe must speak with one voice in the Security Council . . . I think that one should consider a special seat for the EU in the Security Council."[4] The current EU High Representative, Javier Solana, also discussed having one seat in the UN for the EU. He said, "Imagine what influence Europe could have had if it had spoken with one voice?"[5]

1 http://www.bond.org.uk/networker/2007/november/neweurope.htm
2 26 June 2007.
3 *The Times,* 6 August 2007.
4 *EUobserver,* 25 January 2005.
5 http://www.globalpolicy.org/security/reform/cluster1/2003/0324eu.htm

2. *Will the establishment of a European External Action Service make the EU's external action more coherent and effective? What issues arise with regards to its structure, functioning, mechanisms for accountability and financing? What effects, if any, will it have on the UK's foreign policy and diplomatic service?*

A single "European External Action Service" as proposed in the Treaty would for the first time bring together national officials with the 745 civil servants in the Commission's DG external relations and the 4,751 members of staff in the Commission's existing "delegations" around the world.

If the Treaty is approved, the new diplomatic force will begin to take shape in January 2009, although it is expected to take far longer to establish a functional and effective EU diplomatic corps.

Article 13b states that decisions in the creation of a diplomatic service will be made by qualified majority vote on a proposal from the EU High Representative. A paper published by Javier Solana in March 2005 suggested that only a third of the staff of the service will come from member states' diplomatic services. Estimates of the size of the service vary widely. One EU official briefed that the number of diplomats alone would be 7,000, but that it could rise to 20,000.[6]

The European Parliament's External Relations Committee has raised concerns over the proposed EU diplomatic service. It warned that if the diplomatic service was set up as an independent institution it would "take on an uncontrollable life of its own" and would result in an "independent super administration". It suggested that the service would consist of between 5,000 and 7,000 diplomats,[7] yet funding details of the service are not specified.

Wilhelm Schoenfelder, former German ambassador to the EU, highlighted the open-ended nature of the EU diplomatic force, asking "What will be the share of member states, and how will be the share among member states? I don't know. These are all open questions."[8]

Jose Luis Rodriguez Zapatero, the Spanish Prime Minister, has said, "We will undoubtedly see European embassies in the world, not ones from each country, with European diplomats and a European foreign service. We will see Europe with a single voice in security matters. We will have a single European voice within NATO. We want more European unity.[9]

Nicolas Schmit, the Luxembourg Foreign Minister has said, "We want a political Europe that can speak with one voice, and with one minister of foreign affairs and a common foreign service."[10]

The UK Government originally opposed the EU Diplomatic Service. In the negotiations on the draft Constitutional Treaty Denis MacShane said, "We believe that it remains for EU Member States to organise their respective bilateral diplomatic services at the national level."[11]

Under the Treaty Article 20 TEU is amended so that the EU can pass laws by majority vote determining rules on diplomatic and consular protection—so moves towards common consulates and embassies would be likely to accelerate. This is important because the UK has expressed doubts about existing Commission proposals in this area.

In November 2006 the European Commission published a Green Paper which revealed plans to establish EU "consulates" around the world. It argued that "Setting up common offices would help to streamline functions and save on the fixed costs of the structures of Member States" diplomatic and consular networks . . . these offices could be housed in various representations or national embassies or in just one, or they could share the Commission delegation." It went on to say that "the EU consulates could take over functions now controlled by member states, including issuing visas. "In the long term, common offices could perform consular functions, such as issuing visas or legalising documents."[12]

Geoff Hoon responded to the Green Paper saying that Member States have long held the unanimous view that the provision of consular assistance to their citizens is primarily a matter for national authorities, and that "some of the Green Paper's proposals, which involve a greater role for the Commission and Council Secretariat, therefore sit uneasily with this position". He said, "It is also notable that, leaving aside the legal difficulties, the Commission has no expertise in providing consular assistance. We are therefore concerned by those proposals which envisage the Commission becoming involved in consular service delivery (eg the provision of training for consular staff)."[13]

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[6] *European Voice,* 9 November 2004.
[7] *EUobserver,* 28 February 2005.
[8] *EUobserver,* 27 November 2007: http://euobserver.com/9/25207
[9] AP, 17 February 2005.
[10] BBC, 26 January 2007.
[11] *Hansard* Written Answer, 17 June 2002.
[12] http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006—0712en01.pdf
[13] http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-x/41x07.htm

There are questions about transparency in the operations of the High Representative and the European External Action Service. Former Director-General of the Council Secretariat Sir Brian Crowe, a contributor to a European Policy Centre working paper on the development of EU foreign policy, cautioned that "Member States should not expect to see all communications between the High Representative/Vice President and the EEAS, as foreign services cannot operate with "complete transparency". Given the delicacy of the EEAS and the HR/VP positions, they would need some "breathing space" to get going."[14] This leads to questions regarding the EU's commitment to transparency and accountability, as well as who is ultimately the decision-maker or agent of foreign policy.

3. *Will the changes in the area of European Security and Defence Policy (ESDP) enhance its effectiveness? What impact, if any, will they have on the UK's defence policy? How will the new provisions work in practice and what political and legal issues arise? The new provisions include:*

— *The mutual assistance clause, covering cases of armed aggression*

The proposed new Article 27 (7) TEU states 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 Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States."

This article is essentially a mutual defence commitment. Irish Foreign Minister Dermot Ahern has said, "The European Constitution provides for a mutual defence commitment. This establishes an obligation to assist another Member State that is the victim of armed aggression on its territory."[15]

Lord Robertson, former Secretary General of NATO, warned that it is "dangerous to introduce a mutual defence clause into the Constitution if you do not have the means to carry it through".[16] The Government wanted this entire paragraph to be deleted from the Constitution, and issued an unsuccessful amendment to this end, in which Peter Hain wrote, "Common defence, including as a form of enhanced cooperation, is divisive and a duplication of the guarantees that 19 of the 25 Member States will enjoy through NATO." The objection was abandoned.[17]

— *Permanent structured cooperation in the area of ESDP*

The proposed Articles 27 (6) and 31 (1) TEU provide for the establishment of a special sub-group of member states "whose military capabilities fulfil higher criteria and which made have more binding commitments to one another in this area with a view to the most demanding missions". This provision for so-called "permanent structured cooperation" within the EU framework would allow neutral countries to opt out, and create an "inner core" of EU members interested in taking forward military integration, and serve as a mechanism which would allow certain Member states to move faster towards a common European defence.

The implications of this should not be underestimated: The French Defence Minister Hervé Morin, has said, "The responsibility of our generation is to give a more ambitious dimension to defence Europe . . .. Soon, a new institutional treaty will permit reinforced cooperation, notably in the area of defence, since defence Europe will move forward by using a hard core of countries which want to take on their own Security."[18]

The Young European Federalists say in a briefing paper that they "Welcome the possibility to establish Structured Co-operation in the field of Defence, which is a significant step toward a Single European Army."[19] They also welcome "the introduction of structured cooperation in the field of defence, which will allow the willing States to create the bulk of an effective European defence, without which Europe will never be able to develop an autonomous foreign and defence policy."[20]

Article 31 TEU will specify that the group can be set up by QMV. The rough outline of how the group would work is explained in a new protocol annexed to the original EU Constitution. This outlines a number of qualifications which member states would have to pass to join permanent structured cooperation. Clause 1 stipulates that it is open to any member state undertaking to:

(a) "proceed more intensively to develop its defence capacities through the development of its national contributions and participation" in multinational forces and activities of the European agency; and

[14] The EU Foreign Service: how to build a more effective common policy. 26 November 2007: http://www.epc.eu/en/er.asp?TYP=ER&LV=293&see=y&t=2&PG=ER/EN/detail&l=&AI=756

[15] Address to the National Forum on Europe, 21 April 2005

[16] *Le Figaro,* 19 November 2003.

[17] http://european-convention.eu.int/Docs/Treaty/pdf/30/30—Art%20I%2040%20Hain%20EN.pdf

[18] *La Tribune,* 19 July 2007.

[19] http://jef-europe.net/uploads/media/ep02__euroarmy__.doc

[20] http://www.jef-europe.net/index.php?id=4145

(b) "have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned . . . within a period of 5 to 30 days . . . and which can be sustained for an initial period of 30 days".

Article 2 of the Protocol specifies that participating member states would cooperate to:

(a) achieve "approved objectives concerning the level of investment expenditure on defence equipment";

(b) "bring their defence apparatus into line with each other";

(c) "take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces";

(d) "make good . . . the shortfalls perceived in the framework of the 'Capability Development Mechanism'"; and

(e) "take part . . . in the development of major joint or European equipment programmes in the framework of the Agency".

The Government was initially strongly opposed to the structured cooperation proposal. Peter Hain argued in an amendment, "The UK has made clear that it cannot accept the proposed ESDP reinforced cooperation provisions. While we support Member States making higher capability commitments and co-operating with partners to this end, the approach described here—a self-selecting inner group—undermines the inclusive, flexible model of ESDP that the EU has agreed."

However, the Government failed in its attempts to remove the provision for enhanced cooperation from the original Constitution, and after the meeting between the UK, France and Germany in October 2003, the UK agreed to back the idea in return for assurances that member states could not be excluded from the group if they wanted to join.

4. *What are the implications of the other new provisions or amendments, including:*

— *The solidarity clause, covering cases of terrorist attacks or natural/man-made disasters*

Article 188r TFEU stipulates that the detail and meaning of the "terrorism solidarity clause" is to be decided by QMV. This is important because the Government had clear reservations about this article. During negotiations on the original Constitution, Peter Hain proposed an amendment to remove a key provision of the article—that "Should a Member State fall victim to a terrorist attack, the other Member States shall assist it," but the amendment was rejected.

Article 188r (2) reads, "Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities". In a separate proposal, the Government asked for the new EU power to "prevent" terrorist threats to also be deleted. At a plenary session of the European Convention Hain objected that, "if it carries real military obligations to offer military assistance it is duplicating the NATO guarantee. If it does not . . . it is empty rhetoric."[21] However, his objection was ignored as well.

— *The provisions on development cooperation and humanitarian aid*

Two new Articles 188i and 188j set up majority voting on urgent macro-financial aid and humanitarian aid. The UK tried to have these articles deleted. The UK argued that "Macro-financial assistance has been agreed urgently when required". Both amendments were ignored.[22]

Although this seems to be a benign change (and is now cited by the Government as an "uncontroversial" example of a move to QMV), it could raise highly important questions. To give a past real-world scenario, this might have been used to decide whether the Union should continue to fund the Palestinian Authority after the 2006 elections which put Hamas in power—the UK and other Member States disagreed about this, the UK being keen only to fund NGOs and not the Hamas-led authority.

[21] See http://www.europarl.eu.int/europe2004/textes/verbatim—021206.htm

[22] See http://european-convention.eu.int/Docs/Treaty/pdf/869/Art29Hain.pdf and http://european-convention.eu.int/Docs/Treaty/pdf/870/Art%20111%20218%20Hain%20EN.pdf.
NB 188j also sets up a "European Voluntary Humanitarian Aid Corps". The UK also argued against this, saying that, "The idea of establishing a European Voluntary Humanitarian Aid Corps should have no place within the EU's humanitarian action". This third amendment was also ignored.

— *The representation of the Union in international organisations*

As discussed above, the 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, under Article 19 (2) of the Treaty, When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be asked to present the Union's position."

The draft treaty states that the Union shall have "legal personality", as in the original Constitution. This would mean that for the first time the EU, rather than member states, could sign up to international agreements on foreign policy, defence, crime and judicial issues (currently the EC can only sign agreements in first pillar issues like trade). That would be a huge transfer of power and make the EU look more like a country than an international agreement.

Talking about the original version of the Constitution, Italian PM Romano Prodi said that this change was "A gigantic leap forward. Europe can now play its role on the world stage thanks to its legal personality". The French government's referendum website argued that, "The European Union naturally has a vocation to be a permanent member of the Security Council, and the Constitution will allow it to be, by giving it legal personality."

Even the UK Government admitted that it could cause problems. When the Constitution was first being drafted, Peter Hain said that "We can only accept a single legal personality for the Union if the special arrangements for CFSP and some aspects of JHA are protected." He told MPs: "we could support a single legal personality for the EU but not if it jeopardises the national representations of member states in international bodies; not if it means a Euro-army; not if it means giving up our seat on the United Nations Security Council; and not if it means a Euro-FBI or a Euro police force."

The UK Government had long been opposed to the idea of giving the EU a legal personality. Back in 1997 Prime Minister Tony Blair boasted that he had successfully stopped a provision for this appearing in the Amsterdam Treaty. He said, "Others wanted to give the European Union explicit legal personality across all the pillars of the treaty. At our insistence, that was removed."[23]

5. *What effect will the extension of qualified majority voting (QMV) in CFSP have on decision making in the Council, including the efficiency and speed of decision making? What implications will it have for the UK's ability to play a leading role in EU foreign and security policy?*

At the start of the original negotiations on the Constitution Peter Hain promised that "QMV is a no-go area in CFSP" [Common Foreign and Security Policy].[24] During the IGC, Jack Straw said that the move to QMV in this area was "simply unacceptable."[25]

Nonetheless the Government has now accepted it, according to its own analysis, in nine different areas of foreign policy.[26] In fact, there is also majority voting on at least two other aspects of foreign policy—so the veto would in fact be given up in 11 different areas. Thus, the Government's insistence that "unanimity will remain the rule for setting the Common Foreign and Security Policy", is an extraordinary distortion of the facts.[27]

Areas where majority voting would be introduced in foreign policy:

1. *Proposals from the EU High Representative.* Perhaps the most important introduction of QMV relates to the new High Representative. Article 17(2) TEU stipulates that the Council shall act by qualified majority, "when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request to him or her from the European Council, made on its own initiative or that of the High Representative".

2. *The design of the EU diplomatic service.* The new Article 13a TEU allows the organisation and functioning of the new EU diplomatic service to be decided by QMV. The tasks and even the eventual size of the service are still unclear in the Treaty, but the shift toward a more centralised and powerful institution would inherently

[23] *Hansard,* 18 June 1997
[24] *Hansard,* 25 March 2003.
[25] *Hansard,* 1 December 2003.
[26] The UK Government lists these areas as "EU humanitarian aid operations"; "Civil protection"; "Implementation of solidarity clause"; Creation of a "start-up fund" for urgent Common Foreign and Security Policy measures; Urgent EU aid to third countries; Membership of structured co-operation in defence; Appointment of High Representative of the Union for Foreign Affairs and Security Policy by the European Council; Role of the High Representative of the Union for Foreign Affairs and Security Policy in CFSP implementing measures; Measures to facilitate diplomatic and consular protection." http://www.theyworkforyou.com/wrans/?id=2007-07-26b.146189.h&s=EUg146189.q0.
[27] David Miliband Foreign Policy Speech to the House of Commons, 12 November 2007 http://www.davidmiliband.info/speeches/speeches_07_07.htm

result in a major shift of power from the Member States to EU establishments, likely to grow in strength over time. The Council will act on a proposal from the High Representative after getting the consent of the Commission.

3. *Consular issues.* Under the Treaty Article 20 TEU is amended so that the EU can pass laws by majority vote determining rules on diplomatic and consular protection—so moves towards common consulates and embassies would be likely to accelerate. The UK has already expressed reservations and concerns regarding EU consular services proposed by the Commission (see above).

4. *Setting up an inner core in defence.* Under Article 31(1) TEU, the decision to set up the "permanent structured cooperation" group would also be taken by QMV, as would subsequent decisions to expel members, or to admit new ones to the group.

There is also the prospect of majority voting within the inner core. Article 280H (1) TFEU allows for the Council to act by qualified majority voting in the context of enhanced cooperation, if the Council, acting unanimously, so decides. While this new article does not cover "defence" decisions, it presents the prospect of majority voting within the inner core and could affect the common foreign and security policy. (Discussed in greater detail above.)

5. *Terrorism and mutual defence.* Article 188r TFEU stipulates that the detail and meaning of the "terrorism solidarity clause" is to be decided by QMV. This is important because the Government had clear reservations about this article. During negotiations on the original Constitution, Peter Hain proposed an amendment to remove a key provision of the article—that "Should a Member State fall victim to a terrorist attack, the other Member States shall assist it," but the amendment was rejected.

Article 188r (2) reads, "Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities." In a separate proposal, the Government asked for the new EU power to "prevent" terrorist threats to also be deleted. At a plenary session of the European Convention Hain objected that, "if it carries real military obligations to offer military assistance it is duplicating the NATO guarantee. If it does not . . . it is empty rhetoric."[28] However, his objection was ignored.

6 & 7. *Urgent financial aid, and Humanitarian aid.* Two new Articles 188i and 188j set up majority voting on urgent macro-financial aid and humanitarian aid. As noted above, the UK failed to have these articles deleted despite its claim that "Macro-financial assistance has been agreed urgently when required".[29]

8. *The election of the High Representative.* New article 9e specifies that the Foreign Minister/High Representative is elected (and can be sacked) by qualified majority voting. Because he or she is going to be a member of the Commission, whichever country he or she is from will lose its national commissioner if it has one, when he or she is appointed.

9. *Civil protection.* Article 176h allows the EU to pass laws by majority vote on the response to natural or man-made disasters. The UK sought to forestall this move to majority voting, arguing that it wanted to preserve "the current flexible arrangements".[30] However, this request was ignored.

10. *Terrorist financing controls.* Article 67a allows for decisions on measures to control the financing of international terrorism to be taken by QMV. The UK Government was not against this article *per se*, but wanted it to be changed to stop it restricting member states' freedom to act. The UK argued that "At present, the scope of [the] article . . . is certainly too wide and open-ended. Member States should retain competence to take further action consistent with the European law, for example to take immediate action to freeze assets of terrorists identified in accordance with national procedures and laws". This was rejected.

11. The new EU Foreign Policy Fund. Article 26(3) TEU creates a "start up fund" for foreign policy operations. This new fund is seen by many as the first step towards a common defence budget for the EU. All aspects of funding are to be decided by QMV—including the amounts paid by member states, despite UK demands that decisions relating to the fund should be unanimous.

[28] See http://www.europarl.eu.int/europe2004/textes/verbatim_021206.htm

[29] See http://european-convention.eu.int/Docs/Treaty/pdf/869/Art29Hain.pdf and http://european-convention.eu.int/Docs/Treaty/pdf/870/Art%20111%20218%20Hain%20EN.pdf.
NB 188j also sets up a "European Voluntary Humanitarian Aid Corps". The UK also argued against this, saying that, "The idea of establishing a European Voluntary Humanitarian Aid Corps should have no place within the EU's humanitarian action". This third amendment was also ignored.

[30] http://european-convention.eu.int/Docs/Treaty/pdf/857/Art%20111%20179%20Hain%20EN.pdf

Conclusions on the Shift to QMV

Efforts to increase, centralise, and streamline power to create and implement EU foreign policy, are wrought with complications and insurmountable obstacles. Member States' differences in opinion in various foreign policy areas have been intractable and preclude agreement on a common foreign and security policy, adopted by all 27 nations and articulated by the High Representative of the Union.

Current divisive issues such as the status of Kosovo, confronting Iran, the meeting of human rights violator Robert Mugabe in the upcoming EU-AU summit, as well as past cleavages stemming from the invasion of Iraq, are only the most salient points of contention which have obstructed the development of a common foreign and security policy within the EU bloc. The attempts to institute QMV in various foreign policy issues are over-ambitious efforts to create an unrealistically seamless CFSP.

The EU-AU summit in December reveals but one fissure in European foreign policy toward Africa. While Gordon Brown has maintained his stance against dealing with Zimbabwean leader Robert Mugabe, while the human rights abuses in Zimbabwe go unaddressed, the Portuguese EU President has expressed a willingness to go forth with the summit as scheduled. The UK voice would seem to become irrelevant on this issue as South African Foreign Affairs Minister Nkosazana Dlamini-Zuma told reporters that "Summits depend on a number of people, not just one, and one person does not make a summit."[31]

6. *What other important political or legal issues arise, other than those set out above, in the area of EU foreign, defence and development policy?*

The European Court of Justice's jurisdiction over the all aspects of CFSP remains ambiguous in certain areas, and loopholes have been exposed. In a European Scrutiny Committee meeting in 2005, Cambridge Professor of European Law and FCO legal advisor on the EU Constitution, Alan Dashwood noted one particular loophole in Article I-16 of the old Constitution. According to Dashwood, this article, which states that "Member States shall actively and unreservedly support the Union's common foreign and security policy" had not been excluded from the ECJ's remit and, therefore, "means that the issue could be raised in court". This raises the possibility that in the event that Britain's foreign policy actions were deemed to contradict EU policy, the matter could be settled by the ECJ. The updated Article 11(3) of the Reform Treaty states that "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area." This reworded clause does not provide further clarity on this matter.

The issue of ECJ jurisdiction over CFSP was more recently examined during a hearing before the Foreign Affairs Committee on 12 September 2007—and again exposed as ambiguous and unresolved. Europe Minister Jim Murphy described the extent of ECJ jurisdiction over CFSP as "limited", according to the Treaty provisions. However, his next statement that "The interpretation and application of these provisions, in the light of the Declaration, will therefore be determined in the course of decision-making on the CFSP" raised concerns that the ostensibly "limited circumstances" in which the ECJ can exercise jurisdiction over CFSP are not necessarily limited. Sir John Stanley noted that "how far these very limited circumstances go will be dependent on the further negotiations on the terms of the treaty, which are still to be concluded. That would suggest to me, and possibly many others, that there is still a quite wide and as yet undefined area of foreign policy that might fall within the jurisdiction of the European Court of Justice."[32] The extent of the ECJ's jurisdiction over areas within CFSP remains unclear.

3 December 2007

Memorandum by Mr Nick Witney, Defence Analyst

1. In this evidence, I offer some reflections on the concept of *Permanent Structured Cooperation* (PSC)—from the perspective of a former Chief Executive of the European Defence Agency (EDA), and a soon-to-be Senior Policy Fellow of the European Council on Foreign Relations.

2. PSC aims to establish a core group of those Member States "whose military capabilities fulfil higher *criteria* and which have made more binding *commitments* to one another in this area with a view to the most demanding missions" [Article 28 A(6) of the amended Treaty on European Union (TEU)].

3. The criteria and commitments are essentially about improving defence capabilities, and providing operational forces, specifically Battlegroups [Articles 1 and 2 of the Protocol on PSC]. "Defence capabilities" is broadly interpreted—from effective forces, to levels of investment, to equipment programmes, to training and logistics.

[31] *International Herald Tribune,* 10 October 2007.
[32] http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/c166-iii/c16602.htm

There is a strong, though not exclusive, emphasis on doing things together—multinational forces, European equipment collaborations, other EDA-sponsored activities.

4. Against this background, I make below two main points:

- PSC could give a powerful impetus to the objectives which the EDA was established to promote—in essence, better defence capabilities and a stronger defence industry and technology in Europe; but
- To be effective, the PSC arrangements will have to be a good deal more sophisticated than the simple (self-)designation of a "core group" might seem to imply.

5. *PSC and EDA—complementary initiatives.* It is evident from the key texts on PSC (Article 28 of the amended TEU, the relevant Protocol) that the EDA is intended to be closely linked. The broad interpretation of "defence capabilities" in the Treaty echoes the missions and tasks of the EDA. Under PSC, the EDA will provide assessments (Article 3 of the Protocol); involvement in EDA activities is foreseen as a PSC criterion (Article 1). And the very concept of pace-setting, small-group cooperation is already reflected in the EDA's modus operandi, both in theory (Article 28 D(3) of the amended TEU) and in practice.

6. To amplify this last point—the EDA, like the rest of ESDP, is a fundamentally "intergovernmental" enterprise. All member states (MS) are deeply conscious of the centrality of national sovereignty in matters of defence. No MS is going to be ordered by some supranational authority to commit its young men and women to operations; no MS is going to be told how to spend its defence budget. (These are, incidentally, the two points which explode "Euroarmy" myths.) At the same time, both operational and economic logic urges Europeans to cooperate more closely in matters of defence. These two imperatives—preservation of sovereignty, strengthening of cooperation—are reconciled through "variable geometry'—a flexible approach whereby different groups come together at different times and in different combinations, on a voluntary basis, to develop particular areas of cooperation.

7. Thus the EDA's defence equipment market initiative was initially joined by only 22 of the original 24 MS participating in the Agency (itself a matter of choice for all MS); 5 of the 24 decided not to join the first R&T Joint Investment Programme; whilst other collaborative projects such as Software Defined Radio or Combat Equipment for the Dismounted Soldier have only 5 or 6 participants.

8. Indeed, a key aim of the EDA is simply to provide a forum or meeting-place in which MS may come together and find partners for different projects of particular interest to each of them, forming different combinations. In practice, however, there has to date been a certain lack of initiative on the part of the MS, who have generally preferred, rather than to table their own proposals, to wait for the core staff of the EDA to come up with ideas. This passivity, whilst understandable, has significantly detracted from the progress which the EDA enterprise has so far been able to make.

9. PSC, by introducing a new political dynamic and creating new small-group combinations, could be a key means for stimulating a more imaginative and energetic MS input to the increasingly urgent task of raising Europe's game on defence.

10. *But it's not as simple as a "defence Eurozone".* The immediate practical question is "who should be in and who should be out?"—or perhaps "what exactly are these "criteria" and "commitments" which should determine membership of this core group?"

11. There are plenty of clues in the relevant Articles; the trouble is that they throw up some surprising, and often inconsistent, results. Thus:

- defence investment is one obvious possibility. A key criterion or commitment might be the readiness to spend a minimum % of GDP on defence. Yet the latest compilation of statistics released by the EDA, for 2005 (www.eda.europa.eu/documents.aspx), reveals only 4 MS spending over 2%—Greece, France, UK and Cyprus. 2006 data will show Bulgaria and Romania also scoring high on this criterion.
- defence expenditure per capita of population, by contrast, gives a top tier of France, UK, Sweden, Netherlands, Luxembourg and Italy.
- interpreting "investment" as the proportion of defence expenditure going on equipment and R&T (in the context of the general recognition that personnel costs consume too much of the totality of defence spending in Europe) gives Sweden, Greece, Finland, UK, Spain and France. Reformulating this criterion as equipment and R&T spend per soldier would introduce Netherlands and Germany into the top six, displacing Sweden and Greece.
- the provision of usable forces is another important criterion. But events have rather overtaken the commitment to provide or contribute to a Battlegroup. All MS with the sole exceptions of Denmark and Malta could now argue that they qualify—and, though the size of any "core group" is clearly

wide open for debate (my use of "top six" is purely for illustrative purposes), no one will argue that 25 makes any sense.

— alternatively, one might envisage a criterion reflecting the % of national armed forces deployed on operations. Though some might argue for specification of ESDP operations, Europeans contributing to the UN operation in South Lebanon, like the British and Dutch in Afghanistan, would no doubt urge that there should be no "flag discrimination'. On this inclusive basis, the top performers turn out to include Ireland and, in 2006, Estonia.

— PSC is also intended to recognise and incentivise collaboration. Subscribers to permanent multinational formations would no doubt wish to see criteria and/or commitments in that area. In equipment collaboration, I understand that those who spent in 2006 the highest % of their equipment budgets in collaborations with other Europeans were predictably the six members of the LoI Framework Agreement (France Germany, Italy, Spain, Sweden, UK)—only with Sweden displaced by Luxembourg. Change the criterion to absolute sums spent in European collaborations, and it is Belgium which takes Sweden's place. Look at those who spend the highest % of their R&T budgets in collaboration with other Europeans, and though 4 of the LoI 6 are in the top six, the UK and Germany are displaced by Hungary and Belgium.

12. To complete the sense of anomaly, nowhere above do we find Poland—one of the most committed participants in the EDA across the range of its activities, and widely recognised as belonging in any short-list of "serious defence players" in Europe. (Their relative lack of prominence in these statistics suggests the need to further complicate matters by taking account of purchasing power parity.)

13. I do not draw from the forgoing the conclusion that identifying a relatively small core group of MS on the basis of objective indicators is an impossible task. Rather, I conclude that the process cannot be straightforwardly deductive; it will have to be iterative, with the issues of how many and who both illuminated by, and informing, the final determination of appropriate criteria and commitments.

14. I also conclude, even more importantly, that the 26 MS participating in ESDP are a heterogeneous bunch, each with their own particular strengths and weaknesses, and with a wide variety of national interests and priorities. This diversity does not lend itself to any rigid or simplistic one-size-fits-all approach and is, indeed, something to be exploited. Very few MS have absolutely nothing to contribute to improving European defence capabilities—PSC should be operated in a way which incentivises as many as possible to raise their games if not across the board, then at least in areas in which they feel most comfortable.

15. In short, the structure should incorporate variable geometry. What is needed is not one but a range of core groups, grouped around the various themes illustrated at para 11 above—increased investment, greater deployability and more frequent deployment, more pooling of efforts and resources in equipment procurement and in R&T, more role specialisation and multinational formations, greater commonality in training and logistics, etc. The headline PSC group, corresponding to the Treaty's provisions, should sit at the centre of these various satellite groups, where they overlap—with its membership formally derived from a basket of the most significant criteria and commitments operated within the various sub-groups. Thus an MS such as the UK, with its outstanding record on investment and "usability" of its armed forces, could qualify for the core PSC group without having to do more on multinational formations than it wished to—but, equally, without the value of that form of collaboration being denied for those for whom it makes sense.

16. Not coincidentally, there is a parallel here with how the EDA structures its business. The Agency's Steering Board meets in different formations: most significantly, that of Defence Ministers, but also as National Armament Directors, Capability Directors, or R&T Directors. Creation of the sort of hierarchy of groupings suggested above would provide a recognised structure of core groups of properly committed MS who could work with the Agency in setting agendas and launching initiatives across the range of the EDA's responsibilities—with the PSC core group concentrating on the strategic issues typically reserved for Ministerial Steering Boards.

17. In this way, PSC could be harnessed to overcoming the current deficit of committed MS input into the Agency's business; MS would have a real motive—privileged influence over EDA business—to participate in PSC (and live up to the criteria and commitments agreed); and this important innovation in the Reform Treaty could be expected to achieve its underlying objective—contributing centrally to better defence performance in Europe.

17 December 2007

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE D)

WEDNESDAY 16 JANUARY 2008

Present	Arran, E	Palmer, L
	Brookeborough, V	Plumb, L
	Cameron of Dillington, L	Sewel, L (Chairman)
	Dundee, E	Sharp of Guildford, B
	Jones of Whitchurch, B	Ullswater, V

Memorandum by the Department for Environment, Food and Rural Affairs

Introduction

1. To meet the challenges of globalisation effectively, the European Union (EU) needs: a competitive economy with high rates of growth and employment; and to protect the environment, by ensuring sustainable use of natural resources, tackling climate change and energy security. The two are intrinsically linked and complementary. Together they present a powerful case for collective action—many environmental issues are cross-border and tackling these at EU-level can help to minimise competitive distortions:.

- The EU Single Market is the world's biggest trading block (22% of global income), and plays a leading role in the setting of global norms and standards; and the EU also represents 14% of global greenhouse gas emissions.
- By acting together in international negotiations, the EU carries a weight that is not available to any individual Member State.
- EU policies—agriculture, fisheries, energy, transport, R&D, development aid, regional development—have major impacts on the environment.
- Well designed environmental policy can contribute to EU competitiveness and the Lisbon agenda of jobs and growth through encouraging innovation, environmental technologies and services, giving the EU first mover advantage in the move towards a low-carbon world.

2. Among the many successes of the EU over the last 50 years has been the establishment of an EU-wide level-playing field, a common set of rules and a common system of accountability in policy-making. We have also increasingly seen environmental protection and sustainable development become mainstreamed as a key element of other policy areas. These advances have taken place through the development of an integrated assessment process which identifies and addresses the environmental, social and economic consequences of policies, the provision of institutional fora for debate, negotiation and consensus-building between Member States, both with respect to EU measures and in relation to international agreements. The UK has gained access to joint projects and international partnerships which have had, and will continue to have, enormous implications for the UK economy, environment and society, but which the UK could not take forward alone eg EU partnerships with India, China and Russia.

3. The EU has reinforced existing, or intended, UK measures (eg creation of an emissions trading scheme, pollution controls and protection of wild birds and habitats), enhanced and maintained benefits, and encouraged political, financial and social buy-in by other key players. This has been especially important for large-scale projects (eg the EU's Emissions Trading Scheme, ETS) and for international legislation that includes, but goes beyond, EU boundaries, such as the UN Convention on International Trade in Endangered Species (CITES).

4. The Reform Treaty (henceforth "the Treaty") will not lead to any fundamental change in the relationship between the EU and the UK. Instead, the Treaty will allow the enlarged EU to work more effectively and efficiently and settle the debate about how the EU works for the foreseeable future. This will allow us to concentrate on tackling the challenges that matter to the EU's citizens, such as climate change.

Likely Impacts

Environment

5. The Treaty accurately reflects the threats to security, prosperity and well being of Europe's citizens posed by climate change, and recognises this is a shared global challenge. It includes a specific reference to climate change: for the first time, combating climate change is recognised as an important strategic challenge and as a specific objective of EU policy (Art 174(1)). The Treaty demonstrates the EU's ambition to lead the way globally towards secure, low carbon, competitive economies.

6. Environmental legislation is already decided through co-decision (with some particular exceptions) between the Council of Ministers and the European Parliament (EP). This is broadly equivalent to the ordinary legislative procedure introduced by the Treaty, and therefore we do not believe that the legislative process by which environmental policy is decided in the EU will be noticeably affected. The Treaty confirms the wider EU objectives set out in earlier treaties such as working for the sustainable development of Europe, affording a high level protection for the environment and upholding these values internationally.

Agriculture and fisheries

7. As societies face up to today's changing world and the realities of climate change and globalisation, Europe must continue to develop its agriculture policy so that our food and farming sector becomes more competitive and more capable of delivering both economic and environmental benefits. We believe that agriculture should continue to perform a range of functions of value to society, in particular with respect to the environment, by addressing climate change, safeguarding landscapes and protecting biodiversity.

8. Agriculture and fisheries policies remain linked and the Treaty reflects this by integrating fisheries into the agriculture title. Matters previously dealt with by the Council in consultation with the EP will now be dealt with by the Council and the EP under the ordinary legislative procedure. Where the EP is currently consulted, it will now be able to table amendments which will be negotiated with the Council. This will give greater powers to the EP in some agriculture and fisheries matters. However, the ordinary legislative procedure will not extend to measures on fixing prices, levies aid, quantitative limitations (eg milk quotas) and allocation of fishing opportunities (eg total allowable catches).

9. As regards budgetary provisions, abolishing the distinction between compulsory and non-compulsory expenditure will give the EP a greater role in agreeing the agriculture budget.

10. It is too early to say how introduction of these changes will affect the process or substance of Reform of the Common Agricultural Policy (CAP), animal health and welfare or fisheries policy in the EU.

11. The EU may only act within the limits of the competences conferred on it. In relation to the conservation of marine biological resources under the Common Fisheries Policy (CFP), we consider that the Treaty provisions are intended to codify previous case law relating to competence.

Animal Welfare

12. The Protocol on the protection and welfare of animals of the Treaty of Amsterdam (1997) stated "Desiring to ensure improved protection and respect for the welfare of animals as sentient beings' and required the Community and Member States to "pay full regard to the welfare requirements of animals', with certain exemptions. The Treaty closely follows this Protocol but now more strongly emphasises the sentience of animals by using the phrase "since animals are sentient beings".

13. The range of animals covered by the Amsterdam Protocol included those used in agriculture, transport, the internal market and research. It has been extended by the Treaty to those used in fisheries, technological development and space. Whilst there is wide agreement that vertebrate animals are sentient, there is less clarity on the sentience of invertebrates. In developing the Animal Welfare Act 2006, the scope was confined to vertebrates kept by man. The Treaty sets out a wider scope which would include some invertebrates used for fisheries eg shellfish and also the catching of vertebrate fish. The implications of the scope of the Treaty will need to be considered in relation to the exemptions provided for matters such as religious rites, cultural traditions and regional heritage.

December 2007

Examination of Witness

Witness: Lord Rooker, a Member of the House, Minister for Sustainable Farming and Food, and Animal Welfare, examined.

Q1 ***Chairman:*** Thank you very much for coming. The Lisbon Treaty and its impact really on Defra's areas of responsibility and how we go forward. We set it out in terms of various different topic areas: climate change, an interesting one at question three which many of us have spent some time trying to understand what the question is, let alone the answer, then we go on to the impact of co-decision making, fisheries and animal welfare. They are the topics we see that the Reform Treaty identifies; if you think there are other things we will be pleased to hear. Do you want to say anything to begin with, Minister?

Lord Rooker: You have identified the areas okay. I have to say, just for the avoidance of any doubt and so that we do not go down that road, this Lisbon Treaty so far as Defra is concerned has virtually the same impact as would have had the constitution from our point of view, but it is limited to the extent that co-decision was there on environmental issues but not on agriculture, and I suppose that is the biggest change that we will have to be ready for, but as a department of course we have enormous experience at dealing with the EU in terms of co-decision because of the environmental issues to boot. I have to say that there is a caveat on most of the points in that it does not come in until January 2009, next year, there are elections to the European Parliament in the summer, and in terms of co-decision and the attitude obviously of the Parliament , it is pretty crucial in a way and one does not know what the make-up of the Parliament is going to be—if I can put it this way, whether the producer interests will be so dominant in the various committees. We will not know that until later.

Chairman: We might be having a discussion with you on that as we proceed. I wonder if we can kick off with climate change, Lord Cameron.

Q2 ***Lord Cameron of Dillington:*** Good morning, Minister. It seems quite strange to me to make specific reference in a constitutional treaty to climate change but the Lisbon Treaty does do this, and I just wondered what you thought the practical implications of this might be. Climate change is quite important, obviously, for our future, but it seems quite strange to include it in a constitutional treaty, and does it actually mean that the EU will be dealing with it at an international level.

Lord Rooker: Basically there is no legal difference as far as we are concerned having a reference to it in the treaty. There is the European Emissions Trading System which has had its first tranche and we are trying to get it up and running the second time round. I do not say it is a figleaf, but I suppose it would have been unusual in the sense of the treaty being put together and climate change being such a big issue where the EU is a negotiating partner. The Emissions Trading System was probably the first in the world, so there was an initiation there; there is a reference to it, but it makes no legal difference and to the best of my knowledge it does not impact, for example, on the Climate Change Bill that is going through the House at the moment. I am not saying it is just a figleaf, but it was a major treaty and climate change is for many people, and the scientists, the biggest issue in defence of the planet, technologically, culturally and scientifically as well, but it does not make any legal difference as far as we are concerned.

Q3 ***Earl of Dundee:*** I wonder if I could just ask about the recent Bali talks and the impact that these may have on proposed EU structures for the management of climate change, what thoughts do you have on that?

Lord Rooker: I have to say, being completely honest and open with you, which I always am, none. I do not know what the implications are of the climate talks for the management of climate change as far as the EU is concerned. The fact of the matter is there have got to be discussions. Bali agreed—I cannot remember where the next discussions are taking place, I think it is in Canada—to get ready in 2009 for what will be the big negotiations for post-Kyoto. In other words, Bali set the agenda and to that extent it was a success, but it has set the agenda and got a commitment to get the discussions under way, which I understand will be in 2009. That does not affect, in respect of climate change, what we are doing with the legislation that we are proposing to this Parliament at the present time.

Q4 ***Lord Plumb:*** You have been fielding questions and amendments for five days so far on climate change; how do we compare to other countries, are we ahead of some of them, are we way behind? Would it not be better perhaps to have more meetings at European level to compare notes than are taking place at the moment?

Lord Rooker: I always feel, I have to say, some kind of embarrassment when it is always claimed that we are world leaders in every walk of life, because I cannot believe that the rest of the planet is so far behind. The fact of the matter is, though, in what we are legislating for in terms of the targets in the Climate Change Bill, no one has gone that far yet. I understand that Australia and Germany have made progress, but not so far, so to that extent we are quite deliberately setting out to give a lead. Part of what we have got here for sale is the science, the intellectual property rights, different ways of doing this. Our

emissions are tiny, two per cent, so the idea that we can make an impact is not there, but we can make an impact on those generating a lot of greenhouse gases to use, for example, clean coal technology and make the best use of science in terms of the environment. We will have to lock into the European system because part of our target which is part of the discussions we are having at the present time is in terms of buying credits from outside the UK. The Emissions Trading System cuts half our emissions; that is down to individual companies and they may or may not choose to buy on the fourth or the fifth year of a budget; therefore, the Climate Change Committee is going to set the five-year budgets three budgets ahead, so 15 years, and we have a trajectory, a target as a government, but we are not in control of half the emissions because individual companies are in the Emissions Trading System. We have to have discussions on that and it is going to mean a cultural change, industrial change, but we have to make sure that it is done in such a way that it does not damage industry. That was the Stern review and the idea is to get cracking now and then by and large it will not affect the economy, or will have only a minor effect on the economy; leave it for 20 years and it will have a catastrophic effect on the economy. That was the message basically from Stern, so what we are trying to do is get cracking now.

Q5 ***Lord Plumb:*** I assume you are having fairly regular discussions with equivalent stakeholders, if you like, those who are involved or concerned with the whole emissions issue.
Lord Rooker: Yes, in this country and at European level. I never cease to be amazed, but from my own personal point of view I have to say that in ten and a half years as a minister I have only been to Brussels twice, and I am applauded for that by certain people, the fact that I have got away with it. The fact of the matter is that Defra is in Brussels every day, there is no question about that, having discussions on ranges of issues and so are ministers at the Environment Council as well. We are not doing this in isolation and we are sharing our plans and proposals with Member States because we want to make sure we get it right, but nevertheless at the moment, as you rightly said, the Climate Change Bill has only had five days here in Committee and it will leave this House, because of various commitments that I have given on behalf of the Government, in a slightly different shape. The structure is still going to be the same, but certainly we have had very good quality scrutiny and we will make several changes to it, and those are being considered at the present time within Government.
Chairman: Lady Sharp will ask the interesting question on whatever it is.
Baroness Sharp of Guildford: Minister, I do not know whether you can tell us why there has been this procedural change with respect to the nationally sensitive environmental policy issues such as town and country planning, land use and the Member States' choice of energy supply. In what sort of circumstances do you think the Council might vote unanimously in order to apply the ordinary legislative procedure or co-decision and is this more likely or less likely to be so than it was previously?

Q6 ***Chairman:*** Well done, that is very clear.
Lord Rooker: I appreciate the broad areas of discussion and in some ways coming here today is useful, but the thing is that things are going to happen in the next couple of days. For example, the EU Amendment Bill I understand will be introduced tomorrow—I am not certain whether that means introduced as in printed or introduced as in first reading, so I am not certain whether it will be physically available tomorrow or on Friday. That, of course, will give Parliament a new power of veto over the passerelle provisions in the Lisbon Treaty. There are changes—they are not new, these passerelles, which is the treaty articles, a word I had not come across before I have to say, it is a simplified procedure for amending treaty provisions, but it is not new, that is the point. A lot was built up about the treaty, mainly because of what had gone before on the attempt at the constitution, and this is not a constitution as I think has been made clear and will be made clear during the passage of the legislation. These are not new; they were first introduced, I understand, in the 1986 Single European Act, and the thing about it is that Member States will retain full control over their use because they are subject to the veto.

Q7 ***Baroness Sharp of Guildford:*** Because it has to be unanimously decided.
Lord Rooker: That is right, because it is unanimous you have effectively got the veto. You asked about the energy article which falls in there. We can only speculate, first of all, as to when they are likely to be used. The reality is in fact that each House of this Parliament has effectively got a veto on the use of the passarelles because there are changes in this legislation in so far as the national parliaments are concerned of the Member States, they will be directly contacted by the Commission for the first time with a procedure that we can come to later, if you wish. The energy article just reflects the importance of energy security in the EU. The penny has dropped over recent years that we do not want to be reliant on energy supplies from what are fairly unstable countries as North Sea oil and indeed North Sea gas starts to run out, or be more difficult to get out or less economic to get out until the price rises. There are

issues related to energy security, therefore, and of course the link that that has with climate change policy as well. We are in a different scenario, therefore, to what we were only ten years ago. The energy article is not new in this sense because the EU has got an energy policy; the new article I understand removes the need to make use of other articles to achieve the policy, so from that point of view it is a simplification process.

Q8 ***Chairman:*** Do you think or have you got any feeling that the procedural change, the whole business about the passarelles, actually amounts to anything of new significance at all?
Lord Rooker: Probably no, except that the parliaments' role—i.e. our Parliament's role—the individual parliaments of the Member States, will be enhanced, and I think that is a good thing.

Q9 ***Chairman:*** That is a very helpful comment for us. Can we move on to co-decision in agriculture and fisheries, and this is almost the guts of it, quite honestly, in terms of the impact of the treaty. The first question is how content are you with the move to co-decision? In the discussions we have had with other witnesses I will not say there have been balanced arguments, but it is fair to say there have been two arguments in opposite directions, as you can imagine. One is that bringing the Parliament in is going to cause even greater difficulty in agreeing reform because it allows for greater defence of particular producer interests and adds to the pressure for protectionism. That was one argument. The other argument is that by bringing the Parliament fully into decision-making on this rather than just voicing opinions, they will become more responsible and the Agricultural Committee will change out of recognition—I bloody well hope so—but also, rather than agriculture almost paddling its own canoe—the Parliament will view agriculture more through urban glasses in that clearly the weight of representation in the Parliament is urban rather than rural so it will speed up the argument for reform. Any ideas?
Lord Rooker: Your question is very general and I will give you a general answer. We as it were see advantages in co-decision in a way, but you are quite right that we (Defra) have experience of co-decision in environmental matters and we have examples of where it has been quite helpful to have the Parliament involved. The only one I really bring you is the one that I know most about because it occasioned one of my two visits to Brussels in the last ten and a half years which was the chemicals directive, REACH, which required me to go to Brussels and speak and listen to rapporteurs and the parliamentarians. The end product of the REACH arrangements was much better than it started off as a result of the Parliament being involved, so from that point of view we have a positive example of where the Parliament was involved from the original Commission proposal. On agriculture, again, there is that caveat about not knowing the make-up of the Parliament. It some ways it may be urban, but I have to say—and I speak almost as an Englander because I do not travel a great deal—I get the feeling that even urban members of the European Parliament, say from France, are very much with the psyche of the culture of the farming and agriculture. There is no question about it, the attitude of the government is different as well, and that applies to one or two other governments as well, maybe Spain and Portugal. So just because it may be urban I still think there will be a really big input in the issue of agriculture and food production. That is classed as the producer interest but in some ways the producer interest, it could be argued in this country, is not heard enough up the food chain; that is part of the difficulties we have got. The Parliament, as far as I am aware, will not control the overall budget, that is all fixed for a period, and in terms of the health check the health check should be through and done before this change comes in, before the election—the health check will be later this year. In terms of reform we are then talking post-2013 so there will be some time to bed in, but we have got experience of working with the members of the European Parliament and we do not foresee major difficulties. Quite clearly there is going to be more discussion and more opportunity for us in the UK to explain our reform agenda. We are confident enough in the policy for a reform agenda that makes us not worried about co-determination, and we can be quite open because of the future of the European Union in that sense on the world stage in terms of food and everything else we have got to change, there is no question about that and the penny will drop slowly, hopefully a little less slowly with Parliament involved than it would have done otherwise. We see it as being positive in a way and I only speak from our experience of dealing with the Parliament on environmental matters. I could be completely wrong, but until we know the make-up of the Parliament and the committees it is just not possible to speculate really beyond that.
Chairman: Does anybody want to take this further?

Q10 ***Lord Plumb:*** Minister, you would not expect me to entirely agree with My Lord Chairman that the role of the Agriculture Committee needs to be changed. I know from experience of the past that the controlling body in the Parliament was the Budget Committee rather than the Agriculture Committee, but of course things have changed quite dramatically since those days and the responsibilities are somewhat different. What you have said was interesting, but when we met, fairly recently, some of the members of the European Parliament and asked

the same question, they said that with extra power comes responsibility and therefore we ourselves realise that when you are in the final decision-making process you take it much more seriously than perhaps you might otherwise, where you can feel you have satisfied your own people without necessarily having to go right up to the wire to make the decision. I was interested in what you said because in that respect it may speed up the decision-making rather than the reverse, and that is really important. One accepts that the personnel in the Parliament will change after the election, as it always does, but I hope they accept that in this particular area, which is the most important move that has been made for a long time as far as the European Parliament is concerned, they do take it more responsibly and I think we have to keep pressing that point.

Lord Rooker: You are right. I was reminded yesterday, by officials far more experienced than me who know more about the Parliament, there was a time when the Parliament used the nuclear option over the make-up of the Commission and that was really serious, that was big politics, but using the option it sort of dawns on you, hang on a minute, we have got a lot of power here, we had better make sure we use this properly. From that point of view it does pass over if you engage people in sharing responsibility because they want to do what they can to get decisions right, because they will feel a degree of ownership and accountability for the decision. It is part of the process of why we are positive about the role of the Parliament; first of all we have experienced it in other areas, so it is not as though we come to this completely new as a department, we have experienced it in other areas, found it to be positive and they have got some procedures for working. Also, of course, once the penny drops within the Member States and with the stakeholders in Member States, who have not really bothered as much as maybe they should have done with members of the European Parliament on their home turf—because they thought they have no role in agriculture so we do not really need to bother, it is the Commission we need to go for—we have to get them much more involved and up to speed. I am not criticising MEPs in any way for not being involved in this, but if you have not had that responsibility, therefore it is inevitable that you concentrate on the things you are responsible for. There may be the oddball, if I can put it that way, who comes to be an MEP with massive agricultural interests, like yourself from the past, and then you see that you have not actually got a role where you can use your experience in some way. You can do it in terms of speaking, but in terms of actual decision-making you are out of play so there is a role back in this country for the stakeholders and the MEPs to be more up front and up to speed on the issues relating to agricultural food production than there ever was before, and I see that is a positive thing, not negative.

Q11 ***Lord Plumb:*** There is a feeling that this may well take away the powers and responsibilities of national parliaments.

Lord Rooker: But we have not got them now, have we, in that sense?

Q12 ***Lord Plumb:*** That is what I hoped you would say.

Lord Rooker: In that case I will shut up.

Q13 ***Viscount Ullswater:*** If I may join in at this point, we act as a scrutiny committee, with very limited powers, powers to make comments and make speeches occasionally, but will that role of scrutiny now be taken over by the European Parliament because they will actually be able to affect the end decision whereas we do not, we cannot? At the end of a process, say for the Water Directive, it is made up a lot of science and we are presented really with a fait accompli which is agreed by the Government; we can make comments about it but we cannot really alter any of the factors of it when it is brought in, even under secondary legislation or even primary legislation for that matter.

Lord Rooker: That is true, but I have to say that we are all in the same boat on this together and this is where, by involving the elected European Parliament in an area where we have not any competence—whether this House was elected or not because it applies equally to the other place—there is actually a democratic input that has been put into this policy in a way for the first time. That has got to be a good thing.

Q14 ***Viscount Ullswater:*** Where do you think that input will be, at the end of the process? I do not know what your experience was with the Chemical Directive, was it at the very end of the process that the Parliament took an interest in what had been decided by experts and officials up until that moment, or did they get involved at an earlier stage in order to formulate the policy?

Lord Rooker: With respect I cannot answer that because I only came into the REACH Directive when I came to Defra back in May 2006 and it had already been around for a considerable period of time, so I do not know. It had been batted back and forwards, to be honest, between the Commission and the Parliament and there was a fairly long delay, but there are of course these procedures for settling disputes between the Parliament and the Commission and that is a good thing. I do not know, it will depend on the issue in some ways I suppose whether the Parliament wants to get stuck in on an issue in the early days, but that is not to say there is

not a role for national parliaments, as I say, because the Lisbon Treaty and the legislation that is going to come is actually going to enhance the role of this House and the House of Commons in European legislative matters—the orange card, the yellow card—and the scrutiny arrangements for EU legislation are probably likely to change. I think they are going to change dramatically in the other place, by the way, because the present position has lasted for quite a while and I did experience it as a MAFF minister in 1997 to 1999. It is a rather strange procedure and there are going to be major changes there, so I think this could be reviewed between both Houses but the idea that we will not have a role, I do not think that bears any weight, we will have a role, there is no question about it.

Q15 ***Chairman:*** When we took evidence from Professor Helen Wallace on co-decision it was interesting, she was almost saying what you are saying. She said she believed that co-decision would increase the openness of decisions and 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 easy for national parliaments to get any handles on either." I suppose that is about right, is it not?
Lord Rooker: I suppose that given the fact I have now worked under four Ministers of Agriculture who have been responsible, as it were, for going to the Agricultural Council—Jack Cunningham, Nick Brown, David Miliband and now Hilary Benn—what the professor has said is probably true. I have not quite thought about it in that way before, but thinking about odd comments that they have made to me after they have been to Council, it is a little closed shop, so to that extent she is probably right. Therefore, there would be a bigger spotlight put on the activities side, it is only natural. Take the health check, if the timetable was different you could imagine that the Parliament's role in what was on the agenda for the health check would be much more vigorous I would imagine.

Q16 ***Viscount Brookeborough:*** Minister, what you are saying on the one hand is that with stakeholders getting a say through their MEP this is really connectivity that everybody has been striving for for years, but then you are also saying that the Lisbon Treaty is avoiding the national parliaments being bypassed so you are getting the best of both worlds.
Lord Rooker: Yes, it would appear. I suppose in the history of things in terms of the EU we are still in early days if you think about it, in the grand scale of history, we are trying to put together a democratic structure for a good number of countries and constantly moving, we are now up to 27. To modify our procedures and processes, from the early days when we sent members of the Commons and members of the Lords over there as delegates unelected, things have changed dramatically and so we have always got to look at better ways of doing it. The real big prize will be when the people in this country start to take the European Parliament elections as seriously as they take the elections to the House of Commons, because at the moment they do not.
Viscount Brookeborough: That is a long way off.
Lord Cameron of Dillington: Under the current system, no chance.

Q17 ***Chairman:*** Just to change tack for a moment, we have concentrated on co-decision but really if we look at agriculture and fisheries the power to adopt measures on fixing prices, levies and quantitative limitations, and on the allocation of fishing opportunities, that still remains solely with the Council. I assume the argument for that is really a timing one.
Lord Rooker: It is.

Q18 ***Chairman:*** Decisions have to be made and you cannot go through this sort of process—it could take a fair bit of time.
Lord Rooker: It could. It is purely timing I understand. I mean, once they have made these decisions on the total allowable catches, this is done within hours and days. With respect, one of the points you may have raised in taking proofs of evidence is the fact that co-decision may slow the process of decision-making down. We do not necessarily see it like that, but nevertheless it can be weeks and months. We do not want it to be years, but it is not days and in terms of the fishing I think people understand the nature of the beast there, it is purely that we need to take the decision and get those decisions implemented very, very quickly once they are made, within days or two or three weeks. That would not fit in with the timetable of the Parliament and the committees and the others and I think people understand that; it is purely a practical issue really.

Q19 ***Viscount Brookeborough:*** There are those people who feel that the Common Fisheries Policy has not been terribly effective, or if it has been effective it has not achieved the results that we would all have hoped that it would, and it has become very emotional now with discounts and so on. Do you actually see that the Lisbon Treaty is going to make it more effective and come through as to what most people think is a more successful policy when fishermen and scientists seem to be so far apart? Recently we have been told by the fishermen that there is an increase—even scientists agree—in the cod stocks, but of course they are all juveniles; the fishermen want to fish more of them and

straightaway we get a concession on it or whatever. Is the Lisbon Treaty going to satisfy this?
Lord Rooker: There is a real problem on fishing and there is a dispute, there is no doubt about it, between the scientists and the fishermen, and I had this when I was for a year a Northern Ireland minister. Fishing is important to those communities on that coast there, the three particular communities, but the fact of the matter is that major disputes about the amount of fish stocks and the landings, and what looks to the public as crazy—it is crazy—catching fish and having to throw them back because they are the wrong fish, it does not make sense. I do not think this is going to make a great deal of difference to marine policy. I have taken advice on that, but I do not think it will make any difference to the existing position on the regional fisheries management, Lisbon is not going to affect that.

Q20 ***Viscount Brookeborough:*** What is your personal opinion on fisheries management and the future of it? Are we going to continue arguing poles apart and continue to denude the fisheries?
Lord Rooker: I am no expert on this and I am not allowed personal opinions as a minister anyway, but the fact of the matter is I understand there are loads of fish in the sea, but we are not used to catching them, we are not used to eating them, we do not know how to cook them because we have brought up on a range of fish that we have over-fished because they were easy to get at, so it may be we will have to say there are other parts of the oceans we go to. If the fish have all gone they have all gone; this is one of the great dilemmas, is it not? I have to say, by the way, with climate change, you only need a half of a degree change in temperature in parts of the Irish Sea in particular and they have gone. Climate change and temperatures of the sea will make a dramatic difference to the fishing grounds, and therefore that is something we are going to have to cope with. We are doing it now in terms of crops that we are growing, which we were discussing last night. We are growing wine and tea in this country in a way that we have not done for many, many years—I do not think we grew tea before but we certainly grew wine—we will grow new crops because of climate change. The effect on the sea is equally dramatic and it only requires a very small change in temperature and the fish will disappear, move elsewhere. This is something that the fishermen and scientists can argue about until the cows come home, but if the fish are not there you cannot fish them.

Q21 ***Lord Cameron of Dillington:*** Can I ask a question about the exclusive competence of the EU in marine matters; is this going to affect the Marine Bill for instance that is supposed to be coming in later this year? If domestic governments are not allowed competence in this area, is this going to make a difference?
Lord Rooker: I do not think so. I have not seen a draft Marine Bill for a while, although I know it has been kicking around, and I will deal with it in due course, but the initial genesis of the Marine Bill crossed my desk when I was at ODPM back in 2004 and the issue was that around the coast—we are an island nation—there is a complete mess of jurisdictions. I was shown maps and charts about why it needed to be sorted out—there is the foreshore and once you go out within the three mile limit the jurisdictional mess is crazy and it needed sorting out. That was the genesis to start it and I was allegedly there to hold the ring between other ministers.

Q22 ***Lord Cameron of Dillington:*** But the EU seems to be taking all that competence to itself.
Lord Rooker: I do not think so; it may be in terms of the fisheries policy but the Marine Bill is not just about fisheries policies, there is a misnomer there if it is, it is not, in fact probably the majority is not about fisheries policies.

Q23 ***Chairman:*** I suppose one of the bright spots in fisheries management is the development of regional fisheries management groups, the North Sea Group sort of thing. Is the move to exclusive competence in the EU compatible with that sort of regional approach to fisheries management?
Lord Rooker: This is an area where legal issues come into play, with respect. The codification should not make any difference to the existing position on future domestic marine legislation or to regional fisheries management, but as you are probably aware there have been some judgments in the European Court of Justice: I am told *Kramer*, which is a case of 1976, and the case of the *Commission v United Kingdom* in 1979 which established that the conservation of marine biological resources under the Common Fisheries Policy was totally and irreversibly within the exclusive competence of the Community. That is simply now stated on the face of the treaty, but in other words there is no change; that was there, it was accepted from 1976 and 1979.

Q24 ***Chairman:*** It is moving from a decision of the European Court to a treaty provision.
Lord Rooker: That is right, but it has not actually changed anything in practical terms.

Q25 ***Viscount Ullswater:*** Is that going to impede any of our energy requirements in the North Sea, any of the wind farms that are planned for the North Sea, if the marine conservation areas are going to be dictated by Brussels. Will that impact on our requirement for energy or are there plans for offshore wind farms particularly?

Lord Rooker: I am not sure of the present status of that. All I can remember is that the Marine Bill and the idea of having legislation for what was going on around the coast—and do not forget some of this is devolved so when you go around the coast you are dealing with Scotland and Wales and Northern Ireland as well—for example the oil rigs were not covered by the original plan, which was why I could not get agreement around Whitehall because the then DTI did not want the oil rigs covered by the marine legislation, so I am not sure about the wind farms. The wind farms are probably closer to the coast than the oil rigs and it may be that they therefore do come within the areas, but then the wind farms are a contentious issue, as to where they are placed, both from a scientific point of view, the wind point of view and a defence point of view. I have a good answer here: this is a different form of competence to do with habitats so no. The answer is no.

Chairman: Okay, thank you. Animal welfare: Lord Plumb.

Q26 ***Lord Plumb:*** Thank you, My Lord Chairman. The animal welfare issue has been very much in the news recently—every night last week—with people concerned about the welfare of birds or beasts or even fish. The Lisbon Treaty brings the provisions of the 2006 protocol into the treaty and there is a suggestion this has to be therefore amended accordingly. If that is so, how do you think it is going to change? There are new provisions which might affect the fishing practices and of course, as you have already been saying, on the fisheries problem there are some issues that are almost impossible to determine, but this is a matter where we are concerned with the protection of our animals and this is very much an issue for us at the moment, with animal diseases spreading in a way that they have never spread before. How do you see the future here within the Lisbon Treaty? Will it affect it, will it change it and does it mean that the 2006 protocol arrangement is itself amended?

Lord Rooker: The issue relating to aspects of fish, regarding them as being sentient, of course is subject to controversy, but the fact of the matter is that we all should take the view that we share this planet with the animals and we should treat them well. On the other hand, let us be serious about this, we have animals classified as food production animals and we need them to be looked after and kept well, with both disease and other aspects of cruelty eradicated because I am not prepared to say even minimised. I did not see any of the programmes last week, I might add, but I am well aware of what was there. Parliament has just passed the Animal Welfare Act 2006 but the scope of that was quite confined in a way to vertebrates kept by man so you have issues related to fish that are vertebrates and invertebrates, but there are still borderline issues where the scientists might argue one way or the other. In terms of the octopus, lobsters and shellfish there are issues, but I have not got any evidence that we need to bring in loads of legislation as a result of this, to be honest.

Q27 ***Chairman:*** This brings in of course the sanitary measures or the arrangements that are made to protect our animals or sentient beings, as they are called here—I have doubts about that personally—but it does bring into question the whole of the wider European market and, of course, wider from there into products that are coming into the European Union. That of course occasionally brings into question food security; the position in the past has been that there is no need for food security in this country. Is that adequate?

Lord Rooker: This is something that is constantly raised but food security is raised in different ways and people mean different things by the term "food security" with respect. It does not necessarily mean food security as being completely sustainable in what we grow and what we eat here; on the other hand we are in a global market and I do not accept the argument that it does not matter whether we can grow or supply our own food. My view is that we should use as much of our land to grow as much of our food as possible, that is my view, which means I do not have a problem with extending the seasons, for example with polytunnels and things like that. However, there is the issue that people do want their non-seasonal foods every week; they cannot get them if they are grown here. To get them requires oil; the fact of the matter is that if it is imported it is coming by boat or plane and it needs oil, and that is where the security aspect comes in, literally security of supplies for transport, which is not quite the same as saying we should be self-sufficient. We do not have any targets on self-sufficiency, as I have told the Committee before, in terms of food. We are still well above 50 per cent and, by the way, in the 1920s and 1930s we were only half as self-sufficient in food in this country as we are today. It has dropped slightly in the last few years, but it is still very high on the foods we can actually grow here, but we are far more self sufficient in terms of food than we ever were in the inter-war years, there is no question about that. The security aspect, however, is transport; it is a bit like energy security really, not relying on areas that are unstable. The argument on food miles of course is another one as well because that is classed as a good and bad thing, but it is not like that because there has been enough evidence to show that products from New Zealand are less carbon-using than ones home-grown here. The distance or the food miles is not necessarily the key factor; it is a factor but it is not the key factor in measuring the carbon footprint, for example.

Q28 ***Lord Plumb:*** The population has doubled in the period of time you are talking about.
Lord Rooker: That is right; that is what is remarkable. In other words, intensive agriculture has provided this country per head with greater amounts of food than was ever the case in the past, there is no doubt about it. We have made more efficient use of our land and our resources, so we can feed twice as many people, with in effect almost twice the percentage of the food. The figures I saw recently showed that we were only about 30 per cent self-sufficient in the Thirties.

Q29 ***Viscount Brookeborough:*** But this is not going to continue, is it, we are going to go the other way?
Lord Rooker: We are still way above that, in the 60 per cent figures, it is a very small drop. The point is that we are not going to grow any more land as it were, make better use of our land, but we will have different crops. Climate change will lead to the growing of different crops, there is no question about that, and then the whole issue will be about a third of what we grow is used to feed food animals anyway and there are plenty of people who will make the case that with the carbon footprint of food animals we should all be veggies; I do not agree with that. There is nothing illegal with being a veggie, but I am not.
Chairman: I suppose we are looking forward to the Scottish pineapple.

Q30 ***Viscount Ullswater:*** Do you see a danger that Europe will impose more and more animal welfare legislation which will make us more uneconomic in the global sense that you are talking about, food from wherever it might be cheapest is the policy relatively now. Do you think that will impinge on Europe and the farming industry here?
Lord Rooker: Going back to co-determination we may get a bigger debate in the Parliament about the issue of food animals. In terms of welfare conditions, it has been the other way round in a way. We as the United Kingdom have imposed welfare conditions on our food producers, if I can put it that way, well in advance of the European Union and one of our issues has been struggling to get the EU to catch up with what we have done. It has happened with the transport of animals, it has happened with pigs and the sow stalls, it has happened with battery cages as well.

Q31 ***Lord Palmer:*** Veal crates as well.
Lord Rooker: Yes, and veal crates. In other words, we have made a rod for our own back because that was the desire of Parliament. The British public may say that in opinion polls, but they do not always say it when they come to buy the produce because it does cost a bit more, so our task at the moment is to get the EU to catch up with us so that we get a level playing field within Europe, but there is something to be said for Europe wanting to give a lead and the Parliament wants to be able to make it quite vigorous that imports into Europe have got to—this is where they will come up against the World Trade Organisation of course—have the same welfare conditions, welfare-friendly production facilities for animals that we have here. I am quite happy to argue that case, that is what should happen, but we will come up against the WTO on that. However, this is an issue that we have to be upfront about and we have to make it clear that we share the planet with the animals, we use a lot of them for food and we want them properly looked after. That should apply to everybody and you should not be able to undercut and put other people out of business by what would effectively be battery operations; it is the equivalent in other industries really.

Q32 ***Chairman:*** I have just one question on sentient beings and fish. Once you make that concession, that fish are sentient beings, it is very difficult then to justify lutting, is it not, because the death that they suffer when they are brought up through the water column is a pretty awful death.
Lord Rooker: The answer is yes, but one notes that there is scientific evidence that vertebrate fish are sentient, although it is subject to controversy, but there are indications that vertebrate fish have elements of pain mechanisms and therefore should be given the benefit of the doubt. There is an issue here, therefore, that is going to be argued about, there is no question about that.

Q33 ***Viscount Ullswater:*** What about by-catches and things like that, catching dolphin in nets, if you are going to go down an animal rights path.
Lord Rooker: They should not be catching dolphin in nets.

Q34 ***Viscount Ullswater:*** We are already down there, are we not?
Lord Rooker: They should not be doing that anyway. There are all kinds of issues related to what they should be catching and we have got a controversy now down in the Antarctic, which the number one question today will highlight, I have to say, in terms of whales.

Q35 ***Viscount Brookeborough:*** We have satellite monitoring of absolutely everything now and you can read number-plates from satellites, why can we not sort it out on the fishing?
Lord Rooker: I know, it is amazing, is it not, I asked that other day: how come we could not find the Japanese whaling fleet? I am told the Australian Government knew where they were but they would not tell anybody—no, correction, they would not tell

Greenpeace or the *Sea Shepherd* but they did know where they were from the satellites. They probably did but there is a lot more known than what we know, if you know what I mean; in terms of that fleet it was known where they were.
Viscount Brookeborough: But surely not only with them we could have technology which would enable us to see much more of what is going on on fishing boats at all times.

Q36 ***Chairman:*** We can now, it is there.
Lord Rooker: In the Irish Sea there is a box, which they are not allowed to fish in, and it is well-known that with satellite navigation that box is watched. I cannot think of the exact parameters, but I have seen it on the maps, I have seen it on the satellites when I was over there in Northern Ireland, it is very, very precise and the fishing boats are equipped with the equipment. They know whether they are in that box or not and if they are in that box they are not to be fishing, and they do get prosecuted from time to time. It may be contentious, but it is the effort to police the system. There could be arguments that some countries are more keen on policing the system than others, but there is not any argument about where the boats are these days because they are all equipped with the necessary equipment.

Q37 ***Earl of Arran:*** Moving right away from areas of fish and animals to the very important matters of culture, heritage and religion. In your evidence you noted that the implication and the scope of the treaty will need to be considered in relation to the general exemptions provided for matters such as religious sites, cultural traditions and religious heritage. Could you expand and perhaps clarify further on that what you mean?
Lord Rooker: This is where I feel personally uncomfortable. The answer is simple really, we allow animals to be killed before they are stunned for religious purposes; if it was up to me it would not happen, both for the Muslim community and the Jewish community, I would not allow it. That is not up to me and it is accepted for cultural reasons. That is what it refers to, it is as simple as that really. I just get distressed at the fact that some of this meat, I am convinced, finds its way onto ordinary supermarket shelves and is not classified as such, and if people knew the way it was slaughtered they would not buy it, but they are not allowed to know that, so this is another issue.

Q38 ***Viscount Ullswater:*** Is halal butchery done throughout the EU?
Lord Rooker: Yes, this is not a UK issue.

Q39 ***Earl of Arran:*** Surely it is very easy because traceability is so important in all food, even at supermarket level. Surely it would be very easy to include method of slaughter.
Lord Rooker: But that is not the issue though because the labelling process is governed from the EU and that is not allowed apparently on the labelling. If you want religiously slaughtered meat, by and large people know where to go, they know which butchers to go to. In my former constituency there was a halal butcher so people knew what they were getting; it is when there is an excess of supply it gets sold on to the market. I am not saying there is anything wrong with the meat, it is perfectly safe to eat, no one is making any comment other than I have a personal objection, which I am entitled to have because it is a free country, and it would always be a free vote issue, but I personally would not buy such meat if I knew it had been slaughtered without pre-stunning. I have been in enough abattoirs in my time to see the process and I am more than convinced that we run a humane slaughterhouse system in this country; I just do not think that religious slaughter is humane, but that is an exemption that is granted under law and that is one that we all have to live with. That is what is referred to in the memo.

Q40 ***Earl of Arran:*** There is not likely to be any change.
Lord Rooker: As I say, if I had anything to do with it there would be, but I have not. The Government has no proposals.

Q41 ***Chairman:*** At the moment.
Lord Rooker: The Government has no proposals to make a change to this.

Q42 ***Earl of Arran:*** You can always resign on this issue.
Lord Rooker: It is a free vote issue and therefore it is something for, let us say, members of Parliament to raise at some time.

Q43 ***Chairman:*** Is there anything that anybody wants to develop? That is it, Minister, unless you have got any final words of comfort for us.
Lord Rooker: No.
Chairman: Thank you very much again, Minister.

Written Evidence

Memorandum by Compassion in World Farming

The following aspects of the EU Reform Treaty have the potential to have a beneficial impact on standards of animal welfare:

Article on Welfare

In 1997, a Protocol on the Protection and Welfare of Animals was annexed by the Treaty of Amsterdam to the Treaty establishing the European Community (the EC Treaty). The Protocol is legally binding as the EC Treaty stipulates that "The Protocols annexed to this Treaty. . . shall form an integral part thereof".

The Protocol is important in two respects: (i) it recognises animals as "sentient beings": its preamble states "Desiring to ensure improved protection and respect for the welfare of animals as sentient beings"; and (ii) it requires the Community and its Member States, in formulating and implementing the Community's policies on agriculture, transport, the internal market and research, to pay "full regard to the welfare requirements of animals" (emphasis added).

The Reform Treaty has incorporated the provisions of the Protocol into the body of the Treaty as Article 13 of the Treaty on the Functioning of the European Union. Compassion in World Farming (CIWF) welcomes this. We believe that the inclusion of these matters in the main text of the Treaty will give greater weight to the recognition of animals as sentient beings and to the requirement for the Community and the Member States to pay full regard to the welfare requirements of animals in certain specified policy areas.

European Parliament will have Co-decision Powers on Agriculture and the Budget for Agriculture

The European Parliament has for many years tended to be sympathetic on animal welfare. Its influence on the welfare of farm animals has, however, been limited because under the present Treaty the Parliament only gives an Opinion on agricultural matters (referred to as the consultation procedure).

Under the Reform Treaty, however, most decisions on agricultural matters will be taken under the co-decision procedure which gives the Parliament almost equal powers with the Council. In addition, the Parliament will play an equal part with the Council in determining the budget for agriculture.

CIWF welcomes the increased powers that the European Parliament will have as regards agriculture and the budget for agriculture as the Parliament has traditionally been more helpful on animal welfare than the Council.

December 2007

Memorandum by Mr Stavros Dimas, Member of the European Commission

Thank you for giving me the opportunity to submit our observations to the House of Lords Select Committee on the European Union, sub-committee D (Environment and Agriculture) with regard to its inquiry into the agriculture, fisheries and environment aspects of the Lisbon Treaty. Written evidence is submitted with regard to the following questions:

What is the likely impact on the EU, and in particular the UK, of the changes introduced by the Reform Treaty to existing Treaty provisions on environment?

The Lisbon Treaty provides for limited changes to the Treaty on European Union (the EU Treaty) and the Treaty establishing the European Community (the EC Treaty) with regard to the existing provisions on the environment. The Lisbon Treaty adds a number of new objectives to the EU Treaty including a reference to the Union contributing to "the sustainable development of the Earth" in its relations with the wider world. This new objective provides support for the amendment of Article 174 of the EC Treaty. Here the Lisbon Treaty adds the words "and in particular combating climate change" outlining that Community environmental policy shall contribute, amongst other things, to the pursuit of the objective of "promoting

measures at international level to deal with regional or worldwide environmental problems". Given the challenge which the EU is facing in tackling climate change, the addition of a specific reference to the need to combat climate change in the objectives of the environment chapter of the Treaty is welcome. 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.

The Lisbon Treaty also introduces an amendment of Article 175(2) of the EC Treaty which currently provides that certain areas are excluded from the normal legislative procedure applicable for EC environmental legislation. Where legislative proposals in the field of environment are likely for example to affect town and country planning, land use or Member State's choice between different energy sources, such proposals can only be adopted by the Council acting unanimously.

The Lisbon Treaty provides for an additional mechanism whereby the Council can decide, again by unanimous vote, with regard to a specific proposal from the Commission in one of the areas mentioned in Article 175(2) of the EC Treaty and after consulting the other institutions that the normal legislative procedure (ie qualified majority voting) should apply. This is a welcome amendment providing a possibility for a more inclusive decision making process whilst maintaining the control of the Council in these nationally sensitive areas.

Aside from the issues set out above, what other important issues arise as a result of the changes introduced by the Reform Treaty in relation to the environment?

The Lisbon Treaty adds several new legal bases to the existing EC Treaty. Two are worth mentioning here. The first is in the introduction of a new article on energy into the EC Treaty, namely Article 176a). One of the aims of this new article is to "promote energy efficiency and energy saving and the development of new and renewable forms of energy". This new article is welcome given that action to promote energy efficiency and renewable energies is crucial for the EU's efforts to combat climate change. Under this article, the Council may decide on proposals by qualified majority.

Another new legal basis added by the Lisbon Treaty of relevance to the environmental field is the new article on civil protection, namely Article 176c. This new article recognises the need for the EU to encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural and man-made disasters. The actions to be proposed here support, coordinate and supplement the action by Member States.

It should be noted that, whilst the Lisbon Treaty adds these two new legal bases to the EC Treaty, action has already been taken at Community level with regard to energy policy as well as in the civil protection sphere, in some cases solely on the basis of Article 308 of the EC Treaty. What the Lisbon Treaty does here is to provide 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.

I trust these comments are of assistance.

17 December 2007

Memorandum by Food Security

1. The likely impact of the changes is that history will repeat itself, in that England will be treated unfairly and there will continue to be an unlevel playing field. The end of this road is not only ruin for English farmers, but ruin for the whole of the UK.

2. Our ability to organize our own affairs with regard to energy and water supplies also appears to be endangered by the possible switch to co-decision on these and other matters. This is not an insignificant consideration—these are life and death issues.

The explicit taking over by the Union of "the conservation of marine biological resources under the Common Fisheries Policy" is extremely worrying. Do we really wish to risk the lives of our 60 million people? Have we not got the courage to protect our food supply?

The amended budgetary provisions appear to reflect the reluctance of the EU to spend money of food production. The UK Government's own stance on this is alarming—Lord Davies of Oldham said in the House of Lords on 23 May 2007, "We are continuing to bear down as best we can on what is still an inflated budget spent on agriculture".

The conferring on the Union of exclusive and shared competencies is of great concern. So many decisions taken by the EU and accepted by the UK (eg Nitrates Directive, and now cost-sharing with regard to animal diseases) are gradually eroding our ability to feed ourselves, and therefore to defend ourselves. We have noted that, under questioning by the EFRA Committee on 10 December, Lord Rooker admitted that this cost-sharing concept is an EU regulation. We wonder why this Government has led us, up until now, to believe that Defra simply considered it a good idea.

We are concerned that the establishment of an internal market and the inclusion of a solidarity clause will disadvantage Britain and may lead to the seizure of our assets by Europe (eg our armed forces and our natural resources, including our oil).

Does any sober-thinking person really want the consequences of Article 2? Will the democratically elected Government of the UK allow our sovereignty to be eroded yet further? Where are the politicians with the courage to stand against disaster?

15 December 2007

Memorandum by the National Farmers' Union

1. The National Farmers' Union (NFU) represents approximately 55,000 farmers and growers in England and Wales. European policies and most notably the Common Agricultural Policy (CAP) shape the environment within which our members operate. As such, EU developments are of the utmost interest for our organisation.

2. The EU Reform Treaty signed in Lisbon in December 2007 amends some of the existing framework within which EU policies are proposed, adopted and implemented while confirming and reinforcing other aspects of the institutional and policy set-up. The ultimate objective of the Reform Treaty is to make an EU of (at least) 27 members work more effectively—an objective that becomes particularly relevant in an area, like agriculture, given the ongoing process of policy reform and recent market developments and structural changes.

3. It is important to highlight that, despite the many changes embedded in the Reform Treaty, both the objectives of the CAP and the rationale for a common agricultural policy remain unchanged. The objectives of the CAP, laid down in Article 33 (ex Article 39), have not been modified and remain:

(a) To increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour.

(b) Thus to ensure a fair standard of living for the agricultural community . . ..

(c) To stabilise markets.

(d) To ensure availability of supplies.

(e) To ensure that supplies reach consumers at reasonable prices.

The NFU believes that these objectives are neither irrelevant nor mistaken and especially once other article provisions (such as the incorporation of environmental protection into all European policies, via the Single European Act, 1987 in Article 174 (ex 130(r)) are taken into consideration.[1] It is the NFU's belief that these objectives are particularly relevant given tighter agricultural markets (as a result of demographic pressures and supply constraints) and expected increased market volatility.

4. Similarly, the Reform Treaty confirms (see Article 32 (ex 38) of the Treaty) the very reason for the existence of a common agricultural policy: *The common market shall extend to agriculture and trade in agricultural products*. In the 1950s agriculture was subsidised in all countries of Western Europe (including of course the UK) but by different methods and to differing degrees. In order to allow free trade within the common market without distortion, there had to be a common policy. This justification remains to this day.

5. Moreover, since environmental protection became a European issue, it can be argued that there is a further need to ensure that the environmental constraints on agriculture (most notably through cross-compliance requirements) are also broadly equal throughout Europe, in order to avoid competitive distortions.

6. The Reform Treaty further strengthens the role of the European Parliament in farm policy by increasing the role of the European Parliament in the design of agricultural policy (through the extension of the co-decision procedure beyond agricultural issues related to human health or the environment) and in its budgetary procedure (where in addition to approval by the EU Council, assent from the European Parliament will also be

[1] The Amsterdam Treaty (1997) reaffirmed the EU commitment to sustainable development and to high levels of environmental protection—the environment must be integrated into the definition and the implementation of all the Union's other economic and social policies, with a view to promoting sustainable development.

required in order to adopt the EU agricultural budget). The NFU welcomes the extent to which these measures address the criticisms of "democratic deficit" levied against the European Union. However, the increased role of the European Parliament can also have other less positive and/or unpredictable results. In this respect, it should be noted that the increased role of the European Parliament is expected to result in a longer decision-making process and that its effect on the content of policies is more difficult to ascertain—while some claim that a legislative voice for agriculture would potentially tailor Parliament's dossiers to suit more closely the needs of farmers, others believe that another set of opinions into the melting pot of the decision-making process will water down action and increase political compromises.

7. The NFU believes that the additional stability provided by a permanent President of the European Council will provide the continuity to the policy agenda necessary to tackle some of the challenges facing the EU in the years ahead, including CAP reform, globalisation and climate change.

8. The new "double qualified majority voting', to apply from 2014 to agricultural policy, will take better account of population, a move that will give more clout to countries such as Germany and the UK. Although this alteration to the balance of power within the Council might result in a more pro-active policy agenda, when analysed in conjunction with the increased role of the European Parliament highlighted above, the results are less certain. The NFU believes that the new system is simpler than the "triple majority" voting system of the Nice Treaty, fairer and more transparent.

9. The Reform Treaty gives national parliaments a voice in making European laws for the first time and result in the review (if one third of the national parliaments considers the proposal in break of the subsidiarity principle) or rejection of the proposals (if a majority of national parliaments object). This provision is expected to have a clear impact on all areas of joint competence with relevance for the farming sector (including environmental policy, energy policy or competition policy), ensuring that the Community only acts in areas where it adds value.

10. Article 136a (and the associated amendments to Articles 138 and 139) are intended to enhance labour negotiations in the framework of tripartite dialogues (involving employer delegates, employee representatives and government or government appointed representatives). Although welcoming the principle, the NFU believes that the impact on labour relations in the agricultural sector (and most notably on the operation of the Agricultural Wages Board) is, especially in light of the UK-specific protocol, at most, marginal.

11. By introducing the possibility of citizens" initiatives, the Reform Treaty further reinforces the link between EU citizens and the policy-making process. Given that any policy proposal initiated by a citizens" initiative will be subject to the same internal debate and scrutiny as any initiative by the EU Commission, the move is welcomed by the NFU.

12. The Reform Treaty reduces the size of the Commission after 2014, limiting the number of Commissioners to 2/3 of member states. Assuming that the position of Commissioner for Agriculture and Rural Development remains unchanged, the NFU believes that a reduction in the number of Commissioners can contribute to the coherency of policies.

December 2007

Memorandum by the Royal Society for the Prevention of Cruelty to Animals

1. Firstly, the RSPCA would like to thank the Committee for the opportunity to comment on these important issues.

2. The RSPCA is the world's oldest and largest animal welfare organisation and takes a keen interest in, and is actively involved in, European Union issues relating to animal welfare. We are Members of the Eurogroup for Animals, based in Brussels, which represents major animal welfare charities and organisations across the EU.

3. We believe that the EU has a key role to play in improving welfare standards for animals, and has done so in recent years. The 2012 ban on battery cages across Europe is one of the best examples, along with the recently introduced ban on the import of wild-caught birds.

4. Generally, we believe the proposals in the new Treaty will improve the workings of the European Union, and make it more democratically accountable. We would support the changes set out below.

5. Co-decision

6. The Society welcomes the proposals under the Treaty for the European Parliament to have co-decision as the default decision making process for agricultural and fisheries policies.

7. This 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.

8. Article 13 TFEU

9. We welcome the proposals to recognise animals as sentient beings and the reference to animal welfare in this section of the Treaty. The recognition of animals as sentient beings was stated in the Amsterdam Treaty and we are pleased to see it supported again in the new Treaty. We believe that it is important than animal welfare issues are considered fully when formulating and implementing any policy in the EU and in individual Member States, a position echoed by EU citizens, as evidenced by the results of the Eurobarometer survey of public views on animal welfare.*

10. Budgetary Provisions

11. We support the proposals to abolish the distinction between the non-compulsory and compulsory expenditure and to give the decisions on these issues to both the Parliament and the Council. Again, this is a sensible move to make decision making more open and accountable.

*Eurobarometer surveys on animal welfare, 2005 and 2007:

http://ec.europa.eu/food/animal/welfare/survey/sp—barometer—fa—en.pdf

http://ec.europa.eu/food/animal/welfare/euro—barometer25—en.pdf

11 December 2007

Memorandum by the Scottish Fishermen's Federation

1. Thank you for the opportunity to submit written evidence on the fisheries aspects of the EU Reform Treaty.

2. The Scottish Fishermen's Federation is the primary trade association representing the catching sector of the industry in Scotland, with constituent membership all round the coast and including the Northern Isles.

3. The publication of the Reform Treaty coincided with the beginning of the busiest section of the fisheries year. Regrettably, this has limited greatly the effort available to consult industry members and reach conclusions on its likely effects.

4. Regarding the most apparent change—the alteration of decision-making to the co-decision procedure—it is simply not clear to us whether this will be an advantage or hindrance. The balance of benefit will lie between: more thorough consideration with an extended chance to challenge, modify or support proposed measures; extension of the timescale for introduction of measures beyond perhaps that which is desirable for the timely management of fisheries. In any case, the change will place a greatly increased requirement for lobbying activity upon a relatively small industry. A notable exception is fixing and allocation of fishing opportunities; this will be necessary to achieve the required timescale for decision-making.

5. Regarding the exclusive competences of the Union on the conservation of marine biological resources under the CFP, what this will mean in practical terms is again not clear. It does however sound worrying.

6. The wording of Article 13 TFEU on the Protection and Welfare of Animals, which now includes fisheries, is quite definitely worrying. To what degree fish are sentient beings may be a matter for debate; however, the potential for advanced silliness in policy making is clearly apparent. Inclusion of fisheries is unfortunate.

14 December 2007

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE E)

WEDNESDAY 14 NOVEMBER 2007

Present		
	Bowness, L	O'Cathain, B
	Burnett, L	Rosser, L
	Lester of Herne Hill, L	Tomlinson, L
	Mance, L (Chairman)	Wright of Richmond, L
	Norton of Louth, L	

Examination of Witness

Witness: Professor Jo Shaw, University of Edinburgh, examined.

Q1 ***Chairman:*** Good afternoon, Professor Shaw. I am going to start by asking you to identify yourself. We know obviously that you are from Edinburgh University and that you have come here as an expert in the field, and I believe you want to make a brief opening statement, so you are on air and we look forward to hearing what you have to say.

Professor Shaw: Thank you very much. I am very grateful to the Committee for the opportunity to come down and talk to you today and I hope we can have an interesting discussion. My name is Jo Shaw and I hold the Salvesen Chair at the University of Edinburgh in the School of Law and I am one of the co-directors of the Europa Institute in that University. We are going to be talking about freedom, security and justice in the context of the Reform Treaty, and I am sure there is a great deal of expertise about that already around this table. The one point I would make as a preliminary is that in terms of substantive changes to the existing EC and EU Treaties—albeit that the former will be renamed after the Reform Treaty comes into force—freedom, security and justice effectively provides the most substantial substantive and procedural changes. There are some very important shifts in terms of the decision-making process, not just moving from unanimity to qualified majority voting but moving from very much an emphasis on an inter-governmental process, which is still present in the Third Pillar, right through to qualified majority voting and co-decision with the European Parliament. So one should not in any sense underestimate the importance of these changes. In terms of substantive powers, we can look at those in more detail in due course. I think that these are sharpened up and perhaps in some areas broadened in scope in some ways, and I think the sharpening up process is probably an advantage in terms of making it clearer where the EU will have competence in relation to freedom, security and justice issues and where it will not.

Q2 ***Chairman:*** Thank you very much. In that answer you have touched on the collapse of the First and Second Pillars. What were the considerations or problems which have motivated these changes?

Professor Shaw: I think it is helpful to think back a little and to think about the canvassing of the case for reform that was undertaken in the context of the European Convention on the Future of Europe. Working Group 10, which was chaired by former Irish Prime Minister John Bruton, looked at the topic of freedom, security and justice and it has identified freedom, security and justice as areas that really matter, where delivery can make a difference in relation to what citizens' expectations are and also as to whether or not one ends up with this disastrous expectations/capability gap. The primary objective of the report was to propose a legal scenario under which all of the matters related to freedom, security and justice would be brought under a single legal framework, removing such problems as uncertainties about the legal basis, which were very much pointed up by the Council Legal Service, which was a strong adviser to that particular working group, and also the necessity for sometimes having two instruments to cover different parts of the same matter. Furthermore, the absence of qualified majority voting in the field was broadly seen by many as a major obstacle to effective decision-making. That of course had already been recognised when the Area of Freedom, Security and Justice was reformed for the first time in the Treaty of Amsterdam when substantive matters were incorporated into the EC Treaty—"communitarised" to use the jargon—and then with a series of transitional provisions, in most cases, moved with few exceptions into the arena of qualified majority voting and co-decision with the European Parliament. In common with the other areas that the Convention worked with, of course, national parliamentary input was also a leitmotif for the Working Group on Freedom, Security and

Justice. The proposal was to fully communitarise freedom, security and justice whilst preserving the opt-outs for the UK, Ireland and Denmark. These came under some fire in some of the documentation that came before the Convention, notably in the Commission's Penelope Report, but the political reality was that they were always going to be retained, and of course they are retained and indeed enlarged, as we have seen from the June 2007 IGC mandate onwards, to reflect political realities. There will be a fundamental shift in relation to freedom, security and justice decision-making. It will affect the UK, but the UK will obviously have some control and some possibility, as we know—likelihood perhaps in some areas—to opt out from the effects of that shift.

Q3 ***Chairman:*** Can we just focus then on the opt-outs which, as you say, have been applied and I think you also said slightly extended.
Professor Shaw: Yes.

Q4 ***Chairman:*** And perhaps you could help also as to how they operate generally in relation to the areas of freedom, security and justice which are covered now by the proposed new Article 69 onwards. That is border checks, asylum, immigration, civil co-operation, criminal co-operation and the police. Could you then touch on the matter of opt-outs in relation to the Protocol on the Schengen acquis and how they relate. If you could just start with the first general point about freedom, security and justice.
Professor Shaw: In order to understand what they will be, we have to understand what they already are. This is a difficult moment to contemplate that because this is precisely a moment of uncertainty in relation to the scope of those opt-in possibilities, because the UK, having sought to opt in to a couple of Schengen development measures, has then found itself unable to do so, and has challenged that refusal before the Court of Justice in two cases. You have to bear in mind—and we can look at the detail of that later—that this is precisely quite a difficult moment because nobody is wholly certain what the effects of the opt-out procedures are, not in the sense of the extent to which the UK can opt out, but in the sense of the extent to which it may be free to opt back in, or the extent to which it may be locked out from opting back in, because this falls within the area of Schengen, and we are uncertain what it means to be "developing Schengen".

Q5 ***Chairman:*** That is a problem which only applies in relation to the area of Schengen though?
Professor Shaw: It does, but the Reform Treaty, opt-out does potentially cover some measures that the UK wants to opt in to otherwise it would not be looking at that. There are a number of Third Pillar areas as well where the UK may be locked out from opting in, in the future. For example, the UK has not been locked out from the Treaty of Prüm implementing measures, but it could have been locked out of those had the other Member States decided they wanted to do that. Do you want me to talk about the effects of the opt-outs?
Lord Burnett: Could we have rather more detail about that because it is interesting to me?

Q6 ***Chairman:*** I was going to say can we just break it down a little. In relation to civil matters there is no such problem. In relation to some criminal matters might there be?
Professor Shaw: About being locked out?

Q7 ***Chairman:*** In principle we can decide whether or not to opt in. In relation to criminal matters, is there a problem?
Professor Shaw: When the Schengen Acquis was brought into the framework of the European Union, it was partially allocated to the First Pillar and partially allocated to the Third Pillar, with the default position that it was allocated to the Third Pillar. That means that there is a range of areas which are currently covered by the UK's Schengen opt-out but which are not currently covered by the UK's Title IV opt-out, but will be covered in the same way. What I am saying is that effectively any problem of overlap, underlap or conflict between the Schengen Acquis opt-out or opt-in and the Title IV opt-out or opt-in will then be magnified into the Third Pillar as the Third Pillar comes in to the general opt-out as well. That problem is not going to go away, in fact it is going to be extended in scope, because of those measures coming in to the first pillar. At the moment there is no interplay between the two because the UK is putatively in all Third Pillar measures, but of course they are decided by unanimity. That is, unless it is a Schengen development measure, in which case it can only opt in if the other Member States agree. Obviously that is a relatively unusual development but there are quite a lot of areas relating to the management of data, relating to hot pursuit, and certain aspects of criminal process which were effectively covered by the Schengen Acquis which, once you move to a single title rather than two separate ones, means that that interplay between the two opt-outs comes into play in relation to Third Pillar measures, just in the same way that it is now proving to be a bit of a problem in relation to First Pillar measures.

Q8 ***Lord Lester of Herne Hill:*** Just in order to get my mind focused, could you give one example? Would the Schengen Information System be a good example of what you are describing or not, just to make

something concrete so we can see how it is going to play? A practical example would be helpful.
Professor Shaw: Yes. I think the Treaty of Prüm is a good example of that.

Q9 ***Lord Lester of Herne Hill:*** The what, sorry?
Professor Shaw: The Treaty of Prüm.

Q10 ***Chairman:*** It is data, is it not?
Professor Shaw: Well, yes, it is looking at each other's DNA databases and that type of thing to see whether or not there are hits. This might have been an example, although in fact the UK has participated in it fully and it has not been locked out. Some of these areas which are potentially—

Q11 ***Lord Burnett:*** Could I just interrupt, should we be locked out or is it voluntary that we are allowed to be locked into this DNA data?
Professor Shaw: No, we cannot be locked into it.

Q12 ***Lord Burnett:*** Not locked into it; allowed into it, I mean.
Professor Shaw: In what sense do you mean allowed into it?
Lord Burnett: Why are we allowed to go into it if we are out of it? I am just trying to pierce it, if you can make it clear to me and the Committee.

Q13 ***Lord Wright of Richmond:*** Lord Chairman, I think I can offer an example which my previous EU Sub-Committee has just been examining and that is Frontex.
Professor Shaw: Yes.

Q14 ***Lord Wright of Richmond:*** We are in fact not full members of Frontex because we cannot be and we do not have a vote on the management board, but we actually have a member on the management board and we take part in Frontex operations to a greater extent than many of the Schengen countries.
Professor Shaw: And we would like to have participated in the Regulation that established Frontex. But those are both First Pillar measures already so in that sense that tension is already there. I think what the Committee is asking me about is whether or not that tension is going to be magnified or developed and in what areas might it be magnified and developed as we move into having not two separate Titles under two separate Treaties but a single Title, albeit with gradations of different types of decision-making and different involvements of the UK. I am trying to make a very simple point and probably making a meal of it. Under the existing Title IV provisions of the EC Treaty there is a tension that is currently before the Court of Justice between the two Protocols—between the Schengen Protocol and the Title IV Protocol—so one that allows the UK to opt in if it is allowed to opt in and the other one which allows it putatively to opt out, and assumes it will opt out unless it chooses to opt in again, and it cannot be prevented from opting in.

Q15 ***Chairman:*** Can I ask if the United Kingdom position prevailed in those two cases before the European Court, contrary to the Advocate General's opinions, would the problem disappear?
Professor Shaw: Would the problem disappear? Well, it will create more margin of manoeuvre for the UK Government.

Q16 ***Chairman:*** Because the United Kingdom stance there is that under Article 5 of the Schengen Protocol and/or under Title IV opt-in we have a right to opt in on anything except basic Schengen Acquis, and if that prevailed presumably there would not be nearly as great a problem?
Professor Shaw: That is why I said this is a very difficult time precisely to ask that question.

Q17 ***Chairman:*** You are assuming we are going to lose it?
Professor Shaw: I am not assuming we are going to lose it but I think we have to work with that being more than a 50 per cent probability, bearing in mind the fact that the Court more often than not follows the Advocate General. Not that the Advocate General's analysis is particularly convincing in this area, but there is not a huge basis on which to build our legal arguments in this area.

Q18 ***Chairman:*** And assuming that we do lose it and the Court follows the Advocate General, then the problem is one of the inconvenience of not being able to opt in rather than a problem of being forced into things that we do not wish to do?
Professor Shaw: I am absolutely not suggesting that the UK in any circumstances in these areas is likely to be locked into things that it does not want to be involved in. Even with the qualified majority voting stepping in, we have seen with the civil justice co-operation that there appears to be more of a tendency for the UK to opt out at the very beginning, rather than opting in, where qualified majority voting has become the baseline, because there is a little bit more of a danger that a political process might develop and a political set of circumstances might develop in which it then might become difficult for the UK to step out. It may certainly become very politically embarrassing for the UK to step out, and I think that a judgment has been made in Government circles to try to avoid that as far as possible. Wherever there is an opt-in, and the UK has opted in to start with, but then for one reason or another a decision cannot be made, then the possibility for the other Member States to assume that they can proceed on their own

is built into the Protocol, and this would be the case. Where that operates with majority voting and where it operates with unanimous voting are two very different political processes where very different judgments have to be made by those who are involved in the negotiating. What little bit of evidence we have—and it is just a tiny bit of evidence which stems from civil justice co-operation—seems to be that the cautious approach is not to get involved at the very beginning. Unless the UK is absolutely convinced that a measure is in the national interest, then the Government is probably going to opt out from the very beginning, but that is a different type of problem.

Q19 ***Lord Lester of Herne Hill:*** My Lord Chairman said that it is a matter of inconvenience. Can you think of an example where it is not just a matter of inconvenience that we would not have a right to opt in but there is some important public interest at stake beyond mere inconvenience?
Professor Shaw: Presumably DNA databases would be such a case.

Q20 ***Lord Lester of Herne Hill:*** I am still looking for a factual example so that I can see where the shoe would rub in that case.
Professor Shaw: This is not a live example because, as I understand it, it has not been an issue that has been threatened with the UK, but DNA databases, with the Treaty of Prüm, would be one possible example where it would not be merely an inconvenience to be locked out from a DNA database because it was seen as being a Schengen development under what is now the Third Pillar, but I think it would be rather more significant in its impact on the UK's capacity to be a good European citizen in relation to the fighting of serious crime. Whatever else one says about the UK as a member of the European Union, it is quite a good citizen in relation to the crime aspect of it.

Q21 ***Lord Lester of Herne Hill:*** Presumably it goes beyond that. If that were a real example it would not be just being a good citizen, would it, it would be that we would need the co-operation of being within the system in order for ourselves to be able to combat serious crime by use of DNA on a European basis, or have I got it wrong?
Professor Shaw: I think it is a slightly artificial example because there is no way that the rest of the Member States would not want to have access to the rather substantial British DNA database. In that sense it is an artificial example but it is not an artificial example in the sense that whatever measure (which will be concluded in the next few months formally speaking; it has been politically agreed) is there to implement the Treaty of Prüm to bring it into the Union system, having been originally agreed as what some people sometimes call Schengen III, it will probably then have to be reformulated to make it suitable for being a First Pillar measure. If at that point it is done in a way that the UK were to deem unsuitable, then all of the mechanisms for the UK to opt out would in fact kick in, even in relation to such a measure that is already agreed under the Third Pillar and would by then already be in force. You can imagine that a situation would arise, for example, if you had to redesign the database so that it did not access directly into the UK, where there could be costs. This is the example that is given in a couple of places in the Protocols where the UK, in return for securing its opt-outs, has been put in a position where the other Member States have said, "in that case you must bear the costs of perhaps redesigning a computer system in order to be a computer system for 26 Member States rather than a computer system for 27 Member States".

Q22 ***Chairman:*** Can I follow that up by asking whether you can help us as to why it is that this is such an issue in relation to the two cases where there is actual litigation? I think they concern the European Agency for the Management of Operational Co-operation at the External Borders and Standards for Security Features and Biometrics in Passports and Travel Documents. Why was it that there was not agreement at the European level for the United Kingdom to participate? Why is it that the United Kingdom is having to try to establish through the Court a right to participate?
Professor Shaw: I really do not know. Maybe somebody around this table does know. I do not know to what extent at least some of it may have been about establishing a principle. As somebody said already, we participate in a very large measure in relation to Frontex, albeit not directly through the Regulation, but non-participation in the Passport Regulation is hard to justify.

Q23 ***Chairman:*** Can I move on to the next question and that is related to your comments in your opening remarks about the sharpening up of substantive powers. Looking at the different language of the existing Treaties and of the proposed formulation of Title IV, or whatever it is now called, the chapters on border checks, civil co-operation, criminal co-operation and police co-operation, how far do you detect any substantive change, in particular any extension, of the competence of the Union?
Professor Shaw: The first point to make is that this is an area where the Reform Treaty does very substantially resemble the Constitutional Treaty. The basic substantive lines are exactly the same as they were in the Constitutional Treaty. There have been a few bits and pieces in addition to that negotiated, but they are more about process than

about substance. It is a debate sometimes in political circles as to whether or not in effect moving from unanimous voting to qualified majority voting—as it is called in the press "losing the veto"—effectively changes the substance of competence, because it creates a different political dynamic about decision-making, but in the area of criminal justice co-operation that is substantially tempered by the existence of the emergency brakes, which we will come on to discuss in the future.

Q24 ***Chairman:*** What about the scope of the subject matter, which I think I was primarily directing my question to, because clearly the language is considerably more specific in certain areas?

Professor Shaw: I think that is a huge advantage. For example, in relation to criminal procedure there is a specific reference to cross-border matters, and I think that will come as a relief to Member States who have been negotiating the suspects' rights Framework decision and have been trying to argue—and I am not saying whether I agree with this argument or not—that across the board the question of minimum suspects' rights is an ECHR matter, it is not primarily an EU matter, and that any EU measures should be basically limited to cross-border issues, that is matters where there has been an EAW for example, or in the future possibly the Evidence Warrant, has been used. As you say, it is more specific, so what you will get is 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 of what will be the Treaty on the Functioning of the European Union so you will be able to identify whether it concerns mutual admissibility of evidence, the rights of individuals, the rights of victims, and so on and so forth, and you will be able to clarify that. There is a provision also in Article 69f relating to the issues that were raised in the *Environmental Crimes* and the *Ship-source pollution* cases as to whether or not there is a competence relating to the adoption of criminal sanctions in areas where the EU has otherwise adopted harmonisation measures, which has been the subject of at least one or two reports in either this Committee or one of its sister Committees, and that certainly clarifies the issue.

Q25 ***Chairman:*** That is only in relation to areas of particularly serious crime with a cross-border dimension, is it?

Professor Shaw: No, that is in relation to the areas where the EU has otherwise engaged in harmonisation activities where it would be possible to attach a criminal sanction. The environment is a particular area where that might apply but there are also areas such as customs and so on and so forth where there may be other possibilities for introducing such criminal sanctions. In relation to the harmonisation of substantive criminal law there is this list of 12 different types of areas of crime—terrorism, trafficking in human beings and so on and so forth. Obviously the same problem arises with that list which is that there are not common definitions across the 27 Member States as to what these terms mean, so there remain some uncertainties there. There may be some areas where there is agreement about having harmonisation measures in that area where there is still some uncertainty. There is no uniform, unified, universal concept of computer crime or indeed organised crime. Those are the sorts of problems at the margins that may still occur.

Q26 ***Chairman:*** You mentioned a moment ago the *Environmental Pollution* case and the *Ship Pollution* case where the Community was held by the Court to have jurisdiction under the Community Treaty to require criminal offences to exist under national law and it was not a matter which had to be dealt with under the Third Pillar. Is that jurisdiction—the ship pollution and the environmental pollution jurisdiction—now subsumed within this new Article 69f(2) or does it continue to exist under the other provisions of the Treaty?

Professor Shaw: That is an interesting question but I assume that it is intended to be subsumed and encompassed by Article 69(f)(2) but I suppose there may be circumstances in the future where it might be argued that there is a case for doing that. I think the intention is to subsume and encompass and replace that implicit jurisdiction with an explicit jurisdiction which makes it absolutely clear that the same legislative procedure applies in relation to the adoption of criminal sanctions as would apply to the underlying harmonisation measures, so if it was the general legislative procedure, it would be the general legislative procedure, and if it was the special legislative procedure, then it would be that. Whether the UK can opt out of such measures is not explicit as far as I can see. It is hard to see how the UK can opt out of that since it could not opt out from the underlying harmonisation measures.

Q27 ***Chairman:*** If it is subsumed within Article 69f(2) then it comes within Title IV and we do have a right not to opt in, but if it remains freestanding under the other provisions then we are bound. The difference is of course that 69f(2) now entitles the Community, or the Union as it will be, to establish minimum rules with regard not only to the definition of criminal offences but also sanctions which the European Court has just ruled out in the *Ship Pollution* case.

Professor Shaw: Yes and it is also explicitly not just confined to environmental matters. I guess that point is going to be litigated. I cannot imagine that point

will not be litigated in the next ten years or so; I am sure it will be.

Q28 ***Lord Lester of Herne Hill:*** I have been very preoccupied in cases involving the European Court of Human Rights with the weakness of a common law system in a Council of Europe with 27 Member States of which only four are common law systems and where therefore there are only four common law judges, as it were. When one comes to the area of criminal justice, especially the procedural aspects of it, we are in much the same position within the European Union as only Ireland, Cyprus, Malta and ourselves. I sound like a narrow-minded nationalist in asking this question and I do not mean to be at all, but is it not very important that we should take full advantage of the opt-out in this area in order to preserve the integrity of the common law system where it is necessary to do so?
Professor Shaw: Or indeed consult with Scottish partners as to whether or not the particular mixed jurisdiction system in Scotland ought to be preserved.

Q29 ***Lord Lester of Herne Hill:*** I apologise for not having thought of that!
Professor Shaw: That is all right. I am not a Scots lawyer, I just happen to be a resident in Scotland at the present time. That is a matter of case-by-case judgment. What has happened is that a judgment has been made in a political context to shift from viewing the emergency brake as sufficient in 2004, to viewing an opt-in process as essential in 2007, in order presumably, as you say, to preserve that, and one also hopes in order to make it possible to engage in the appropriate type of balance between the different criminal procedures that exist within the boundaries of the United Kingdom. Whether it has in fact been done in order to enhance the claim that this is a different treaty to the Constitutional Treaty, and therefore should not be susceptible to referendum, is an alternative view of that particular decision. I guess that you would probably prefer to think that it was there because the UK had certain specific national interests in that particular area of the law which it needed to protect through an opt-in system.

Q30 ***Lord Lester of Herne Hill:*** I am not so interested in my question in the motives behind it as in the effects of what we have. Speaking for myself, because I am not a Cartesian but a typical English pragmatist, the more examples one can have of how this works, like the criminal justice one, I think the easier it is to see whether the Reform Treaty is going to strike a fair balance between national interests and European interests, as it were. That is why I keep asking this tedious question about examples because I think with examples we can then explain to ourselves and to the wider world what this means in practice. That seems to me quite a good example.
Professor Shaw: You have to bear in mind that I am not a criminal lawyer, I am an EU lawyer—

Q31 ***Lord Lester of Herne Hill:*** Nor am I so you are all right!
Professor Shaw: But you are a human rights lawyer of great distinction and I am not a human rights lawyer either. I am an EU lawyer so I am looking at it from the point of view of how the system works, or may work in the future, so my grasp upon examples drawn from the interstices of criminal procedure is relatively weak. However, if you look at some of the examples of things that are currently under review such as the Evidence Warrant, such as the rights of the victim—

Q32 ***Lord Lester of Herne Hill:*** European supervision orders.
Professor Shaw: Yes, supervision orders. You have got the pre-trial detention measure and you have also got the rights of suspects in criminal trials. These are obviously cases where the UK should look at it on a case-by-case basis, where it needs to balance the integrity of the system that it is looking at versus whether not participating in the pre-trial detention measure may result in more UK citizens being detained abroad for longer and more overcrowding of British prisons with non-national prisoners, than is in the public interest. It has to balance those two things against each other and it has to try to work out whether or not the different conceptions of probation or supervision can in any way be melded together on the basis of a mutual recognition decision. I am sure that criminal lawyers will point out specific points of clear friction between the systems which makes it more difficult to make it work but, on the other hand it is not only about that, it is also about whether or not a country does feel fully engaged in a mutual recognition process. The Court tends to airily assume that mutual recognition and mutual trust are actually operating rather than starting that we are in a painful process of moving towards that situation. I think that it is a separate question to the question as to whether there is unassailable friction between the different types of systems that exist.

Q33 ***Lord Burnett:*** I noticed your speculation about we have opted in and opted out and there could be a cynical, or otherwise, view that that was just to construct a difference between the Constitution and this Treaty, but is it worth, Lord Chairman, asking the witness whether she is prepared to tell us in her view whether we are stronger if we opt in than if we opt out and which is the better position for us to be in?
Professor Shaw: I shall never be in the position of taking the decision, thank goodness.

Chairman: Can we just clarify, were you asking whether an opt-in is better than an opt-out?

Q34 ***Lord Burnett:*** Yes, that is basically it.
Professor Shaw: In looking at it objectively, I am not a huge fan of having more and more variegated, concentric, overlapping, underlapping circles of Member States involved in different measures. It does not seem to me that that is necessarily in the interests of transparency and maximum public understanding and participation in the process of the European Union. However, one has to recognise that there is a fair degree of this already going on with Schengen and the world as we know it has not come to an end; we just have to organise our airports in order to make it happen. The major disadvantage of opting out obviously is not participating in the shaping of the measure, and if the shaping of the measure impacts in a major way upon the efficacy of either detection procedures or intelligence processes in relation to the commission of serious crime, then it may well not be in the UK's interests to be opting out both because it is not eventually involved in the systems in question but also because it was not involved in the decision-making process. This is not a system where the UK is basically allowed to come to the table and help design a measure and then say, "Okay chaps, you carry on on your own. We have got this type of thing but we do not want to participate but we want to be in some way connected with it or we possibly want to agree a separate international treaty to participate in it in some way." You are in or you are out.

Q35 ***Chairman:*** As we have seen with the several occasions where we have not opted in in relation to civil proposals, you do get the opportunity to participate in negotiations with a view to arriving at some final draft which you can opt in to. It is a pragmatic question whether that is a good way of proceeding.
Professor Shaw: But I do not think the UK has a right to be allowed to do that.
Baroness O'Cathain: Why not?

Q36 ***Chairman:*** I am not sure about that, I think it may do under Title IV. Perhaps we do not have a right; we can check that.
Professor Shaw: What you are probably talking about is a gentlemen's agreement to allow the UK to participate and maybe people also felt that there was some sort of gentlemen's agreement in relation to things like the Frontex Regulation and the Passport Regulation, I do not know, that may be true, but there may be limitations to the formal processes.

Q37 ***Chairman:*** I thought that Article 4 of the Protocol on Title IV actually says at any time after the adoption of a measure by the Council pursuant to Title IV you can notify the intention that you wish to accept.
Professor Shaw: Yes, but that is not necessarily on the basis of having participated in the negotiating process. That is on the basis of "take it or leave it".

Q38 ***Chairman:*** Can we perhaps go back to the question you touched on of emergency brakes. We have got in general a right not to opt in and then we also see references to an emergency brake which is available to any country. Can you help us, firstly, are there limitations on the emergency brake system and, secondly, is it any use to the UK if the UK has chosen to opt in to a measure in the first place? Can it then apply an emergency brake?
Professor Shaw: I do not see why it cannot. I do not see that there is any reason why the UK would be in any different position to any other Member State. There is nothing I can see in the legal documentation that indicates that the UK would not be in that position. That does not provide a total security of outcome for the UK. You have to go back to thinking about what an emergency brake is. It is almost like "back to the future" in the sense of these emergency brakes were used extensively throughout the early part of the European Community's history from the time of the Luxembourg Accords onwards until the Single European Act. It was not a legal change that broke it. It was, as much as anything, a political change and a self-denying ordinance on the part of the Member States in the operation of the Council of Ministers not to insist that decision-making that was legally supposed to be by qualified majority voting should be taken by consensus. Consequently we are into this scenario of not knowing exactly how it is going to work. 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.

Q39 ***Chairman:*** I suppose you could get situations where after opting in the measure actually changed in radical senses which became objectionable?
Professor Shaw: Presumably behind the surface of the procedures, if the UK opts in on good faith on one basis and it gets to a certain point in the procedure, then I suspect that the other Member States will not object to the UK opting out at that point, as opposed to pulling the emergency brake, but this type of thing is not precisely revealed in the text that we can see before us. Presumably there will be people in the Council of Ministers' Secretariat with an awfully

long memory, stretching back even before the Single European Act, who can tell us how things worked under the Luxembourg Accords and suggest how it might be applied in the future. The Luxembourg Accords were never operated in conjunction with a opt-out so, whatever else we can learn from it, it cannot tell us precisely the question you are asking, which is the interface between that and an opt-out. There will have to be either formal or informal procedures behind the face of the opt-out in order for that to operate in practice. You would have thought that there would be steps of engagement at the point at which, as you say, if the measure changes dramatically so that then the UK can say, "Hang on a minute, we did not opt into that measure, we opted in to something else." It is not just a question of applying the emergency brake, this is that we are almost back to zero with the legislative process and therefore we should have that opportunity to opt out.

Q40 ***Chairman:*** The emergency brake would be the only formal right you would have at that stage.
Professor Shaw: One is making it up as one goes along to some extent, but you could imagine that the emergency brake is the thing that is pulled almost at the point of decision. I cannot imagine that the UK would be so hamstrung in its negotiation to let itself get to that point with a measure that has changed in real essence from the beginning. These things will be subject to a whole series of stages of negotiation.

Q41 ***Chairman:*** Can you help us as to your perception of the utilisation of the emergency brake. Is it going to be something which is on that basis very rare and, if so, is one possible consequence, which is enhanced co-operation, likely also to be something that is very rare?
Professor Shaw: Yes, unless we are talking about a massive increase in the rate of decision-making --- and in fact the rate of decision-making in the third pillar has dropped off quite considerably. It accelerated after 9/11 up to about 2004 and then it has dropped off really dramatically since then as the lower cherries were picked off the tree at an early stage and now we are trying to reach for some of the higher cherries, which present some particularly intractable questions when you start to think about harmonising them. You cannot imagine that there will be a huge number of legislative processes in any given year that would reach that so by definition I think we would be talking about a rare procedure. If you combine that with the fact that I do not suppose the heads of state and government want to get involved in discussing this level of detail particularly regularly, so the pressure will be on to solve these things somewhere other than in a summit where they much prefer to concentrate on the broader picture rather than on these sorts of questions. 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. I can imagine it will be fairly rare. There have been some problematic changes of government, let us put it that way, in some of the Member States over the years which might lead to them applying the emergency brake. That does not necessarily mean they would not lose political capital by doing that—I think they would lose political capital—but I do not see the UK and Ireland applying it because they would not want to lose the political capital. I think they are far too sophisticated in their European negotiations to have to do that. Without pointing the finger too specifically, you can imagine a number of Member States who might find themselves in that situation because of changes of government which bring perhaps clumsy operators to the table.

Q42 ***Chairman:*** Shall we move on and the next question which we asked you to consider related to Article 69h and Eurojust. Can you help us as to how you think that may develop and operate under the new proposals?
Professor Shaw: It is by no means a bad thing to have it a little bit more formally constitutionalised than it is at present but it does not strike me that the drivers of change in relation to the role of Eurojust will be structured within the context of the Treaty reform process. I think those drivers of change are present anyway in the negotiations in the way in which practical judicial co-operation is happening. I understand that the Committee probably already knows about a recent Communication from the Commission on reform of Eurojust and I honestly think that the drivers of change are outside the Treaty reform process. I do not think there is much more I could helpfully say about it.

Q43 ***Chairman:*** Basically it does not include a role in respect of the conduct of litigation. It includes a role in relation to the initiation of criminal investigations and proposals to national criminal prosecuting authorities and investigating authorities.
Professor Shaw: There is an awful lot of interesting things one could say about Eurojust but I do not think that the Reform Treaty makes it more likely that it is going to be reformed than otherwise.

Q44 ***Chairman:*** What about the next provision which is for a European Public Prosecutor to combat crimes affecting the financial interests of the Union, building upon Eurojust?
Professor Shaw: This is a very, very difficult provision. It has been around as a proposal for a while since the negotiations of the Treaty of Nice. It is clearly something that the Commission feels quite strongly about in relation to wanting to get a proposal onto

the table and there are some powerful Member States—France and Germany in particular—who expressed their support for the idea, and doubtless insisted on its inclusion. It is interesting to see they have included an accelerator clause, which has been included here to deem the consent to enhanced co-operation to be present in circumstances where there is a lack of unanimity in the Council. If there are nine Member States who want to establish a European Public Prosecutor, and with that accelerator in place, then it does not seem inconceivable that such an office may be established for that group of nine or more Member States, I assume not including the United Kingdom.

Q45 ***Chairman:*** How would that work? The Public Prosecutor would not have jurisdiction to prosecute in the United Kingdom but presumably he would have the jurisdiction to prosecute in one of the nine Member States, including jurisdiction to prosecute a United Kingdom citizen, and then am I right that the European Arrest Warrant could be used to take the United Kingdom citizen from this country to the foreign state to be prosecuted by the European Public Prosecutor?
Professor Shaw: Is there anything more abhorrent in that possibility given that it happens anyway?

Q46 ***Chairman:*** I am not suggesting it is abhorrent; I am just analysing how it would work.
Professor Shaw: It would indeed work like that, and assuming that the Evidence Warrant comes in in due course, recourse will be had to other mechanisms in order to facilitate a cross-border prosecution process.

Q47 ***Lord Lester of Herne Hill:*** Would this include, say, someone who is corrupt and is affecting the financial interests of the Union through serious corruption involving the Commission for example or some other EU institution? Could this person be subject to prosecution by a European Public Prosecutor under Article 69i, if it came to pass?
Professor Shaw: At the present time they could only be prosecuted under one of the national criminal systems because there is no equivalent to a federal criminal jurisdiction in the EU, as I am sure you know, so for someone whose criminal acts involve crimes against the European Union—and there are manifold measures in that respect trying to establish a set of common standards across the Member States and trying to raise standards in some cases where there were problems—the process would take place entirely within one of the national systems at the moment, with recourse to mutual legal assistance of one type of another, whether under EU law or general public international law, to bring the relevant aspects of the case to bear.

Q48 ***Lord Lester of Herne Hill:*** Would this new office make it more probable that one would move in the direction of more effective sanctions in that kind of case?
Professor Shaw: That is undoubtedly the motivation of the Commission, that it believes that there is a problem that could be solved in that way. Some people have suggested that because there have been considerable developments—and as I say this is an idea that dates from the late 1990s—that many of the micro steps (I suppose with the Arrest Warrant being a bit of a macro step) have removed some of the problems that this was supposed to be the solution to. So you may say that this is a solution now looking for problems that do not exist as much. I am not qualified to judge really whether that is the case but if you look at the European criminal process world as it is in 2007, if you will, it is not the same as it was in 1999, so you would want to have a thorough impact assessment to judge whether or not this was truly going to make a difference. The problem of opting out is not necessarily that it would make enforcement less effective either against British citizens committing crimes that impact in other Member States or foreign nationals committing crimes in the UK. I have no doubt that the UK criminal process can deal with those matters and that UK criminal law sets some standards in relation to conduct that will catch most of the problematic behaviours. However, the problem might be that somehow this was seen as a signal or a symbol that the UK did not take it as seriously because it was not prepared to participate in the European Public Prosecutor. I do not think that would be the reality but it might be treated as a symbol, in which case it could be used politically in order to make arguments that I think could be dangerous for the EU overall.

Q49 ***Baroness O'Cathain:*** Is this solely against financial matters, because that is the way it reads? It encompasses offences against the Union's financial interests so it would not be anything else, it would not be anything to do with terrorism or any of these things?
Professor Shaw: You mean somebody blowing up the Berlaymont?

Q50 ***Baroness O'Cathain:*** I suppose that would be against the financial interests of the Union.
Professor Shaw: But I imagine that the Belgians would probably do the business and so on and so forth. For a lot of the terrorism offences there would be extra-territorial jurisdiction in many of the Member States anyway.
Chairman: There is the provision under paragraph 4 for the European Council to adopt a decision amending paragraph 1 to extend the powers of the

European Public Prosecutor's office to include serious crime having a cross-border dimension.

Q51 ***Baroness O'Cathain:*** I see.
Professor Shaw: That is what you would regard as an accelerator clause.
Chairman: It would have to be done unanimously.

Q52 ***Lord Bowness:*** You have touched on my question and presumably paragraph 4 could extend his jurisdiction beyond the nine Members; is that right?
Professor Shaw: No, it would be a substantive increase in his jurisdiction to cover crimes other than crimes against the financial interests of the Community. You could imagine perhaps some fit between that and the list of crimes in Article 69f, paragraph 1, the areas of particularly serious crime with a cross-border dimension where there is already an explicit power to harmonise the substantive elements of those crimes, and you could imagine there might be a fit between paragraph 1 of 69f and paragraph 4 of 69i.

Q53 ***Baroness O'Cathain:*** So would the European Public Prosecutor's Office be in charge of those as well—terrorism, trafficking of human beings, sexual exploitation, et cetera?
Professor Shaw: Presumably it would not if it were initially set up—and it does say at the same time or subsequently the European Council can decide unanimously to extend it also to those crimes, but that is the European Council and I presume that is the European Council of all 27 Member States, that is, not just the ones who are participating in the Public Prosecutor's Office, because otherwise that would be delegating to nine Member States, or perhaps a few more, the power to amend the Treaties and that cannot be right. That is obviously a simplified amendment procedure for the Treaties but it would be all 27 Member States, including those who did not want a Public Prosecutor's Office or did not want to participate in a Public Prosecutor's Office for a variety of reasons.

Q54 ***Chairman:*** Can we move on because time is doing so. You touched to some extent on the question of border checks, asylum and immigration. Can you help us as to any further aspects of the changes that would be worked in that respect and whether there is any extension of the competence of the Union?
Professor Shaw: I think what you find with the provisions on border checks, asylum and immigration, as it is now titled in Chapter II, is some attempt to import some of the language of the Tampere programme from 1999 which, as I am sure you know, set the initial frame for development of the post-Amsterdam Title IV. So you see some of the language about fair treatment of third country nationals, which is a good example. That is language that is not in the existing Title IV in terms of a broad objective for the European Union. In terms of references to a uniform status of asylum and uniform status of subsidiary protection, those are specifications of competence which came in the Tampere programme and have been *de facto* part of the structure of decision-making, if you will, and the objectives that the Member States have been working towards, in terms of asylum. So that is one of the main changes that has occurred. The other change I would draw your attention to is this whereas under the existing Treaties there is a provision in the citizenship provisions saying that the EU citizenship provisions cannot be used for measures in relation to passports and identity cards, so consequently that has been done in the context of external frontiers, but it has not had an explicit competence, which is very unsatisfactory, and I would be the first to say that the security standards in passports regulation rests on a rather slim legal base. I think from a legal point of view it is helpful that in wherever it is—

Q55 ***Chairman:*** You have got that put on a proper legal base.
Professor Shaw: Yes Article 69(3): "If action by the Union should prove necessary to facilitate the exercise of the right referred to in . . . "—that is the right of free movement basically—"and if the Treaties have not provided the necessary powers . . . " there are special legislative procedures—that means unanimously adopted provisions—"concerning passports, identity cards and so on." So I think that is a proper legal basis which is important. Other than that I do not see any major changes. Perhaps I am being naive but, as with the ones in the Third Pillar, there has not been any legal basis litigation so far for us really to peer into our navels and scratch our heads about the precise scope of the powers. The Amsterdam provisions were not particularly well drafted and were not particularly clearly drafted and these are considerably clearer. One other thing is different, because there were still residual provisions under Title IV that were not subject to qualified majority voting, specifically relating to legal migration that is, the regulation of regular migration. These will now be essentially subject to qualified majority voting, subject to a saving provision that was added in the Constitutional Treaty; paragraph 5 of Article 69b, states that this does not affect the right of the Member States to determine the volumes of admissions of third country nationals. That was included at the behest of Germany in the Constitutional Treaty and it has been carried across into the Reform Treaty unchanged.

Q56 ***Chairman:*** If I can at that point ask you about 69c where it says: "The policies of the Union set out in this Chapter"—that is the chapter dealing with border checks, asylum and immigration—"and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including financial implications . . . " I do not know whether that was put in to please the Government of Poland or what precisely it had in mind and perhaps you can give us—

Professor Shaw: Possibly the Government of Malta actually rather than the Government of Poland.

Q57 ***Chairman:*** The idea no doubt is that everyone takes his or her fair share of the load.

Professor Shaw: Indeed, and there are more specific measures as well about sudden influxes of nationals of third countries in paragraph 3. You should not look at Article 69c in isolation. You could say that one of the changes from the Constitutional Treaty to the Reform Treaty has been a taking out of most of the symbolism and so on and so forth. But the solidarity provisions, which actually pervade right through the whole Treaty—they are there in the external action, they are there in the Treaty on the European Union, they are in lots of different places that I could bore you by pointing you to them. It was very much a leitmotif of the Constitutional Treaty. Jörg Monar, who is much more of a distinguished expert in these areas than I am, commented about the Constitutional Treaty—and I wrote this down—that the inclusion of the solidarity principle no less than four times in one guise or another in this Title here implied the inclusion of what he called "an important new integration principle for the EU". So Monar obviously thought these provisions were quite important.

Q58 ***Chairman:*** This is an aspiration though really, is it not?

Professor Shaw: I would say they are aspirational. They obviously cannot have any direct teeth.

Q59 ***Chairman:*** They are aspirations of the legislators.

Professor Shaw: Yes.

Q60 ***Lord Tomlinson:*** If I can pursue one small point. If we pick up this solidarity principle in Article 69c where it particularly refers to the fair share of responsibility, including its financial implications, how do you see its relationship to Article 69i where with the establishment of the European Public Prosecutor's Office it might be established with only nine Members, where does the balance of financial responsibility there lie? Is it with the Union and the Member States, as it says earlier, or is it with the nine?

Professor Shaw: You would have to look elsewhere for the answer to that because there is an answer to that in the Treaty, but whether I can find it without spending a little bit of time flicking through, I do not know. The basic principle of enhanced co-operation is that the financial burden of enhanced co-operation falls upon the Member States who choose to enhancively co-operate, and it says so explicitly in the old enhanced co-operation provisions in the existing Treaties, and I could not for a moment tell you which Article it is in just off the top of my head.

Q61 ***Chairman:*** Do not worry, it sounds logical and fair.

Professor Shaw: It is there somewhere and you can dig it out.

Q62 ***Chairman:*** Can we move on to a different subject and that is Article 10 of the Protocol on Transitional Provisions, which excludes the jurisdiction of the European Court of Justice and the Commission's powers to monitor the implementation and act in respect of the existing Title VI measures—that is police and judicial co-operation measures—for five years. Perhaps you could just help us as to how that is going to work. I am not sure what the purpose of this provision is. I do not know whether you can help us on that. Secondly, is the purpose potentially undermined if the existing measures in question are converted into new measures, as they did with some of the old civil conventions by converting them into regulations?

Professor Shaw: I am sure that is what will happen, there will be a great deal of work, but I would have thought there will probably be some reconsidering of some of the existing provisions. Some of those that were negotiated extremely fast may need a little bit of work on them to improve the drafting, particularly if after five years they could have direct effect. That is the issue about which all of this is silent. It says that the legal effects remain the same in Article 9, which is all that there was in the original Constitutional Treaty. That was Article 443(8), paragraph 3 of the Constitutional Treaty.

Q63 ***Chairman:*** Until they are repealed, annulled or amended. If they are re-enacted --

Professor Shaw: Maybe if you leave them as framework decisions then they cannot possibly have direct effect in the future, but that is the one point about which both the Constitutional Treaty was notably silent and this Protocol is notably silent. I suspect that there will be work on the existing measures to make them suitable for enforcement by national courts because whatever it says about legal effects I think that some national courts will come under a lot of pressure in any event. They already have the *Pupino* principle about faithful

interpretation which the House of Lords has adopted as well, but regardless of what it says in the old Treaty about framework decisions not having direct effect, there will be a lot of pressure on national courts, and it will be better not to just let that happen and cause problems but to renegotiate and formulate provisions in a way that will make it easier for the national judges who are going to bear the brunt of some of this.

Q64 ***Chairman:*** So the five years may not be five years in fact?
Professor Shaw: No exactly, but you are going to get a lot of grey periods of having to negotiate. Presumably any new measure will still have to have an implementation period because in many cases it will require primary legislation at the national level and you cannot just magic parliamentary time out of nowhere.

Q65 ***Lord Bowness:*** A lot of people ask questions about this Protocol. Could I just ask the witness to say whether she is satisfied that it does in fact mean what it says about the Commission and the powers of the Court of Justice. In subsection 1 of Article 10 it is saying that the powers of the Court of Justice will remain the same as in the version of the Treaty in force before this one comes into force.
Professor Shaw: I have no reason to believe that it does not mean what it says so that will take us through to 2014.

Q66 ***Lord Bowness:*** It is helpful to hear you say it.
Professor Shaw: I have no reason to believe it does not but you obviously fear there may be forces at work which I cannot discern.
Lord Bowness: I do not fear anything; I just think the answer is useful for the record because it is a matter which is the subject of a lot of discussion and conjecture.

Q67 ***Chairman:*** Can we move on to another area where the European Court of Justice will no doubt come in for questioning and that is the Charter of Fundamental Rights. Can you help us as to the impact which Article 6 of the Treaty on the European Union will, in your view, have, which says the Union recognises the rights, freedoms and principles set out in the Charter and so on.
Professor Shaw: I am sure as a lawyer you will be struck by the curiosity of the drafting, giving what apparently is a declaratory instrument the same legal value as treaties formulated by sovereign states. It is undoubtedly a rather curious way of formulating it, but I am sure it is there for political reasons rather than anything else. 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. The Court of Justice is perfectly capable of doing rather dramatic things with fundamental rights without the Charter, as witness the *Mangold* case, which I am sure Lord Lester is very familiar with. I am distinctly sceptical as to whether or not it is going to make some dramatic difference to have the Charter there or not. I think there are all sorts of comments about but it is unfortunate not to have a statement in the Treaties from a political point of view.

Q68 ***Chairman:*** Unfortunate not to have a statement to what effect?
Professor Shaw: I personally would have appended it as a Protocol if I had been doing the job, because it clearly would make no difference but at least it then would be part of the documentation that people like us would be flicking through trying to find answers to things. I do not quite understand why they have not at least included it as a Protocol. By not including it as a Protocol you presumably have frozen it in time forever or you have abdicated the responsibility of the Member State to change it to the institutions, because after all at the moment it is a document of the institutions even though the Member States were intimately involved in negotiating it, as some people around this table doubtless know. It is a very curious formulation from a lawyer's point of view.

Q69 ***Chairman:*** I think it is a formulation which applies the rights and freedoms as in the Charter as at 12 December 2007. Can you just help me on the Protocol relating to the application of the Charter to Poland and the UK. It starts off with a ringing statement whereas Article 6 requires the Charter to be applied and interpreted by the courts in Poland and the UK strictly in accordance with the explanations referred to in that article, and then it goes on with the qualifications which we are familiar with, I suspect. Have you got a clear picture in your mind as to how those statements inter-relate? When would the courts in the United Kingdom be applying and interpreting the Charter as opposed to their domestic law?
Professor Shaw: As things stand?

Q70 ***Chairman:*** In the recital it assumes that the courts of the UK would be applying the Charter whereas the actual articles in the Protocol suggest that what counts is national law.
Professor Shaw: If you look at it as an issue of Community law, which is presumably the primary obligation upon national courts in this context, there is no necessary reason in most cases why the national court would look at the Charter other than because what the Charter along with its explanations provides is a handy ready-reckoner to work out, if you will, what is the state of the general principle of

Community law, which is what applies currently in the UK anyway, and will continue to apply, as is clear from where it states that the UK is still bound. The last recital reaffirms that this Protocol is without prejudice to other obligations. They are the other obligations of the UK. The Civic Platform Government in Poland has indicated that it does not want to participate in this platform so we are just talking about the UK as a stand-out on this one. I do not think it is easy to reconcile this but I thought the most revealing information that I have come across about this was the exchange of letters between the Foreign Secretary and the House of Commons Select Committee on the European Union where David Miliband essentially said this is not an opt-out; this is merely a clarification of the law as we understand it to be, so I might venture the view that this is a Declaration masquerading as a Protocol.

Q71 ***Chairman:*** Quite what it is declaring may be open to discussion.
Professor Shaw: Yes because it is explicitly not changing the status quo of Community law.

Q72 ***Lord Lester of Herne Hill:*** It seems to me that much of this is driven politically but not legally, and what I mean by legally is by the needs of judges, lawyers or citizens. I wanted just to give one example. Suppose I were arguing before Lord Mance in an actual case here, as an advocate I would show him Lord Diplock in a case called *Garland*, who years ago said look at the Treaties by which the UK is bound as a presumption that our legislation, for example, conforms to the Treaty. I would say to Lord Mance in his judicial capacity that we are parties to the International Covenant on Civil and Political Rights as well as the European Convention. Indeed I might refer to other provisions as an aid to interpretation. He might put my argument in the waste paper basket or he might not, but for years and years British courts have been looking at Treaties that have not been incorporated. A good example recently was the Roma rights case where they looked at everything, including obviously customary international law. Therefore in the question you have been asked about these explanations relating to the Charter of Fundamental Rights, looking at the Charter itself, I have to say it seems to me that what it is doing in a gingerly way is to give effect to the Treaty obligations that bind all Member State. What it tends to do is to refer to European sources although much of it comes for example from the International Covenant on Civil and Political Rights. This is becoming a long question but it will get somewhere, I promise you.
Professor Shaw: There are some very illuminating statements in there.

Q73 ***Lord Lester of Herne Hill:*** It has got some interesting things in it about the principle of the right to good administration, for example, and that kind of thing but it seems to me that the politicians, from whatever party who seem terrified that this Charter is somehow going to change things in terms of what national courts do by a process of interpretation or what the ECJ does are not understanding the process that the Luxembourg Court and the national courts have been indulging in for years and years, because when they have to make difficult policy choices about constitutional questions, they need all the help they can get, and they look at Treaty obligations as part of that. Talking as lawyers and not as politicians I do not understand as lawyers why this makes much difference to existing practice nationally or at European level.
Professor Shaw: It does not. I absolutely agree with you, I personally do not think it does. As I say, my belief is that it is a Declaration masquerading as a Protocol. Furthermore, I find it quite an extraordinary thing to create a Protocol signed by the UK's 26 partners which instructs British courts what they are supposed to do. I do find that that expresses a degree of distrust of the judiciary which I find absolutely staggering.

Q74 ***Lord Lester of Herne Hill:*** I totally agree, if I am allowed to express a view. We can only speculate about what Lord Mance would do in a hypothetical future case, but I have no doubt about his predecessors because again and again in these established cases they have done so. It goes back to *Waddington v Miah,* 1974, Lord Reid, about retrospective legislation and the unincorporated European Convention and the International Covenant, where he said there must be a presumption that we do not have retrospective legislation based on these unincorporated international Treaties.
Professor Shaw: I agree with you entirely. As I say, I think this displays an extraordinary distrust of the justiciary.

Q75 ***Chairman:*** Let us hope that that does not happen in practice.
Professor Shaw: I was not suggesting that it does.

Q76 ***Lord Bowness:*** Not wishing to reopen this discussion but again, in a sense, for the record, it is all very well the witness saying it is a Declaration masquerading as a Protocol but a number of people would say therefore it has not got legal effect. You are not saying that, are you?
Professor Shaw: I am not saying it does not have legal effect but I would doubt what legal effect it would have. Unless the UK Government does something staggering and changes the core provisions of the European Communities Act in order to give effect to

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it—and I do not think that is going to happen—then I do not know, unless you get into some sort of story about implied repeal if this is included in a future European Communities Act, but doubtless lawyers will derive some fun with it.

Q77 ***Chairman:*** Can we move on to the last subject and that is Article 33 of the TEU, the amendment of the freedom, security and justice provisions. How do they operate? Am I right in understanding that they are basically consensual and either consensus or unanimity is required?
Professor Shaw: As I am sure you have seen, there are a number of different possibilities. There is the standard amendment procedure which is exactly the same as it is at the moment, plus it has the rider about four-fifths of the Member State agreeing and what happens if you cannot get complete agreement. Then you have the simplified revision procedures, and I have never been wholly convinced by the effectiveness of simplified revision procedures of this nature because although it does not involve a convening formally of an Inter-Governmental Conference I am not sure how much difference it makes in practice. It may give the European institutions something more of an insight into what is going on, but on the other hand they are relatively involved at the moment. It is still subject to unanimous decision and it is still subject to ratification in accordance with whatever the constitutional requirements are. Perhaps paragraph 7 of Article 33 raises some more novel questions which we have not tried in the past which would be a *passerelle* for decision-making processes based on prior notification to national parliaments, allowing national parliaments in advance to hold up a red card and say go away. Maybe that might be something that might pose some novel challenge to national parliaments in terms of inter-parliamentary co-operation. That is an interesting one. Whether each national parliament is going to insist on acting entirely autonomously or whether they are going to be captured by party interests in the normal way, I do not know, but that is an interesting one giving national parliaments a prior notification opportunity and the capacity to hold up a red card.

Q78 ***Chairman:*** Am I right that a *passerelle* has not hitherto been a method by which amendments have in practice been made?
Professor Shaw: No. I think there are good reasons which political scientists would tell you about because they would focus on how agenda-setting works amongst sovereign states. There are very good reasons, other than through the legislative process, why Member States find it very hard to amend treaties other than through package deals where they trade justice and home affairs against the high representative of foreign policy or a smaller Commission against an extra seat in the European Parliament and so on.

Q79 ***Chairman:*** Professor Shaw, thank you very much indeed for coming and for giving us your time and your expertise.
Professor Shaw: My pleasure.

WEDNESDAY 21 NOVEMBER 2007

Present	Bowness, L (Chairman)	Lester of Herne Hill, L
	Burnett, L	Norton of Louth, L
	Jay of Ewelme, L	Rosser, L
	Kingsmill, B	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr Tony Bunyan and Professor Steve Peers, Statewatch, examined.

Q80 ***Chairman:*** Good afternoon and thank you very much for coming to give evidence to us, Professor Peers and Mr Bunyan. Perhaps I could ask you whether you would first of all like to make an opening statement. Perhaps, for the record and for the benefit of the Committee, you could tell us very briefly about the organisation Statewatch, or perhaps you would prefer us to go straight to the questions, having told us about Statewatch.
Mr Bunyan: I think that we will go straight to questions.

Q81 ***Chairman:*** For the record, perhaps you could just tell us something about Statewatch.
Mr Bunyan: Statewatch was founded in 1991 and so, for almost 17 years now, we have been working on justice, home affairs and civil liberties in the European Union. We have come many times to this and other committees in this and the other House to give evidence. We monitor as best we can all the measures that are going through the European Union on justice and home affairs and, on some areas, we will pay more attention and produce analysis in depth. For example, on the Reform Treaty itself, way back, we started an observatory on the Constitution, with all the documents and, from early this summer, we again picked up the cudgels, took up the Reform Treaty, and Steve Peers did very good work. It meant that by 5 August we got online the actual text of the transposed mandate into the treaties—which was some two months before the Council managed to do it themselves. The subject that we are discussing today is therefore of great interest to us.

Q82 ***Chairman:*** You will know that we are concerned with Law and Institutions in this Sub-Committee and our report is going into the report which the Select Committee is producing on the Reform Treaty. The Chairman of the Select Committee has described it as an analysis of the impact that the Treaty will have on the United Kingdom, pointing out the changes that it will make to the existing treaties. Within our particular area of interest to begin with—freedom, security and justice—can you perhaps tell the Committee whether under the existing treaties there are any serious problems for action within that area?
Mr Bunyan: The thing that I would highlight is the role of decision-making. As we all know, up until now, and indeed until recently under immigration and asylum, the European Parliament was only consulted. Obviously, the big move in the new Treaty is that the Parliament primarily has co-decision, although there are still some areas of consultation preserved and the funny concept of "consent" coming in. However, the key issue is clearly the area of co-decision. A comment that one would make in relation to co-decision is that, when the European Parliament got the power over immigration and asylum, which it did last year, some nine measures have gone through—or eight have gone through and one is going through. On those eight measures, even though they had co-decision and equal co-decision making with the Council, they all went through by what one could call first reading agreements, through secret trilogue meetings—which did not auger well for the future. If the European Parliament is to have co-decision, there may be occasions on highly technical issues when this may be a proper process, but not on what one might call more controversial issues like the Schengen Information System II, which may be technical but it is also quite an important political issue. The one exception in those nine measures is the Visa Information System, on which Baroness Ludford is the rapporteur. That has taken a very long time and so, in a sense, the secret discussions have not worked in this particular case. Indeed, just before I left this morning I noticed in a letter that the Civil Liberties Committee of the European Parliament has agreed an amendment to the visa draft directive, to say that the fingerprinting of children should not be from the age of five but from the age of 12. This of course has to go from the committee to the plenary at the end of the line, but this is a very important issue to which we drew attention last year. The Council was discussing in a technical committee the question of at what age it was possible to fingerprint a child, rather than the political/moral question. I think it is very hopeful that this committee has decided to go for a higher, more sensible age, closer to the age of 14 which the Eurodac system allows for the fingerprinting of

children. The debate that might be around, therefore, is the extent to which the European Parliament will fully use its power for co-decision, when it also has co-decision over police and judicial matters.

Q83 ***Lord Rosser:*** Co-decision means that they and the Council have to seek to agree that, at the end of the day, if there is a disagreement, the two have to try to come together and reach an accord. That is what it is likely to force to happen.
Mr Bunyan: Yes.

Q84 ***Lord Rosser:*** When you said, "Up to now they appear to have had discussions in secret"—I think that is what you indicated—is that discussions amongst themselves as members of the European Parliament or discussions with outside bodies or people, or what are we talking about?
Mr Bunyan: No, this is under a formal agreement which was signed last year. This is now a formal agreement between the Council and the European Parliament to allow for the speediest implementation of all measures. This is right across everything. Indeed, when they have reached agreement—whether it is in these secret meetings or whether it is at first-stage committee reading—then a letter will go between the Council and the chair of the committee in order, as it were, to cement that agreement. Our concern is twofold. One is that, when there are discussions of this kind, the documents which are being discussed—as in the case of the whole VIS package, in which there are four measures—have officially all been secret. We do not know what has been discussed. We have managed to get hold of a number of these documents to make sure that people know something of what is going on. However, it means that it is not just secret in the sense of secret meetings: it is secret in the sense that nobody outside knows what is going on. Citizens and parliaments do not know what is going on. I think that the second aspect is in relationship to the standing of the European Parliament. Over the many years that I have been going there, the European Parliament has been saying, "When we've got the power of co-decision, particularly on the sensitive issue of immigration and asylum, we will make sure that we have a proper, full debate. We will squeeze as much as we can out of the Council for individuals' rights". It has not done them any great credit that, on eight of these nine measures, they have gone for this secretive approach. It means that we cannot see a committee voting on meaningful amendments, as you can with the plenary voting. In other words, we lose what is the visible side of the democratic process. As I said earlier, there are certainly some measures that are highly technical, which one can understand are agreed and pushed through, unless a matter of critical importance comes up. This is one's concern: it is both the secrecy and the lack of access to the information on what is going on, and it does not do the standing of the parliament any good. In my view, if the parliament were to proceed down the same road on police and judicial co-operation, this would really lower its standing in the eyes of people outside of the parliament itself.

Q85 ***Lord Lester of Herne Hill:*** The trouble with being on a committee like this is that one is hesitant to ask questions which expose your own complete ignorance—which I am now about to do! Can you explain what happens with co-decision vis-à-vis the European Parliament after the secret negotiations take place? Is there some kind of reporting back which goes to the European Parliament and enables them then to discuss the agreement that has been reached, or is it simply in a private room, negotiated, and that is that? One of the reasons I am asking the question is not just for the reason which you have given just now but, as you probably know, within the Council of Europe they are drafting a convention on access to official information, which at the moment has a big exception for legislatures, which I imagine would include the European Parliament. Can you tell us how transparent the European parliamentary procedure is when the co-decision process is taking place? I should know the answer but I do not.
Mr Bunyan: In this instance what would normally happen would be that the parliamentary lead rapporteur, plus other rapporteurs from other political parties, would go into negotiation. The rapporteur is the formal negotiator with the Council; the Commission sits in on the meetings. In some cases, though, you will find that the main rapporteur will kick the other rapporteurs from the other political parties out, if things take a long time. Equally, in these meetings the Council will bring in the "heavyweights". If things are getting difficult, it will bring in the Perm Rep in from the Presidency; it will bring in the Commissioner. That is the answer to who takes part in these meetings. Yes, of course the rapporteurs of other parties will usually know what is going on; but there can be many meetings and many different amendments. At the end of the day, it does go before the committee. The committee is given a text.

Q86 ***Lord Lester of Herne Hill:*** Before the decision is finally reached?
Mr Bunyan: If it is quick, the committee might express some point of view on a draft. However, if it is taking a long time, the difficulty is that the committee as a whole is unlikely to have followed all the changes to it, and it will be almost set in stone by the time the rapporteur brings it back from these negotiations. It would therefore be quite difficult, unless there is a substantive point, to overturn.

Indeed, I suppose that the rapporteur would have to be very mindful in their negotiation. I would have to say this: that if they can see a big problem coming up in what they are negotiating, they would probably make some concession on that account—if they thought that one or more political group was going to object to something very strongly. There is some informal give and take but, in terms of the actual voting on amendments in committee, in a sense that disappears in this process. In other words, there being a draft report; people needing to put in whole sets of amendments; and there being votes in committee. That tends to disappear almost completely under this.

Professor Peers: It happens at an early stage, as the parliament is beginning to form its position. At some point either the committee has voted on a text already, which becomes a kind of negotiating position, or usually halfway through, when there is a draft report and some draft amendments—on the basis of that having assessed more or less what element of support there is for the draft report and the draft amendments—that becomes a sort of *de facto* negotiating position, or some element of it becomes a sort of negotiating position with the Council. It is therefore very difficult for an outsider to work out what exactly the negotiating position is if they have not, as a committee, voted on a report—which they sometimes do and, as I say, they sometimes do not. It is a much more opaque process if they negotiate on the basis of a draft report than on the basis of something which the committee has already voted on. To give you an example, yesterday, dealing with the Rome regulation on the conflict of law in contract, the Legal Affairs Committee voted on a report. It seems to be the product of a deal with the Council. I have not yet been able to confirm that. Even when a deal has been done, therefore, the text is available but it is not actually clear whether or not it is a deal yet. Perhaps in the next week or so it will be clear if that is a deal with the Council and if the Council is willing to approve it. The text itself only emerged in the last week or so of that apparent deal with the Council. It is a very opaque process, therefore. That was another example of where the parliament was negotiating on the basis of a draft committee report, with a series of draft amendments. An outsider would have no way of knowing what their negotiating position was, and even less way of knowing normally what the Council's negotiating position is. Sometimes the Council adopts a general approach, which tends to be published on the Council's register as the basis for the negotiating position but sometimes it does not and it is negotiating on the basis of some vague draft text, which is never publicly available or formalised in any way. Sometimes, therefore, the process is a little easier to follow and sometimes it is absolutely impossible, even to a specialist. Even to someone getting the published documents from the Council via Statewatch, it can be impossible to know what stage the process is at and how much negotiation is going on—or sometimes even whether negotiation is going on at all, never mind what stage the negotiations are at and what texts are under discussion. If you were to try to apply this to the British parliamentary process, it would be as if, every time a bill was submitted to Parliament, a small number of people from the House of Commons and the House of Lords got together in a private room to negotiate the texts, then presented a final bill to both Houses at the end of that negotiation, having been completely non-transparent in the negotiation, as a *fait accompli* that they had to vote on, otherwise there would be no legislation. That would obviously be considered unacceptable and that is basically the problem which we have with the co-decision process, particularly at the first reading level.

Q87 ***Lord Lester of Herne Hill:*** What is the need for so much secrecy and opaqueness, according to the official line? Why cannot there be some kind of public disclosure of the process? What do the officials say about that?

Mr Bunyan: They did produce a report. This is what is disturbing. Mr Leinen produced a report earlier this year on how co-decision was going. There was general satisfaction, because now some 66% of measures going through the European Parliament are going through on this first reading procedure. Some may well be technical. There was a little note that there was "a bit of unhappiness", but it was a long report and I was reading through it, hoping to find some cognition that this was possibly a problem, but it really was not in that report. I think that it came out in April. It is on our website and I can certainly send you a copy of that report. However, it was a bit disturbing to see that the parliament's own assessment of how this is working seemed to be very uncritical of what the effect was.

Q88 ***Chairman:*** Can we press on to the opt-ins? The UK has its general opt-in so far as FSJ is concerned under the protocol on the position of the UK and Ireland—the Title IV Protocol—and there is a further opt-in provided by the protocol on the Schengen *acquis*. How will the position under these protocols be different from that which exists at the present time?

Professor Peers: The Title IV Protocol will change in two ways. First of all and most obviously, to be expanded so that it will also cover policing and criminal law as well as immigration, asylum and civil law, which it does at the moment. However, a more complex amendment was added during the process of negotiating the Reform Treaty to deal with the

specific situation when the UK or Ireland is faced with a proposal to amend legislation which we have already opted in to. In that case, it is possible that if we do not opt in we will be urged to opt in, and if we do not respond to that urge from the Council we will, in effect, be cut out of the existing legislation. Equally within the Schengen Protocol, there is a new clause which is more or less to the same effect, although the details are different. In that case, though, as it stands right now, we are not able to opt out of measures built on a measure we have already opted in to. That would therefore be a new possibility for us as regards Schengen but, again, it would be subject to a possible sanction if we do not choose to opt in to these further measures which amend measures we have already opted in to. For the first time there is, in respect of Title IV, a possibility of pressure that could be placed on the UK to opt in to something, whereas at the moment there is not any mechanism to place pressure on us to opt in to something, and in practice no pressure has ever really been applied—as far as I can tell, in eight years of watching this process very closely. That would be a significant change, I think. Both would be significant changes.

Q89 ***Chairman:*** What about the situation that arises out of ECJ Cases C-77/05 and C-137/05, which were brought by the United Kingdom against the Council and the disagreement about which protocol applies in given circumstances?
Professor Peers: There is nothing in the Reform Treaty or the Treaty of Lisbon which clarifies which protocol applies. I had thought at one point that the UK might be intending to negotiate on this issue but, as it turned out, they did not. I understand that they never attempted to try and address this issue in the negotiation. I guess that the whole issue now depends on the ruling of the Court of Justice in those cases, and that will settle the situation—presuming that it is clear, not only as regards the current legal framework but also as regards the legal framework in the future, as to how to distinguish between the two protocols.

Q90 ***Chairman:*** What are the circumstances where we are currently locked in or locked out of participation, under the protocols?
Professor Peers: I am a little reluctant to use the phrase "locked in" and "locked out" because it implies absoluteness. We can always get in or out, but with consequences. It is like a marriage: if you want out, there are consequences. You can do it. If you want in, you can do it, with consequences. At the moment, the only case in which we are locked in or locked out is the Schengen *acquis*. We are locked in wherever a measure is proposed which builds on something we have already opted in to as part of the Schengen *acquis*, which is mainly the criminal law part, the policing part—with a little exception—and the illegal immigration part. If something new were presented on carrier sanctions, for instance, we would now be obliged to opt in to it as the rules currently stand, because we have already opted in to the existing Schengen convention rule on carrier sanctions. Again, with the Schengen Protocol there is a lock-out rule, at least in practice—this is the issue which is in dispute before the Court of Justice. The way the Council and the Commission interpret the rules is that we cannot generally opt in to something which builds on a part of the Schengen *acquis* which we have not opted in to yet. In the case of external border controls or visas, for instance, we cannot generally opt in to something—in their interpretation—which builds on something we have not opted in to yet. The determining factor, therefore, is whether we have already opted in to something in the Schengen *acquis*. If we have, we have to stick with it as we pass future measures; if we have not, then we are locked out as regards future measures. We might at least get a little bit of flexibility at the margins on that point, but not very much. As I say, the UK has challenged that interpretation and I think it has a very good argument, but at the moment it is looking like it will not win. As regards Title IV, it seems to me that we have total freedom to opt in or opt out of individual measures. We have never been pressured to opt in to anything. The UK has always taken its own decision; we have never been told that we cannot opt in to something that we wanted to opt in to as regards Title IV. Equally, we have never been told that we must opt in to something that we wanted to opt out of. Even where a proposal amends an existing measure which we have opted in to already, we have not been told that we have to opt in to it. Although I understand there has been some discussion about that from the Council's Legal Service, which is apparently why the UK was anxious to try and address this issue by means of a protocol. It may have been better to let sleeping dogs lie, but I suppose this new clause in the Title IV Protocol gives us insurance that at least we can opt out of something which amends something that we have already opted in to. The position would change under the new Treaty, therefore. First of all, with Title IV, if something amends something we have already opted in to, we can still opt out of that amendment but with the risk that the Council will decide to cut us out of the measure that we have already opted in to; although there is a procedure and there is a substantive rule for that. They can only cut us out if our opting out of the new measure makes the application of the existing measure inoperable for other Member States or the Union. If they did make a decision to cut us out, it would obviously be subject to legal challenge. I would interpret that substantive rule quite narrowly: to say that, for instance, if there were an amendment to the Asylum Procedures Directive it is unlikely that

the existing directive would be made inoperable simply because we applied the existing directive but not an amendment to that directive. Equally there are a lot of other cases where I think that would be so. Simply because we apply somewhat different rules than other Member States would not therefore normally make that measure inoperable. It might make it more complex, but "inoperable" is a higher threshold than simply "more complex" or "more difficult". It suggests a technical inoperability; not just a difficulty but in practice making it unable to function without the UK's participation in the amending measure. I therefore think that is a higher threshold, although others may take a different view and it may end up being litigated in future. The Court of Justice may take a different view as to what exactly the threshold is of "inoperability". The issue is that we will at least have that prospect hanging over our heads, where a proposal would amend an existing text which we have opted in to. It would be irrelevant if we have not opted in to an existing text—in the case of immigration, for instance. The Schengen *acquis* protocol will be amended much to the same effect, with the threat that we will be cut out of our existing partial opt-in to Schengen to some extent, if we do not opt in to a measure which amends the part we have opted in to. As I have said, however, that is more flexible than what we have now. As it stands now, we cannot opt out of something building on to something we have opted in to as far as Schengen is concerned. We will actually have more flexibility to do that in future, but subject to those possible consequences of being cut out of parts of our existing participation. Although, again, that is subject to a threshold which will not automatically be satisfied. It is a slightly different threshold than simple inoperability. Again, the threshold would have to be measured. In my interpretation, I think that it is a reasonably high threshold to satisfy for the Council to start cutting us out of the measures. For instance, I think that it would be possible for us to apply a slightly different version of carrier sanctions than other Member States if we decided to opt out of a proposal amending the existing regime, for instance. That is my interpretation. That may end up being subject to a different interpretation if the Treaty came into force.

Q91 ***Lord Wright of Richmond:*** My Lord Chairman, may I take the opportunity to thank both our witnesses for the help they gave me as Chairman of Sub-Committee F? It is very nice to see you both again. Can I ask you about Frontex? You possibly know that Sub-Committee F—and I am not speaking here as a member, let alone as a Chairman, of Sub-Committee F—are undertaking an inquiry into Frontex. I would be very interested to know how far our rather anomalous relationship with Frontex, in terms of opting in and opting out, is affected by the Reform Treaty. Will it differ?

Professor Peers: No, because the Reform Treaty would not clarify this question of when the UK can opt in to measures building on Schengen. It makes it easier for us to opt out of things we do not want; it does not make it easier for us to opt in to things that we do want. If the Council and the Commission are correct in saying that we cannot opt in to the European Borders Agency as it stands now, they will still be correct after the Reform Treaty. Equally, if they are wrong, they will still be wrong after the Reform Treaty. It all depends on the Court's judgments in those particular cases.

Chairman: Can we go on to criminal justice and policing? Perhaps you would like to open that question, Lord Wright.

Q92 ***Lord Wright of Richmond:*** Perhaps I may echo the remark made by Lord Lester and his improbable claim not to know all about the subject on which he was asking a question. In my case it is a rather more genuine claim! Under Title VI, new Chapter IV sets out detailed areas of competence in criminal law. Is the scope of co-operation wider than under the existing EU Treaty? Could I perhaps add a supplementary point to that? The European Select Committee heard evidence yesterday from Professor Chalmers, who made the comment that he thought there was a risk of the European Court of Justice becoming an asylum court. I do not know whether you have any thoughts on that, but perhaps I could put the main question to you?

Professor Peers: They are quite different questions. However, in my opinion it would be quite interesting to see the Court of Justice becoming an asylum court and lots of asylum cases being decided there. It is a little theoretical at the moment to say that it would get vast numbers of asylum cases. So far, it has not had any and I do not think you could assume that such a huge proportion of asylum claims would be referred there by national courts. Although there are 400,000 or so asylum claims a year in the European Union, only a certain number of them will be litigated before the courts, where people would wish to continue litigation and to get references to the Court of Justice, and where national courts would be willing to send cases to the Court of Justice. In any event, the Court is trying to set up an emergency rulings procedure. I am not convinced, therefore, that there will necessarily be an unmanageable number of cases or that there would not be the further development of a mechanism, such as setting up a separate tribunal or something that could deal with the number of cases effectively. I am more concerned that it is not getting asylum cases than by the number of cases it might get. In the absence of getting asylum cases, it is impossible to talk about establishing a common

European asylum system and to have uniform standards, or any move towards uniform standards, across the European Union. As far as criminal law is concerned, 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 Reform Treaty is an expansion or even potentially a narrowing of the criminal law powers of the European Union. There is a vague power to facilitate cooperation in the Treaty at the moment. That would be replaced by a very specific power, particularly in 69e(2), to deal with domestic criminal procedural issues; but that still has to be to the extent necessary to facilitate mutual recognition, and it still only concerns specific criminal procedural issues—although the specific issues cover quite a lot of the content of criminal procedure, particularly evidence and individual rights in criminal procedure. Depending on whether you think the existing power is very narrow or very broad, that is either an expansion or a narrowing. I tend to think that the existing power is quite broad and so this, in my opinion, is a narrowing. Of course, some Member States, like the UK Government, argue that it is quite a narrow power and that therefore this is a broadening. That could equally be said perhaps of the competence over substantive criminal law. Certain substantive crimes are mentioned in the treaty and so, as it stands now, it is not entirely clear whether the Union's competence to harmonise substantive criminal law is limited to those specific crimes or not. Under Article 69f of the Reform Treaty, you have a list of ten crimes which the Union is competent to harmonise; at least you have a clarification, therefore. Again, whether that is wider or broader than the existing powers depends on how you interpret the existing powers: either as a *carte blanche* to harmonise anything as far as substantive criminal law is concerned, or a limitation to the relatively small number of crimes which are explicitly mentioned. Just as with 69e, it depends on what you make of the existing text. At least it can be said that both 69e and 69f are clearer than the existing powers. Therefore, they do bring about a fair amount of clarity as compared to the existing text. I think that it would have been inappropriate to have qualified majority voting apply to the existing powers without this further degree of clarity, and that is why the clarity was introduced—because qualified majority voting was also to be introduced.

Mr Bunyan: Under the heading "judicial co-operation", one remembers that it is about mutual recognition of offences and decisions; but it is also about the clause, "Police and judicial co-operation in criminal matters", which is about evidence-gathering. This is the subject of a treaty between the EU and the USA, for example, and mutual assistance in this area. One is concerned with evidence-gathering, therefore, and not just the judgments and the decisions. In that respect, I think one has to be a little concerned, because they talk in 69e about specific areas like "mutual admissibility of evidence", "the rights of the individual", "the rights of the victims", and that is clear. However, we then have this phrase, " . . . (any) other specific aspects of criminal procedure, which shall be identified in advance by the Council, acting unanimously after receiving the assent of the European Parliament". We are getting a funny procedure coming in here. If in our domestic law we were to have a major extension, when A, B and C are absolutely clear, if we can have *any* extension, we would not have *carte blanche* for another procedure; we would have, in European terms, a co-decision. We would have another framework decision which would amend the existing framework decision, in order that we can fully see. Why they suddenly lapse into a different procedure of unanimity in the Council and consent of the parliament—where, in that sense, apart from informing it, it means that the parliament has to consent or not consent to a whole text—and why we cannot have co-decision here, I do not understand.

Q93 ***Lord Jay of Ewelme:*** May I thank our witnesses for the papers they have produced? I found them extraordinarily helpful. Those of us who have been arguing over the years for the principle of mutual recognition rather than harmonisation have been quite pleased to see that the principle of mutual recognition is now enshrined in the Treaty. However, I wondered whether you could say something about how significant you see that as a change over existing arrangements. Also, would you reckon that there is broad agreement among the Member States about what is meant by mutual recognition? There has been at least one recent Council conclusion, the Council conclusion of June this year, which has suggested that the nature and content of the principle of mutual recognition might need further exploration. It suggests that there may not be complete understanding among all Member States as to exactly what it means.

Professor Peers: I think that it has always been a bone of contention as to exactly how mutual recognition should be applied in the area of criminal law and civil law, when it comes down to discussing the details. To answer the first part of the question, however, I do not think that it makes much difference to say that mutual recognition is officially recognised in the Treaty as the core principle relating to civil and criminal law. That is because the judgments of the Court of Justice have already, in civil and criminal law, said that mutual recognition was an essential element of the legislation; and even, in the case of criminal law, the Court of Justice has said that,

within Article 2 of the EU Treaty as it stands now—which defines the aim of freedom, security and justice—it is implicitly a system based on mutual recognition. You will not find that explicitly in the Treaty; that is the Court of Justice's interpretation of the Treaty. Therefore, explicitly to make it a rule in the Treaty does not add anything to what the Court of Justice has already said. Equally, there are also some civil law decisions which talk about the importance of mutual recognition. I do not think that specifying it in the Treaty therefore adds too much to the existing legal interpretation of the treaties. In terms of the precise content of mutual recognition, it does differ already in a number of specific mutual recognition measures which the Council has adopted. It differs in the civil law measures and it also differs in the criminal law measures. There is one criminal law measure which has a longer list of crimes where the principle of dual criminality is abolished. That is the framework decision on recognition of financial penalties. However, there is another one where there is no principle of dual criminality being relinquished at all; that is the framework decision on the recognition of prior criminal convictions. There is another one where the Member States have an option not to apply the abolition of dual criminality. It is the framework decision on the transfer of prisoners. You have had those and you have had a large number of different approaches to the grounds for non-recognition, whether they are mandatory, optional or not, of other Member States' decisions. If you compare the six or seven framework decisions agreed, adopted or proposed as regards mutual recognition in criminal law, therefore, you have a wide variety of approaches to the different grounds for non-recognition. I think that the particular concern in the June Council related to a concern the German Government had last year as regards the European evidence warrant. The German Government had suggested that, if there were to be lots of mutual recognition measures, there should be further harmonisation of substantive criminal law; but, in the end, the Council's conclusions on this were inconclusive and they left it to further discussion as to whether there should be a continued process of harmonising substantive criminal law. That is an issue which may come up again, however, as mutual recognition measures start to be more commonly applied. Once the evidence warrant is applied and, for instance, homes or businesses are searched in relation to an act which was not criminal in that Member State, there may be increasing concerns that we should be harmonising substantive law more, or at least, alternatively, harmonising more of the procedural protections that apply to searches and seizures for instance, or both. Those are the sorts of issues which I think will arise in the future. There is bound to be a continued debate on the detail of the mutual recognition principle, even as it is more and more accepted as the central principle in practice.

Q94 ***Lord Lester of Herne Hill:*** As you know, out of the 47 Member States of the Council of Europe only four have a common law system base, and that applies also among the 27 members of the European Union. As you also know, our criminal justice system substantively, and especially procedurally, is very different from those of the great majority of states within Europe. Following Lord Jay's question, if we are concerned with preserving the integrity of the common law system and the virtues of it, while being good Europeans, will the changes made in the European Union Reform Treaty and the opt-ins and opt-outs enable us and the smaller countries, which are Ireland, Malta and Cyprus, to be able to maintain the integrity of the common law system, procedurally and substantively, or not?

Professor Peers: I think that for the UK and Ireland the answer is yes, provided they use their opt-out to stay out of the way of any proposals which do seem likely to have an impact on the common law system. For Malta and Cyprus it is a different position, because they do not have opt-outs; they have emergency brakes instead. It may be harder for a very small Member State to pull an emergency brake politically, but at least it is open to them to stop the discussions on the grounds that their criminal law system would be fundamentally affected. In the case of the European public prosecutor, if we opt in we have a veto—or we could just opt out. Malta and Cyprus, who do not have an opt-out, would have a veto in that case. I think that it is quite likely that the UK will opt out of the idea of a European public prosecutor, once the proposals come to fruition. I think that it is quite likely that the UK will opt out of at least some of the domestic criminal procedure measures, which are likely to be proposed on the basis of 69e(2). To that extent it should be possible, certainly for the UK and Ireland, to avoid any dramatic impact on the common law system under the Reform Treaty.

Q95 ***Lord Lester of Herne Hill:*** I speak now from practical experience, as an advocate who appears in Strasbourg more than in Luxembourg. My concern is that we regard the European Convention on Human Rights as some great, harmonising, overall set of principles that will apply to all European states. My impression is that the composition of the European Court of Human Rights now, with its 47 judges, is less appreciative of the need to preserve the integrity of the common law system in some cases than it used to be. Therefore, when looking at the link between the EU and the ECHR system, I am troubled as to whether reliance upon the ECHR as the great harmoniser of procedural guarantees is a sufficient

safeguard. I do not know whether this is your area and whether you understand that slightly muddled question, but I hope that you do.
Professor Peers: Yes, I think I understand it. However, to the extent that the Commission makes proposals to implement ECHR standards in greater detail, for instance, in relation to the rights of individuals in criminal procedure, the UK can simply opt out. That is not a hypothetical example, because the Commission made such a proposal in 2004; the UK and some smaller states have vetoed it. I would anticipate the Commission making a proposal to that end, or perhaps a more ambitious version, after the Reform Treaty is in force, and I would expect that the UK would then simply opt out. The discussions would therefore proceed on the basis of the Commission's proposal without our involvement. I do not think that proposal was ever likely to damage the common law simply because it reflected the wording of the ECHR to a large degree. However, taking your point on board and taking the wording of the ECHR on board—that perhaps it does in fact represent some kind of threat to common law—in any case our ability to opt out of that, and the likelihood that the UK would opt out of that proposal, would mean that any threats to the common law by means of the ECHR will not happen, by virtue of Union law. It might of course still happen in the Strasbourg jurisprudence. There is no way of getting round the UK being sued there by individuals. However, it will not happen via the EU legislation on this issue as a venue, as long as the UK is willing to exercise its opt-out as often as I think it is quite likely to do.

Q96 ***Lord Rosser:*** I am not a lawyer and so I sometimes struggle to grasp exactly what is being said, and I realise that my question is asking you to go back on something you have already covered. However, am I right in saying that what you have said is that if there is a measure that we have already opted in to, which in future will be covered by qualified majority voting, then, if an amendment is made to that measure which we do not like the look of, we can opt out?
Professor Peers: We can still opt out of a proposal to amend a measure that we have already opted in to.

Q97 ***Lord Rosser:*** And where qualified majority voting applies?
Professor Peers: It does not actually matter whether qualified majority voting applies or not, but it would normally apply. There is more of a risk, of course, of our not getting our way if we opt in and qualified majority voting applies. The answer is that we can still opt out, but it is a possibility that the Council can say to us, "Your opting out of this new measure, this amending measure, makes the existing measure inoperable for everyone else. What we are going to do, therefore, is cut you out of the existing measure". They cannot force us to opt in. We still have the opportunity to say, "We don't like the look of that amendment" and, no matter what, we cannot be dragged in, compelled as such, to participate in the adoption of that amendment. What can happen, however, is that there will be an alternative sanction for us, which is that we are in effect kicked out of participation in the existing measure—which is, assuming that we wish to continue participating in the existing measure, a sanction placed upon us. Perhaps you would argue that ideally it is something that we would not want to have, but that is not the same thing as being forced to participate. There is no way in which we could be forced to participate. It can be construed as pressure to participate, of course, but it is not legally possible to force us to participate in an amending measure.

Q98 ***Lord Rosser:*** I have understood what you have said, but could you give me an example of a measure where we did not like a proposal to amend it, we said, "We are therefore opting out", and we were taken out of the measure completely? Could you give me an example of one that might prove politically very difficult for us, if that happened?
Professor Peers: For instance, the proposal I mentioned on the Rome regulation which regulates the conflict of laws in contract, where already we ratified the Rome Convention, but we opted out of the Rome regulation because there were some specific provisions that the Government had concerns about. The Government has been hovering on the sidelines with this one, trying to influence the Parliament and the Council to adopt a text which it could then opt in to after it is adopted—which is a procedure that is open to us—and it has perhaps succeeded. We are getting towards the end of that process, as I said before. However, what it would be open to the Council to do would be to say to us, "Now the procedure is nearing its end, we are going to urge you to opt in to this regulation and, if you don't, we'll cut you out of the Rome Convention"—so we would no longer be governed by the Rome Convention. That would place greater pressure on us and would change the whole negotiating dynamics, you could say. At the moment the UK has been hovering on the sidelines, in a way not being constrained; because if we lose our argument to change the text during negotiation we are still bound by the Rome Convention, which we are willing to live with. Then the negotiating dynamics would change, because there would be the possibility of the Council saying, "No, it is inoperable to have these two texts applying simultaneously. Therefore, we are going to cut you out of the Rome Convention". At least, that threat

would perhaps be made or discussed during the negotiations. We could argue that it would not be inoperable for us to have one set of conflict of law rules and the other Member States to have a slightly different set. There is not a vast difference between the texts in any version that has been under discussion. As I said, it is possible that the threshold for inoperability is not as high as I have suggested it should be, and that would make it easier for the Council to place that kind of pressure on us. That is just an immediate example; there are other, more hypothetical, examples. For instance, the Commission will propose amendments to all the asylum legislation next year, which is likely to raise the standards of protection. If the UK is not keen on raising the standards of protection, then the discussion on those proposals is likely to continue after the Reform Treaty is in force and therefore the question will arise. If we do not want to participate, if we have opted out of those proposals for amendments, we can be cut out of the existing asylum texts. Of course, the Government could welcome that; they might be happy to be cut out of the existing asylum texts. They might even want to opt out of the proposed amendments, in order to get cut out of the existing ones. It is actually a way out of existing texts. If you take the view that we perhaps should not have participated, then this is a way out of them. We might want to convince the Council that our opting out of the new measure makes the existing one inoperable, "So please kick us out of the existing one". It is theoretically possible perhaps that, under a different Government than the current one, we might want to make that kind of argument. That is, at least theoretically, a possibility. As I say, we could not be forced to participate. This possibility of a cut out, though, could be construed as pressure placed upon us.

Q99 ***Chairman:*** My next question is about the purpose of Article 69f(2) and whether it resolves the question regarding the legal basis for measures defining criminal offences and sanctions, and whether or not criminal offences and sanctions could be defined under the provisions on the environment, which is outside Title IV, to which the UK opt-in would not apply. Could you briefly help us on that?

Professor Peers: I think that it does clarify, first of all, the legal base issue. It makes it clear that, within the other spheres of Union policy, the Union can adopt criminal law measures, to the extent that the area has been subject to harmonisation measures and that those measures can involve both criminal offences and sanctions. At the moment it is not clear whether that principle extends beyond environmental law or environmental-related issues, like ship source pollution—which is the subject of a recent judgment—and also the Court of Justice has ruled out the adoption of detailed sanctions on the basis of such a power. That would be possible under the Reform Treaty. However, it is not entirely clear to me whether the British opt-in would apply to such measures. I think that it probably would not, because such measures would presumably be adopted on the other legal base: the environmental law legal base or the transport law legal base, for instance. It is not absolutely clear from the wording of the Treaty whether it would be that other legal base which applies—the environmental law legal base—or whether it is simply that the decision-making procedures which exist elsewhere would be imported into Title IV. We have the wording, "Such directives shall be adopted by the same ordinary or special legislative procedure". You could read that to mean that it is just the same procedure being moved over here; that it is not the use of an environmental legal base but the use of a Title IV legal base. The importance of that, of course, is to determine whether the British opt-out applies. I do not think that it is entirely clear. One thing that is clear is that the emergency brake would apply. We could still stop discussions on the proposal if we had a fundamental problem with it; if we thought that it would fundamentally affect our criminal justice system.

Q100 ***Lord Wright of Richmond:*** Given the events of the last 24 hours, this might not be the happiest moment to raise the question of data protection. However, could I ask Mr Bunyan this? The new Article 24 of the Treaty on the European Union requires the Council to adopt a decision on data protection when Member States are acting in the context of their common foreign and security policy. What is the purpose of this provision, and why is it not subject to co-decision by the parliament?

Mr Bunyan: The purpose, I think, is in order to protect and to extend the existing agreements with third states, primarily with the United States, for example the Europol agreement, the sending of data, the extradition one, the one on mutual co-operation, the one on PNR—which is the most controversial or one of the most controversial. In a sense, SWIFT does not come under this, because they have managed to shove SWIFT off into the cul-de-sac of Safe Harbour and pretend that it has nothing to do with foreign policy—but the same questions arise. What is of concern, of course, is that at the moment there are secret meetings, EU-US, trying to negotiate a set of standards so that, every time they have an agreement, they do not have to go through the process all over again. They want to have one set of standards which can be applied to any external agreement, rather than on each occasion having to go through a different fight of finding it open to

challenge. I know that it is one of the ambitions of the present Government in this country to bring international treaties, for the first time, under a degree of parliamentary control and agreement. One would like to think that, at least on this occasion, the EU would perhaps follow this example, rather than the reverse, of EU policy and think that the idea that you can reach international treaties without having co-decision of the parliament should be a thing of the past. We have to get rid of the idea that they can do this and come to agreements with third states. As we know, the most controversial in data protection are those with the United States. Of course it should be subject to co-decision and I would like to think that is the primary purpose. We have seen in the negotiations over data protection, in what is currently the third pillar data protection measure, going through in secret. In the very early stages, the United States, in the EU-US meeting minutes—which again are secret but we have managed to get copies of them—has made it quite clear that what was Article 15, which replaced the need for adequate comparable standards on third states, had to go, because it would mean that the United States could not exchange data. It is very clear, therefore, that we should not have one data protection standard outside the EU and another data protection standard inside. That is clearly nonsense, and any decision should be decided with co-decision within the parliament.

Q101 ***Chairman:*** Can we go on to border checks, asylum and immigration, and ask you to outline the most significant changes that the Reform Treaty introduces regarding co-operation in that regard? At the same time, could we ask you to comment on the new Article 69(3) of the Reform Treaty, based on Article 18(3) of the existing European Community Treaty, which allows the Council by unanimity to adopt measures relating to specified areas concerning Union citizens' rights to move and reside freely, where the treaties have not provided the necessary powers? The areas that were excluded by Article 18(3) were " . . . passports, identity cards, residence permits or any other such document or to provisions on social security or social protection". Those are excluded in the existing Treaty. Can you indicate what significance the change is likely to give rise to?
Mr Bunyan: In answer to your first general point, I do think that the issues of repatriation and residence without authorisation will become a concern. Obviously, what is brought formally in here is the negotiation of readmission agreements with third countries. I would single out those two as the two distinctly new aspects. They are both underway at the moment; but if they are now in the Treaty and clearly on the table in that sense, then I think that they may become a problem in the future. The second point you make, though, is an area which has been of interest to us and on which we have worked for many years. This was in Article 18(3) of the Nice Treaty, which was absolutely clear that we were not going to have passports requiring biometrics of any kind as far as this is concerned. This was moved, of course, as noted in our comments. It was moved from one section into this chapter, in the process of the mandate through to the final clause. What we have here, therefore, is something which is saying that we may, in relation to any travel document—such as passports, identity cards, residence permits, or any other such document—take necessary powers; and this is to be done by the Council acting unanimously with the parliament yet again consulted. This is probably one of the most outrageous provisions in the new Treaty. Here is something which was expressly precluded under Nice and is now coming back in again, where the parliament is again being given just the role of consultation and not co-decision. I am very suspicious when I see terms such as "measures concerning", because we could think that means just the document or just fingerprinting and biometrics; but it could also include the databases on which that information is held—whether at national level or EU level. It could include data-mining, data-sharing, data protection standards. We are concerned here, therefore, with all the onward use of measures connected with; and "measures connected with" of course come back the other way. In this country and elsewhere, you do not just have to give your fingerprints once and to get your new passport next year. There is a massive industry now building up in terms of providing all the readers for every other EU Member State you enter. Initially, all your fingerprints get on the UK records. Therefore, if you go to Germany, France or wherever, they will have to take your fingerprints again—to prove that your fingerprints are the same fingerprints as are on the chip, as are on the passport. You will not be giving your fingerprint once, therefore; you will be having it done in every country you visit and in every country you leave. Clearly the standards and the measures necessary connected with these travel documents represent a pretty big decision—including, as I mentioned earlier, at what age you fingerprint children. That should clearly be a matter of co-decision and a matter of public debate and concern.

Q102 ***Lord Lester of Herne Hill:*** Including remedies. You have not mentioned remedies. Remedies for abuse of the system. That should also be included, should it not?
Mr Bunyan: Of course it should, yes.
Professor Peers: I will comment generally first of all and then on that specific point of the passports power. The borders and visas power is slightly broader than the existing power because the visas

policy is broader in principle and the power to regulate the freedom to travel is broader in principle. There is also a new power to establish an integrated management system for external borders, which I assume means aspects other than border checks on people, including customs as well. The asylum power is much broader and includes the power to adopt uniform measures in most areas, giving a status of asylum which is valid throughout the Union. That is therefore a more intensive power than the power at the moment, which is to set minimum standards. The powers over immigration shift, as far as legal immigration is concerned, to a qualified majority vote and co-decision, which is a very significant change in decision-making, although Member States have reserved powers to regulate people coming from outside the EU for employment. Therefore, that important issue, the volumes of such people, is still within the sole competence of the Member States. There is a little clarification as to the powers over migration, which more or less confirm the status quo of what the Union already does. There is not much change in the powers over illegal migration. There are already many readmission agreements by the Community; so I think that an express power to adopt them does not actually change very much. To come back to this passports clause, it is subject to two conditions. The action by the Union must be necessary to facilitate the exercise of free movement rights of EU citizens, and also it can only be used if the Treaties have not provided the necessary powers. First of all on that second point, there are already passport security measures adopted on the basis of the EU's external borders powers, which will be subject still to qualified majority voting and co-decision. It therefore seems to me that that type of regulation, of passport security issues anyway—to the extent that you can link any of these things to external border control—would still be an external border measure and therefore still subject to a different decision-making procedure. However, that is harder to justify in terms of identity cards, because they cannot be used for crossing an external border of the Schengen states; although they can, in the sense that you can use an identity card to cross the border between the UK and Ireland and the Schengen states, and vice versa, under Community free movement law. That is therefore an ambiguous position, as to whether or not that particular border is an external border, which makes the decision-making subject to a different procedure. I think that point is quite unclear. Also, there is the important proviso that any passport or identity card measures have to be there to facilitate the exercise of the right to free movement. I do not think that it facilitates my free movement rights or anyone else's free movement rights if the security authorities want to collect masses of data on everyone holding an ID card or a passport. Of course it facilitates the interests of security, and that may or may not be justified, depending on how proportionate it is; but I do not see how it facilitates the exercise of the right to free movement if we are required to go to involvement centres and to be asked hundreds of questions before we get a passport, for instance, or to impose additional requirements as regards biometrics, or whatever else is applied, as regards getting passports and ID cards. It simply does not facilitate free movement; it may even make it more difficult. To the extent that you could find a legal base for security-related measures, it cannot be this legal base. I think that it would have to be somewhere else: whether external borders, to the extent these documents are used to cross external borders, or some other power in the treaties, if such a power exists. What does that leave us with? I think that the Union can harmonise the format of passports, ID cards and residence permits or any other such documents, to the extent that that is directly related to exercising free movement rights. It obviously is simpler already. Because of the soft law harmonising the format of EU passports to cross borders, you could therefore have hard law which sets out in the detailed regulation what the format is of a European Union passport. Equally, you could have hard law, if you wanted, harmonising the standard of identity cards, but purely because identity cards would be used to cross internal borders within the Union, particularly between Schengen and non-Schengen states, because of Community free movement law. However, it could not go beyond that. It could not include security features because the security features do not assist the exercise of the right to free movement. That is my interpretation, though I can imagine that there will be some who would take a different view. That is certainly how I interpret what are those clear conditions on the use of paragraph 3. There is a final point as regards data protection. Remember that there is a general data protection power in the Treaty. That would have to be the correct legal base for adopting general data protection rules. Although I would imagine it is still possible that if a measure is adopted—let us say establishing a passport database, assuming that is valid under this new paragraph—there could be some additional detailed rules on data protection as it relates to that particular database. You would therefore have a mix of general rules in the general data protection legislation and detailed rules in the specific measure, just as you have now as regards the Community's general data protection directive and the Visa Information System or the Schengen Information System, for example.

Q103 ***Chairman:*** Can we go on to civil justice and family law measures? Again, perhaps you could indicate the most significant change that you see the

Reform Treaty introducing in the area of co-operation in civil justice and family law. Is the scope for co-operation increased?

Professor Peers: Generally, I do not think that the revised version of Article 65 does very much. It may seem that it makes it slightly easier to adopt measures because it specifies that they may harmonise national law but, in practice, I think that the measures which are adopted already on the basis of the existing power entail the harmonisation of national law on issues like the conflicts of law jurisdiction and recognition of judgments. For instance, it specifies that mutual recognition is the basic principle but, as I have said, that is already the case. The decision-making does not change, whether in respect of family law or non-family law issues. There are a couple of new points added to the Union's powers, such as effective access to justice; but these essentially reflect measures which the Union has adopted already under the existing powers. Essentially, there is no profound change, therefore. There is also no longer a requirement that the measures are necessary for the functioning of the internal market, but there is still a requirement—which I think is the more important requirement—that the measures have to have cross-border implications, which in practice has been a significant constraint. Member States have all interpreted that to mean that the individual measures must deal only with civil law disputes which have a specific cross-border component, about plaintiffs, defendants, or people involved in the proceedings having relationship in different Member States. Therefore, with someone suing someone in Britain, with a British plaintiff, and a British defendant, with all the aspects of the law confined to Britain, cannot be the subject of a civil law measure; there has to be some cross-border aspect to it. That important restriction is therefore maintained. As far as family law is concerned, unanimity is maintained and with, in fact, an even stricter rule relating to changing decision-making. At the moment, national parliaments are not involved. If the Union wanted to change the decision-making, the Council could act unanimously without their involvement; but, under the Reform Treaty, each national parliament will have an opportunity to block the decision-making and therefore stop that change from taking place, within a six-month period. It is not a full Treaty amendment but it still gives each individual national parliament the power to block the decision. That is therefore a significant change, and in fact it protects national parliaments and protects the specificity of family decision-making more effectively than the existing Treaty does.

Q104 ***Lord Jay of Ewelme:*** On that last point, that is repatriation of competence in a sense, is it? Perhaps that is putting it too strongly. It is a move in the direction of greater power for the nation states and parliaments than is the case under the existing treaties.

Professor Peers: It specifically gives more power to the national parliaments. Member States still have a veto over a change in decision-making. At the government level that has not changed. It is the national parliaments who have an additional power to block the change in decision-making. It does not actually alter the competence of the Union—there is still a family law competence—but it will be harder to shift that to qualified majority voting than it is at the moment. It therefore safeguards national interests in that way.

Q105 ***Chairman:*** Turning to transitional provisions and the particular protocol, the transitional provisions relating to Title VI exclude those measures from the jurisdiction of the European Court of Justice and the Commission's powers of enforcement for five years, unless the measure is amended. Can you tell us what you think might happen in the interim period and whether they will renegotiate all the measures? Will amendments be obvious, therefore, when the exclusion no longer applies? How do you see all this happening?

Mr Bunyan: I think that the justice and home affairs *acquis* in total is several hundred measures. Many have been inherited. There is therefore a pre-Amsterdam *acquis*—which even includes, prior to that, some of the Trevi measures. We do try and track measures which are supplanted. The most obvious one which the Council has itself been motivated to do is to take upon itself the rewriting of the rules for Europol and then to give itself the power to change them whenever it wants to, rather than having this rather inconvenient Convention—which this House spent many months going through, if my memory is correct, as did many other national parliaments. I think that where the Council, or possibly the Commission, want to make changes on selected things, they will make the change—and indeed already are. I suspect that it will be a small number of the existing *acquis*. It is of course possible that some of them will be argued to be technical changes, which would be simply transferring it. Will it be easy to spot that when it is happening? It is a double answer, therefore. On the one hand there is a lot where one would suspect they would just leave them there, unless they become an issue—because it is a great mass of legislation to change, except, like Europol, where they have chosen to change it. On the other hand, if they do, it may be passed at a first reading, quick change, where we may run up and try to find a catch and say, "Look, do you know what is happening?" I do not know whether Steve has a different interpretation.

Professor Peers: It is only the policing and criminal law measures which are subject to this special rule and the Court of Justice. It does not arise in respect of all the immigration and asylum measures. 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, that would still mean flooding the legislative system of the Community for a year with 50 or 100 measures, or something like that. There are over 20 framework decisions and several more will be adopted. Forty decisions have been adopted on top of the pre-Amsterdam measures as well, and more decisions will be adopted in the next year. It would therefore be a massive undertaking to readopt them all. However, I think that some of them will be amended in the normal course of events during those five years, such as Eurojust for instance—where the Commission wants to make a proposal next summer, which probably will not be agreed before the Reform Treaty is in force. It will have to re-table it and, therefore, once it is adopted, that is an amendment to the Eurojust decision. One measure would therefore be amended very quickly already. Will it be obvious if an existing measure has been amended? Sometimes, yes, it will be very obvious. For instance, if you added a new ground of non-execution of a European arrest warrant—to the framework decision on the European arrest warrant—obviously that is an amendment to the framework decision on the European arrest warrant. The new jurisdiction of the Court of Justice applies; though that still raises some interesting questions. Does it apply immediately or does it apply at the date of transposition, which might be two or three years after the directive is adopted? That could be a practically important question. Sometimes, however, it will not be obvious whether an existing measure has been amended. What if it is an implementing measure that is amended rather than the parent measure? That is an obvious question which arises with Europol, where, as Tony said, the Europol convention will probably be replaced by a decision next year; but there are a lot of implementing measures which are amended each year. In fact, all the existing implementing measures will have to be replaced. They are planning to replace them over about a two-year period. That takes us right into the period after the Reform Treaty would be in force. Would the adoption of a new implementing measure, even with the same text of a previous implementing measure relating to Europol, mean that everything to do with Europol is therefore considered amended, including the main decision, or will it be only each individual implementing measure which will be considered as amended and therefore subject to different jurisdiction of the Court of Justice? That is a rather peculiar example. Another example would be, for instance, if new legislation takes some clauses out of an existing piece of legislation but does not add anything in. There are a number of examples of that under discussion already or which have been adopted in the past. Would you therefore regard the existing measure as having been amended or not? Has it had anything added to it? Would you therefore regard it as having been amended? Another example would be if a provision of the Schengen *acquis*, or particularly the Schengen convention, is altered or withdrawn. Would that therefore mean that the whole of the policing and criminal law part of the Schengen *acquis* must be regarded as amended? It concerns many different things. Would an amendment to, say, one specific clause dealing with hot pursuit mean that everything which is in the Schengen convention as regards policing and criminal law must be regarded as therefore amended? Those are the sorts of issues. One thing I have to point out about the way this question is phrased is that the Court of Justice is not excluded entirely from Title VI as it is now; it is simply subject to a different jurisdictional regime. The UK has opted out of sending references to the Court but 15 Member States have opted in. They will be able still to send references to the Court for that five-year period. This restriction on the Court's jurisdiction for that five-year period therefore does not mean so much to them as it does for us and the other Member States which have opted out of that jurisdiction. It is relevant to everyone as far as the exclusion of infringement proceedings is concerned, but it is not relevant to everyone as far as references from national courts are concerned. Tony has made a note here about "soft law". I guess the same point would apply. If soft law is amended, then it will be subject to the Court of Justice, because the Court has asserted jurisdiction over Community soft law; but it depends of course on how you define amendments and whether the measures are in fact amended.

Q106 ***Chairman:*** Can we turn to the question of the Charter of Fundamental Rights, which we could perhaps deal with fairly shortly? Could you tell us what impact you think Article 6 of the proposed Treaty will have on the protection of fundamental rights in the freedom, security and justice measures? Indeed, what will be the effect of the protocol which the United Kingdom has—I think now not Poland perhaps—and will that protocol actually prevent the courts from referring to the source of Charter rights, which are all set out in the explanations relating to the Charter? Can our courts be prevented in any way? Are they currently prevented from referring to those sources?

Professor Peers: To answer the more general question, it always has to be kept in mind when discussing the Charter that human rights are already protected as

general principles of law, and that some of the basic rules, such as the right to a fair trial, are already recognised by the Court of Justice as general principles of law. Equally, there is a rule in the Reform Treaty that the EU should accede to the ECHR. To the extent that rights that are relevant to this area are ECHR rights, therefore, they will be protected ultimately by means of that mechanism of EU accession to the ECHR. There will be that third prong. Those two prongs will apply to the UK. There is no restriction on *them*, regardless of the restriction on the Charter. The important question really is, how is the Charter different from the general principles, if it is different from the general principles, and if it is different from the ECHR. Certainly there are some rights in there in addition to the ECHR. Is it different from the general principles? So far, the Court of Justice ruled on this briefly last year, in a case called *European Parliament v. Council*, when it said that the primary aim of the Charter is to reflect the general principles and to make them more visible. That is interesting wording—"the primary aim". It leaves a certain wriggle room to say, "It's not the only aim; it adds some rights as well". The starting point is that that is the primary aim of the Charter: to restate the general principles. If the Court of Justice continues down that line and, in any case that comes before it, says, "Of course, the Charter and the general principles are the same, whether in terms of the substantive rights or in terms of the horizontal rules", then the distinction between the Charter and the general principles is irrelevant and therefore the British Protocol is meaningless. We are covered by the general principles anyway. If they mean the same thing as the Charter, whatever restrictions might be placed on the Charter applying to us do not matter. It does become important, of course, if the Court does not say that and if the Court recognises some areas where the general principles and the Charter are different, or if the Court's judgments—and this is something that I would hope could be avoided—leave it a bit unclear as to whether the Charter and the general principles are the same. If that is the case, if there is some scope to argue about the differences between the general principles and the Charter, I think that the Charter might then have an impact, because it contains some provisions which have not yet been fully recognised as general principles—such as the right to asylum—or others which I am sure would be recognised, such as the freedom from torture, the right to life, freedom from being expelled to face torture, all of which I am sure would be recognised. Some others, like the right to asylum, the right to proportionality of criminal sentences—which the tabloids have been getting quite excited about, identifying some serial killers whom they think the Court of Justice will release—that sort of thing, if it is an additional right to the general principles, would be a change; but the Court of Justice can always say, "Even though we have not commented on it already, it is already there in the general principles". It does depend, as I say, on whether they say the two things are the same or not. If they are not, then that protocol is important, because we have to determine what is in the general principles and what is only in the Charter. If something is only in the Charter, the protocol is supposed to limit the legal effect of the Charter. It does not exclude it altogether for the UK, however; it simply prevents national courts and the Court of Justice from criticising national law in light of the Charter. However, it leaves intact the possibility that other EU rules will apply. Those other EU rules, of course, might be interpreted in light of the Charter. If that interpretation is distinct from the general principles, it is very hard to say that EU rules are interpreted in light of the Charter for some Member States but not for the UK and they have a different meaning for the UK. I cannot see how that would actually work. It just does not make sense in terms of the very nature of Community law. I think the likelihood is that if the Charter and the general principles are to some extent different things, then that protocol will have a limited effect because, although it will limit the ability of national courts to strike down legislation, it will not limit their obligation to interpret that legislation in light of Charter rights—which, as I say, could be significant as far as some new rights like asylum or the proportionality of criminal sentences are concerned, because those have not yet been officially recognised as general principles. That is the significance it could have, therefore. That leads us to the question of whether, when the Charter applies, there is a sufficient link with Community law. Assuming that the Court of Justice interprets that obligation of a link with Community law, as it does already for the general principles, then you cannot have the Court of Justice letting go every serial killer in the country on the grounds of having disproportionate sentences, because most of them will not have any links with Community law. There might be a link in the case of terrorism or organised crime, because you have Community Acts defining the crime and, to a limited extent, defining a minimum sentence. You can just about argue for a link there, but certainly the vast amount of criminal proceedings will not have a link with Union law. Although most asylum procedures will, many immigration measures in the UK will not, any more than they will in other Member States, because of our opt-outs. Assuming that is still something which the Court of Justice insists upon—and I think that it will—you have to keep in mind that importance of a link with Union law for the Charter to apply.

Q107 ***Lord Lester of Herne Hill:*** My question is not intended to result in a long answer because I am

trying to keep it very simple, if I may. If I, as an advocate, appear in front of an English judge and I rely upon an equality directive, let us say, or equal pay for women, or I am seeking to interpret a British Act of Parliament in the light of EU law, or I appear in Luxembourg in the European Court of Justice, all of the rights and freedoms in the Charter are already binding upon all the Member States as parties to all the international human rights treaties—apart from one or two reservations—are they not? Answer: "Yes".
Professor Peers: No, there is no international treaty—

Q108 ***Chairman:*** I am no judge, but I think that is leading the witness! A single-word answer would be appreciated.
Professor Peers: No, they are not.

Q109 ***Lord Lester of Herne Hill:*** Let us assume that, in the main, everything in the Charter is in the international covenants and all the other human rights laws. Let us assume that and that it is all binding already. My question is, if I appear in any of these courts and I refer to the treaties which are already binding, no judge is going to stop me, in England or in Luxembourg, or for that matter in Strasbourg, and say, "You can't do that, because those instruments have not been incorporated into domestic law". They will allow me to rely upon them as a matter of interpretation or legal public policy. For my part, therefore—and I would like you to correct me if I am wrong—I regard the whole fuss about the Charter as a bit meaningless, since the judges do it all the time, can do it already, and will continue to do it, regardless of what is in the Charter.
Professor Peers: Yes, I think that is correct. The general principles already exist, and I think that is a particular example of what you are already saying. The general principles are there. They are taken from national constitutions and international human rights law, and the Court of Justice would continue to develop them even if the Charter were not there. It is likely to say that they are more or less the same thing, and so I do not think—

Q110 ***Lord Lester of Herne Hill:*** And national courts as well.
Professor Peers: And national courts as well, if they take a lead from the Court, will do that, yes.

Q111 ***Chairman:*** We have two more questions to cover and an additional question which Lord Wright will ask. Just dealing with the jurisdiction of the European Court of Justice in this Article 240b, which says, " . . . the Court of Justice 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 . . . ". What is it there for and what does it apply to?
Mr Bunyan: In very simple terms, it is obviously there to exclude them from being accountable to the European Court of Justice. However, I am always confused by these terms, because they are mixed in the Treaty and they are mixed in the usages—"police and other law enforcement agencies." Is "law enforcement agencies" simply the police and the customs and immigration? On the other hand, as part of the same thing we have, "responsibilities . . . (in the) maintenance of law and order and the safeguarding of (national) security". Here we are talking about Special Branch, MI5, GCHQ, MI6. I am always confused here about what we are referring to. If there may be another question, it is the question of realising that law enforcement agencies have one role and the intelligence community have another role. I find it very confusing here about to whom this is referring. Clearly they are excluding the law enforcement agencies from any jurisdiction. We must remember the other point on this question. As I read it, we are not just talking here about the national activities of police and law enforcement agencies; we are talking about any co-operation—which is much stronger—on the operational side of this Treaty; any co-operation which a national police force takes part in with other Member States, effectively under EU direction. It is not just exempting any miscarriages of justice or maladministration at the national level; it is also excusing any jurisdiction of the Court over what they will do at a European level—which is much stronger in this new Reform Treaty.

Q112 ***Lord Wright of Richmond:*** If Mr Bunyan is confused, I am not sure that he is able to answer my next question! It relates to national security.
Mr Bunyan: I hope that I can!

Q113 ***Lord Wright of Richmond:*** The question is this. The new Article 4(2) contains a reference to national security remaining the sole responsibility of each Member State. The Minister for Europe has told us that this goes wider than the current derogation for internal security matters. Do you agree? Will one result be to shield Member States' security and intelligence agencies—which you refer to—from the reach of EU law?
Mr Bunyan: I think that Article 4(2) is just the generality; but when you look at it in terms of the chapter on justice and home affairs—let us do that for a start—there is the impact of it. We have a Standing Committee on Internal Security. Who will be on it? What are its powers? It is for operational co-operation, this standing committee. The acronym is COSI. The European Parliament only is to be

"informed" as to its activities. We know that is pretty well meaningless. However, there is something else that has crept in out of nowhere, which was not in the Constitution. It is in Article 66, which says, "It shall be open to Member States to organise between themselves and under their responsibility such forms of co-operation and co-ordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security". Those are the internal security agencies. Here we have a new Treaty power. I know that it is not an obligation, but it is open to them to all come together and to establish co-operation and co-ordination between all the internal agencies, without any mechanism there for accountability, and also without any jurisdiction from the Court. One might also add that, under another provision, under the second pillar, we have the creation of the External Action Service. I have been waiting for this to happen. Mr Solana has always wanted it. One of the problems post-11 September was that the Commission representations around the world—the 180 representations—are not empowered to gather intelligence, as our embassy would be empowered to do. This External Action Service will have those powers. It may be in the same office as the Commission or in an adjacent one, but they will have different powers, and Mr Solana has been very keen for the EU to have its own independent intelligence capacity. We will look at this picture pretty widely, therefore. We must remember that when they are discussing the Data Protection Framework Decision, it expressly excludes data protection in relation to the security agencies. I have always asked the question that if this measure only covers policing and law enforcement, are we to have another measure which covers security agencies? It would appear that at the moment we are not going to. The answer to your question as to what we are getting, therefore, is that we are getting the recognition of the role of the intelligence agencies—which is new—but we are getting no accountability whatsoever, whether it is data protection or to the courts.

Q114 ***Lord Wright of Richmond:*** It is a question of whether the security and intelligence agencies are more or less shielded by this new measure.
Mr Bunyan: Shielded in the sense that we are getting both a greater recognition in this Treaty of their existence and also that they are being shielded absolutely, on the one hand, from what one can see as data protection and, on the other, from judicial review.

Q115 ***Lord Lester of Herne Hill:*** But they are not more shielded, are they?
Mr Bunyan: I am not a lawyer, so I do not know. It is possible, of course. I think that there was a Swedish case in the ECHR earlier this year relating to the records being held by the Swedish intelligence agency (SAPO), and the case was overturned. They were told that they had to destroy records in four out of the five appellants. This will be a case which will relate to how much data you can keep on someone's political activity, maybe gathered under terrorism or whatever. It may be that we are therefore seeing the construction of an issue. I do not know.

Q116 ***Lord Jay of Ewelme:*** As I understand it, what we are seeing here is more of a clarification of something which already exists, which is quite useful, namely co-operation among intelligence agencies. It is a clarification that that is not subject to the Court. I am not sure that changes the present arrangements, but is it not a clarification of where things are?
Mr Bunyan: In one sense it is a clarification but, in another sense, we have new powers. The Standing Committee on Internal Security is an utterly new development. The concept of internal security, to people who do not know it, seems to mean simply the police. It is not. It is a concept invented by Mr Kitson in 1971 in Malaya for internal security, in Britain's imperial role. It was a theory which then developed in Vietnam, developed further in Northern Ireland, and is now part of the language in the European Union: that internal and external security have to be seen as both separate and joined up. It is a concept embracing the gathering of resources, not just from the police and security service, but going into the other areas we have talked about: data-mining; getting data on people; monitoring their flights; monitoring their telecommunications. It is a very wide concept. When you set up a high-level committee in the EU concerned with operational co-operation in internal security, this is a major development. This is not recognising what they are doing; this is something entirely new, which we have not had before.

Q117 ***Chairman:*** Can I clarify that for the record? You said that the External Action Service was going to be engaged in intelligence-gathering—
Mr Bunyan: One of its roles. I am not saying that it is its only role.

Q118 ***Chairman:*** Are you saying that is in the Treaty somewhere?
Mr Bunyan: It is not in the Treaty.

Q119 ***Chairman:*** I am sure that it may be in other documents and other people may want to look at it but, for the purpose of our report on the Treaty, I think that is quite important.

Mr Bunyan: You are quite right that it does not say it in the Treaty; but if you read many of the speeches by Mr Solana, Mr de Vries and others, you will know that this is exactly what it is going to do.

Q120 ***Chairman:*** I do not in any way seek to diminish the importance of what you are saying and I am sure that there is a sub-committee that will want to look at it.
Mr Bunyan: But you are quite right that it is not in the Treaty.

Q121 ***Lord Lester of Herne Hill:*** I am not quite sure what you are seeking here, Mr Bunyan. Judges are not best placed to deal with matters of security, unless there is some clear breach of a human right or some abuse of power. Judges, as you know, adopt a hands-off policy when it comes to questions of national security, with those kinds of exceptions. Are you saying that what you regret about this is not just the recognition of greater co-operation by the intelligence services, but you regret the fact that the European Court of Justice is not going to have a hands-on approach in reviewing the exercise of these powers? Or are you accepting in my question that it is undesirable to think of judicial remedies, except where there are breaches of human rights or abuses of power? What actually is your position when you deal with the jurisdiction, as it were?
Mr Bunyan: Yes, I think that they should have the jurisdiction. I have left out the point, which perhaps should be obvious, that one must see accountability here. Before these bodies meet, there must be a national and European Parliament coming together on what is to be their role. What are the limits of their role? Are they going to report back? Are we going to get annual reports? There are always two sides. There is the judicial side and then there is the democratic side, if you like, about what role we are allowing these agencies to carry out in our name.
Chairman: These are all questions for us to ask when they take decisions, if they do take them, under the provisions of the Treaty, not on the Treaty. May I thank you very much indeed, Professor Peers and Mr Bunyan, for your evidence and the very detailed replies that you have given to all our questions.

WEDNESDAY 28 NOVEMBER 2007

Present	Bowness, L	Mance, L (Chairman)
	Burnett, L	O'Cathain, B
	Jay of Ewelme, L	Tomlinson, L
	Lester of Herne Hill, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Professor Elspeth Guild and Mr Florian Geyer, Centre for European Policy Studies, examined.

Q122 ***Chairman:*** Professor Guild and Mr Geyer, thank you very much for coming to give evidence to the Sub-Committee. Perhaps I ought to say what I said before you came in: there are no declarations of interest except, possibly, that I have myself an interest, a rather remote one, as a member of the Lord Chancellor's advisory committee on private international law, which has something to do with Title IV. The purpose of this session is to look at the proposed Treaty. As a first question I would like to ask about the UK opt-ins. The UK has a general opt-in in the area of freedom, security and justice, and it has a further opt-in provided under the protocol on the Schengen acquis, integrated into the framework of the European Union. Perhaps I should have offered you the opportunity of making a preliminary statement, but the first question I would like to ask when you have done that is what the effect of those opt-ins will be and how that may change the present position. If you would like to say something in opening, please do.

Professor Guild: My Lord Chairman, it is indeed a pleasure to be here and to appear before this Committee regarding the Reform Treaty. I understand that Professor Steve Peers gave evidence last week and I am sure that he has provided very substantial detail on the wording of the various different aspects of the protocols. While I have not seen his evidence, I very much suspect that I would agree with the positions which he has taken. I would like to take a rather larger perspective on your first question, if I may. It seems to me that, in the opt-ins which we have, the objective of the UK Government in the negotiations and in respect of which it has succeeded is to obtain wider opt-outs and opt-ins than it had under the Amsterdam Treaty, so that the possible flexibility for the United Kingdom to participate or not to participate in the area of freedom, security and justice has become more flexible rather than less flexible—and, of course, the most important aspect is in respect of judicial cooperation in criminal matters/policing and civil cooperation. The objective, as I understand it, of the UK Government in the protocol to opt-in and opt-out in respect of the Schengen acquis was drafted very carefully in order to achieve the objective of avoiding the possibility of being excluded which has happened in respect, so far, of the European Union Border Agency. Taking these two objectives together—on the one hand, seeking greater flexibility and, on the other hand, the point at which the most substantial conflict has occurred in this area has been where the UK has not been able to participate—one wonders whether we need an awful lot more capacity to stay out when we really want to be more engaged in. Is it worth diminishing the negotiating capacity, regarding the form which Directives may take in the end, through insisting on this very wide capacity to opt in and out? Is it worth the effort, when in fact we want primarily to be in? Of course, in any negotiations, the more space which one party demands and the wider the rules have to be for that one party in comparison with the others, the less force the voice of that party is likely to have.

Q123 ***Chairman:*** I understand your point about the Schengen acquis and the solution of the problem raised by the current litigation, but it is not really a wider opt-out in respect of judicial cooperation in respect of criminal matters, is it? The present position is that they are dealt with, largely, subject to the *Environmental* and *Ship Pollution* cases, under the third pillar, so that there is a unanimity principle anyway.

Professor Guild: Indeed. However, I would say that it is one thing to participate in a framework decision on an aspect of criminal law/judicial cooperation in criminal matters, the legal effect of which is perhaps more subdued than a Directive or regulation in the first pillar, in comparison with deciding, "We don't think we will have anything to do with that" and opt right out of it, and that puts us in quite a different position in terms of our ability to participate generally in the field.

Q124 ***Chairman:*** You mean it is going to go ahead anyway under Title IV, and if we are seen as the one person who does not participate at all that will be detrimental.

Professor Guild: I think one could put it that way. I think there is also another angle on it that we will probably come back to a bit later, which is that, while there may not be agreement in the Council, it may be better for negotiations to go on longer to achieve agreement than for a small number of Member States to go ahead on their own. If there is not agreement, that means there are profound difficulties, that there are Member States that have positions which, for their own reasons, they see as being very important. It seems to me, as a principle of European law and the effectiveness of European law and its coherence, 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 with rather than to leave some Member States behind.

Q125 ***Chairman:*** Of course, very often—and we have not had a great deal of experience of not opting in—the purpose of not opting in is in fact to achieve a better deal into which you feel you can opt. That is clearly what is intended in relation to the current Rome I negotiations, for example. Is that not an effective approach?
Professor Guild: My Lord Chairman, whether something is effective depends upon the objective you seek to achieve. I am sure that is an effective approach in respect of certain objectives. In terms of the smooth operation of the European Union, it may be slightly less effective. It might be better to lower the sights of the overall proposal and decide on something which is perhaps less extensive in order to deal with the objections of one or two Member States.

Q126 ***Lord Burnett:*** Are you suggesting that the other members of the EU should lower the hurdle in order to achieve agreement with others?
Professor Guild: My Lord Chairman, I think that is how the European Union has operated. In order to achieve agreement among 27 Member States/25 Member States/15 Member States—or however many you have from five onwards—there are always some things that some Member States will want and to which others are opposed and it will always be a matter of negotiating to achieve an outcome which satisfies the parties which everybody can live with. If one says, "We don't want to do that anymore. That's too complicated, we can't live by that rule anymore, and we are now going to say we will not participate in that" then one achieves a very different result and a different kind of European Union than if one proceeds by the traditional mechanism.

Q127 ***Lord Burnett:*** May I add one more point, My Lord Chairman on that. If we did adopt the proposal you are making and go through it in that way, could we be therefore bound by qualified majority rules to accept terms and conditions which we would find unacceptable?
Professor Guild: We do live in democracies and qualified majority vote is a lot more than 50%. We have made a number of choices about how we want to proceed with lawmaking and there is always the possibility of insisting on unanimity in certain fields which are particularly sensitive, as has happened in a number of different areas.

Q128 ***Chairman:*** There is, of course, the "emergency brake" in the proposed criminal area, but, coming back to that point, there are still respects in which different European countries focus on different things and that is particularly true, perhaps, in the area of civil and criminal law. To take civil law, London is an international legal centre and we have interests—for example, in the derivatives markets and so on—which are perhaps not shared throughout Europe. Again drawing on the Rome experience, there were particular points which might not have met with sympathy on a majority basis. There is the other factor that the common law, although it is a very strong world legal system, is to some extent an odd man out in Europe: there are only three and a half common law countries and most of them are very small and perhaps some of our concerns are not fully understood. Is that not a valid reason for having quite a general opt-out with the intention of opting in whenever possible?
Professor Guild: My Lord Chairman, one and a half of those common law systems do not have any difficulty being part of the system. A second one probably would not if the UK was not having a lot of difficulty with it. So we are down to one really! On the basis, "Good grief, we do not want to be bound by anything coming from anywhere but our own Parliament," one really ought not to enter into any international treaties at all.

Q129 ***Lord Burnett:*** Could I add to what My Lord Chairman said: there are certain financial industries and businesses which are not of important concern to our country but which are vitally important. I think you said that sometimes these things are not properly understood and the markets in which our City of London operates are not properly understood and there is not sufficient sympathy with them among many other members of the European Union. Or am I completely wrong about that?
Professor Guild: My Lord Chairman, I would certainly not suggest that Lord Burnett is wrong on anything! Certainly every Member State has terribly important interests which are central national interests and which they are very anxious to protect. We have seen this, for instance, in telecoms. This has been a terribly sensitive issue. We have seen it again on the Directive on Services—the infamous

Bolkenstein Directive—where very central issues of concern to the Member States in terms of protection of their services markets were at stake. In those two cases, the United Kingdom was on the other side of the fence, in saying, "Well, actually, we don't think this is quite so central," nonetheless, if we take the Services Directive as an example, the interests of those Member States which were particularly sensitive were, of course, taken into account. And perhaps we do not have a Directive that we wanted but we have a Directive that everyone can live with.
Chairman: I think perhaps we ought to move on. I want to give Mr Geyer a moment, but let us have Lord Lester's question first.

Q130 ***Lord Lester of Herne Hill:*** I should just say where I am coming from. I, on the whole, favour as few opt-ins and opt-outs and as much integration as possible, so that explains my slightly strange question. You slightly dismissed My Lord Chairman's question about protecting the common law, so I just want to give you one example, declaring an interest, because I was counsel for the Cyprus Government in a case called *Kyprianou* in the European Court of Human Rights which concerned the common law contempt jurisdiction—the kind of jurisdiction where you throw an egg at a judge and he or she is able to lock you up immediately. Out of the 47 judges of that court—and I suppose you would call them, in your idea, two and a half or three and a half—only four judges were from a common law background and the concern of Malta and of Ireland and of Cyprus and of the United Kingdom was that those judges would show very little regard for that common law jurisdiction. They all came in and made their representations in that case. Does that not indicate that there is a common interest among common law jurisdictions—including, for this purpose, Scotland because they also were affected—in a system which, if one is not careful, will adopt a strongly Napoleonic civil tradition and therefore we should pay attention to that? I apologise for the length of the question but I wanted to give you a real example, albeit on the Strasbourg side and not on the Luxembourg side?
Professor Guild: There are a number of different legal traditions in the European Union. We have a strong Roman Dutch tradition in some areas; we have a Napoleonic code system in others; we have common law systems; and we have other parts of systems which have come in particularly with the newer Member States. From what I have seen so far, it seems to me that there has been tremendous respect for the different systems which apply and, certainly, if one looks at the decisions of the European Court of Justice on enforcement of, for instance, time limit systems by which legal systems operate, there has been quite substantial deference to the differences in the national systems. Yes, of course this is something of an adventure. It is a route we chose to go down, starting from about 1993 with increasing integration of our systems. Either we have confidence in our partners in this regard or we do not. I think that is the problem. At the moment we are saying, "We do and we don't"

Q131 ***Chairman:*** Mr Geyer, do you have anything you would like to say on the subjects which we have been touching on?
Mr Geyer: My Lord Chairman, thank you very much. We had divided up the questions and we decided that it might be wise to leave Professor Guild the questions that are more related to UK specificities. I can only agree and join in with what Professor Guild said.

Q132 ***Chairman:*** Then perhaps we can move on. I think you touched on the effect of the new Treaty in relation to Schengen and the question of locking in and locking out. Would you move to consider the proposed new redefinition of the area of criminal competence and may I ask you to compare it to the existing jurisdiction under Title VI of the Treaty on the European Union. Do you see the grounds as differently expressed/more wide in the competence afforded?
Mr Geyer: When looking at the mere provisions in the new Reform Treaty one might get the impression that, in fact, there is an extension of the criminal law provisions and there are more detailed rules or more substantial rules. We have new elements in this Treaty, including the European public prosecutor. It seems as if there is something completely new coming up on the horizon. Especially when looking at the question on the substantive criminal law provisions, the harmonisation or approximation, or however one might define this process of finding common definitions and common sanctions of criminal offences. In the existing Treaty it is only mentioned that we can do that on terrorism; in trafficking in drugs; and in organised crime. This is Art. 31 (1)(e) of the Treaty on European Union. When looking at Article 69f in the new Treaty, there is a much wider field of possible criminal offences. However, when we look at what has been adopted already by Member States, and most often on the initiative of Member States as framework decisions under the third pillar, we see that we have a framework decision defining criminal offences and penalties in the areas of fraud and counterfeiting of non-cash means of payment; trafficking in human beings; unauthorised entry or residence; private sector corruption; and attacks on computer systems. All these are things where we have harmonisation and approximation contained in framework decisions which do not fall, under my understanding, in those three limited cases of drug

trafficking; organised crime; or terrorism so that we have already this extension under the existing framework. The new Treaty does, however, make it clearer. It clarifies and structures this area which seems a bit broad and upright now and brings in checks and balances on top by involving more actors, by involving the European Court of Justice, by involving the European Parliament. In the end, a virtually uncontrolled area which has often been labelled as an interior minister's "playground" is in fact constrained and tamed and does not necessarily extend in substantive what has not been happening before.

Q133 ***Chairman:*** Could I suggest two possible differences which I would like your comments on. One is that the *Ship Pollution* case establishes that the determination of the type and level of the criminal penalties to be applied does not fall within the Community sphere of competence, the competence under the existing Title VI; whereas Article 69f of the proposed Treaty provides expressly that by a qualified majority in the areas you have mentioned—the core areas: terrorism, drug trafficking, visa crime—the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions. Is that not an extension?
Mr Geyer: It is so far no extension. In those framework decisions we have also those penalties and sanctions. The main question we have in the *Ship Source Pollution* and in the *Environmental* case is not: Does it exist? The question is: Who is deciding on it? In framework decisions we have Member State governments under the EU Treaty agreeing on sanctions and penalties and the question is only: Is it the Community competence or is it the Union competence? It is only the question under which procedure and who, and not so much what.

Q134 ***Chairman:*** The answer is that my question is put on a false premise because it is not comparing like with like. Essentially what is happening under the third pillar at the moment is the setting of minimum sanctions, so this is a reproduction. The other question is in the opposite sense. The *Ship Pollution* and the *Environmental* cases show that there is a criminal competence under the first pillar, not extending to the setting of sanctions. Do you have a view as to whether that would now have to be exercised under Article 69f with the consequent right not to opt in or would this *Environmental/Ship Pollution* jurisdiction still continue independent of the opt-in?
Mr Geyer: This is one of the questions that is wide open to speculation. It is very difficult to predict how it will proceed. One might argue that with the coming into force of the new Reform Treaty we have a specialised system, a special detailed ruling how this should happen: how it should happen that we provide criminal sanction and penalties in a field of, then, Union policy and, now, Community policy when it is harmonised, and this would provide an end to jurisprudence of the court.

Q135 ***Chairman:*** The argument is the *lex specialis*, that you have a special provision.
Mr Geyer: Exactly, we have a special provision so we do not have the supposed gap any more in the Treaties and we have to rely on the new provision. On the other hand, one might argue and say that it is still as you have mentioned, there is a difference between the court's jurisprudence and what will be written in the Treaty, so under the *Ship Source Pollution* and under the *Environmental crime* we have it limited mainly to the aspect of environmental policy. Even the *Ship Source Pollution* did not go along the way in opening up to all Community policies but took it from transport and said, "But in the end it is an environmental measure". We have the *Ship Source Pollution* not opening up the field, as many argued and as, also, the Advocate-General opined, we have it still limited to the environment, and we have, as you said, the missing criminal penalty provision, so one might argue that there is a difference and, as there is a difference, the case law can still continue to apply. The question would then be: Would it be wise, would it be practical and what would be the outcome with the opt-out?

Q136 ***Chairman:*** Theoretically, could you get a problem? If the matter was pursued under Title IV with an opt-in, could it be said that it should be pursued under the other provisions? Or would that argument no longer apply? The argument in the *Ship Pollution* case and the *Environmental* case was that it had to be pursued under the first pillar.
Mr Geyer: This is the point. If it has to be pursued under the first pillar and Article 175 is the proper legal base for doing this, then one might argue: Why should this stop being the proper legal base in the future? We might see that limited and restricted to environmental policy, this case law will continue, but it will not be broadened out to the other fields. It might also not be advisable or practical to propose this because this case law has major faults. It does not provide for the specification of sanctions and it is limited. Therefore it might be that, even though there is a theoretical legal possibility to continue, in practice it will not be recalled upon by the Commission or other Member States when initiating new proposals.

Q137 ***Baroness O'Caithan:*** Is that because the case is going on at the moment?

Mr Geyer: The case has finished.

Q138 ***Baroness O'Caithan:*** If we did opt in under Article 69f and a similar case occurred, what would happen?
Mr Geyer: A similar case that is already existing or a new measure?
Baroness O'Caithan: A similar case to the one that has already finished on marine pollution.
Lord Burnett: But new circumstances.

Q139 ***Baroness O'Caithan:*** New circumstances. It would not be identical but similar.
Mr Geyer: My Lord Chairman, may I ask in which direction the question is going?
Baroness O'Caithan: The question is: If you go and opt in on this one, everything that has gone before would not apply? Is that right? You would not refer back to that case law. Is that it? I am trying to clear my own mind.

Q140 ***Chairman:*** I think the argument is as to whether the only means of legislating is now under the new provisions which provide for an opt-in or whether there is still a residual and, one might argue, a primary basis of legislation under the transport and environmental provisions which presently have been worked out in their scope by the European Court. The European Court has spoken cautiously in each case and limited its observations to a pillar one jurisdiction in respect of environmental matters. Is that not the position?
Mr Geyer: As I said before, if there are future cases, they will be limited, I presume—but it is never able to predict it with full certainty—to environmental crime. It might be possible or we might see that it will be eliminating an opt-out in this case if the court is, let us say, strong enough or confident enough to say, "We have developed this under the old Treaty and, as we have not changed the environmental law substantially with the new Treaty, we have, in effect, the same provision which was good enough for criminal sanctions under the old system and it will continue." But, as I said, I think it will be limited to this special field of policy.

Q141 ***Chairman:*** Just to sum it up, we may be in a position where the court is unlikely to eat its previous words but is unlikely to speak more widely and extend the jurisprudence, which, apart from the Treaty, it might well have done.
Mr Geyer: Yes.
Professor Guild: My Lord Chairman, I would like to add that the Commission has proposed a number of other measures now which include criminal sanctions in other fields. For instance, the one I am most familiar with is the employer sanctions for hiring irregular or undocumented aliens. There are a number of proposals out there that are on the table of the Council at the moment which do include the sanctions. It will be a question for the Council to decide in the negotiations in which the UK will participate—unless, of course, it opts out, as it looks like it is going to do on the employer sanctions one. It will be in those negotiations that that decision will be dealt with. If in a Directive in some other field of law beyond, for instance, environmental—let us say in working conditions—the Council agrees a measure which includes criminal sanctions, it would seem to me a bit odd then if the Court of Justice were to say, "Tut-tut . . . No, no, we cannot possibly do that," because we will have the political evidence in the form of the Directive that the Member States wanted to do it.

Q142 ***Chairman:*** Thank you. Shall we move on to another concept which we find for the first time in this area—correct me if I am wrong—and that is mutual recognition, Article 69e. What do you perceive Article 69e as meaning and how do you perceive it as applying?
Mr Geyer: It is very interesting to see that the principle of mutual recognition is making its way into the Treaty. It has been out there for quite a while, since the late 1990s. The most stunning aspect of the irony of history is that it was in fact the UK which was most eager and strongly promoted this principle of mutual recognition to be used and applied also in criminal law because it would help in overcoming the different systems—common law, civil law—making it not so necessary to approximate procedures. It is interesting to see that now that it will come into the Treaties promoted by the UK, the UK chooses to get as far away as possible from those provisions, like a father who is seeking to avoid any responsibility for his child. The principle of mutual recognition has its pros and its difficulties. There are difficulties, highlighted, for example, by the Finnish Presidency last September, where they issued a paper stating, "We are facing problems with this principle. We thought it was a very good principle but we are having problems in the implementation," and in June the Commission tendered for a study to assess this principle and what the future of this principle will be. It is very interesting to read the tender explanation because it is in fact a statement of all the things that do not go well under the principle of mutual recognition. It is in fact stated in this tender that there are different conceptions and understandings between Member States as to what it refers to and what it actually entails. We are in the situation right now that the principle of mutual recognition will be elevated from policy to hard treaty law but we see that there are still some misconceptions and difficulties in knowing what actually this new Treaty provision will entail.

Q143 ***Chairman:*** In language terms it embraces not merely recognising each other's decisions but also, linguistically, it is expressed to include an approximation of the laws and regulations of the Member States in certain areas, particularly the core areas of terrorism, drug trafficking, et cetera. Linguistically, it is a slightly all-embracing concept.
Mr Geyer: We had already taken the position that mutual recognition might not work in its pure form. It always needs accompanying approximation of certain rules in order to allow us to make it happen, because this principle of mutual recognition, the concept of mutual recognition, is built on mutual trust. One judge trusts the other judge and the citizen has trust in the different systems and knows that his rights and safeguards are protected throughout the EU. This is why we can trust an order that is coming from Greece to Germany or from Spain to Italy, because we know that there are common rules. This is why we always said that the pure principle of mutual recognition will face difficulties because this trust cannot be imposed and implemented without the accompanying measures that show the professionals and the citizens that there are reasons to have trust in each other. In an edited volume that we will be publishing soon, we have a contribution titled: *Too Different to Trust* and there the author made a comparison and interviewed German judges and UK judges on the implementation of the European Arrest Warrant and the level of trust that they have. There it was seen that the further away legal systems are in their concepts, the less it is that judges and magistrates do practically work together. There is a good relationship between Germany and Austria because the systems are similar and the languages are similar but the further that moves apart the more difficult it will become to have this trust that is necessary.

Q144 ***Lord Jay of Ewelme:*** In the classic areas of the Treaty where mutual recognition has existed so far or has done for some time, like the single market, there is usually a combination, as I understand it, between mutual recognition based, as you say, on trust and a sort of minimum harmonisation in order, as it were, to encourage that trust among the Member States. Is that a concept which you can see as applying in the areas in Title IV or is that an area where one is going to have to look at this rather differently?
Mr Geyer: This is the idea where it comes from, but I think that Member States so far were quite eager to try to agree on those underlying common principles, like toy safety. If we trust in a different product—alimentation, toys, liquids, chemicals, all those things—we trust each other because we have common standards of product safety. Exactly this is the problem in the field we are talking about now: we want to promote the principle of mutual trust but Member States have difficulties in finding common ground on those accompanying measures that would establish the common standards.

Q145 ***Lord Jay of Ewelme:*** What would be the process, as it were, of testing this system? Would it be coming forward with a proposal and then, as it were, testing it during the negotiation? Or would there be some kind of event before that to work out exactly what Member States meant by mutual recognition in the context of Title IV? What happens now, as it were, or will happen, assuming this goes through?
Professor Guild: If we take a couple of the really difficult chestnuts on the European Arrest Warrant, one is the elements of the crime. We have our list of the crimes for which there is no longer an obligation of criminality in two Member States. One of the difficulties which arises endlessly is: "Yes, but does robbery mean the same thing?" Are the elements of the crime the same in two different Member States or is this a completely different crime for which we are no longer required to have criminality which means that we have a fundamental problem. To resolve that, if we take one of the practical examples and one of the areas where there has been quite a lot of call in the legal world for further clarification to ensure that we know exactly what we are talking about when we are talking about mutual recognition for the purposes of the European Arrest Warrant, there would need to be a proposal. It would need to be a legislative proposal. It is almost inconceivable that it could happen through judicial decision making. If the system got so out of control that the European Court of Justice was faced with the question: "What are the elements of the crime?" I think that indicates a failure on the part of the lawmaker to give sufficient clarity to the issue.

Q146 ***Lord Lester of Herne Hill:*** I wonder whether this makes any sense. It seems to me that in the German or the American system of government you have federal clients, federal courts, common standards as well as state courts. In the European system, we do not have that. We do not have federal crimes, we do not have federal courts, we have a very incomplete system. The European Court in Strasbourg is meant to ensure independence and impartiality in the determination of criminal and civil cases but its 47 judges have a backlog of over 100,000 cases and cannot really do that well. Among the Member States there are some who do not yet have properly independent and impartial courts, in my view. Therefore, when we talk about mutual recognition and other compromised mechanisms, is it not right to say that these are attempts with an incomplete system to do the best one can, given all the disadvantages I have just tried to summarise crudely and undiplomatically?

Professor Guild: One of the issues which we have raised again and again is that there have to be compensating measures. One of the great difficulties about going down the route of the European Arrest Warrant is that, if you do not have at the same time a measure on the rights of the defence and a measure on bail, you are going to get a highly inadequate system; that you cannot go down the course of route without also protecting the citizen against the course of power of the state. We see again and again an enthusiasm for abolishing the internal borders that constrain the coercive state among the Member States and a huge reluctance to abolishing those obstacles that borders form for the protection of the defence. Therefore, I think that your question, Lord Lester, is a very proper one.

Q147 ***Lord Lester of Herne Hill:*** You are talking about substantive safeguards built into the European legislation. I am trying to say that whatever safeguards you build in—and I quite agree with the point you make—you have to have judges there to be able to give effective remedies. The problem is, looking at Europe as a whole, to see that there will be a common system of effective remedies, either among the Member States' courts or among the two European courts. Therefore, when you are seeking mutual trust it makes it harder to do so if you are looking at it from the enforcement point of view, from the judicial determination point of view, whatever safeguards you build into the legislation.
Professor Guild: Indeed, but I think we need to be careful when we are looking at different systems and our concerns. Perhaps we can take the excellent study which the Council of Europe's Committee CEPEJ did on criminal justice systems in the 47 Member States of the Council of Europe. They did a very wide ranging study on the criminal justice systems, looking at them from the perspective of how resources are allocated to them, and one of the things which I found particularly interesting is that there is one new Member State where a starting prosecutor is paid twice the salary of a starting judge and there is another Member Stats where a starting judge is paid twice that of a starting prosecutor. The first case is Sweden and the second case is Ireland. These are not self-evident. The ways in which our criminal justice systems work and the weightings which we give to different parts operate differently and perhaps the results are not as obvious as one would expect.

Q148 ***Chairman:*** Perhaps I could follow this line of thought a little. You have been talking about the criminal areas. I do not know whether you know, in the civil area, a case called *Eric Gasser v MISAT*, the Brussels regime. It is a case where the European Court effectively said that the fact that the Strasbourg Court has the backlog that Lord Lester has mentioned and the fact that the backlog is very heavily contributed to by Italian delays is irrelevant. The Austrian Court had to await the outcome of Italian proceedings. Even if there was a clear exclusive choice of law courts referring the dispute to Austria, the Austrian Court had to stay its hand until years down the line and the Italian Court eventually got round to saying, "This is not for us." This is a device which an Italian professor once described, I think in the 1970s, as the "Italian torpedo": you commence proceedings in Italy in order to thwart them in the proper jurisdiction. I do not say that that was the facts in this case but it is a well-known device and the backlog is referred to in the CEPEJ study which you mentioned. You are saying that we need to have compensating measures if we are going to impost mutual trust on states: we have to try to ensure that the quality of justice is the same and that the standards are the same and therefore a degree of harmonisation should follow. Have I understood it right?
Professor Guild: My Lord Chairman, I am delighted to hear this Committee speaking in favour of harmonisation in criminal justice because I think that it is really quite a sensible approach!
Lord Burnett: I think that is going a little far actually, but, still . . .

Q149 ***Chairman:*** I was putting it to you as a question, I hope—though I was much interested in Lord Lester's question and your response to it.
Professor Guild: Perhaps I could add a little bit to that on a more serious note. Article 69e(1) says "The European Parliament and judiciary, acting in accordance with the ordinary legislative procedure, shall adopt measures to: (c) support the training of the judiciary and judicial staff; (d) facilitate cooperation between judicial or equivalent authorities of the Member States . . . " It seems to me that we have at least there a glimmering of a competence to deal with some of the issues which are of concern to you which are very serious.

Q150 ***Chairman:*** Do you think that if the Community signs up to the European Convention on Human Rights it might take a greater interest in its jurisprudence in the Human Rights aspects of access to justice?
Professor Guild: One would certainly hope so!

Q151 ***Chairman:*** Perhaps we ought to move on. Would you make a comment on what you mentioned in passing in your opening remarks, and that is the dangers of different levels of integration via the enhanced co-operation provisions via opt-outs and opt-ins. That happens already. Why do you think it would be undesirable? It happens already, informally and in Schengen and so on.

Professor Guild: Yes, indeed, My Lord Chairman. I think our position is that if one looks at the Schengen experiment one sees a very unsatisfactory mechanism of lawmaking. It can hardly be a satisfactory situation that a whole treaty and all of these uncertain objects that are made—and I will not even glorify them with the name of "Acts"—suddenly get pumped into the EU system to be sorted out thereafter, as we did with the Amsterdam Treaty, and it has taken us more than five years to try to figure out what is the legal value of any particular issue. We still have tremendous incoherence throughout the Schengen system about how it operates and which set of rules. We have not managed to adopt a common visa code yet as a regulation. We do have a border code as a regulation. It is a very, very unsatisfactory way of going about things, which fails, in our opinion, to give proper voice to the correct concerns of the Member States. When a small group of Member States gets together and agrees something, the reason it is not agreed by the 27 is because not all 27 agree. Therefore, some have very substantial concerns. One can take the Treaty of Prüm and the concern of the Swedish Government regarding air marshals being armed on planes, which gave rise to a series of difficulties there. If a smaller number of Member States gets together and then seeks, as in the Treaty of Prüm, to set out in a treaty what the agenda is and then at the end of that treaty says, "And in two years we intend to make this EU law" they are effectively saying that the legitimate concerns of the Member States which had difficulty with certain provisions are not legitimate at all. That seems to me to be an extremely unsatisfactory way of going about lawmaking in a European Union of the 27.

Q152 ***Lord Jay of Ewelme:*** How would that make it European law? If there were only x number of states under the Treaty of Prüm, they cannot just say, "This is going to be European Union law"; there then has to be a process which the others agree.

Professor Guild: Indeed. This is what we thought and then the German Presidency put forward a proposal for a decision which would transform the majority of Prüm. I would like to say that the air marshals bit fell out in the process, but, nonetheless, the rest of it has all stayed in. They have proposed a decision—not even a framework decision, so it will not even go through the legislative process—to transform Prüm into a third pillar measure.

Lord Wright of Richmond: My Lord Chairman, can I help Lord Jay and say that if he looks at the European Union Select Committee's Report on the Prüm Treaty, on which, I may say, Professor Guild was extremely helpful, you will see there an explanation of what the Germans were trying to do.

Chairman: Did they succeed in doing it?

Lord Wright of Richmond: Yes.

Chairman: They did. Under what provision is this? Under the third pillar?

Q153 ***Lord Wright of Richmond:*** It is well under way.

Mr Geyer: I think they reached a political agreement at one of the Council meetings. It is not yet hammered out completely but apparently it will be soon. In spite of it being transformed through the negotiating of the process into EU law, the old, the original, Prüm Treaty does not cease to exist, so it will be an international agreement between the seven original Member States and whoever wants to join in, continuing to exist on top of a Europeanised "Blue-Prüm". This makes it very difficult for the judge and the magistrate who has to deal with it because exactly what we want to achieve with the common EU area is to make it more simple and more easy and to avoid a million systems—

Lord Jay of Ewelme: I can see that. I can see that that comes in untidy and undesirable and unstructured and all that, but that seems to me a different point from the point we were on earlier. It seems to be rather an important point—which I have to say I had not quite focused on—that there was a risk that people who had reached an agreement outside the framework of the Treaty could in some kind of almost automatic way make that an instrument of the EU as a whole. That seems to be rather an important point.

Chairman: We are all grateful to Lord Wright for the reference and we shall study the report. Which Sub-Committee was it?

Lord Wright of Richmond: Sub-Committee F. It is a European Select Committee Report. I should say that there are also instances of six ministers getting together and taking decisions which, by implication, commit all the members of the European Union, in successive meetings on which this Committee has also reported at Stratford-on-Avon and Heiligendamm, meetings of Home Office ministers.

Chairman: We will ask our legal advisers to send us all a copy. They are going to do that. I think this is an important point.

Lord Wright of Richmond: My Lord Chairman, Prüm is being debated in the House of Lords next week.

Chairman: Yes, on 5 December. Lord Bowness, you had a question.

Q154 ***Lord Bowness:*** A very short question, My Lord Chairman. If we could just leave aside for the moment the desirability or otherwise of these opt-ins and opt-outs, could I just ask the witness whether they think the claimed opt-ins and opt-outs are effective in law.

Professor Guild: My Lord Chairman, I am the opt-in person, so I guess I had better try to answer that one. Are they effective in law? Well, the UK Government has chosen not to participate in all of the measures on

legal migration and that means, for instance, that it does not participate in the long-term residence Directive; that means, for instance, that if Americans who have been living and working in the UK for five years get a posting to Paris or to Frankfurt, they cannot go without going through the whole work permit scheme over there and starting all over again. Once again this has been dealt with in a report of Sub-Committee F. Are they effective? Yes. To that extent we have prevented third country nationals in the UK from participating in that system.

Q155 ***Chairman:*** And vice versa, presumably.
Professor Guild: And vice versa.

Q156 ***Lord Bowness:*** Do you believe they will be equally effective under the new proposals?
Professor Guild: It would seem to me that those kinds of opt-ins and opt-outs will be equally effective. If one looks at, for instance, the third country agreements in the area of immigration and asylum, the UK has opted in to all the readmission agreements and out of all visa facilitation agreements. That seems to be piggy-backing for coercive measures and then refusing to accept the trade-off on the basis of which the third country agreed the coercive measures.

Q157 ***Chairman:*** Mr Geyer, time is short as far as you are concerned, or relatively short. Is there anything you want to add on this question which bears directly on the paper which we have read and thank you for?
Mr Geyer: On the enhanced co-operation question?

Q158 ***Chairman:*** Yes.
Mr Geyer: I think we always need to keep in mind just a very short remark, that the reason for judicial co-operation as it was perceived historically and within the Treaty is not an aim and a goal in itself but always accompanied or seen as a flanking measure of opening up borders within the internal market. This makes a difference in comparison to the international co-operation, Interpol and the different measures—which may be seen as an aim in itself—but within the EU it was always a flanking measure: "As we may be losing security by opening up borders, we will enhance co-operation of judges and policemen and we will make it easier not to rely on borders as gatekeepers of security because we have made it more easy to operate across borders of policemen." When we have a common area of free travel, and if we want to have this one area, then it is imperative that also within this common area we do not have different levels of these flanking measures. This is why, from this conceptual understanding, a differentiated treatment of flanking measures within a unified free travel area would lead to difficulties and to negativities.

Q159 ***Chairman:*** Can I move on, unless there are any questions on that, to a point on the new Article 24 of the Treaty of the European Union which in the area of foreign affairs requires unanimity in respect of the protection of individuals with regard to the processing of personal data, whereas in other areas there is no such requirement. What is the purpose of that provision?
Mr Geyer: On this question, My Lord Chairman, we would be most grateful for the possibility to find out among the governments of the EU 27 the purpose and the history of this provision, because we did not have it in the Constitutional Treaty. It is in fact an innovation of this new reform setting. It was agreed upon in June, when it was also decided that the idea of the Constitutional Treaty to have one common goal on data protection, notwithstanding the policy area, was divided up. We have a special declaration on data protection in the now third pillar; we have this special provision of Article 24 on data protection when we come to foreign policy. All this is surprising and there is no proper explanation given, at least in the open sources, so we would be most grateful if this would be a question posed by your Committee to your Government and by the other parliaments to their governments because it is very difficult to see. It seems to us that it might be linked to the considerable difficulties and considerably difficult questions in connection to the Extraordinary Rendition Report of the Parliament. It might be linked to the measures against financing terrorism, the listing cases, because all this involves sharing data and using data with third states, with third intelligence services, and it might be that in the Council and among Member States there was a certain kind of nervousness that new data protection rules that would apply to all fields would make them forced to open up things that they might better not want to open up.

Q160 ***Chairman:*** It is designed to increase the standard of protection of individuals, is it, in the area of foreign policy?
Mr Geyer: I think it is designed to have a special regime on it and to say: "We will adopt a special data protection rule"—which in my opinion certainly will not be higher than the others but which will have to be subject to the special sensitivities that we have in foreign policy and security measures. I think it is an excuse.

Q161 ***Chairman:*** It may move in the opposite direction, you are suggesting.
Mr Geyer: I do think so. I do think that the aim is to move it and to adapt it to the needs of the second pillar and to the special needs that exist there.

Q162 ***Chairman:*** There might even be an intention to give less protection to individuals.

Mr Geyer: It might do so and the parliamentarians, the MEPs who represented the European Parliament, Elmar Brock, Mr Duff and Baron Crespo, took this particular Article to say this is unacceptable and they have been highly critical of this move of the Inter-Governmental Conference to move out the data protection standards in the second pillar. I think at a certain point they even threatened to say, "If this is in the Treaty, we will not sign."

Q163 ***Chairman:*** Because they will not have a word in the setting of the standards under the EU.
Mr Geyer: Yes.

Q164 ***Lord Lester of Herne Hill:*** It seems to me, looking at Article 24, that the last sentence is rather worrying because it says that compliance with the rules will be subject to review by independent authorities, but that is not an effective safeguard for the individual of the kind that is required by the European Human Rights Convention, is it?
Mr Geyer: Exactly. It would add an independent authority of which kind? Is it the European Data Protection Supervisor? Is it the Article 29 Working Party? Will it be a special committee created newly to allow for a special in camera procedures? There is a fear that it might add another body/institution that has a special mandate and, as you say, will not live up to the data protection standards that we normally are used to.

Q165 ***Chairman:*** Although, to be fair, that is also a phrase which appears in Article 15a in the Treaty on the functioning of the European Union, so it is a common problem whether we are talking about foreign policy or not.
Mr Geyer: Yes.

Q166 ***Chairman:*** Could we move on then to a question about the changes introduced by the proposed Treaty as regards co-operation in relation to border checks, asylum and immigration. That is a comparison of the existing Article 63 of the EC Treaty with Article 69a of the new Treaty of the functioning on the European Union. Do you have any concerns about that?
Professor Guild: My Lord Chairman, our greatest concern or our greatest interest in respect of these changes is specifically the changes in respect of the competence and the jurisdiction of the European Court of Justice. The extension of the court's competence to receive preliminary questions from courts at all instances we think is absolutely fundamental and the most important change which is taking place in this field and one which we very strongly support.

Q167 ***Chairman:*** Is that not going to carry with it risks of delay and overloading of the court, which is already overloaded and is perhaps not in its most familiar area dealing with this type of problem?
Professor Guild: Indeed, My Lord Chairman. This has been a very big question since 1999 (when we gave the court jurisdiction at all, and only from courts of final instance) but, if one looks at what has happened, we have only one reference to the court of justice from a court of final instance on an asylum issue on the Qualification Directive—I do not even think it has a number yet—whereas on judicial cooperation in civil matters there have been quite a number of references and even some judgments. It does not seem at the moment that the area of borders, immigration and asylum are going to overload the court but probably civil justice.

Q168 ***Chairman:*** Is this an area where you might also suggest alterations, changes, adaptation to meet the new European rules, not at the national level here but in the European Court of Justice itself.
Professor Guild: There is a proposal on the table which was put forward last year in December 2006 on changes to the procedures which seemed to be quite solid which are still sitting on the table but certainly are designed to address the question of how to deal with cases where there really is a tremendous need for expedition and this seems to me to be a very sensible approach. It does not seem to me to be necessary to start thinking about specialised chambers until one sees what kind of demand that is, until one begins to get the cases going. At the moment, there does not seem to be a tremendous demand. The Member State courts seem to be dealing perfectly happily with interpreting the borders, immigration and asylum acquis.

Q169 ***Lord Lester of Herne Hill:*** My wife is an immigration and asylum judge, so I should declare that before asking this question. Obviously asylum and immigration cases are cases that need to be decided very quickly in some cases. Will the new opportunity to refer cases be subject to some accelerated procedure in terms of the European Court itself so as to ensure that there are no unnecessary delays in cases of real urgency?
Professor Guild: My Lord Chairman, every time there is a discussion of urgency in immigration and asylum cases sadly it seems that it is the Member States arguing that they are not going to be able to expel somebody as fast as they want and it is never concerns about, for instance, facilitating family reunification for children who are growing up far from their parents.
Lord Lester of Herne Hill: I am sorry to interrupt you but I was thinking precisely of that kind of case where someone has been hanging around for years and

years and it is very urgent to get that sort of issue resolved.

Chairman: I am told that we are going to see next week the proposal you mentioned a moment ago on urgent preliminary references which is, I think, designed for this area.

Lord Lester of Herne Hill: In that case, I withdraw the question.

Q170 ***Chairman:*** I would like to move on to give Mr Geyer an opportunity to wind up with any points he wants to make before he has to leave, but I have a question on Article 65 of the existing Treaty on the European Community and Article 69d(2) of the Treaty on the functioning of the European Union. Both deal with co-operation in civil justice and family law in matters having cross-border implications but the existing wording is "in so far as necessary for the proper functioning of the internal market" and the revised wording will be "particularly when necessary for the proper function of the internal market". Would you give your view as to why there has been the change in wording and how significant it might be.

Professor Guild: My Lord Chairman, I will deal with your question on Article 65: Is "particularly" going to be particularly important? Clearly somebody thinks it is going to be particularly important. Some think it is going to be so particularly important that it is worth making an awful lot of noise about. Do I think it is going to be particularly important? I cannot say I really do. It does not strike me as the kind of thing that will be decisive if one gets to the European Court of Justice and the court is trying to decide whether it is "necessary for the proper functioning" or "particularly when necessary . . . ." Perhaps there is a change of emphasis but will it be substantial? Perhaps it will act as a good indicator to the lawmaker, to the Council and to the Commission not to propose things which are unnecessary, but, beyond that . . . .

Q171 ***Chairman:*** It does not say "when particularly necessary"; the "when necessary" is one example. It would be open, surely, to the European court to say that a requirement of relevance to the proper functioning of the internal market was irrelevant/no longer existed.

Professor Guild: Indeed. When we see the Reform Treaty in operation the way in which the internal market will be articulated with the area of freedom, security and justice and the slightly wider objectives of the European Union will take some time to adjust to. Perhaps I am too embedded in the traditional thinking where the internal market **is** the driving force and retains its centrality as the driving force. Perhaps I am too rapidly jumping to the conclusion that things will not change so dramatically as regards the perspectives. However, it still seems to me that one would need a good reason to proceed if one was going to take advantage of that slightly widened competence.

Lord Jay of Ewelme: It is on the face of it wider, is it not?

Q172 ***Chairman:*** I think everybody agrees it is on the face of it wider. Professor Guild is perhaps suggesting that we still have to find a reason for judicial co-operation in civil matters having cross-border implications. Since internal market has a very broad meaning anyway, on the face of it any judicial co-operation in civil matters having cross-border implications is likely to require some sort of link to the central purposes of the Union.

Professor Guild: Indeed.

Q173 ***Lord Lester of Herne Hill:*** If you think about harmonising divorce law, it is a strange notion that that is a full and proper functioning of the internal market.

Professor Guild: Indeed, My Lord Chairman, as divorce is illegal in Malta, I do not think we have to worry about that too soon!

Mr Geyer: Part of the internal market is the free movement of persons. It is directly linked. It is one of the four freedoms forming part of the definition of the internal market.

Q174 ***Chairman:*** There are already proposals in that area.

Mr Geyer: There are proposals and there are difficulties. Just to round this up: in family law, especially in divorce law, there still will be unanimity when adopting measures. This is one of the areas that was kept out of qualified majority voting and there will be unanimity requirements in family law.

Q175 ***Chairman:*** That is helpful. Perhaps we could move to Mr Geyer's question, before he goes, on transitional provisions which under the protocol restrict the jurisdiction of the court and the Commission's powers of enforcement over existing Title VI measures (criminal, et cetera) for a period of five years, unless the measure is amended. Is the five-year period going to be realistic, a real one? There is a qualification of unless the measure is amended. Are the existing measures not going to be amended or renegotiated and will it be clear when they have been?

Mr Geyer: This transitional provision is enshrined in article 10 of the Protocol on transitional provisions. It is one of the other major interesting aspects of this new configuration that only came out after the October final negotiations. It was not included already in the IGC mandate. It seems to be that, for five years on, the old system shall apply as regards to infringement procedures, so the powers of the

Commission to make the Member States do what they had agreed to do and signed to do, and also insofar as it concerns the court's competence. We will freeze what we have now for the Pre-Reform Treaty Acquis. It is important to see that it is for the old measures: everything that we experience now, we will have a freezing; we will have no sudden change. It is for the European Arrest Warrant, Eurojust—everything which is existing under the old measure—but, in fact, it is the question of the amendment which will be the crucial one and it will be mainly a strategic question, I think, of the actors involved as to what to do within this five year period as concerns amendments. There might be files and legislative acts which it would be very unwise to reopen by introducing an amendment. They were difficult enough to keep contained, and bringing in an amendment would make it wholly impossible to continue or to implement an existing measure. On the other hand, we have often seen, especially in this area, that there is no progress because Member States do not implement what they have signed up to, and so this theoretical power of the Commission as the watch-keeper of the Treaty to make Member States do their part and to implement framework decisions, et cetera, might prove necessary and might be an incitement to propose an amendment in order to get, before the collapse of the five-year period, this extra pressure on the establishment of this common system. For the citizens, it would be a clear advantage, in my opinion, if the court would have the powers it has under the normal treaties to step in, but, in the end, I think the Commission will do a careful assessment of each and every measure that exists, valuing which ones are the sensitive ones and which ones need to be amended in order to make the procedure faster. I do not think there will be an overall approach in bringing in small amendments for each and every measure but it will be a very careful exercise on top of that. Also, Member States can bring in proposals still. There is still a shared right of initiative, which is important in this field. It is not only the Commission who can make legislative proposals but a shared initiative right, as it is now. Any Member State can propose to bring in an amendment; it is not only the "bureaucrats" in Brussels.

Q176 ***Chairman:*** Under which provision is that?
Mr Geyer: It is 68 in the general introduction of the area of freedom, security and justice.

Q177 ***Chairman:*** We are going to move on now to the Charter of Fundamental Rights. What impact, if any, will Article 6 of the Treaty of the European Union in its new form have which declares the binding nature of the Charter of Fundamental Rights have on the protection of fundamental rights in freedom, security and justice measures?
Professor Guild: My Lord Chairman, in our view this will have a very beneficial effect. We think the Charter ought to have been binding from the very beginning. We think the constant references to it in the preambles to all the measures which have been adopted under Title IV have been particularly important and we would like the legal effect of that to be reflected in respect of all of the measures in the area of freedom, security and justice. Another great advantage of the Charter of Fundamental Rights is that it includes specificity going beyond the European Convention on Human Rights, including aspects of protocols of the European Convention on Human Rights, which will provide something of a backstop in some areas where we have not had progress, for instance, in the rights of the defence or the rights of suspects in criminal trials where there has not been agreement on the framework decision. We think that the impact will be excellent in terms of concentrating the minds of the lawmakers and will be extremely helpful for the national courts at interpreting measures and also for the European Court of Justice.

Q178 ***Chairman:*** Having given that general answer, perhaps you could answer what the impact will be on and in respect of the United Kingdom—bearing in mind the Protocol on the application of the Charter, which of course starts with a ringing recital that Article 6 requires the Charter to be applied by UK courts strictly in accordance with the explanations in Article 6 and then goes on to contain in the body a number of qualifications. What does all that mean? How will it be perceived?
Professor Guild: My Lord Chairman, it is very difficult for us to assess how this can possibly apply. We have read that Protocol a number of times and 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. How will the impact work? We have the wording of the Protocol which we can look at and we can dissect until the cows come home. Is there going to be a practical effect? What will that practical effect be? It needs to be tied in again with the opt-ins and the opt-outs. If the minds of the lawmakers are sufficiently focused on the necessity to comply with the Charter of Fundamental Rights, will this discourage the UK from opting into a measure in the area of freedom, security and justice? It is very difficult to say what the outcomes will be.

Q179 ***Chairman:*** These are ultimately legal questions which have to be viewed in some legal context. One can talk about domestic litigation, one can talk about litigation in the European court, one can talk about litigation in some other court

involving the UK citizens, and in all those situations one has to ask whether in a concrete case this protocol means anything and, if so, what. You have not sought to make an analysis of that.
Professor Guild: One could argue this in a variety of different ways and come up with any answer you want on the basis of the wording of the protocol: that the protocol should not be applied; that the Charter of Fundamental Rights should not be applied by the UK courts; that judgments of the European Court of Justice which rely on the protocol should not have an effect in the UK. If we have a concrete case, how is this to make any sense at all? Does this mean that if we take, for instance, the Qualification Directive on Refugees and Subsidiary Protection, that if reference is made in a judgment of the European Court of Justice to the right to seek asylum in the Charter that that whole judgment will not be applicable in the UK? It seems to me it would be very difficult and very hard for the national judge who is looking for a common interpretation of, for instance, Article 15c on whether you have to have an individual fear of torture and inhuman or degrading treatment in a generalised situation of violence. How are you to interpret that if you are then denied the possibility of taking advantage of a decision of the European Court of Justice merely because a reference has been made to the right of asylum?

Q180 ***Chairman:*** Presumably a UK court in that situation would have to refer to the European Court of Justice the question whether, leaving aside the Charter of Fundamental Rights, the European Court of Justice's decision would have been the same.
Professor Guild: Indeed. That is one possible solution to that particular problem.

Q181 ***Lord Lester of Herne Hill:*** I share your bewilderment about the effect of the protocol at all. If one were arguing a case for a British court, in so far as the Charter simply embodies the international obligations by which the United Kingdom is already bound under the UN covenants or any of the other instruments, the presumption would be, anyway, that the UK statute or administrative decision should conform to our international Treaty obligations. That is quite clear. It seems to me that the only area in which this might create problems for advocates or British courts is where the Charter goes further than existing international Treaty obligations binding on the UK. For example, we have not ratified the fourth protocol, the ECHR, as you know, and therefore one can imagine a situation there where it would really matter to the UK Government. However, it seems to me that in the main, in 99.9% of cases, this is not going to make any difference. The national court will have been invited to construe domestic legislation, et cetera, in conformity and it cannot be inhibited by the protocol from doing that job if it chooses to do so. Is that right?
Professor Guild: Indeed, my Lord. That is why I used in my example the right to seek asylum in the Charter because of course it does not exist in any of the obligations to which the UK is bound other than the UN Declaration of Human Rights, which has a specific status, and the difficulties which apply there.

Q182 ***Lord Lester of Herne Hill:*** That is a very good and powerful example but it is not a typical example.
Professor Guild: One would hope it is not a typical example. One would hope those situations would be few and far between. Sadly, in this particular area that seems to be where we have the cluster of examples of unratified protocols and aspects which are likely to give rise to difficulties.

Q183 ***Chairman:*** Let us thank Mr Geyer, who has delayed as long as he possibly could before having to leave. We wish you a good return journey.
Mr Geyer: Thank you very much. It was an honour and a pleasure to be here. I do apologise for having to leave.

Q184 ***Lord Tomlinson:*** What do you think the British Government was trying to achieve. You have talked about your views about the deficiencies in the protocol. What do you think they were trying to achieve? Have they achieved anything other than what you appear to be saying is confusion?
Professor Guild: It would seem to me that in the UK we have gone through a period of great interest and support for human rights with the Human Rights Act, which Lord Lester was very instrumental in bringing into UK law. We went through a period of great support for the idea of human rights. We have perhaps passed into a period which is slightly more reticent about human rights and fundamental rights generally.

Q185 ***Lord Tomlinson:*** The British Government is not objecting to the part in the Reform Treaty about adhering to the European Convention on Human Rights. That is all there. There is no objection to that. It is really what additional to that you think the British Government was trying to achieve and what they have created.
Professor Guild: It would seem to me that it is no new obligations in human rights.

Q186 ***Lord Lester of Herne Hill:*** Could one not give the answer to Lord Tomlinson's question that it is political, in that by having the protocol in place one can deal with anti-European sentiments in this area by saying, "We have this in place." Therefore, in so far as tabloid journalisms or politicians seek to make

capital out of all this, it provides some defensive material for Her Majesty's Government?

Professor Guild: Indeed, my Lord. This is a very political answer which sounds extremely persuasive to me.

Q187 ***Lord Bowness:*** My Lord Chairman, I am sorry to labour this particular point but it is quite important. I do not think we ought to get into discussions about whether we are in favour of this or against it. This inquiry is seeking to deal with the effect the Reform Treaty will have on the law as it stands. One example of the Charter of Fundamental Rights which is much discussed and probably understood by a little more by most people than some of the other issues, and that is the Right of Collective Bargaining and Action. Article 28 of the Charter of Fundamental Rights talks about that right and workers having the right to take collective action to defend their interests, including strike action. The explanation makes it quite clear, and talks about the modalities and the limits of the exercise of: "Collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States." That seems to me to be quite clear, unless you believe that words do not mean what they say. The question I really want to know is this: Do you think this protocol in any way changes either the Article or the explanation? Would it allow a court, European or national, to come to a decision about, for example, secondary picketing, which we believe it cannot come to under our existing legislation.

Professor Guild: It would seem to me, My Lord Chairman, that the question is: When different aspects of the Treaty come into conflict with one another how does one resolve the problem? There is of course the case from the European Court of Justice in the *Schmidberger* case which was about the right to collective action versus the fundamental right in the EC Treaty to provide services, if I remember correctly. The Court of Justice had to find a way of dealing with that question. The exercise of collective rights will always of course interfere with some fundamental right to provide services or an aspect of the Treaty. It would seem to me that in those circumstances the ability to have reference to the Charter would assist in the clarification of that particular kind of dispute.

Lord Bowness: I have never believed that anybody can stop any court of any advocates anywhere referring to something. The question really is: If somebody were to seek—as a "for example"—a right to indulge in secondary industrial action—which is not legal, as I understand it, under our domestic legislation—whether this protocol would make it possible for them to succeed in that. In other words, does the protocol work or not? Because the words are quite clear.

Lord Lester of Herne Hill: Could I , as it were, add to that important question?

Lord Bowness: Please—I am sure more eruditely than I.

Q188 ***Lord Lester of Herne Hill:*** To take that example: suppose that an individual sought to challenge the ban on secondary picketing in this country, in doing so they would rely upon the European Convention on Human Rights for a start and freedom of association—they would lose but they would rely upon it—and they would rely on the ILO Conventions by which we are bound and they would rely upon the UN Covenants by which we are bound, economic and social, as well. They would rely upon all of that in the UK court anyway as a source of interpretation and they would seek a declaration of incompatibility with the Human Rights Act and so on. Let us say they would lose and there could be a case in Strasbourg and there could be a case in Luxembourg as well. Whether the protocol works or does not work in a narrow sense, in legal terms it could not be like the court of King Canute and keep out all these other international instruments from being prayed in aid to seek to challenge the secondary boycott. I think the secondary boycott would not be successfully challenged but that is another matter. I do not see how the protocol would act as a real barrier in that case. Am I right or wrong?

Professor Guild: I would agree entirely with you, Lord Lester. We are looking at a framework of fundamental rights in which the Charter is only one piece, which has to be understood within the larger framework of international human rights law. It cannot be read out of context. The intention is to provide a coherent system of fundamental rights which apply in the 27 Member States and which take into account and which interpret and apply at the EU level correctly the international obligations of the Member States.

Q189 ***Chairman:*** It is the position, is it not, that the protocol, in particular in relation to Title IV of the Charter, is designed to say, "That cannot be the tipping factor". One asks, looking at Title IV, whether it would anyway be the tipping factor because it does not say that you do have the right to take the collective action; it simply says that you have the right in accordance with Union law and national laws and practices. National laws and practices do not have all the rights and, unless you can find them elsewhere in Union law outside the Charter, it is not easy to see that Title IV would necessarily anyway be the tipping factor.

Professor Guild: Indeed. It would seem to me that this is quite the case. 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.

Q190 ***Chairman:*** The new Article 4(2) of the Treaty of the European Union contains a reference to national security remaining the sole responsibility of each Member State. As has been stated to this Committee, do you agree that goes wider than the current derogation for internal security matters under Article 64 of the Treaty of the European Community? What might be the result, if you do?
Professor Guild: This was an answer which Florian would have answered had he still been here. I shall seek to make a few comments about the new Article 4(2) in general. It has been worded differently and the intention is to make it wide. That seems to be self-evident from the wording of the two provisions. Of interest to me a bit beyond that is not so much the shielding of Member States intelligence agencies from the reach of the EU law but the widening of various aspects of EU law to include intelligence agencies—and here I would draw your attention in particular to the way in which the proposal to widen access, for instance, to the Eurodac database has been worded, the wording of who will have access to the VIS (visa information system), the wording of who will have access to the Schengen Information System II when it ever comes forward, and we see a continual widening of the agencies which will have access to these different databases, not to police agencies but the wording has a tendency to be wider to include intelligence agencies, or, at least, to use wording with certainly leaves open the possibility that the Member States can interpret access as being made available to intelligence agencies as well. On the one hand, we may be concerned about Article 4(2) in terms of protecting national security. On the other hand, we see the gradual incorporation of powers for intelligence services in the question of information gathering, exchange of information and certainly in the Prüm Treaty and its continuation as well.

Q191 ***Chairman:*** Are you happy in that respect with the general provisions relating to the institution of data protection of individuals?
Professor Guild: This is the problem that we come back to: if we are going to allow the intelligence agencies access to all of the databases, then (a) we should have made a formal decision about it and (b) we should decide under what circumstances and how they are able to use it. Because, while we have fairly substantial rules which affect other of our coercive agencies, the police, et cetera, about how they have access and when they have access and what they can use information for, the intelligence services tend to be less carefully regulated, and that aspect is a matter of some concern as well as. It is not so much, "Are we shielding our intelligence agencies?" but "Are we bringing them in and are there consequences of bringing them in in respect of the information which is being made available to them?"

Q192 ***Lord Lester of Herne Hill:*** Long ago in a case called *Klass v Germany* the Strasbourg Court said that in this area there had been adequate safeguards against the use of the powers that are conferred. Are there built-in safeguards in the computer programmes and so on of the information systems that make it very difficult for abuses to take place, given that judicial remedies are not likely to be effective?
Professor Guild: Certainly we have the case of *Rotara v Switzerland—Klass* revisited—which concerned intelligence services refusing to correct incorrect data about an individual in a database. Clearly we do not have satisfactory mechanisms which protect the information about individuals in databases. Certainly, if we look at jurisprudence from the European Court of Human Rights, this has certainly been a very hot issue about the third pillar, with *sui generis* rules on data protection going into every single different provision creating a new database, and each time the provisions appearing to be less and less satisfactory.

Q193 ***Chairman:*** Is that because they are in general terms saying that adequate protection should be assured and really leaving it to individual national countries without some single European standard? Why is it that they are unsatisfactory?
Professor Guild: We are certainly getting the pushing down of the problem to the Member States themselves. If you look at the opinion of the European Data Protection Supervisor on the latest proposal on data protection in the third pillar, Mr Hustinx says that the level of data protection which is proposed in the third pillar now, in the proposed framework decision following the further watering down under the German Presidency, does not even meet the minimum requirements the Member States are required to comply with under Convention 108 of the Council of Europe on data protection and the creation of databases. Mr Hustinx himself is saying, "What is the point of this framework decision when it does not even comply with the minimum requirements of a 1981 Council of Europe Convention?"

Q194 ***Lord Lester of Herne Hill:*** My Lord Chairman, the question was predicated, I think, on the notion that there would be national remedies that might bite on this. My concern would be my name gets put into another Member State's information

system, is circulated on the Schengen Information System, is circulated across all the states, yet I have no real safeguard after the event in a national court of a European court because I do not know about it in any event. The only safeguards could be built into the system itself, in the computer systems, to prevent inaccurate and unnecessary information being circulated without proper checks. My questions are really about—and, again, I am speaking from pure ignorance—is to what extent there has been focus on building in those kinds of machine safeguards as well as human safeguards.

Professor Guild: To take perhaps the most experienced of the databases at the EU level, the Eurodac database, which contains the fingerprints of everyone who has applied for asylum in a Member State of the European Union and those persons who have been apprehended irregularly crossing an external frontier, the database is a centralised database and therefore, unlike the Schengen database which tends to be a mishmash of national databases linked up, it is one database with an entry/exit system: fingerprints are sent in and answers are sent out. The Eurodac Regulation was very carefully drafted to permit access to the database only of authorised persons for the purposes of determining whether an asylum application had been made in the Member State. The criteria for the database when it was being set up were exactly those to fulfil that particular need. Under the German Presidency, a proposal was put forward, which is being sponsored very heavily, that this database now needs to be opened up to the law enforcement agencies, and the terminology seems to include also intelligence agencies, which will require a minor change in the gateways to access to that database. The fact that there needs to be an amendment to the regulation to do that indicates that the system has worked very well and if anybody else wanted that data they were not getting it.—or, at least, somebody was concerned that the legality of access to that data was correct. There have been two reports so far by the European Data Protection Supervisor of Eurodac and in neither of those reports has he indicated concern about unlawful access to the database. The database seems to work and, because it works, now it is going to be changed.

Q195 ***Lord Lester of Herne Hill:*** Though not in relation to Schengen, which, as you say, is a mishmash of information coming from national databases.

Professor Guild: Schengen is a much less satisfactory database.

Q196 ***Lord Tomlinson:*** I always have great difficulty in reading Articles of Treaties and feel a bit intimidated by them as a non lawyer, but, if we look at Article 4(2) the language seems to have a certain precision of meaning. I am concerned about the relationship between Article 4(2) and the ensuing sub-Article 4(3), where, after the precision of Article 4(2), you then get words like "sincere co-operation", "full mutual respect", and "the Member State shall facilitate the achievements of the Union and refrain from any measure which could jeopardise the achievements of the Union's objectives." Do any of those things in Article 4(3) apply backwards to Article 4(2)?

Professor Guild: It would seem to me that Article 4 has to be read in the whole.

Q197 ***Lord Tomlinson:*** That is what I would have thought.

Professor Guild: Looking at the wording, as we speak, it would seem to me that the principle of loyal co-operation of the Member States to the European Union, as enshrined in Article 10, has been a particularly important one but it has never been used to my knowledge to defeat a legitimate claim to the safeguarding of national security. It would strike me as surprising should such a result ensue. It would seem to be very difficult—

Q198 ***Lord Tomlinson:*** If that is the only thing that is really there in Article 4(2) why bother to have it at all if it is never used? It struck me as either seriously qualifying Article 4(2) or redundant.

Professor Guild: In so far as you were concerned about the safeguarding of national security, there is a series of objectives which are sought in Article 4(2) and Article 4(3), it seems to me, is a provision which is seeking to ensure that Member States apply in a proportionate manner what one might call almost derogations of 4(2). Yes, the Union shall respect essentially state functions, including ensuring territorial integrity and maintaining law and order and safeguarding national security. 4(3) says that, nonetheless, there is the obligation of sincere co-operation.

Lord Bowness: It also says, My Lord Chairman, the matter of carrying out tasks which flow from the treaties, whereas Article 4(2) says national security is the sole responsibly of the Member State, so it does not flow from (2).

Q199 ***Lord Burnett:*** Can an individual apply to find out what is on the database concerning him or her? If it is wrong, can they apply for rectification?

Professor Guild: It depends on which database. There is certainly provision to receive information on what is on the database on Eurodac. There are also provisions to have an intermediary, for instance a national data protection authority, to ensure that information on an individual is correct in the Schengen Information System. Certainly in those

two information systems there is the right for the individual, either directly or indirectly, to have verification that information is correct and, if the information is not correct, to have it corrected. When Lord Wright was chairing Sub-Committee F in the inquiry which looked at the Schengen Information System, we provided information from the Data Protection Supervisors in four of the Länder in Germany, from CNIL, the Data Protection Supervisors in France, as well as in the Netherlands. On their inspections, of the Schengen Information System as regards their data, in some cases up to 42% of the data in the files which they were looking at were incorrect in one way or another or the information was being held illegally.

Chairman: It sounds as if it is an area which could merit some attention at a general European level, as I think you have been telling us.

Lord Tomlinson: I am always very happy to be corrected by Lord Bowness, but, after it talks about arising from the treaties, the Article goes on to say, "or resulting from the acts of the institutions of the Union" and in the next paragraph it goes on to talk about "could jeopardise the attainment of Union objectives". All those seem to be very, very wide qualifications and that is why I really raised the question about 4(3). I do not intend to pursue it not but I just wanted to have that on the record.

Lord Bowness: For the record, My Lord Chairman, I would not presume to contradict my friend Lord Tomlinson, just to have a different point of view.

Chairman: On that happy note of unanimity, we must all thank Professor Guild very much for her patience and for the very helpful and very clear way in which she has explained the position to us. Thank you very much indeed.

WEDNESDAY 5 DECEMBER 2007

Present	Bowness, L	Norton of Louth, L
	Burnett, L	O'Cathain, B
	Jay of Ewelme, L	Rosser, L
	Mance, L (Chairman)	Wright of Richmond, L

Examination of Witness

Witness: Mr Martin Howe QC, examined.

Q200 ***Chairman:*** Thank you very much indeed for coming to give evidence and it may be that there is something you want to say at the beginning. I think it is the first time you have given evidence. You will be given a copy of the transcript afterwards, and you might like to start by indicating what your interest in the area is?
Mr Howe: My interest in the area is I do quite a lot of Community law as part of my practice at the Bar but I have a broader, sort of constitutional, political interest in the subject of the development of the European Treaties and I have written a number of publications on previous Treaties, particularly on the Constitutional Treaty most recently. Although I actually have not published anything yet directly on this Treaty, I have looked at it, studied it and talked about it at various venues.

Q201 ***Chairman:*** Thank you. I do not think anyone in the Sub-Committee has an interest to declare, except me perhaps. I declare that I am a member of the Lord Chancellor's Advisory Committee on Private International Law, which looks at matters in the freedom, security and justice area. I do not think that is a very relevant interest, but just for completeness. Could you help us about the general opt-in in that area, under the Protocol relating to the United Kingdom and Ireland, and in doing so perhaps relate it to the different opt-in provided by the Protocol on the Schengen *acquis*, and explain the interrelationship, if you can?
Mr Howe: Perhaps the starting-point really is the position under the existing Treaty. Sorry, it is slightly more complex than this, because, of course, there are certain aspects of what will become the complete area of freedom, security and justice, which at present are under the Rome Treaty, notably to do with immigration, border checks, and so on.

Q202 ***Chairman:*** That is going to be an opt-in that at present we do not have?
Mr Howe: No. Our opt-in does apply to that; the existing Amsterdam Protocol applies to that. What would happen is that the additional areas which at present are under the framework of the Treaty on the European Union but are not under the framework of the Treaty of Rome would come under the umbrella of the Treaty of Rome. I describe it that way. Of course, they will be renamed, that will be renamed as the Treaty on the Functioning of the European Union. Currently, measures in the area, say, of police cooperation, judicial cooperation, are characterised as being intergovernmental, as distinct from traditional European Community Directives and measures, which are characterised as being supra-national. It is important not to get too hung up on the terminology, but the differences of substance are that Community legislation, coming under the existing Treaty of Rome, is part of Community law and, in accordance with the case law of the Court of Justice, that law penetrates directly into the laws of Member States. The Court of Justice has jurisdiction both to interpret it, and therefore, potentially, in practice, to widen it, and it has a specific enforcement jurisdiction against Member States when Member States fail to take action to implement it internally. The general effect of the Lisbon Treaty, before we come to the United Kingdom's opt-in or opt-out Protocols, will be to move what are at present intergovernmental measures—- -

Q203 ***Chairman:*** The third pillar measures; into Title IV, in the first place?
Mr Howe: Yes; into Title IV. In general, the third pillar measures are characterised in that they require unanimity, in general, subject to detailed implementation, that they do not, in general, incorporate the jurisdiction of the European Court of Justice, and therefore that really they are analogous to international agreements, in many ways, albeit that they are made in the framework of the European Union, not in the framework of the European Community. The main effect will be that the measures in these fields, which at present we have an ability to take part in via the third pillar structure, will no longer be an option, and if we want to participate in them at all we will have to do so by the supra-national mechanism, in other words, we will have to accept them as being measures which are part of what would now be Community law.

Q204 ***Chairman:*** Is there any particular problem arising from that, which you want to identify?

Mr Howe: There is. Of course, the particular problem is the jurisdiction of the European Court of Justice, because 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. In effect, that is a loss of control, which we have already in respect of existing areas of supra-national Community competence. It is a serious question whether we would want to extend that, if you like, loss of control into sensitive areas relating to our criminal law and the criminal justice system. The choice we face is that we would no longer be able to carry on with the existing system of intergovernmental agreements, effectively; we would be forced, if we wanted to co-operate with other European Union States within this area, to do so via the fully supra-national mechanism.

Q205 ***Chairman:*** There is a gloss, we will come to later, is there not, the five-year transitional period, which we can take in due course?
Mr Howe: Yes.

Q206 ***Lord Jay of Ewelme:*** Just to probe a little bit the point you were making; and clearly you are not the only person who is worried about this expansionary character of the European Court of Justice. I wonder if you could just give one or two specific examples of ways in which in the past the Court of Justice has, as it were, expanded jurisdiction to the detriment of the United Kingdom?
Mr Howe: There is actually a very interesting and important expansion which is directly relevant to this area of criminal law, and that is the *Commission v Council* case of 2005.

Q207 ***Chairman:*** This is the environmental pollution and then the ship pollution case?
Mr Howe: Yes. If the Court of Justice is right in the decision it reached in 2005 then the Treaty of Rome always contained a power, from its very beginning, to allow the Community to direct Member States to create criminal offences. I think, if you had raised that as a possibility at the time of signature of the Treaty, or indeed even ten years ago, it would have been dismissed as being something, "Oh, no, no, they can't possibly go out into criminal law."

Q208 ***Chairman:*** That may be your feeling instinctively. I do not know whether you can document it after this hearing? It would be interesting to look back and see what the discussions were on the criminal law pillar and just see whether there was any precursor of the environmental pollution and ship pollution cases.

Mr Howe: Yes. That is not the only case in which the European Court of Justice has advanced the goal-posts, if you like.

Q209 ***Baroness O'Cathain:*** Can I just ask, Mr Howe, how significant is this? You have told us, first, about the first case and then you said this is not the only case. Does this mean that it is creep and that, long term, all criminal law will actually come under this?
Mr Howe: I do not know about all criminal law.

Q210 ***Baroness O'Cathain:*** But if they are part of it?
Mr Howe: The effect of that case is, although it was related specifically to environmental law, the logic of it must apply, in fact, to all areas where the European Community has an existing competence. So that if, for example, it decides to provide measures for consumer protection I cannot see why it could not also impose on Member States a requirement to create offences for the protection of consumers, and so on, or in the financial sphere it issues Directives harmonising financial markets. I cannot see why, in principle, it does not have the power to create criminal offences to protect the functioning of financial markets.
Chairman: This is the Commission's attitude, but it is fair to say, is it not, that in the ship pollution case, in fact, the European Court was careful to limit what it said to the environmental context?
Baroness O'Cathain: Yes, but that was before this, was it not?

Q211 ***Chairman:*** That was a very recent decision.
Mr Howe: I think the general point I was making about the expansionary nature of decisions of the European Court of Justice is that the effect of this aspect of the Lisbon Treaty would be that, although we have the opt-in, which I have described the effect of, we cannot participate in that area 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, although it will become the European Union legal order under the Treaty.

Q212 ***Chairman:*** Perhaps, again, without spending time on this, it is fair to say though, is it not, that in one respect it is quite possible that Article 69f, paragraph two, actually rows back and brings the criminal jurisprudence of the environmental and ship pollution cases within the opt-in, in future, thereby actually not to this country's detriment but giving it something that it did not have before? I appreciate that is arguable, but that is a possibility, is it not? Some of the evidence given to us has been quite emphatic that is the effect; other of the evidence has been less certain.

Mr Howe: Yes, I take the point. A possible argument one would put on 69f(2) is to say that, insofar as it specifically provides a mechanism for the Union to attach criminal offences to the effective implementation of a Union policy in an area where it has an existing policy, the appropriate Treaty base for such a criminal measure is 69f(2) and not the original Treaty base. Therefore, the further corollary of that would be then that comes within (I will continue to call it) the Amsterdam Protocol opt-out, as extended by the Treaty. However, the problem with the way the system works is, if you get a political impetus to try to bind the United Kingdom into some measure which the other States want to take, the temptation to use an alternative Treaty base will be there, and the argument will be whether the Commission is entitled to select the most appropriate Treaty base.

Q213 ***Lord Burnett:*** Would that be challengeable?
Mr Howe: It is challengeable, but, on the other hand, the Court of Justice, though it does have a legal power to entertain such a challenge, does not always uphold such challenges. I think the classic example was the selection of the health and safety Treaty base for the Working Time Directive, which, had it gone under the then social provisions of the Treaty, would perhaps have been a more appropriate selection, but the Court of Justice upheld the Commission's decision, when it initiated that legislation, to select the health and safety basis. In fact, the political reason why the Commission had done that was in order to bring it in under a QMV power, rather than the power which required unanimity; so whilst it is possible for the Court to overrule these sorts of decisions, it tends to rule in accordance with its broader objectives.

Q214 ***Chairman:*** Would that be another example of the expansive attitude that you were mentioning?
Mr Howe: I would say so, yes.

Q215 ***Chairman:*** Are there any others you want to give?
Mr Howe: If we come more broadly to the powers of the Court of Justice, I think in different phases of its existence it has expanded in different directions. One specific area where I think in recent years there has been quite a lot of expansion has been in the field of direct tax harmonisation, where direct tax harmonisation has been, if you like, blocked at the political level because it requires unanimity under the Treaty and the British Government has consistently refused to agree to allow that to become QMV. We have had a torrent of cases from the Court of Justice on the compatibility of national tax arrangements with general Treaty principles, in which the respondent States have been overwhelmingly unsuccessful. What has been happening in that field is that the Court, for example, previously allowed a national tax system, to do things such as allowing tax reliefs only to subsidiaries based in your own country because that was necessary for the coherence of the national tax system. Then they have been outlawing those sorts of practices simply by taking a stricter approach to the application of the general Treaty rules on non-discrimination, free movement of capital, and so on; so you have got an example of change of approach to interpretation.
Chairman: Would the advance corporation tax case be one example of that?

Q216 ***Lord Burnett:*** Marks and Spencer?
Mr Howe: Yes; Marks and Spencer.

Q217 ***Chairman:*** Is that the main one you were thinking of?
Mr Howe: That, but also there is an earlier one; the name is Lankhorst-Hohorst.

Q218 ***Lord Wright of Richmond:*** Are you saying that this situation has actually changed as a result of the Reform Treaty?
Mr Howe: No; that is not an aspect which has changed as a result of the Reform Treaty. I think the way I was going, or at least being led by the questions, was towards the more general point about the tendencies of the European Court of Justice.

Q219 ***Lord Bowness:*** You talked about the Commission's choice of legal base and the Court of Justice upholding that, whether because of their expansive tendencies or not. Can you just help me; would it have been possible, however, for the Council to have challenged the choice of legal base before it was actually proceeded with?
Mr Howe: The Council has power to amend Commission proposals. I am just trying to think whether there is any example of an amendment by the Council which has altered the legal base of a Commission proposal.

Q220 ***Lord Bowness:*** My Lord Chairman, whether they have the power to amend, they also, presumably, have the power to reject. I fully accept that the Council and the Commission initiate. They can initiate as much as they like, can they not; the Council has not got to accept what they initiate?
Mr Howe: Certainly, the Council can just reject it and say "We were not accepting a measure on this legal base; go away." Of course, the situations that I have given an example of are ones of the Working Time Directive, where there was a majority of the Member States politically in favour of it and so there was majority political support for using a QMV basis.

Q221 ***Chairman:*** The Legal Adviser reminds me that in the environmental pollution case the original proposal was for first pillar; the Council did change it to third pillar and the Court held that it should be under the first pillar. That is an example of a situation where all the groups were gone through; it was not just the Council allowing it to go through.
Mr Howe: I think these are more general points, which have taken us perhaps a little bit away from the specific question, the opt-in Protocol.

Q222 ***Chairman:*** I want to task you in a moment about the Schengen opt-in, but is there anything more you want to say on the general Amsterdam Title IV Protocol, as to the effect of the expansion of Title IV and the corresponding widening of the general opt-in?
Mr Howe: Yes; there is a general point about the opt-in which is fairly obvious and it is that, although, of course, there is a right to opt in, as far as I can see it is irreversible once you have opted into a proposal. Therefore, one possible danger is to opt in to a proposal at a stage where it is in a form which is acceptable to the United Kingdom, for it to be amended in some way subsequently to a way which causes us problems. As far as I can see, you are then stuck with it, and if it is a QMV basis then it would be passed through under QMV.

Q223 ***Lord Jay of Ewelme:*** How would that differ from normal Community business, when a proposal is put forward and they can accept it, can like it and then there are amendments or arguments and it is changed? What would be new about the Reform Treaty, as it were, by comparison with the existing method of operating in this respect?
Mr Howe: It is no different from an existing QMV Treaty base, and, of course, in that case you do not have the right to opt in or not opt in to it in the beginning. I think what one is saying is that the right to opt in or not to opt in is not an absolute protection, because one has to consider carefully not the measure in the exact form that is before the Council at the point one decides to opt in but the possibility of it being amended in some way which is detrimental.

Q224 ***Chairman:*** I suppose there may be a nice point there, taking the wording of the Protocol: you notify that you wish to take part in the adoption and application of any such proposed measure, whereupon you are entitled to do so; if there was a sufficiently significant change, it would cease to be any such proposed measure, it would be a different one?
Mr Howe: That is a possible argument, and of course the Commission uses a similar argument; it claims the right to withdraw a proposal if it is *dénaturé*, denatured or changed substantially by the Council. The other thing about the opt-in/opt-out is that it covers the freedom, justice and security provisions of the Treaty; it does not, if you like, cover surrounding areas. There is one particular expanded power in the Lisbon Treaty, which personally I suspect may be the most significant expansion of the powers of the European Union, which is Article 188l, or the Article 188l to be inserted, which is the external Treaty-making power of the European Union outside the field of the Common Foreign and Security Policy. I am not sure in what format you have the Treaty.

Q225 ***Chairman:*** In our bundle, it is page 59, in handwriting.
Mr Howe: It is 188l. It is a lower-case "l" so it looks a bit like a one.

Q226 ***Chairman:*** Is this an entirely new Article or is there a corresponding one with which we should compare it?
Mr Howe: I think it is entirely new, but there are specific provisions relating to the conclusion of an agreement within the scope of the Common Commercial Policy, but it is certainly new in the extent to which it goes.

Q227 ***Chairman:*** Right; and what is your comment on it?
Mr Howe: It does affect the justice and home affairs provisions, because it expands the European Union's external Treaty-making powers to agreements that are "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union, or is likely to affect common rules or alter their scope." If you take, for example, let us say, the external extradition agreements between the Community and third states, the Community has existing internal extradition agreements which are embodied at present in the European Arrest Warrant Framework Decision and it could be argued that concluding an external agreement between the European Union and third parties relating to extradition will fall within the competence of the European Union under Article 188l, because it is likely to affect the internal rules or alter their scope.

Q228 ***Chairman:*** Can you help us as to what is the internal decision-making process which leads to the Union being able to conclude such an agreement: who, on behalf of the Union, takes the relevant decisions?
Mr Howe: The decision-making process is set out in Article 188n, and in fact the general rule which is in Article 188n is: "The Council shall act by a qualified majority throughout the procedure." But then there

is an exception; it says: "However, it shall act unanimously . . . " This is Article 188n, paragraph 8.

Q229 ***Chairman:*** Yes: " . . . shall act unanimously when the agreement covers a field for which unanimity is required . . . "
Mr Howe: There is a sort of logic in that; if the internal rules in the field concerned require unanimity then concluding an external agreement also requires unanimity. A difficulty I see with this is how this interrelates with measures within the scope of the United Kingdom's opt-in, because there is no explicit provision here as to how this international agreement provision will operate if we have opted out. In other words, does that mean we also opt out, cannot be entrained into an external agreement relating to that field, or does it mean that we are caught by the international powers of the European Union even if we have opted out, as regards internal application? I confess, this has been a bit of a puzzle to me and I have sort of hunted round as best I can to see if there is any answer in the revised Protocol.

Q230 ***Chairman:*** And you have not found it?
Mr Howe: I have not found it, but I remain ready to be convinced that somehow it has been thought of and dealt with.

Q231 ***Chairman:*** Can you help me on two points. Is that a problem which already exists, in relation to agreements, for example, in the context of immigration, which we have not opted into? Does not the Union already have certain external competence? What happens?
Mr Howe: At the moment, you have to distinguish between the Union's external competence and, of course, the Community; the Community's external competence is much more limited. Under the Court's doctrines, again, the Court has devised an implied external competence.

Q232 ***Chairman:*** You are referring to the Lugano type opinion, *Commission v Germany*, I think. I am not sure what the title is, but it is the opinion on the external competence in respect of a revised Lugano Regulation to replace the Lugano Convention?
Mr Howe: That is one of them, yes. The explicit competence is limited to commercial agreements within the scope of the Common Commercial Policy. There is certainly no general power by QMV to impose on Member States external agreements within the justice and home affairs field.

Q233 ***Chairman:*** I think the Lugano opinion indicates that there is if there has been an internal regime set up. I suspect it echoes or relates to the last words "likely to affect common rules or alter their scope." Where you have got an internal arrangement then there is an existing, exclusive external competence within the freedom, security and justice area?
Mr Howe: If it is within the Community provisions, rather than in the European Union third pillar provisions. Article 188l is stated to be based on taking the case law of the Court of Justice and putting it in statutory form. However, it does seem to me to go a little bit further in conferring a positive power to make external agreements simply because they affect internal common rules. It is going rather further than saying Member States are prevented from doing things in conflict with common rules, which is another matter.

Q234 ***Chairman:*** It does throw up the point you have highlighted relating to Article 188n and the position if the UK does not opt into some measure. Thank you for that. Would you like to say anything about the opt-in relating to the Schengen *acquis* and whether you see any potential problems in that regard?
Mr Howe: For my part, I could not see anything different in the Schengen Protocol as distinct from in the Freedom, Security and Justice Protocol.

Q235 ***Chairman:*** Is not there an improvement compared to the present position, in the sense of a widening of the UK's freedom, in the sense that we are no longer obliged to take part in proposals or initiatives building on existing areas of the Schengen *acquis* into which we have opted?
Mr Howe: This is a reference to the new Article 5, paragraph 2?

Q236 ***Chairman:*** Yes; exactly. Page 111 in our bundle.
Mr Howe: I think I would agree with that, because there is an additional opt-out which is conferred there.

Q237 ***Chairman:*** Perhaps just going back on one point on the basic Amsterdam Protocol, there is the further safeguard, is there not, for the United Kingdom, and indeed for any country, that in the case of the United Kingdom if it is opted in and there was some fundamental change in the proposal is there not then the emergency brake available to the United Kingdom?
Mr Howe: Yes. The emergency brake would be available in the criminal area, in the areas to which the emergency brake applies.

Q238 ***Chairman:*** Perhaps we could move on to the third question, the detailed enumeration of areas of competence under the new Chapter IV in criminal law matters. How do you see that; is that a widening, is it an improvement and in what respects?

Mr Howe: I think in some respects it is a widening and in other respects it may be regarded as a sort of intensification of the more broadly-defined definition. The existing starting-point is Article 31 of the Treaty on the European Union and the new benchmark is really Articles 69e and 69f. There is some expansion of the areas of criminal law to which the minimum rules can be applied.

Q239 ***Chairman:*** Are there any particular ones that you want to identify?
Mr Howe: The existing Article 31e is progressively adopting measures to establish the minimum rules relating to the constituent elements of criminal acts and penalties in the fields of organised crime, terrorism and illicit drug trafficking. Article 69f is 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 payments, computer crime and organised crime. There is a specific expansion there. Of course, the other general expansion is Article 69f(2), which we have referred to already, which is criminal measures in support of other areas of Union policy.

Q240 ***Chairman:*** Potentially it has some effects, as you were explaining, in bringing back within the opt-in certain areas which could be regarded as under the general provisions of the Treaty not subject to the opt-in, although, as you were saying, that could be arguable?
Mr Howe: Yes; it may have that effect.

Q241 ***Chairman:*** What about the operation of the emergency brake followed by the provision for enhanced cooperation, following its operation; is that a change which you want to comment on?
Mr Howe: In a sense, I am broadly positive about such measures, because it strikes me that you have a real political difficulty if one Member State does not want to go along with a particular measure. At the end of the day, in an organisation of 25 States, you cannot necessarily expect to stop the whole organisation from adopting a measure in a particular field because you do not want it applied to yourself, and therefore the enhanced cooperation provision is a logical corollary for greater freedom of action.

Q242 ***Chairman:*** Would enhanced cooperation count as a common rule for the purposes of Article 188l and the external competence that you were referring to again?
Mr Howe: It had not occurred to me. I would have thought not because, under enhanced cooperation, by definition, the legal instrument adopted is not a legal instrument of the European Union, it is a legal instrument of a subset of States.

Q243 ***Chairman:*** Shall we move to border checks, asylum and immigration: what are the changes of significance introduced by the draft Treaty as regards cooperation in those areas, and do they give rise to any particular matters you want to mention?
Mr Howe: There is a general intensification of the Union's policies in these areas. Article 69b provides: "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows," and so on and so on. It is correct, of course, that the development of such a common immigration policy we do not have to participate in because of the provisions of the opt-in Protocol

Q244 ***Chairman:*** Is there anything you want to say about Article 69(3), in particular, which is the possibility of the Council acting unanimously in order to promote rights of free movement in the area of passports, identity cards, residents' permits and any other such document?
Mr Howe: There is one point I want to check, as to whether this would be within the scope of the opt-in Protocol, as amended.

Q245 ***Chairman:*** Is it not all part of Title IV?
Mr Howe: I think it is, yes. I just want to check that point.

Q246 ***Chairman:*** I think the Protocol applies to the whole of this?
Mr Howe: Yes; certainly.

Q247 ***Lord Wright of Richmond:*** Is it your view that the Reform Treaty changes the British Government's relationship with Frontex and with Frontex operations?
Mr Howe: I do not know.

Q248 ***Lord Wright of Richmond:*** We have a rather anomalous relationship, as you probably know, with Frontex at the moment. We sit on the management Board but do not have a vote, and I just wondered whether you thought that, on the border questions, the Reform Treaty affects that relationship?
Mr Howe: I cannot see that it should, no; anyway, I have not seen that.
Chairman: Shall we move on to the next question then, the European Court of Justice. Are there any major changes affecting the jurisdiction of the Court of Justice and what effect might they have on cooperation in the area of freedom, security and justice? You have indicated that the jurisdiction would be expanded substantially and I think we have covered to some extent the second question. I might ask you, firstly, if there is any more you want to say and, secondly, whether you have any view as to whether the European Court of Justice, as presently

organised, is going to be a satisfactory forum for dealing with the expanded jurisdiction?
Lord Burnett: Did you want to say something, My Lord Chairman, about civil justice and family law?

Q249 ***Chairman:*** I am sorry. I think I did miss a question. Take the question then of civil justice and family law first: what are the most significant changes introduced by the Reform Treaty as regards cooperation in those areas and are the amended provisions likely to increase the scope for cooperation here and, if so, what will be the likely result?
Mr Howe: Again, I regard the most significant change as being the change of the legal basis of measures from broadly being intergovernmental into being Community law measures. It is true that there are some measures which fall within that field which are already directly Community-based, of which what was originally the Convention on civil judgments is the major example, later converted into the Brussels Regulation. Again, the principal effect would be that all such measures would come within the ambit of directly applicable Community law, instead of being within the field of international cooperation.

Q250 ***Chairman:*** There is, in fact, though a qualification, is there not, in respect of family law, that insofar as one is talking of measures concerning family law with cross-border implications, and there is a requirement of unanimity, is there not?
Mr Howe: Yes, but I do not think that affects the issue of the legal nature of the measures which will be adopted.

Q251 ***Chairman:*** Or the jurisdiction in respect of issues arising in relation to them of the European Court?
Mr Howe: Which would be the jurisdiction of the European Court; yes.

Q252 ***Lord Burnett:*** My Lord Chairman, I have not fully understood that, I am sorry. It is an interesting point. Is there a chance therefore that our own internal matrimonial law and property law would be subject to European law?
Mr Howe: I think, not directly, but, of course, obviously where it comes in is, first of all, allocation of jurisdiction in cases having cross-border elements.

Q253 ***Lord Burnett:*** That is more frequent, with people marrying; property law, and so forth?
Mr Howe: Indeed; yes.

Q254 ***Chairman:*** The reference to cross-border implications is because the whole of the civil law competence is limited to judicial cooperation in civil matters having cross-border implications, and so this is simply a less wide competence which requires unanimity in relation to family matters?
Mr Howe: Yes. The general rule in the field will be QMV, under the Treaty.

Q255 ***Lord Burnett:*** Where, for example, UK individuals are married, Mr Bloggs marries Mrs Bloggs, both were born and brought up in the UK and married in the UK but they have property in the EU, does that all this affect, in other EU countries where they have property?
Mr Howe: That is an interesting point. There are issues which certainly have surfaced at a political level where, for example, British property owners in Spain have found that they have been built without relevant planning permission because of alleged corruption on the part of the local authorities. It has been raised, certainly at a political level, by agitation through Members of the European Parliament, that "the wicked Spanish are depriving us of our property through their unfair legal system." Looking years ahead, one can see that sort of issue could lead to calls for some sort of intervention for the protection of people's property in other countries. I would say no more than that.

Q256 ***Chairman:*** I can see that somebody might argue that was a family law matter with a cross-border implication, but I think we will leave the argument until it arises.
Mr Howe: No, I do not think that is a family law matter; that is more a general civil law matter with cross-border implications.

Q257 ***Chairman:*** Shall we move on now to the next question, which I put prematurely, are there any major changes affecting the jurisdiction of the European Court and what effect might changes have on cooperation in the area of freedom, security and justice? I think you have answered that in large measure. I wanted to ask you a supplementary question, whether you saw any problems in the European Court dealing with this perhaps from a legal, technical viewpoint, and qualifications, and so on, as well as load of work?
Mr Howe: Indeed, there are practical issues to do with the background and experience of the judges at the Court and, in a sense, those issues have already surfaced in other fields, nothing to do with justice and home affairs.

Q258 ***Chairman:*** Such as?
Mr Howe: A field I know well, the field of intellectual property, where traditionally the jurisprudence of the Court of Justice bearing on the intellectual property field was to do with the free movement of goods, freedom to provide services, and therefore was dealing primarily with economic questions rather

than with the substance of the rights. What has happened in that field of law is that the substantive law has been progressively harmonised. We have harmonised trade mark law, harmonised design law, in particular, and indeed we have a whole European Community structure of the Office for Harmonisation in the Internal Market, which is a trade mark and design right Office with a system of appeal up to the Court of First Instance to the Court of Justice. This has required the Court of Justice, in fact, to take a lot of decisions about substantive intellectual property laws which it has not had to do in the past, because having harmonised the law the substance of the law needs to be interpreted, and this has led to a Court which perhaps does not have that much expertise in that particular field to be taking substantive decisions on the law.

Q259 ***Chairman:*** Do you know what the background of the Court is; can one generalise about this? One knows that the appointment system is one judge per country; is there any view you want to give us as to what the present background is, the composition? They are specialists; you were indicating not in this area?
Mr Howe: Yes. I think there is a great variety in the way they are appointed in different States. Indeed, they are appointed on perhaps a far more political basis in other States than the people we tend to nominate. France appoints former officials of the Ministry of Justice, and so on. I think, the point is, if we look across to the area of freedom, security and justice, there will be a requirement, presumably, for the Court of Justice to be taking decisions on substantive matters of criminal law.

Q260 ***Chairman:*** I was going to say, just to take the areas of civil law, family law, criminal law, do you know if there are specialists or judges who have had experience of those areas?
Mr Howe: I could not answer that question on the background of the judges at the Court.

Q261 ***Chairman:*** Is there any way in which one could ensure, or hope, that judges came in with criminal experience; that is, practitioners?
Mr Howe: Given the current appointments system, it is quite hard, short of hoping that some Member States may take the need for the Court to have a broad range of judicial experience into their own individual nominations.

Q262 ***Chairman:*** One of the features of the Treaty (I am not sure where the provision is) is for a committee of seven wise persons to vet potential appointments and it may be that this is a matter to which they should be asked to, and no doubt will, give attention?
Mr Howe: Yes; quite possibly.

Q263 ***Chairman:*** How one influences particular countries to make particular proposals is a different matter, of course. Let us go on then to the next question, which we touched on, the jurisdiction of the European Court and the five-year transitional Protocol, which restricts the jurisdiction in respect of existing Title VI measures, under the third pillar, for a period of five years, unless and until the measure is amended, and gives the UK, at the end of five years, an option to opt out of all existing non-amended measures, in which case, however, there is a potential answer back from the Community side if that has undermined, I think, the operation of the measure?
Mr Howe: This is Article 10 of the Protocol on transitional provisions which contains this particular five-year period. It strikes me that the impact of the transitional provisions is it makes it clear that after the five-year period the existing corpus of third pillar measures, to which this country is a party, will be converted into full Community law first pillar measures. That is the combined effect of Articles 9 and 10 of the Protocol on transitional provisions. Article 9 preserves their existing legal effect; so, for example, a framework decision on the European Arrest Warrant would continue for a five-year period to be an "intergovernmental measure" and would then convert into being fully part of Community law at the end of the five-year period. This then puts a bit of a dilemma on the United Kingdom, if we think it is a good idea to continue participating in that area, in that it would not be open to us to continue to participate on the existing intergovernmental basis. We have a "take it or leave it" choice of pulling out or accepting the full jurisdiction of the Court and then the measure itself will become directly effective within our own legal system according to the ordinary rules which have been developed by the Court of Justice on direct effect. As far as I can see, our right to opt out at that point is unqualified but we can then be lumped with the costs occasioned by our withdrawal.

Q264 ***Chairman:*** Presumably the intention is, have I understood it correctly, that by the end of the five-year period the existing measures will have been considered and the view will either have formed that they are suitable for direct effect or they will have been amended so as to make them more suitable? In either case it is hoped that all States will regard them appropriate for enforcement under the new Union basis, and if we take a different view we can opt out, although with the downside that you have mentioned.
Mr Howe: Yes. Five years is not necessarily a long time horizon, in the timescale of the Community legislative process.

Q265 ***Chairman:*** So there is a possibility that it will not have been completed and we may find ourselves, at the end of the five years, presented with some unsatisfactory choices?
Mr Howe: Indeed; yes.

Q266 ***Lord Wright of Richmond:*** My Lord Chairman, can I ask, we cannot pick and choose which measures we opt out of; the word in the question is "all" and I take it that it means all, does it?
Mr Howe: I must say, I had read this as giving us a pick and choose on individual measures.

Q267 ***Lord Wright of Richmond:*** The question says the UK may choose to opt out of all existing non-amended measures; that means all, you cannot pick and choose?
Mr Howe: I had not read Article 10 of the Protocol that way. Actually, sorry, yes, at paragraph 4: "At the latest six months before the expiry of the transitional period . . . the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1," that is the transitional acts, "the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period . . . " Then: "This subparagraph shall not apply with respect to the amended acts . . . " I think you are right, it is in the wording, it appears to be all or nothing.

Q268 ***Lord Wright of Richmond:*** It is all or none?
Mr Howe: Yes.

Q269 ***Chairman:*** That is right. One has not got a feel at the moment for how many acts there are, but it sounds improbable, on the face of it, that the United Kingdom would want to opt out of all acts which happened to be under-amended?
Mr Howe: I confess I had not read it that way, simply because it would not occur to me that "all or nothing" was a sensible way of reading it. Certainly the wording does say that.

Q270 ***Chairman:*** Who would have jurisdiction to determine then whether "all acts" means all acts?
Mr Howe: I suppose it would be the European Court. Supposing one sent in a notification that related to some acts but not all acts, I suppose the European Court might then say, "Ah, that's a void notification because it doesn't relate to all acts," and you are caught by everything.
Lord Wright of Richmond: My Lord Chairman, I am reminded of Resolution 242 in the United Nations, about which there was considerable argument as to whether the French version of "all the territories" was *tous les territoires* or *tous territoires*; "*les*" being of very considerable importance. I am sorry; that is rather beyond the scope of this Committee.
Chairman: It will be very helpful when the problem arises. Thank you for that exchange.

Q271 ***Lord Burnett:*** Did I understand you to say that if we opted out in five years' time we would pay the costs of withdrawal; is that what you said?
Mr Howe: Yes. That is in Article 10, paragraph 4, of the Protocol on transitional provisions.

Q272 ***Lord Burnett:*** What are those costs likely to be? How will we measure those costs?
Mr Howe: It says: "The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts."

Q273 ***Chairman:*** There is quite a restriction on the financial consequences by the words "necessarily and unavoidably" is there not?
Mr Howe: Yes.

Q274 ***Chairman:*** Just going back to Lord Wright's very good point on Article 4, paragraph 1, it may be we would like to look at paragraph 5 of Article 10?
Mr Howe: Yes, of course, that contains a power to go back in, as it were.

Q275 ***Chairman:*** And here it does not have the word "the". It is a very close analogy with the UN Resolution. It looks as if you come out as a whole but there is a right to come back in?
Mr Howe: Yes. There is a right to come back, so it looks as if, yes, you can opt out of all acts and come in on individual acts; you choose. Of course, if you do that, it has to be on the basis that they are directly applicable, a fully effective part of it.

Q276 ***Lord Burnett:*** If we do opt in, cherry-pick the things we want to come back in, is there any cost implication to that?
Mr Howe: No; but I think there are certain general provisions about costs in the Protocol itself. There is nothing specific there. There is a similar provision about costs somewhere else. I am sorry, I cannot remember where.

Q277 ***Chairman:*** Shall we move on. What impact, if any, will Article 6 of the Treaty on the European Union, which declares the binding nature of the Charter of Fundamental Rights, have on the protection of fundamental rights in relation to

freedom, security and justice measures? It may be you will want to take that in conjunction with the next question ten, what is the effect of the Protocol on the application of the Charter of Fundamental Rights to the UK?
Mr Howe: It strikes me that the most important impact is that, in effect, the jurisdiction to decide on compatibility with fundamental rights in that area is likely to shift substantially from the Strasbourg Court to the Luxembourg Court. The reason for that being that, existing third pillar measures in that area, intergovernmentally adopted, the Member States then implement them and their compatibility with the European Convention on Human Rights is then a matter between the Member State and the Strasbourg Court within the confines of that Convention. Whereas the effect of Article 6, in the binding nature of the Charter, taken in conjunction with the fact that those measures will come under the general jurisdiction of the European Court and be supra-national in nature, means that it will be the Luxembourg Court which will be interpreting and applying the EU Charter, albeit in this area it is primarily the part of the EU Charter that is based on and derived from the ECHR. One may then get a difference in approach.

Q278 ***Chairman:*** This would be a ground for challenging measures passed under Title IV, say, in the criminal area, for infringement of one of the fundamental rights, and this could come in front of the European Court of Justice?
Mr Howe: Yes. Of course, there is a more complex question, can you also challenge such measures in the Strasbourg Court.

Q279 ***Chairman:*** How is that going to work, bearing in mind the interrelationship, I think under another provision, potentially, between the Union and the European Convention?
Mr Howe: I think if the Union joins the Convention then it will sort of work, because, in effect, I suppose one could challenge decisions of the Luxembourg Court at Strasbourg. If the Union does not join the Convention, if we have this sort of position where the Member States are all contracting States to the Convention but the Union itself is not a party then the acts of the Union themselves, the institutions themselves, seem to be outside the purview of the jurisdiction of the Strasbourg Court because they are not the acts of the Member State. There have been differences in approach. The Tillack case, the Belgian journalist, he was reporting on fraud inside the European Union's Anti-Fraud Office, and they got the Belgian police to raid his home and journalist office and raid his papers. He challenged these measures through the Community Courts and failed, but recently, I think, he has won his case in Strasbourg, and he could do that because it was the Belgian police taking these steps. I suppose it illustrates that the Luxembourg Court may have a different emphasis when it comes to the interpretation and application of these rights, because it will give a higher priority perhaps to the Union's objectives compared with the rights of individuals. This might not be an improvement, in practical terms, when it comes to the protection of fundamental rights.

Q280 ***Chairman:*** Assuming that the Union signs up to the Convention, do you see a problem or any inconvenience in a system whereby the challenge is first to Luxembourg, of course it may be conjoined with all sorts of other challenges, the competence under the Treaty, subsidiarity, whatever, but then on the human rights point can go to Strasbourg?
Mr Howe: I think that system is workable, yes.

Q281 ***Chairman:*** I take it though if and until the Union signs up there are potential difficulties, and I suppose also the questions about competence, the specialisms of the judges, again is going to be important until the Union signs up?
Mr Howe: Yes. Again, do you need specialist human rights judges in the Court, could be a question which could be asked.

Q282 ***Lord Bowness:*** My Lord Chairman, is it correct that the Union cannot sign the Convention without the provisions in the Treaty which bestow the power on it and giving it the legal personality to do it; they could not join now under the existing Treaties, is that right?
Mr Howe: I cannot think of any power which would allow it to join as a body. Technically, the Community would have to join.

Q283 ***Chairman:*** Can we invite you to go on to the next question; what is the Protocol doing, in your view?
Mr Howe: That is the most difficult question. One possible view is that it does nothing and then it has no substantive legal effect. It is a difficult issue. There is an inherent difficulty with the Protocol in that the Charter, in general, first of all, clearly is given legal effect by the Treaty, by the amended Article 6. Secondly, in general, whatever effects the Charter might have, the starting-point should be it should have uniform effects across the whole of the territory of the European Union. Therefore, when one comes to the Protocol one has to ask whether it 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. It is interesting to start with the recitals to the Protocol, because the fifth recital states: "WHEREAS the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles." There is a general statement in the Protocol which is a general statement about the Charter in its overall effect. That recital is not merely talking about what happens inside the UK or Poland. However, you have the words of Article 6 itself, which states "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights, as adapted, which shall have the same legal value as the Treaties." That definitely gives legal effect to the Charter at the same level as the Treaties, and therefore at a level in the legal hierarchy above subordinate instruments, such as Directives and Regulations. There is obviously a tension between that and this recital, and one might resolve the tension by saying, "Well, it might not create new rights or principles but it might create new ways by which they can be enforced." For example, by, in effect, conferring on the Court of Justice a power to strike down Community legislation, which, in its view, is incompatible with the provisions of the Charter. It might be argued that possibly it has that power already because it recognises certainly the basic principles in the Charter as general principles common to the law of the Member States. Furthermore, within the recitals of the Protocol it is recorded that the Protocol, this is the second-last recital: "It is desirous therefore of clarifying the application of the Charter, in relation to the laws and administrative actions of Poland and the United Kingdom and of its justiciability." Again there is perhaps a suggestion that it is declaratory rather than substantive in its effect. We then go on to Article 1 and, in a sense, Article 1 may be aiming to defeat a problem that was never there, because the so-called horizontal provisions of the Charter itself state: "The provisions of this Charter are addressed to the institutions and bodies" offices and agencies "of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."

Q284 ***Chairman:*** That is Article 51?
Mr Howe: Article 51, paragraph 1, yes; jargonistically, one of the horizontal Articles of the Charter. There may have been a sort of fear that the EU Charter would sort of spread out from the field of Union law across the board into unrelated fields of national law, which, I must say, has never been a concern I have had. The key point, I think, there, where there is a possible interrelationship with the Protocol, is when the Charter, as stated by Article 51(1), applies to the Member States when they are implementing Union law. A practical example of that might be, say, in a field coordinated by a Directive where there is some form of exceptional derogation, when the scope of that might well be interpreted by the Court of Justice by reference to principles in the Charter. As far as I can see, starting with what the Protocol on the UK and Poland does not do is that it does not inhibit the ability of the Court of Justice either to strike down acts of the Union itself as incompatible with the Charter or to interpret those acts by reference to the Charter. That then raises the issue, supposing the Court of Justice interprets a piece of Community legislation in a way which perhaps expands its scope by reference to the fundamental rights in the Charter, that meaning would be a meaning normally which would then be adopted across the entire European Union. Can Article 1 of the Protocol then be prayed in aid to say, "Well, even though the Court of Justice has expanded the interpretation of a Directive, in general, by reference to a case coming from, say, Germany, that extended interpretation does not apply to us in the United Kingdom so as to interfere with an existing law, regulation or administrative provision."

Q285 ***Lord Wright of Richmond:*** My Lord Chairman, does that make the situation for the United Kingdom different from the existing arrangements, our existing commitments, under the European Convention on Human Rights?
Mr Howe: The Charter is different from the European Convention on Human Rights. Basically, the first part of the Charter is the same, and indeed is sort of stated to be a rewriting of it, in somewhat different language but to the same effect; but it then goes on to provide for social and economic rights, which are not contained in the European Convention on Human Rights. I think much of the political concern about the Charter has been in giving legal effect to concepts like the right to strike, for example, which are not within the European Convention on Human Rights. It strikes me there are two ways of interpreting Article 1. Either what it is saying is that the Charter does not introduce any free-standing ability to strike down national laws, but that this Article does not in any way inhibit a secondary effect of the Charter by reason of a Community instrument which has legal effect being interpreted in a particular way. With this sort of thing one cannot say with total confidence which way it would be interpreted, but I would bet that the European Court of Justice would say this is about saying the Charter does not have a sort of direct or extra effect in striking down a national law; in other words, it is a re-emphasis of Article 51(1) of the Charter itself. It applies to the Member States

only when they are implementing Union laws; it is not intended to affect the operation of the Charter within the context of the application of Union laws.

Q286 ***Chairman:*** What is the meaning of the word "reaffirm" in the recital? Does that suggest that the rights, freedoms and principles reaffirmed have some separate existence?
Mr Howe: They do have a separate existence, in that historically the Charter was developed, as I said, the first part of the Charter, by taking the European Convention on Human Rights on the basis that all Member States of the European Union are parties to that Convention, and then reflecting the Convention, and in some respects developments of the case law of the Strasbourg Court, in the Charter. That relationship is, in fact, expressed in the Explanations, which are attached to it. I think the Explanations are in this, in the booklet you have; the Explanations begin at page 149. For example, the Explanation relating to Article 2 of the EU Charter explains the links to corresponding provisions of the European Convention on Human Rights. For example, the Explanation relating to Article 1, human dignity, there is a reference to the 1948 Universal Declaration of Human Rights and to case law of the European Court of Justice, and so on. In that sense, yes, the provisions of the Charter are said to be based on or expressing pre-existing rights and principles, albeit they may not be directly enforceable as part of the Union legal order.

Q287 ***Chairman:*** That is the gist of what Article 7, Articles 51 and 52 is aimed at saying, as well?
Mr Howe: I would suggest, what it does is it takes what may have been, for example, a United Nations right, as such, would not be directly enforceable as a legal law within the European Union; by putting it in the Charter it may be, in a sense, a right you have got already but they are making it legally enforceable.

Q288 ***Chairman:*** On that basis, at least on one of the views you have explained, Article 1 of the Protocol is designed to ensure that nonetheless they shall not be legally enforceable in certain respects?
Mr Howe: Yes, a reaffirmation that it applies to Member States only when they are enforcing Union law; Article 1 might be. If you interpret it as applying to the United Kingdom even when it is enforcing European Union law, you are then creating a disconformity in the interpretation and application of common European Union measures in the United Kingdom and in other Member States. I would expect the European Court would strive by might and main to avoid such a disconformity.

Q289 ***Lord Wright of Richmond:*** My Lord Chairman, insofar as you understand the concerns which the British and Polish Governments have about the Charter, to what extent do you actually regard the Protocol as an adequate protection of those concerns? I am sorry; if I could widen the question, to what extent do you think the European Court of Justice would regard the Protocol as an adequate protection for those concerns?
Mr Howe: That involves identifying precisely what those concerns are. I cannot, I am afraid, necessarily adequately express exactly what the nature of the concerns is because they vary at different points in time. At one point they were very keen to address the concerns by getting the Explanations given a sort of semi-legal status in conjunction with the Charter. That was in the series of negotiations which led to the adoption of the Constitution Treaty and resulted in the inclusion in that version of the Charter of a specific reference to the Explanations. One of the concerns, I think, was in relation to the social and economic rights, which are in Title IV of the Charter, in particular things like the right to strike. Certainly the British Government has taken a point which is important to them on the distinction between rights and principles, as expressed in the Charter, taking the view that a right is something which an individual perhaps potentially can rely on and may be justiciable, whereas a principle is just guidance to the legislator, not capable of justiciability. Whether it is possible to make such a clear-cut distinction is not altogether clear.

Q290 ***Chairman:*** This is what Article 52 is designed to achieve, is it not, whether it achieves it or not?
Mr Howe: Yes; the distinction between rights and principles.

Q291 ***Chairman:*** I think it is right to say that this is something which the last Attorney General was responsible for negotiating, Lord Goldsmith?
Mr Howe: Yes, because, in fact, even before he became Attorney General, he was the Prime Minister's Representative in the Convention which drafted the Charter. To pick up where it seems to me what they have been trying to achieve, an example of it, Article 35 of the Charter, on healthcare, states that everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practice, and then a high level of human health protection should be ensured in the definition and implementation of all the Union's policies and activities. Within that there is the phrase "everyone has the right to benefit from medical treatment under the conditions established by national laws and practice." An issue there is, is this merely declaratory, saying that if national law

gives you a right to health treatment then you have a right to health treatment, which is a bit circular, or does it have some substantive effect, in other words, does it give the Court of Justice jurisdiction to say "Your national laws and practices are inconsistent with some minimum law that we are going to establish yet"? I think Article 51(2) of the Charter is designed to deal with that point.

Q292 ***Lord Bowness:*** This is obviously a complicated area but I wonder if we could be specific. Mr Howe has referred to the right to strike, you referred to Article 6 in the Protocol, but actually presumably the Court of Justice would also refer to the Charter itself, which talks about, in Article 28, amongst other things, the right in cases of conflict of interest to take collective action to defend their interests, including strike action. It begins that those rights are only in accordance with Union law and national law and practices, and that is emphasised in the Explanation of Article 28: "The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States." The question really I would ask you is if somebody in the British courts, in litigation, sought to challenge our law against secondary picketing, could they or could they not rely on the Charter of Fundamental Rights, or would the words in the actual Charter and its Explanations mean what they actually say and they would get nowhere with this?
Mr Howe: I think they would get nowhere, because in order for the Charter to apply at all you would have to come within some area that is directly governed by European Union law. Where the Charter might possibly impinge might be where you have got an existing piece of Community legislation, possibly in some circumstances an existing, directly applicable Treaty Article, which impinges on the situation in some way.

Q293 ***Lord Bowness:*** Staying with my example, can you think of an example?
Mr Howe: Where it could impinge? The Treaty provides a general right of free movement, the right to work in another Member State. The Community has also passed a number of specific measures which relate to the conditions with health and safety measures, and the Working Time Directive. Article 31 of the Charter, on fair and just working conditions, states: "Every worker has the right to working conditions which respect his or her health, safety and dignity. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." When you come to, say, the interpretation by the Court of Justice of the Working Time Directive and consider issues in it like can there legitimately be exceptions to that right then the Court might take into account the fact that it has been expressed to be a fundamental right of every worker to limitation of maximum working hours in considering whether or not any exception to that is legitimate or interpreting the scope of that exception. That is the sort of example where you could have an impingement of the Charter in this kind of field.

Q294 ***Lord Bowness:*** You are not suggesting that, if somebody were to maintain that, that would then legitimise secondary picketing, are you?
Mr Howe: No. You would have to have an existing piece of Community law which was directly relevant to the situation before the Charter could come in and affect its scope and interpretation.

Q295 ***Lord Burnett:*** That would be something which would mean that the Charter impinged on us in the UK?
Mr Howe: Via the mechanism of the interpretation of the measure. If it does that, this sort of effect by virtue of interpretation of the Community measure, I cannot see that the Protocol, as it were, keeps it out.

Q296 ***Lord Burnett:*** But you do think that the Protocol in other respects does keep it out of UK law?
Mr Howe: Yes. I think the difficult question is whether the Protocol actually does anything more than is done already by the provisions of Article 52(1) of the Charter.
Chairman: Perhaps that is an appropriate point at which to leave the exam paper and thank you very much for your assistance.

Supplementary memorandum by Martin Howe, QC

Following the Sub-Committee's oral evidence session, I thought that it might be useful if I were to supplement my oral evidence on two of the issues which were covered.

UK opt-ins and international agreements

In my oral evidence, I drew attention to the relationship between the UK's "opt-in" protocol provisions and the expanded power of the Union to enter into international agreements outside the field of the CFSP under new Article 188L TFEU. That Article will authorise the Union to conclude an agreement with third countries or international organisations "where the Treaties so provide or where the conclusion of an agreement is necessary to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

The ECJ has developed in its case law a doctrine that the European Community has, in addition to a number of fairly limited explicit competences to conclude external agreements, an "implied" competence to do so in certain circumstances. One circumstance in which, according to the ECJ, the EC has an implied competence is where the conclusion of an international agreement "is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law" (Op. 1/03 of 7 Feb 2006 on The Lugano Convention, para 128: that Opinion contains a fairly full recapitulation of the Court's previous case law on implied external competence.)

In my view the new Article 188L is significantly broader than the implied competence under the existing case law since the final words relating to "common rules" will be stripped of the present requirement that the conclusion of the international agreement must be directly linked to the integrity of the internal system of rules. (In the Lugano Convention case, the Court was of opinion that the Convention "would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules"—para 172.) Instead, demonstrating some kind of effect would be enough to give competence to the EU under the new Article 188L. The doctrine of implied external competence is itself an example of the ECJ expanding the powers of the EC under the guise of "interpretation" of the Treaty when the Treaty itself confers no such power, and Article 188L would take this process of expansion of external competence considerably further.

Under the Lisbon Treaty, the incorporation of the Justice and Home Affairs "third pillar" areas into what is at present the "first pillar" EC structure means that Article 188L will also apply to those areas. The EU will be able to conclude international agreements relating to those areas in its own name, exercising its newly conferred international legal personality.

Where the United Kingdom has opted into or is already bound by internal EU measures, it appears that Article 188L will provide the EU with a competence to enter into external agreements which relate in some way to that system of common rules: for example, the European Arrest Warrant provides an internal EU system for extraditing alleged offenders between member states and therefore the EU would have competence to conclude extradition agreements with third countries since those rules would to some extent interface with and affect the internal rules.

Such an international agreement would be concluded under the Treaty base of Article 188L and not under a Treaty base within Title IV of Part III of TFEU. It appears to follow that the "opt-in" Protocol (the Protocol originally adopted at Amsterdam, whose new title will be "Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice") would not cover the exercise of that competence. Accordingly, the United Kingdom could be forced to accept the international agreement by QMV where the corresponding Title IV Treaty base provides for QMV for internal measures. Under Article 188N(8), QMV is the normal rule under Article 188L unless the agreement covers a field for which unanimity is required.

A further question is whether Article 188L would apply so as to bind the United Kingdom in a situation where the common rules concerned had been adopted by the other member states but the United Kingdom had not "opted in" to the common rules under the Protocol. Common sense might indicate that it ought not to do so. However, neither the wording of the Treaty nor of the Protocol makes provision for this situation as far as I can see. In a real situation, it might be argued that the UK's participation in an agreement by the EU with third countries is necessary or desirable to make fully effective the system of common rules within the other

EU states. In this way the UK could be forced to participate in the external aspects of common EU policies within this area even if the internal application of those policies is within the opt-in Protocol and the UK chooses to stay out of them. This appears to be a dangerous loophole in the protection given by the Protocol.

EU Charter of Fundamental Rights and the Poland and UK Protocol

The Sub-Committee's original question was:

> "What is the effect of the Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom?"

In order to address this issue, one first needs to ask what would be the effect of the Charter in the absence of that Protocol, and then ask to what extent, if at all, the Protocol modifies that effect either in relation to Poland and the UK specifically, or possibly even in relation to the EU generally.

The effect of the Charter is regulated by the so-called "horizontal" clauses in Articles 51 to 54. The most important of these is Article 51(1), which reads:

> "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

Since the Charter is addressed to the institutions and bodies of the Union, the ECJ will be able to use the Charter (once it has been given legal effect at Treaty level by amended Article 6(1) EU) as a legal basis for the invalidation of acts of the institutions including Union legislation. I cannot see that the Protocol would affect or restrict this aspect of the legal effect of the Charter from operating within the UK and Poland in the same way as in all other Member States.

The Charter will also legally bind the Member States when they are implementing Union law. The most obvious mechanism by which this will be achieved is through the ECJ interpreting Treaty provisions or EU legislation in accordance with the Charter. Depending on the nature of question at issue, the effect of such an interpretation could be either to restrict or to extend the scope of the Treaty provision or EU legislation.

A recent example which illustrates how the Charter could affect the scope of other rules of EC law is Case C-438/05 *ITWF v. Viking Line ABP* (11 Dec 2007). That case involved a conflict between the right of a shipping line to establish in another Member State under Article 43 EC and the right of workers to take collective action which interferes with that right. The ECJ observed (at paras 43–45 of the judgment):

> "43. In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961—to which, moreover, express reference is made in Article 136 EC—and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation—and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000.
>
> 44. Although 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, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.
>
> 45. In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods . . . or freedom to provide services."

Once the Charter is given direct legal effect, it is likely that the ECJ will give greater weight to the rights which it contains in that kind of balancing exercise. Although in the Viking case the impact of the "fundamental right" to take collective action was at least potentially to restrict a Treaty right, there are likely to be instances

where the impact of the Charter could be to expand the scope or application of EU law. For example, one can envisage that derogations from the Working Time Directive could be interpreted more narrowly in the light of Article 31(2) of the Charter, which provides that: "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." Conceivably, exceptions or derogations in the Directive might even be struck down as invalid because they contravene the Charter.

Would the Protocol then prevent such an interpretation or partial invalidation having legal effect within the UK and Poland? Article 1 of the Protocol provides that the Charter does not extend the ability of the ECJ or any national court to find that the laws or administrative practices of the UK or Poland are inconsistent with fundamental rights in the Charter, and states that nothing in Title IV of the Charter creates justiciable rights except insofar as the UK or Poland has provided for such rights in national law.

In the example given, the UK's national law would have been found to have been inconsistent not with the Charter as such, but with another EU legal norm (ie the Working Time Directive) when interpreted by reference to the Charter or when partially invalidated by reference to the Charter. I consider it unlikely that Article 1 of the Protocol would be interpreted so as to prevent this kind of indirect but real effect of the Charter. The ECJ would strive strongly to preserve the uniform interpretation and application of EU laws across the EU and would be hostile to an interpretation of the Protocol which would undermine that principle. It would be fortified in this interpretation by the preamble of the Protocol, which notes the wish of Poland and the UK to "*clarify* certain aspects of the application of the Charter", and would hold that a wider interpretation of Article 1 of the Protocol would go beyond clarification.

The upshot is that on the above interpretation, the Protocol does no more than reiterate the provision of Article 51(1) of the Charter restricting its application to member states only when implementing Union law, and has no substantive legal effect.

22 January 2008

WEDNESDAY 12 DECEMBER 2007

Present	Blackwell, L	Lester of Herne Hill, L
	Bowness, L (Chairman)	Norton of Louth, L
	Jay of Ewelme, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr Stephen Hockman QC, Mr James Flynn QC and Professor Alan Dashwood, Bar Council, examined.

Q297 ***Chairman:*** Gentlemen, good afternoon. Thank you very much for coming to give evidence to us on the impact of the Reform Treaty on the area of freedom, security and justice. I should say at the beginning of this session that Lord Mance, Lord Lester and Lord Wright of Richmond have declared interests that are in the Register of Interests and available to any witnesses and members of the public who wish to see them. You have had an indication of the areas that we want to cover; is there anything you want to say before we move to the questions?
Mr Flynn: My Lord Chairman, perhaps I could say who we are and introduce us to the Committee. I am Co-Chair of the European Committee of the Bar Council and I am accompanied by Stephen Hockman on my far left, who is a former Chairman of the Bar and an experienced practitioner; and Professor Alan Dashwood, who is Professor of European Law in the University of Cambridge and who also has the rare distinction of being a practitioner in some of the areas that your inquiry will focus on, both as a former member of the Council's Legal Service and now at the Bar. I thought I should just say for the record, if I may, that the Bar Council is the governing body for the 15,000 barristers in independent and employed practice, and the European Committee is one of the representative committees of the Bar Council, with a mandate essentially to follow what is going on in Brussels, if I could use that as shorthand, and respond to consultations, for which purpose we draw on specialist Bar associations and other expertise available within the Bar with the aim of providing practical input, with the interests of practitioners and the legal profession at the forefront of what we do. That is where we are coming from.

Q298 ***Chairman:*** We will move to the questions. Can we first look at the question of the United Kingdom opt-in that we have acquired in the general area and the further opt-in provided by the Schengen Protocol. Can you indicate how the position of the United Kingdom will differ, if the Treaty proceeds, from the present position; and do you foresee any problems in the various proposed protocols?
Professor Dashwood: I have been elected to deal with this question, Chairman. If I may begin with the Title IV Protocol, there are two significant changes that will be made in this. First of all, the extension of the Protocol to cover the subject matter which currently falls within Title VI of the Treaty on the European Union, the so-called Third Pillar, will have a broader scope than at present. The other change is one that goes to the issue of locking-in, which is referred to in question 3. It has been a question whether the United Kingdom's opting-in mechanism applies to proposals for the amendment of Title IV measures that it had previously opted into. It had always been the United Kingdom's position that the mechanism did apply, but it is believed that at least the Legal Service of the Council may not have been in agreement with that, although I am not aware of this ever having become an issue in practice. At all events, the new Article 4a of the Protocol will resolve that ambiguity by extending the opting-in mechanism to amending measures, but at a certain cost. Article 4a(2) will lay down the procedure where the Council determines that the United Kingdom's non-participation in the amended instrument makes that instrument inoperable for other Member States (page 61 in the October text, point 20 of Protocol 11). Article 4a states that the opting-in mechanism will in the future apply to amendments, and then paragraph (2) is about what should happen if the Council judges that the UK's non-participation in the amendment would make the application of the measure in question inoperable for the other Member States or for the Union. It is believed that the word "inoperable" was intended to set out a high threshold, but of course that is a matter for interpretation; it will only be if the degree of inconvenience for other Member States passes that threshold that the Council will set in motion the procedure which, if the United Kingdom cannot be persuaded to opt into the amendment, will result in its exclusion from the original measure. Pursuant to paragraph (3) this could have the consequence of the United Kingdom's having to cover the direct financial consequences, if any, that would result from reorganising things so that they can be comfortably applied to 26 Member States or 25 Member States instead of 27.

Q299 ***Lord Wright of Richmond:*** Professor Dashwood, I think it is thirty years since we first met in Luxembourg!

Professor Dashwood: I think it must be, yes.

Q300 ***Lord Wright of Richmond:*** One of the people who have given evidence said 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, by which clearly they are referring to opt-ins and opt-outs. Do you have any comment on that?
Professor Dashwood: That is a political judgment of course.

Q301 ***Lord Wright of Richmond:*** Indeed.
Professor Dashwood: I suspect it may very well be true in the sense that a higher political price may have to be paid for not opting in. So far, the United Kingdom has opted into a significant proportion of the type of measures to which this mechanism applies but it can be said—and this moves to the second part of the question as to whether the mechanism entails problems—that up until now the experience has been pretty satisfactory. I am not aware that the United Kingdom has encountered difficulties with its EU partners which means that they are finding us more than usually irritating on this account.

Q302 ***Lord Wright of Richmond:*** My second question relates to an organisation called Frontex. I do not know whether you have had any experience of it? It is the organisation based in Warsaw which tries to facilitate co-operation between the EU's external frontiers.
Professor Dashwood: This is the Border Agency.

Q303 ***Lord Wright of Richmond:*** Indeed, with which we have a rather anomalous relationship, which is to say that we participate quite fully both in its meetings and in its operations, but still do not have a vote on its management board.
Professor Dashwood: Yes.

Q304 ***Lord Wright of Richmond:*** So far as you understand the situation, will it change as a result of the Reform Treaty?
Professor Dashwood: I am afraid that it will not. I have been very concerned with Frontex, the border agency, because I have been acting for the United Kingdom in the litigation that relates to the border agency regulation and to passports.

Q305 ***Lord Wright of Richmond:*** I apologise for implying that you might not know what it was!
Professor Dashwood: Not at all. I always have to think carefully because, I do not think of it as Frontex, but civil servants I talk to do, so it takes me a moment to connect up with that. The Frontex issue is one that goes to the position of the United Kingdom under the Schengen Protocol, not under the Title IV Protocol. The litigation has arisen because the Council, on the advice of its Legal Service, decided that the Border Agency Regulation and also the Passports Regulation were measures building upon the Schengen *acquis* and the Council and the Commission and a number of Member States, but not all of them, take the position that the United Kingdom is only entitled under Article 5 of the Schengen Protocol to opt into so-called Schengen building measures if it already participates in the underlying Schengen *acquis*. The Border Agency is regarded as something that is very closely connected with the management of the Schengen external border, and for that reason the UK was excluded from participating in the adoption of the Regulation and is therefore unable to be formally a member; although, as you rightly point out, it is informally involved in the running of the Agency, as indeed it was previously in the arrangements that applied before the adoption of the Regulation. We will only able to get into the Border Agency if the United Kingdom wins its case, which at the moment, in a sense, it is half-way to losing, because the Advocate General has concluded against us.

Q306 ***Chairman:*** Would the position be better or clearer under the proposed Reform Treaty?
Professor Dashwood: It might conceivably. If I can move on to the Schengen Protocol, there are two provisions that specifically concern the United Kingdom: Article 4, which is the procedure for opting in to the Schengen *acquis*, the whole body of Schengen measures; and Article 5, which is about participation in Schengen building measures. Article 4, which relates to the Schengen *acquis,* requires a unanimous decision by the Council to let in the United Kingdom if we want to become a part of the *acquis;* and we have in broad terms opted into quite a lot of it—into the part of the *acquis* that relates to police and security matters and the aspects of the Schengen information service relating to those matters. (The United Kingdom has not got into the parts of the *acquis* concerning the abolition of controls at internal borders and the movement of persons.) We did that on the basis of a Council Decision that was taken in 2000. One of the provisions of that Decision related to the procedure for the UK's participation in Schengen building measures. I will come to that in a moment. Under Article 5 of the Schengen Protocol—and there is a new version of Article 5 at 18(g)—paragraph 1 is substantially unchanged. That lays down the procedure for the United Kingdom's—I am trying to avoid the word "opting in" because it is procedurally distinct from the Title IV Protocol; the paragraph operates as a special form of enhanced co-operation.

If the United Kingdom and Ireland do not notify their wish to participate in a Schengen building measure, that automatically triggers an authorisation to the other Member States to proceed by way of enhanced co-operation. Paragraphs (2) to (5) are new, and their purpose is to neutralise the provision that I referred to in the Decision of 2000, which said that with respect to measures building on the parts of the Schengen *acquis* which the United Kingdom had opted into, we are irrevocably deemed to have given notice under the first paragraph of Article 5. That provision of the decision, paragraph 8 of Article 2, locked the United Kingdom into any Schengen building measures relating to part of the Schengen *acquis* which we had opted into. The purpose of paragraphs (2) to (5) is to enable the United Kingdom to break out of that prison. Paragraph (2) says that, where the UK is deemed to have given notification pursuant to the Decision of 2000, it may nevertheless notify the Council in writing within three months that it does not wish to take part, and as from that notification the procedure for adopting the measure will be interrupted. The Council will see whether it can reach a decision as to any necessary adaptation of the decision authorising the United Kingdom's participation in the underlying *acquis*. If it cannot, then it is possible for the matter to be referred to the European Union Council. If the European Council is not able to reach a satisfactory decision, then the responsibility falls back on the Commission. It would be finally the Commission that would have to decide how the underlying *acquis* would need to be adapted to take account of the fact that the United Kingdom has decided not to participate in this particular building measure.

Q307 ***Lord Wright of Richmond:*** So it potentially gives the British Government more freedom of movement.

Professor Dashwood: It does, yes. It is rather similar in its operation to the new Article 4a of the Title IV Protocol, but there is nothing about inoperability.

Q308 ***Chairman:*** We move to criminal justice and policing. The new Chapter IV of the Treaty sets out the detailed areas of competence in criminal law. Can I ask our witnesses whether they think the scope for co-operation is wider under the proposed Treaty than under the existing Treaty?

Mr Hockman: My Lord Chairman, I think it is for me to try to assist you on this. Perhaps I could to some extent treat questions 4, 5 and 6 together because they do to a degree overlap. As you will be aware, the key provisions here are what you will have as Article 69(e) and 69(f), or in the December version 69(a) and 69(b). Broadly speaking, one might say that Article 69(e) deals with Community competence in procedural matters, and Article 69(f) deals with Community competence in substantive matters. If I can start with competence in substantive matters, which is 69(b) in the new notation, you will see that the Community will have the right to establish minimum rules concerning the definition of criminal offences and sanctions in the following areas—and there are two main ones, sub-paragraphs (i) and (ii). The first is the area of particularly serious crime with a cross-border dimension, and the areas are specified to include such matters as terrorism, drug-trafficking and so on; and then a second area is in the area where there have already been harmonisation measures, and the approximation of criminal law is necessary to ensure effective implementation of the policy underlying harmonisation. That is the regulatory area, the area previously covered by such cases as the two identified in question 6; that is the environmental area typically, where there has already been harmonisation and where the European Court of Justice has already said that it is permissible for the Community to legislate in relation to criminal measures in support of the policy of harmonisation. Looking at that substantive area, perhaps one could add two specific comments. First of all, in answer to question 6, we take the view that Article 69(B)(ii) does resolve the question raised in those previous European Court of Justice cases, and does confirm the Community's right to legislate in those areas; and that probably, but perhaps not definitely, the power will now be contained in Article 69(B) rather than deriving from previous jurisprudence. I think that that was the advice you had the other day from Professor Shaw from Edinburgh, and we think that that is probably right, if only on the basis that it would seem rather odd if express provision is made in the Treaty but with safeguards, but then those safeguards could immediately be circumvented by returning to the previous jurisprudence, to which the safeguards do not apply. Whether if ever the matter came before the European Court, that sort of argument would ultimately prevail; there may be a slight question mark over that, but the authoritative view seems to be that Article 69(e) is now the defining source of this sort of power. A question that we posed to ourselves but perhaps did not definitively answer is this. In the ship-source pollution case it was said that when it comes to Community measures indicating what sort of penalties can be imposed, the Community can legislate in a broad way and can say that the penalties should be sufficiently dissuasive to ensure effective implementation of the harmonisation policy; but there was, so to speak, a self-denying ordnance in paragraph 70 of the judgment in which the court held that the determination of the type and level of criminal penalties did not fall within the Community's sphere of competence. I think

everybody has regarded that as being an appropriate self-denying ordnance on the Community's behalf. A question could arise as to the meaning in this context of the phrase "establish minimum rules with regard to sanctions". Is that intended to convey the same sort of relatively limited power, or does it go further? Could the establishment of minimum rules extend to defining minimum or maximum penalties; or should that phrase be interpreted in the light of what the Court of Justice has said in the ship-source pollution case? The answer to that question may not be quite so clear. I think I was disposed to say that it should be interpreted in accordance with the previous jurisprudence, but Professor Dashwood, to whom I defer on this and other matters, was a little less sure; so we flag that up as a possible area of concern without wanting to overstate the point. That is on the substantive side. On the procedural side, this is Article 69(e), where there is similar phraseology, establishing minimum rules in various procedural areas, and based, as you can see from 69(e)(2) on what is called "the principle of mutual recognition of judgments". You asked the question, are Member States in agreement as to what the principle of mutual recognition involves. I am not sure that we know the answer to that. It is a difficult question because I am not sure that the concept of mutual recognition itself is a particularly precise one. If it means recognition of judgments and decisions of the courts in a fairly narrow and strict sense, which presumably is one meaning, then it occurred to us that the following issue might arise. We have asked ourselves: in what context would the recognition of a decision by a foreign court be relevant in a criminal context? Of course, under our current criminal law the previous convictions of an accused person are increasingly relevant because we recognise increasingly the relevance of the defendant's previous convictions as being at least potentially relevant in some situations to the determination of his culpability. The question could arise, I suppose, as to whether a conviction is conclusive evidence of his guilt of a previous offence, or whether it is merely evidence which it is open to him to rebut. Under our law it is open to an accused person to say, "I may have been convicted of committing a rape five years ago, which you say is relevant to the charge that I face now; but I was not guilty of it and I dispute it." That issue would need to be resolved by the court of trial. One would hope that that would be the situation and that it could never be suggested that the record of a conviction could be conclusive; but I do not know whether that risk might arise and whether it would be said that the minimum rules could include the possibility of making the record of a conviction conclusive evidence; I think we here would find that a little surprising if that were to be suggested. Those are some initial comments. They may or may not go some way towards answering questions 4, 5 and 6.

Mr Flynn: The reference to mutual recognition of judgments is, as it were, an aspiration and that is the guiding principle, and that is what should be worked towards; but, obviously, there is a lot of legislation to be undertaken and probably some rather difficult discussions to be had under paragraph (a) of part 1 of Article 69(e).

Q309 ***Lord Lester of Herne Hill:*** I am not a criminal lawyer but I was looking at Article 69(e), paragraph 2. It tells us that the rules must take account of differences between legal traditions and systems of Member States; so they have, as it were, a common law tradition and Union inquisitorial systems and recognise that there is diversity. It then says: "They shall concern mutual admissibility of evidence and rights of individuals in criminal procedure"—and those are the first two examples. I take it that that means that in the law-making function of the Treaty, matters like hearsay evidence and rules about the admissibility of hearsay evidence as between a common law system and a civil law system would be in play; or say the rights of individuals in criminal procedure, where you have inordinate delay in a criminal trial—say ten years after the facts. In England the remedy would include quashing proceedings, stopping them because you cannot have a fair trial; but in France the remedy would not be that; it would be compensatory only, as I understand it. Therefore, would it be right to say that there would be some desire, to take those two examples, to harmonise across completely different legal traditions in those matters?

Mr Hockman: Yes. It seems to me that a lot may turn on what the phrase "establishing minimum rules" means. Implicit in what you are saying—and I respectfully agree—is that that phrase makes it quite difficult to apply it in the substantive context, but it is even more difficult to apply it in a procedural context. To take either the hearsay example that you give or the delay example that you give, how can one find the lowest common denominator between the right to have the proceedings stayed for delay, and the right to have compensation? I respectfully agree that it is not at all easy to see what minimum you could arrive at in that situation. Hearsay might be slightly easier of course: our law increasingly recognises the possibility of hearsay being relied on, so a minimum standard there may be something that is easier to get at.

Q310 ***Lord Lester of Herne Hill:*** When it says "adoption of minimum rules referred to in this paragraph shall not prevent Member States from maintaining a higher level of protection", it means

that one looks at the lowest common denominator of mutuality but expects diversity to continue where, say, we give higher protection to the remedies for the effects of delay than some other systems will do; and therefore there will continue to be substantial diversity in aspects of criminal procedure between, say, our system and the French system?
Mr Hockman: That would certainly seem to be right, although that phrase presents more problems, does it not, in relation to the hearsay issue, I suppose? Once you have accepted that hearsay is admissible, then it is rather harder to see how you could go back on that and introduce a higher level of protection for an accused person.

Q311 ***Lord Lester of Herne Hill:*** The only way in which one could get, as it were, equal protection, would be if the Strasbourg Court of Human Rights, in a French case—to take my hypothetical example—were to require French procedure to conform to Article 6 of the European Convention in a similar way to compliance by the UK; in other words, the other European Court in Strasbourg could perform that kind of a function to raise the level of protection across State A and State B. It could not be done through this but it could be done to raise levels rather than to lower them presumably through the other European system!
Professor Dashwood: I would have thought that it would be possible for the Community to introduce a rule comparable to the Strasbourg principle that there is a right to a hearing within a reasonable time, and that beyond that point the proceedings should be stayed. That would be something that the Community would be empowered to do by this provision.

Q312 ***Lord Lester of Herne Hill:*** But we would not like it if the Charter of Fundamental Rights were used for that purpose in respect of the United Kingdom!
Mr Hockman: That issue may raise other problems.
Professor Dashwood: This drafting technique empowering the Council to adopt minimum rules and then allowing the Member States to go much further is actually used elsewhere in the Treaty as quite a familiar approach in the context of social policy, protection of the environment and so on. It may be more delicate in this context, but it is a similar logic.

Q313 ***Lord Blackwell:*** Can we move to enhanced co-operation and the interaction, if there is one, between these articles and the development of a European public prosecutor: to what extent will a European public prosecutor, if it evolves, act as a force for establishing procedures and rules of evidence that *de facto* become harmonised? Second, even if the UK does not participate in a European public prosecutor, would a European public prosecutor be able to use the European arrest warrant to arrest people and charge people in the UK?
Mr Hockman: I do not know how complete an answer I can give you to that question. I see from Article 69(2) that the public prosecutor's office is going to be responsible primarily for investigating prosecuting and bringing to judgment the perpetrators of certain offences, and I suppose the extent to which he or she engages in policy-making will depend a little bit on the individual. It may not be a very helpful point to make, but I do not know that our own Directors of Public Prosecution have seen it as their responsibility to engage very much in policy-making: on the whole they have taken the view that that is not really their job, that they should remain reasonably objective and neutral in policy terms.

Q314 ***Lord Blackwell:*** Presumably they are not bound by any national prosecuting code because they are operating on behalf of the European Union, so they must in a sense evolve their own procedures.
Professor Dashwood: I am sure that must be right.
Mr Flynn: I think that is right, My Lord Chairman. If it is right, it is perfectly possible that the European prosecutor's office, if it set up the approach that is taken by that office to certain aspects of criminal procedure, would in effect become at least an incentive, a sort of benchmark for the national law. That is perfectly possible and perfectly foreseeable.
Professor Dashwood: It is worth making the point that the function of the European public prosecutor is very specific; it is to combat crimes affecting the financial interests of the Union. These will be defined by legislation. Paragraph (2) is the paragraph that talks about the office being "responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, perpetrators of and accomplices in serious crimes affecting more than one Member State and of offences against the Union's financial interests as determined by the European law." This regulation has yet to be adopted. The policy underlying this initiative, this innovation, is the sense that 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 national interests. The purpose of it is to ensure that there will be somebody whose job it is to get these cases before a judge.

Q315 ***Lord Blackwell:*** With respect, I am not an expert on this but paragraph 4 of the same article says that while it may be set up in that way, it may be extended to cover any crime.

Professor Dashwood: True.

Q316 ***Lord Blackwell:*** I realise it is more speculative, but to the extent that that became a broader prosecuting service, it seems to me that the effect would become a way of harmonising—

Professor Dashwood: Of course, it would have a much wider scope. This could only happen as the result of a unanimous decision by the European Council.

Q317 ***Lord Wright of Richmond:*** Can I ask a general question? I do not know if any of you have views on the practical effects of all these provisions in the Reform Treaty? One of our witnesses has said that it seems to provide an impetus for more legislative initiatives in EU criminal law. Another actually said to us—although this was denied by a subsequent witness—that he or she foresaw a rash of asylum cases coming before the European Court of Justice.

Mr Hockman: For my part at least, it is necessary to keep one's feet on the ground in relation to this.

Q318 ***Lord Wright of Richmond:*** I will try!

Mr Hockman: Substantively there are two main areas. One is the use of the criminal law to back up regulatory policy, for instance in the environmental area. That is already extensively part of our law. It is saying it is not really the direct use of criminal sanctions against behaviour in the sense of behaviour that is contrary to the Ten Commandments and so forth; it is in areas where the activity is permissible but only with certain regulatory limits, and the criminal law is used to ensure that people comply with those regulatory limits. That is something that happens in our own jurisdiction very commonly already and it is something that was already authenticated in the European Court in two earlier cases, and on the face of it it ought not to have caused major practical problems. In the other area, one is dealing, as I read it, with particularly serious crime with a cross-border dimension. One can certainly see why the Community would want to have competence in those situations. Of course, if there is a rash of cross-border crime, then there may be a rash of cases, but I do not know that—you know, it will be driven by the need rather than anything else. That would be my at least partial answer.

Mr Flynn: I would remind ourselves, My Lord Chairman, since we have not used the phrase, that this is where the emergency brake comes in. For Member States to object to these proposals, they have their own measures in addition to the UK Title IV Protocol.

Q319 ***Chairman:*** That takes us very neatly on to enhanced co-operation and the fact that the proposed Treaty would facilitate closer integration through automatic authorisation for enhanced co-operation after the emergency brake had been used. Do you view that as desirable? When you are answering that question, could you deal with the question 188(l), the external competences of the Union and Member States that are not party to the enhanced co-operation?

Professor Dashwood: I think, My Lord Chairman, that if this were a problem it would be a relatively minor one. The emergency brake is likely to be used very infrequently. That has been the experience of these emergency brakes. In one form or another they have been present in the Treaty since Amsterdam, and they are hardly ever activated. I do not think this is an issue. The question of whether enhanced co-operation may be troublesome is a much wider question than in the context of the emergency brake. Unfortunately, it is a question that can only receive a speculative answer because although, again, in one form or another enhanced co-operation has existed ever since Amsterdam, it has never been used to date. The only real experience we have of the functioning of an enhanced co-operation mechanism are the Schengen and Title IV Protocols which are in a sense enhanced co-operation at the level of primary law. I suppose the cases that I have been involved with underline one kind of problem with enhanced co-operation, which is defining its boundaries and preventing spill-over. By that I mean that a group of Member States establish an enhanced co-operation; and somebody comes forward with a proposal for a further measure which the members of the group believe to belong within the co-operation, whereas Member States that do not want to join the co-operation feel that they would like to participate in the measure. I think that is the kind of problem that would be encountered here, as in other areas where enhanced co-operation is used; but it is simply the consequence of adopting this flexible mechanism. If you are going to have differentiation, you are going to have to draw lines, and it is sometimes going to be difficult.

Q320 ***Lord Norton of Louth:*** Who would identify the sort of problem you have identified?

Professor Dashwood: It could only be the Court of Justice, as a result of somebody contesting the legality of being excluded.

Q321 ***Chairman:*** What about 188(l), the Union's ability to conclude an agreement with one or more third countries or international organisations, *et cetera*? What would be the consequences of that article for Member States not party to enhanced co-operation if the signing arose out of enhanced co-operation?

Professor Dashwood: This again is speculative because we have very little experience, but I believe the interests of non-participating Member States are amply protected by the Treaty which says their rights and responsibilities must not be affected. I am pretty sure—although it is not actually stated—that you could have an international agreement entered into within the framework of an enhanced co-operation exercise, but the consequence of that would be that the agreement binds the Union but would not bind the non-participating Member States. They would be required to refrain from action that impeded the functioning of the cooperation, but they would not acquire any additional legal responsibilities.

Q322 ***Lord Blackwell:*** Does the application of the emergency brake—if the UK were to invoke the emergency brake and the rest of them were then to proceed by enhanced co-operation, is that a different outcome than if we simply opt out? Are we in a different position?
Professor Dashwood: Substantially I think not. We are not participating in an action that others have undertaken.

Q323 ***Lord Blackwell:*** With enhanced co-operation is there not an option that you can opt in, whereas if we opt out we—
Professor Dashwood: Under the Title IV Protocol you can opt in to a measure that has already been adopted. You do not have to opt in at the time the proposal is before the Council. You can opt in subsequently.

Q324 ***Lord Blackwell:*** For the UK these are the same thing.
Professor Dashwood: In a way it is a belt and braces for the UK. If we opt in to the proposal and then the negotiation seems to be developing in a direction which we think might be damaging to our interests, there is a question that texts do not answer, whether once having notified we can withdraw our notification. Arguably we could, but in any event we could fall back on the emergency brake.

Q325 ***Chairman:*** Can we move forward to border checks, asylum and immigration? Perhaps one of you would care to outline what you think are the most significant changes that the Treaty introduces as regards co-operation in that area, and are there any particular concerns that you have?
Mr Flynn: I have to say, My Lord Chairman, this is an area where we felt we were unable to assist you to any great extent. This is, I am afraid, something that at the level of the European Committee we have not looked into in any great detail. I know that you have had evidence from others on this point. We were concerned at an earlier stage—and it is not directly coming from the Treaty itself—with the court's proposal for an accelerated procedure for hearing cases involving the liberty of individuals and children and so forth, which is before the Council probably at this very moment, under which a sort of simplified oral procedure is envisaged. It does not flow directly from the Treaty, although there is reference to a proposed amendment to Article 234 requiring the Court to act with a minimum of delay in relation to persons in custody. I am afraid other than that we do not have any information we can give you.

Q326 ***Chairman:*** Can we look at civil justice and family law: are you able to help us on that one—the main changes that it introduces?
Mr Flynn: There are obviously some fairly significant changes of wording as between Article 65 as it stands at the moment and Article 65 in the Reform Treaty. Notably the phrase in the existing Article 65 says that measures that can be taken in the field of judicial co-operation are civil matters having cross-border implications in so far as it is necessary for the proper functioning of the internal market. The phrase now is "particularly when necessary" so it does not have to be necessary for the proper functioning of the internal market. The previous article referred to the good functioning of civil proceedings and promoting the compatibility of national civil procedure rules, whereas the new article plainly relates to the adoption of measures—the new Article 65 in its first paragraph refers to co-operation in the civil justice field including the adoption of measures for the approximation of laws and regulations of Member States; so there is no limitation to civil procedure in the new wording. The list of areas in which measures may be adopted as set out in part 2 of that Article is longer than that which appears in the current version of Article 65. Firstly it refers to mutual recognition and the enforcement aspect, which we have discussed in the criminal context. It refers in (g) to alternative dispute resolution matters and to training in paragraph (h), which is already a point on which you have had evidence from Sir David Edward. It is a more widely framed article, and I suppose therefore one can expect slightly more ambitious proposals from the Commission under that. Obviously, the opt-out applies. Paragraph 3 of the Article, which is concerned with family law with cross-border implications, will continue to be subject to a rule of unanimity. Our expectation is that that is very unlikely to change, given the difficulties that we had last year in relation to negotiations in connection with matrimonial support and applicable law in matrimonial matters, which died a death, with several Member States violently opposed.

Q327 ***Chairman:*** Perhaps we can go on to the transitional provisions and the protocol that deals with that, restricting the jurisdiction of ECJ and the Commission's powers of enforcement over the existing Title VI measures for five years unless it is amended. Can you help us as to what you think would happen in the interim? Are we likely to see, and is it practical for the existing measures to be re-negotiated? Perhaps most important, is it likely that it will be obvious when a measure has been amended?
Professor Dashwood: I think it is unlikely that any significant number of existing measures will be re-negotiated. I do believe that there may be difficulty in interpreting paragraph 2 of Article 10. This is Article 10 of Protocol no.10. It says that the amendment of an act referred to in paragraph 1, (ie, a previous Third Pillar act), shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaty with respect to the amended act for those Member States to which that amended act shall apply. That seems to be saying that if one indeed measured it amended, then the normal powers of the Commission and the Court of Justice will apply, and the paragraph says: "To the amended act"; it does not say "to the part of the act that has been amended" or "to that amendment". The wording seems to indicate that amending a Third Pillar measure during the transitional period will have the effect of neutralising paragraph 1. I am not convinced myself that any amendment, however small, should have this effect. I think this is an issue, and I think that there is a significant ambiguity here. There may be difficulty, but it should normally be possible to say whether an act is being amended, even if the amendment involves deleting language and adding nothing—that would clearly be an amendment. It seems to me to be a very radical consequence that any amendment at all would have the effect of neutralising paragraph 1. That is one of the provisions that I find troublesome.

Q328 ***Lord Blackwell:*** It seems to me there may be occasions where the Commission in effect has a choice of whether it wants to bring in a completely new piece of legislation or whether it wants to achieve that by tagging it on as an amendment to something which already has some relevance to that—and we have seen in the past they can be quite imaginative in stretching that. It seems to me that that has consequences because if they amend an existing piece of legislation, that is by QMV—the emergency brake does not apply and for us to opt out, it means we have to opt out of the original instrument. It would be a lot harder for us to resist something that was an amendment of an existing—
Professor Dashwood: The inoperability threshold would have to be crossed because that applies under the Title IV Protocol. Our opting out would have to be judged sufficiently troublesome to render the original measure inoperable to the other Member States before the Council embarked on the procedure that could lead to our being excluded from that measure.

Q329 ***Lord Blackwell:*** Perhaps, conversely, I am looking for ways in which the Council might seek to get to its measures—overcome resistance, if you like.
Mr Flynn: In chatting through to prepare for this session we did see some opportunities for gaming the system, if you like, or applying a certain amount of pressure. We are perhaps not very well placed to play the political game and guess the circumstances in which that might be done.

Q330 ***Lord Blackwell:*** Given what has already been agreed as legislation under the existing Pillar Three, how much scope does that give to extend that?
Professor Dashwood: I can think of a few measures, I suppose, but the most famous Pillar Three measure is the European arrest warrant. Most of those measures are ones that the United Kingdom has been quite enthusiastic about and would want to remain part of; so I think in practice the likelihood of our not wanting to be bound by an amendment is perhaps limited. This is not a provision that has been put in only for the benefit of the United Kingdom; we are by no means the only Member State, for instance, that has not given notice under Article 35 of the Treaty of the European Union with respect to references for preliminary rulings; there are other Member States. This seems to be a sensible kind of measure that provides an opportunity for the Member States to get used to the idea that the institutions will in the future have powers with respect to acts that have been adopted under very different institutional and procedural provisions.

Q331 ***Chairman:*** The Charter of Fundamental Rights: what impact do you think Article 6, which declares the binding nature of the Charter, will have on the protection of fundamental rights in the freedom, security and justice measures, if any?
Mr Flynn: It is a difficult question. I think we find the first part of Article 6 to be a little circular because the Charter is supposed to be declaring what is already there. It is a statement that one finds, but fundamental rights in the Charter have the same legal value of the Treaty as they are recognised, but the whole purpose of the Charter was to make clear what was supposed to be already there in the Member States. It is a little hard to know what the impact of this provision will be. I must confess I cannot

remember the extent to which the Court itself has already drawn on the Charter. I know the Advocates General have made fairly frequent reference to it and I believe in one or two judgments of the court it has been referred to by way of confirmation rather than as a source of any particular right. My own view is that one might expect to see references to it possibly in judgments but it is unlikely to change the picture very much.

Q332 ***Chairman:*** Perhaps we can go on and deal with the Protocol: what effect does the Protocol have on the application of the Charter to the UK?
Professor Dashwood: I think it is a belt-and-braces, myself. On one view of the Charter, which is mine but not universally held, it does not create any new rights; it simply records and proclaims rights that are derived either from EU law through the jurisprudence of the Court of Justice, or from national law, because it refers to national rights as well as EU rights. That understanding of the Charter is recorded in one of the recitals to the Protocol, which presumably all the Member States must agree with even if the Protocol only exists for the benefit of the United Kingdom—I think Poland has dropped out. But they must agree with this because it is part of the primary law in the Union. The recital states, that the Charter reaffirms the rights, freedoms and principles recognised in the Union, and makes those rights more visible but does not create new rights. One view, which I believe is the correct one, is that the Charter does not enlarge the possibility for acts of the Member States or indeed of the Union's institutions, to be challenged in courts, on a proper understanding of the Charter, read in the light of the explanation which will now be specifically mentioned in Article 6. If you take that view, then you have got your belt, and the Protocol is simply a pair of braces. If you take the different view, that maybe the Charter does provide something by the way of additional rights, then you can say that at least as far as the United Kingdom is concerned it must be interpreted as not doing so, in which case the Protocol would have some legal consequences. My own view is that we do not need to take that second step. The Protocol is not an opt-out for the United Kingdom; it is an interpretative protocol, and this is how the Charter must be interpreted at least in the United Kingdom.

Q333 ***Lord Lester of Herne Hill:*** If I could take the two questions together, I put this to previous witnesses. It seems to me—and I wonder whether this is right—that the fuss about the Charter is a fuss about very little in terms of law, as distinct from politics. As a matter of English law, as long agreement as the 1970s Lord Reid in *Waddington v. Miah* [1974] 1 WLR 683 said of an argument about retrospectivity of immigration legislation that it would be unthinkable in the UK to enact a law that was in breach of international human rights conventions by which we were bound even though we had not made them part of our system. In *Garland v. British Rail*, an EU case in 1981, Lord Diplock said that there is a presumption that our statutes will conform to our Treaty obligations even if they have not been incorporated; and asked *a fortiori* whether that was true of a binding directive under EU law. As an advocate, it seems to me that if I turn up in an English court and I want to rely upon soft law, ie, the ILO Convention for collective bargaining, which is not in the European Convention on Human Rights, as an aid to interpretation of an English statute on the basis of those presumptions, it is up to the judge whether to allow me to do so. The fact that it is in the Charter does not seem to me—quite apart from the Protocol—to add or subtract; the Charter is a collection of international obligations already binding upon all Member States who have signed up to all these international human rights committees. It does not seem to me that there is anything new in the Charter that is not already in the international; Treaty obligations and in existing EU law. Am I wrong?
Professor Dashwood: No, you are right.
Mr Flynn: That is really what we are saying. If it is not adding anything then you do not have to face the question you are asking. If it does add something, as Professor Dashwood said, then it may just be that this Protocol has some effect limiting what the judge you would be addressing can do.
Professor Dashwood: It is my view that it does not add anything, but there is a view that maybe it does. I do not find language in the Charter to support that.

Q334 ***Lord Blackwell:*** Can I pose a counter view, which is on what scope it might or might not add to the role of the ECJ to interpret laws that might then affect the UK; and I am thinking particularly about social measures in the Charter to do with social rights? The UK's Protocol says that those can only be interpreted to the extent that they are already part of UK law, so UK law, if it wants to ratify this Treaty, will embrace anything that is European law because we will have incorporated European law into UK law. Could it not be that if there is a measure which has been adopted in an area of shared competence, for example in social policy, where there is some degree of doubt as to what this legislative measure means and encompasses, the ECJ would be in a position of interpreting what that directive meant and would be able to pray in aid the measures of the Charter of Fundamental Rights and interpret it in a way that it saw fit to interpret that social policy?

Professor Dashwood: This has been a particular concern in the United Kingdom. It seems to me that if you look at the language of Title IV, "Solidarity", in the Charter—what it says, for example, about the right to belong to a trade union and the right to strike is extremely anodyne. It refers to EU law and to international law and it simply says that this right exists. There is no doubt that the right does exist in the UK. I do not think that if the Court of Justice were inclined to develop the right to strike by talking about things like secondary picketing and all those aspects of old-fashioned industrial relations, it would not gain anything from the Charter if it wanted to do that; it would have to range more widely and look at the international agreements which Member States are party to, and where I do not think you will find anything particularly helpful—or to what it calls the constitutional traditions of the Member States. Again, I doubt if there they would find there was a sufficient consistent experience that could be drawn on. I do not think the language of the Charter would be any help at all for the Court.

Q335 ***Lord Lester of Herne Hill:*** To pursue the same question in a slightly different way, my understanding—and I will be corrected if I am wrong—is that the Luxembourg Court, like the British courts and like the Strasbourg Court, illuminates its reasoning process by having regard not only to the text before it, but also to relevant international treaty obligations, in order to establish the context, as it were, in making policy choices. That has nothing to do with the Charter; that has been going on for decades. It has been going on in the United Kingdom—the roamer rights case, which I was in, is a very good example. They looked not only at customary international law but they looked at a lot of conventions and covenants by which we were bound in order to give judgment. As I understand it, the same is true in Luxembourg. They will look at the ILO Convention to see how the principle of equality applies and will look at these instruments. Is there anything new in the methodology, if instead of looking at the Treaty they look at a charter that gathers the Treaty obligations into one place?
Professor Dashwood: I do not think they 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, in order to guide it in applying these principles in detail, because the language of the Charter is simply recording that the European Union thinks these rights are important.

Q336 ***Lord Jay of Ewelme:*** Mine is a rather more general question. As this discussion has shown, the Treaty framework is becoming increasingly complex as we try to reconcile the need for binding rules to preserve the heart of the original Treaty and in particular the Single Market, and at the same time accommodate a larger and increasingly variegated European Union of 27. From a legal point of view do you think it will be workable?
Mr Flynn: I suppose I would like to say on behalf of the Bar Council that I am sure we will rise to the challenge. It really is getting a bit ridiculous to my mind and it is a complete mixture of the different schemes, different compositions and different institutional arrangements. Speaking personally rather than as a lawyer, I find it regrettable it becomes a subject for specialists.
Professor Dashwood: My answer to Lord Jay's question is that I do think it is workable. I am endlessly optimistic about the European Union. We always seem to find a way of making it work. Through all the enlargements, we have been told that it is going to become unworkable, and somehow we have managed to struggle through. I think 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. The European Union could not have failed to respond to the new political and security situation in Europe that resulted from the break-up of the Soviet Union. If the price of this is rather complicated legal arrangements, so be it; we will just jolly well have to make the best of it!

Q337 ***Lord Blackwell:*** The Government's response to those who have concerns about giving the EU competence to legislate by QMV in these areas we have been talking about—civil and criminal matters—has been: "Do not worry; we have our opt-out and the emergency brake; and therefore we are not really participating in the QMV legislative process here." Your responses to a number of questions have been that it is unlikely that we will regularly use that; that it would be difficult to use the emergency brake too often and we would not want to use the opt-outs. If it were the case that the rest of the EU wanted to proceed at a level of integration of their criminal and civil systems that we were not happy to participate in, and therefore the enhanced cooperation and other things meant that they went off effectively on their own, how sustainable in practice do you think it would be that we could retain a wall between our legal system here and what evolves on the Continent, or would it become unsustainable?
Mr Hockman: Could I offer a comment on the criminal side? Forgive me if it sounds a little bit like a politician's answer to a political question. Can I question the premise of it? On the criminal side the core of this is empowering the Community to deal with problems that everybody recognises are both

very, very important but also have an international dimension, whether it is cross-border crime on the one hand or environmental issues, particularly climate change on the other. If you take climate change, the need for new regulatory measures to address that problem, I would have thought, is increasingly widely accepted. If we do not empower international institutions to deal with those issues, then that will be a problem. I would question, on the criminal side—I say nothing about other areas—whether we will actually wish, as a matter of policy, to maintain the wall.

Professor Dashwood: I did not mean to give the impression that I do not think the UK will be able to take advantage of these various mechanisms. I do think that the emergency brake is going to be something that is rarely used, because that is what experience so far would indicate. I expect the UK to make quite vigorous use of the opting-in measures, as it has in the past; but, as Stephen has said, an awful lot of these Title IV measures are ones in which the UK has a great interest. I think we should see Title IV not only in terms of the extraordinary degree to which we have been able to protect our common law heritage by way of these special mechanisms, but also as an opportunity to get the kind of legislation on to the statute book which we would very much like to see there.

Chairman: There are no more questions. Thank you very much indeed for coming and giving your time this afternoon. You will of course get a transcript.

WEDNESDAY 9 JANUARY 2008

Present	Blackwell, L	Mance, L (Chairman)
	Bowness, L	Norton of Louth, L
	Jay of Ewelme, L	O'Cathain, B
	Kingsmill, B	Rosser, L
	Lester of Herne Hill, L	

Examination of Witnesses

Witnesses: Mrs Claire-Françoise Durand, Acting Director-General, and Dr Clemens Ladenburger, Commission Legal Services, examined.

Q338 ***Chairman:*** Thank you both very much indeed for coming. I am the Chairman of Sub-Committee E, Jonathan Mance. We have taken a considerable amount of evidence already. This session is on the record and a transcript will be provided afterwards. I do not know whether you have given evidence before but I do not think it is different from what you would expect in that regard. If there are any supplementary points you want to make afterwards in writing in the light of the transcript or otherwise we would be very grateful to receive them. We have a short timescale and we are preparing a report which will be incorporated in a Select Committee report by the House of Lords on the Treaty, which will hopefully be of relevance and assistance when the House debates the bill which is being put forward to implement the Treaty. I would invite members of the Sub-Committee to focus their attention, in view of your expertise, on the legal rather than the more general aspects. Obviously, many of them we have covered with previous witnesses, but if I may take the first question: the new Chapter IV sets out more specifically, to some extent in different language, areas of competence in criminal matters. Can you indicate how far in your view that expands the present Third Pillar, Title VI powers, and how far it is simply making them more specific and concrete?
Mrs Durand: The new Chapter IV does not increase the competences but makes them more precise. Under the present EU Treaty, Article 31, the EU competence for judicial co-operation in criminal matters is laid down, and Article 31 starts with a statement that action on judicial co-operation "shall include", which in French is translated as "concerns among others", which is written in a very wide and open manner and in a sense makes all the rest of the provision non-exhaustive. The corresponding articles in Lisbon are no longer open-ended and contain on the contrary a more precise delimitation of competence. This is, of course, one of the results of this provision now being governed by co-decision instead of unanimity. If I take the example of harmonisation of legislation in substantive and procedural criminal law, and if we compare the current provision with the provisions of Lisbon the point can be illustrated quite clearly. If we take criminal procedure, this competence is for the moment governed by Article 31(1)(c) which provides for measures to ensure compatibility in rules applicable in the Member States, which is a wide definition of competence, and, together with the non-exclusive character of Article 31, in practice one could almost say that this competence is open-ended. In the Lisbon Treaty, on the contrary, Article 69A of the Treaty on the Functioning of the EU lists three aspects which can be subject to harmonisation, which are the mutual admissibility of evidence, the rights of individuals and the rights of victims of crime. Paragraph (d) indeed again allows for enlarging this field of competence but this enlargement will be done only by unanimity. If we go on to Article 69B of the TFEU we can find the same sort of conclusion. In the current state of the EU Treaty, sanctions are governed by Article 31(1)(e). Article 31(1)(e) cites three domains of crime which can be the subject of harmonisation—organised crime, terrorism and trafficking of drugs, but this provision again is governed by the non-exclusive character of 31(1), and secondly it is also governed by Article 29, which again for the list of crimes cites some crimes, and you have the word *notamment*—'in particular'. Therefore, as to the crimes the current Treaty is open-ended. Now with Lisbon you have a list of nine areas of crime defined and, as I said before, this list of crimes can be extended but only by the Council acting by unanimity, so you have on the one hand something more precise but on the other hand something more limited, more defined. Article 69B is also defined and provides for the establishment of sanctions linked to Community policies but also it is not a new competence, as we know from the current state of play.

Q339 ***Chairman:*** Sorry—I missed that one. Which one was that?
Mrs Durand: That was 69B(2). One could argue: is it a new competence? The answer is that it is not a new competence. It has been done to define sanctions linked to Community policies.

Q340 ***Chairman:*** Can I just ask you a supplementary with regard to Article 69B(2)? We now have, as part of the Lisbon Treaty, Title IV, subject to qualified majority voting, this provision relating to the approximation of criminal laws and regulations where essential in areas subject to harmonisation measures, and that is a special law. Can you tell us how you see that in relation to the existing jurisprudence in the environmental and ship pollution cases which established Pillar One criminal jurisdiction for the Community, which was outside Title IV? Does that continue? Can it be further developed or is it subsumed now within 69B(2)?
Mrs Durand: I am afraid that on this issue we are still in the process of analysing this particular legal question and at this stage I cannot give you an answer from my institution.
Lord Lester of Herne Hill: Could I just ask a very brief question? I do not have the old Treaty in front of me to compare but, just looking at the crimes listed, are they exactly the same?
Chairman: No.

Q341 ***Lord Lester of Herne Hill:*** Take the example of forcing people and children to marry against their will, a wide abuse that happens to some. When it refers here to "the sexual exploitation of women and children" or "trafficking in human beings", are those new crimes that are here? They are not defined, I do not think, except as listed as names, but are they in the existing Treaty?
Mrs Durand: They are not cited as such. In the current Treaty you have "trafficking in persons and offences against children". Therefore, what you are pointing out falls within that category. It would clearly fall also within the old Treaty. My point was more that since you have in the current Treaty "combating crime, organised or otherwise", "in particular" terrorism and trafficking, therefore among the "in particular" you could there find—

Q342 ***Lord Lester of Herne Hill:*** No; that I understood. Is that the nature of the crime rather than with the inclusive words you cited?
Mrs Durand: Yes.
Baroness Kingsmill: This seems to be wider, in fact, because sexual exploitation of women and children is—
Lord Jay of Ewelme: Yes, but this is limited; this is specific, whereas the earlier one was "in particular", so it was in fact broader.
Baroness Kingsmill: But in terms of the numbers of crimes you said that this is narrower because it is clearly enumerated, but the definition thereof could be wider because—
Lord Lester of Herne Hill: Precisely.
Baroness Kingsmill:— the sexual exploitation of women and children is limited in the old Treaty to "trafficking". Here it is spelled out as "sexual exploitation of women and children".
Baroness O'Cathain: It is not trafficking. It is not in it.
Baroness Kingsmill: So it could easily be, as you say, forced marriages, or indeed prostitution.
Lord Lester of Herne Hill: I am not opposed to it. I am just saying that, if one takes it very carefully, in clarifying and producing an exhaustive list, as it were, subject to co-decision and unanimity, there is a bit of widening (welcome widening in my view) of the definition of the nature of the offences which would cover wider evils than are covered under the existing Treaty.

Q343 ***Baroness O'Cathain:*** But the existing Treaty does not cover people trafficking.
Mrs Durand: Yes, it does.

Q344 ***Baroness O'Cathain:*** Where does it? In Article 31?
Mrs Durand: Article 29.

Q345 ***Chairman:*** Am I not right that in the light of the use of the word *notamment* or "in particular" under Pillar III there have been measures in each of the areas which are now specified in 69B(1)? Is that right? I am suggesting that 69B(1), and I may be wrong; help me, covers specifically areas in which there have already been measures.
Mrs Durand: I am not sure.
Dr Ladenburger: When I recall the process of when this was drafted, indeed, the examples to make a case that there should be harmonisation at Union level were drawn from past practice of the Council, so I think one could probably point to a harmonising act for each of the areas of crime already. There is also, if I may add, a further precision in the new article that, if you wish, makes competence more precise or restricted as compared to the open-ended current language, and that is that each area of crime subject to harmonisation must not only be particularly serious but also have a cross-border dimension. That may go without saying but it is not something you will find in the current Treaty.

Q346 ***Lord Lester of Herne Hill:*** Baroness Kingsmill was making the same point. What I am suggesting is that there has been a helpful widening as well as narrowing, but the narrowing is the *notamment* point. The widening is that the reference to sexual exploitation of women and children is capable of covering more than trafficking, for example, cross-border forcing of a young child or woman to enter into a so-called marriage against her will, where kidnapping and abduction and all of that would be criminal matters for national law but under this there

would be a competence to deal with them in a cross-border way, which was not so clear under the old Treaty.
Dr Ladenburger: It is a helpful precision.

Q347 ***Baroness Kingsmill:*** It is a helpful precision in that particular area, yes.
Dr Ladenburger: It was all controversial so far.
Baroness Kingsmill: It is a helpful precision—that is a good way of putting it.

Q348 ***Chairman:*** Can we move on? Let me pose a third question, enhanced co-operation by a group of Member States in certain circumstances if a Member State ever felt it necessary to operate the emergency brake procedure. Can you just give us a view as to what the position in relation to external competence of the union would be, that is, under the new Article 188L, and the position, if the Union did have an external competence, of Member States who were not party to the enhanced co-operation?
Mrs Durand: Where an internal act is adopted in enhanced co-operation it does not bind those Member States which are not part of the enhanced co-operation, and therefore any external competences resulting from this act would not affect the external competences of those states who are not part of the enhanced co-operation.

Q349 ***Chairman:*** But you do consider, do you, that external competence of the Union would follow in relation to those states who were party to the enhanced co-operation?
Mrs Durand: Yes.

Q350 ***Baroness Kingsmill:*** Can I just get some clarification on that, because maybe I have not understood it as well as I should have done, just looking at it as an example and from a British perspective if I may? There is something into which the UK has exercised its right to opt in, or indeed opt out, and then there becomes an area of disagreement and the emergency brake is applied for four months, and at that point, the same point at which the emergency brake is applied for the four months that there can be discussion, the enhanced co-operation arises and a minimum of nine Member States have to get together to bring about this enhanced co-operation. Is that the way it would work?
Mrs Durand: If a Member State objects and says, "I have a problem with a fundamental aspect of criminal justice systems; this new directive causes me a problem", then the draft Act goes to the European Council. In cases where there is consensus within the European Council to go on with the act they go on. In cases where there is no consensus that is the point when those who want to take the act—
Baroness Kingsmill: It is an alternative to consensus. I see.

Q351 ***Lord Blackwell:*** Can I just ask on this point of the emergency brake what authority would adjudicate on whether it was affecting a fundamental aspect of the criminal justice system in the country which was objecting? If a country says that is that enough or is it open to dispute? If the UK used the emergency brake and said, "We do not want to go ahead with this. It affects a fundamental aspect of our—
Mrs Durand: The point is that it is hardly controllable by the Court because the sentence starts with "Where a member of the Council considers that" it affects . . . . It appears more like a political process than a legal process.

Q352 ***Chairman:*** You do not read in the words "on reasonable grounds"?
Mrs Durand: You have the notion of consensus as to the decision-taking by the European Council, which is a procedure which it is not very easy to circumscribe.

Q353 ***Baroness Kingsmill:*** One imagines also that the emergency brake would very rarely be applied. It is the existence of it which would trigger negotiations presumably if a member of the Council decided that there was something they were uncomfortable with.
Mrs Durand: That is also a political question.

Q354 ***Chairman:*** Has anyone given examples of situations in which a country might consider that fundamental aspects of its criminal justice system were affected?
Mrs Durand: Examples thought of would be when a measure would affect in particular the judicial system of the country, the way people are tried and this kind of thing.

Q355 ***Chairman:*** I have heard references to the jury system in this connection, for example, but that may be fanciful.
Mrs Durand: But this presupposes that the harmonisation act contains aspects which affect them.

Q356 ***Lord Jay of Ewelme:*** In some ways it is a sort of extension of the Luxembourg compromise, is it not?
Mrs Durand: Not really. The new element in this emergency brake that was from the Treaty is the notion of enhanced co-operation, which is that some countries do not want to go along with it but the others can go on.
Lord Norton of Louth: It is only temporary. You could not block it if many others wanted to proceed.

Q357 ***Lord Bowness:*** My Lord Chairman, while we are on this section, and I apologise because I must say I do not quite follow it, in 69B(2) the last words are, "without prejudice to Article 61I", and, looking at Article 61I, how do these two relate? I have to say it is a very short set of words and I do not quite see what it is trying to say.
Mrs Durand: I think it refers to the fact that in this field Member States also have the initiative. It is not only a proposal of the Commission, which is the rule for other Union policies; in this field Member States have the initiative. Therefore, Member States could also make a proposal in that field.

Q358 ***Lord Bowness:*** My Lord Chairman, forgive me. I appreciate that fact, but what is the point of the reference to it in 69B? What effect does this have in regard to the proposals on the emergency brake?
Mrs Durand: It is connected with the procedure of adoption of the 69B(2) act. That is how we read it.

Q359 ***Lord Bowness:*** I am sorry, my Lord Chairman, I am probably being very stupid over this, but it says, "Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to 61I". My question, rather rudely, is, so what? 61I enables Member States or the Commission to bring it forward. What is the significance of the reference?
Mrs Durand: Here it says, "Such directives shall be adopted by the same ordinary or special procedure . . . ". The ordinary procedure always starts with a proposal of the Commission. Therefore, it was felt necessary to add that the general rule covering Title IV, which is that Member States have also the initiative, still would apply.

Q360 ***Lord Lester of Herne Hill:*** I hope this is not too complicated a question, in which case please do not answer it. It is envisaged that the EU will become a party to the European Convention on Human Rights, so suppose that under these provisions most states want to get their procedures more in line with European Convention requirements but a particular state says, "No. This is fundamental. It will not change our system". Will the fact that the EU is party to the European Convention affect that process in any way? For example, you will be able to argue to the naughty state, because it is holding out, "We are now bound by the Convention directly and therefore we had better get a better system across the Member States; otherwise you will find yourself in trouble in Strasbourg or Luxembourg". Do you understand my question? Is it going to be helpful in this area that you will be a party to the European Convention?
Dr Ladenburger: The crucial point here is that accession of the European Union to the European Convention on Human Rights will be needed in order to bind the action of the institutions to the system of Strasbourg whereas Member States are already bound by Strasbourg. That is why I do not think that after accession there will be an additional argument for the Union legislator to say, "We must further harmonise your systems. Otherwise we get into trouble in Strasbourg".
Lord Lester of Herne Hill: I understand. Thank you.

Q361 ***Chairman:*** Can we move on to civil justice? Current Article 65 envisages co-operation in civil matters "in so far as necessary for the proper functioning of the internal market", and the new article envisages the adoption of measures "particularly when necessary for the proper functioning of the internal market". Was this is a deliberate change which was intended to cut co-operation in civil matters free from precise restriction to the requirement for the proper functioning of the internal market and to enable its use in any case which had cross-border implications?
Mrs Durand: Yes.

Q362 ***Chairman:*** Can you give us some examples of situations which would therefore in your view potentially be covered under the new wording which would not have been covered under the old?
Mrs Durand: We were searching for concrete examples and I must tell you we did not find any. In legal terms it is clear that "particularly when" means a larger scope than "in so far as", there is no doubt about it. The impact it will have is very difficult to assess, especially given that this whole provision is still governed by paragraph 1 of 65, which indeed foresees that co-operation will occur in matters having a cross-border dimension. Therefore, as for the effect of it, frankly, we could not think of any concrete examples.

Q363 ***Lord Blackwell:*** My Lord Chairman, on this point can I just ask a question about the linkage between cross-border and domestic legal issues? There is a list of areas here where, in pursuit of cross-border co-operation, the European Parliament can adopt measures to ensure, for example, co-operation in taking of evidence, effective access to justice, support of training judiciary and judicial staff, et cetera, and the same applies on the criminal side. Do you think in reality it will be possible to develop measures that are strictly limited to cross-border legal issues or inevitably will not measures that you adopt for cross-border legal issues have an impact on domestic issues?

Mrs Durand: The issues that should be the subject of harmonisation are civil matters having cross-border implications. Therefore, as long as they have cross-border implications they can be the subject of harmonisation. As to whether then you can have a double system for managing that, one for cross-border action and one for national, this I think should be decided on a case-by-case basis. We cannot decide in abstract that a double system could be maintained. I can imagine certain areas where it is possible and certain where it is not, but it has been a recurrent problem; we knew it already, and this criterion, the cross-border dimension, was already there.

Q364 ***Chairman:*** Can we move on, and obviously we have looked quite closely at the new opt-out which is a general opt-out in relation to all aspects of Title IV? Are there any particular points you want to highlight in relation to the scope of the opt-out and any respects in which it is either broader or narrower than the existing position?
Mrs Durand: The existing opt-outs have been modified by the Lisbon Treaty and I think one could say that they offer more freedom to the United Kingdom and Ireland to decide whether or not to participate. I can highlight several aspects of change in relation to the present situation. First of all, the scope of the general UK Protocol obtained on Title IV is considerably extended with this new Treaty because it concerned only the areas of asylum, immigration and civil law, and now it is extended to the whole of Title IV including police and criminal matters. There has been a change from the state of the Constitution to the present state of the Lisbon Treaty on this aspect and now criminal matters are included in the Protocol. The second change where the UK has gained more flexibility is regarding the Schengen-building measures. A new mechanism has been created which allows the United Kingdom not to participate in measures which have been the subject already of an Article 4 decision and this is something which leaves more freedom of decision. The third aspect concerns amendments to existing measures not related to Schengen. The legal situation was not very clear as to whether, once the UK had opted in to a measure, it could opt out of an amendment to the measure. Now this is made clear in the Protocol. Even if the UK has opted into for one measure which has been adopted it still can opt out of the amendment to this measure. The fourth item I would mention is the provisions on transitional measures, because at the end of the transitional period the United Kingdom has the freedom to decide whether to accept the general competence of the Court and the general competence of the Commission. Therefore, there is a decision to be made in that the freedom is offered and if the UK does not accept this competence the existing measures will cease to apply to this State but there is still the possibility on a case-by-case basis to re-enter and re-accept and re-participate in these measures. Those are the four items which have been the subject of the last discussions and the subject of a compromise and which present a balance between the different objectives and interests of the Member States.

Q365 ***Chairman:*** Can I ask one other question about Schengen? Is the recent case, which the United Kingdom lost, affected as you see it, or may it be affected in any way, or reversed in particular by the new Treaty or not?
Mrs Durand: This case bears on the interpretation of Article 4 which remains totally unchanged and therefore it is not affected. In order to participate—and this is even more so, I would say, under the wording of the new Article 5—in order to participate in a Schengen-building measure a decision of the Council under Article 4 has first to be made, and on the basis of this decision of the Council there is then the possibility to go on.

Q366 ***Chairman:*** Can I ask you then a further question about the practical position if the UK opts into a measure and takes part in the negotiations, but the proposal changes during negotiations? What happens then? At what point can the United Kingdom, if at all, argue that the measure is a different measure from the one it opted into?
Mrs Durand: The decision to opt in has to be taken within the three months following the presentation of the proposal and then all Member States are at the same level and they have to negotiate with each other and obtain the kind of act which they can agree with.

Q367 ***Chairman:*** So it is for better or for worse, is that what you are saying? Once you opt in you accept the result of the negotiations?
Mrs Durand: Yes.
Lord Blackwell: Subject to the emergency brake.

Q368 ***Chairman:*** Subject to the emergency brake in criminal areas.
Mrs Durand: Yes, or the other option is not to opt in and to decide later on to opt in if the proposal for this act is suitable.

Q369 ***Chairman:*** Our next question is related to the European Court of Justice. I do not know whether this is a question on which you want to say anything. It is not directly a legal question; it is more a question relating to the organisation of the Court. Unless there is anything you want to say perhaps we should simply leave it.

Mrs Durand: I think it is important to say that this was the question which affected in the past the decision whether to give more competence to the Court or not and therefore the question is now whether the Court will cope with the new competence which is given by this Lisbon Treaty. I think it is very important to say that the answer is certainly yes. The Court has made a lot of efforts to go faster with the referrals which are put in front of it. It has also—and this is very important—put forward a new procedure enabling it to deal very quickly with references which may be made in the area of justice, freedom and security, and therefore the Court is really trying to show in advance that there is every possibility of dealing with the possible increase in cases coming to it. In practice you should know that for the last years when these matters were also the subject of Court jurisdiction there were very few cases in front of the Court.

Q370 ***Chairman:*** I think there are some other aspects which interest us but probably we will not pursue them now in view of the shortage of time. Transitional provisions: I do not know whether you can help us as to the Commission's view as to what may happen relating to the conversion of existing Third Pillar measures into directive amendments within the five-year period. Is that likely on a wholesale basis or do you think it will be done very selectively?
Mrs Durand: It is difficult to anticipate the future policy of the Commission and I am not in a position to take a detailed position on that. What I wish to recall is that there is a Declaration number 50 which invites institutions to seek to adopt in appropriate cases legislation converting Third Pillar acts into normal Community acts.

Q371 ***Chairman:*** This is Declaration number 50, I think.
Mrs Durand: Declaration number 50, and this language "in appropriate cases" in fact was proposed by the Commission itself in order to fix some parameters as to what kinds of proposals the Commission should make. Again, that is fairly vague language but at least one can draw the conclusion that it does not cover all existing measures, only those in appropriate cases. The other point to mention is that this Declaration is not only addressed to the Commission but is also addressed to all the institutions which should make this effort to try to convert these acts before the end of the period and therefore some sort of agreement should be found between the institutions on what kinds of acts are those for which conversion is "appropriate".

Q372 ***Chairman:*** Where amendment is appropriate what happens? Does a framework decision become a directive if it is amended? If it does not become a directive when amended is it capable of having direct effect in any circumstances?
Mrs Durand: Framework decisions can be transformed into either directives or regulations unless the Treaty specifies what kind of act should be used. As long as it remains a framework decision it keeps the effect of the framework decision and therefore does not have direct effect. Once it is replaced you have two possibilities. One is a total replacement of the framework decision, in which case it has the effect of a normal directive or regulation, or you have the amendment solution, in which case you would have the perhaps strange situation of the main act being governed by the current rules under the Transitional Provisions Protocol and the amendment being a new act. One thing which is clear is that the amendment is going to be clear on the point that it is an amendment. I think it has to be clear, that the amendment would be an amendment to a particular act; otherwise there would be legal uncertainty, and, secondly, our rules on legislative drafting oblige us to mention whether an act is an amendment or not to a previous act.

Q373 ***Lord Blackwell:*** If the route is taken to replace the existing agreement with an amended version which becomes a Pillar I directive, what is the legislative process for doing that?
Mrs Durand: I am not sure I have understood.

Q374 ***Lord Blackwell:*** If we have an existing Pillar III measure and the decision is taken to replace it with a new version by an incorporating amendment, what is the legislative procedure to replace it?
Mrs Durand: The new legal basis offered by the Lisbon Treaty, that is the legal basis offered by the Treaty on the Functioning of the European Union. Of course it has to be done on the basis of the new provision.

Q375 ***Lord Blackwell:*** So the UK would have the opt-out or opt-in decision at that point?
Mrs Durand: Yes.

Q376 ***Chairman:*** Can I just go back to the question of framework decisions because under the present Treaty they do not entail direct effect? The transitional provisions provide that the legal effects of acts of the institutions shall be preserved until those acts are repealed, annulled or amended.
Mrs Durand: Yes.

Q377 ***Chairman:*** So that, if you had an amendment of a framework decision, on the face of it the whole framework decision, as amended, would cease to have the same legal effect as before and it would become subject to the jurisdiction of the European Court, would it not, even though previously it did not have direct effect and was outside the jurisdiction of the European Court?
Dr Ladenburger: My Lord Chairman, direct effect is a different question from the question of the jurisdiction of the Court.

Q378 ***Chairman:*** I see, so you say it would become subject to the jurisdiction but it would not have direct effect?
Dr Ladenburger: Exactly.

Q379 ***Chairman:*** Although there is now no provision saying that it does not have direct effect, or there will not be under the Lisbon Treaty?
Dr Ladenburger: But Article 9 of the Protocol on Transitional Provisions is very clear, that these existing acts adopted under the old Third Pillar preserve their legal effects until they are amended or replaced.

Q380 ***Chairman:*** Yes, but once they are amended does that mean that they automatically would acquire direct effect?
Dr Ladenburger: No.

Q381 ***Chairman:*** Why not?
Dr Ladenburger: Because if they are only partially amended the new provisions have the effect of the act in which they are adopted, so they have the effect of a regulation or of the directive, but parts of the act not touched by the amendment still have the legal effect of the form of instrument under which they were adopted previously. However, they come integrally under the jurisdiction of the Court.

Q382 ***Chairman:*** That is a helpful interpretation. I now understand where you are standing. It may create some interesting positions if you can have direct effect in relation to amendments but not in relation to the original document.
Dr Ladenburger: Yes.

Q383 ***Chairman:*** I can see that that could be complex, but thank you. Finally, can you help us in relation to the impact of Article 6 of the Treaty of the European Union declaring the binding nature of the Charter of Fundamental Rights, bearing in mind, amongst other things, the distinctions which it draws between the rights and principles and bearing in mind that it includes not merely rights which Europe has recognised but also references to international covenants? If you can help us on that can you also help us on what effect the Protocol relating to the UK might have?
Mrs Durand: I am going to let Clemens answer the first question because he is a specialist on the Charter.
Dr Ladenburger: I will try. The question is a bit speculative, I find, because it is on how to measure the effects that a legally binding Charter may have in the future, not only on the Court and its case-law but also on our institutions, on the political institutions as well, on the legislation. I would suggest distinguishing between two perspectives that one can take in looking at the question. One would be a more immediate and legal perspective and the second would be a more long term or indirect perspective. Under the first purely legal and shorter term perspective we should recall that fundamental rights are already today general principles of Community law, well developed by the case-law of the Court of Justice. In this regard the European Convention on Human Rights has special significance. There is very well established case-law of the Strasbourg court. Already now fundamental rights of the Community legal order derive also from other sources as developed in the Court's case-law and the Charter of Fundamental Rights, as its own preamble says, serves to reaffirm existing rights and make them more visible. The Charter rights are to be applied in a pretty clear framework set by the general provisions of the Charter, Articles 51 to 54, and the sources of these rights deriving from the existing situation are well documented in the explanations to the Charter, which courts are to take duly into consideration when applying the Charter. In particular, in the area of police co-operation and judicial co-operation in criminal matters, I think it is important to keep in mind that almost all human rights issues at stake, as Union law is developed, typically concern the classical civil liberties that are guaranteed in the European Convention on Human Rights, and as regards these the Charter is very clear in its Article 52, paragraph 3. It takes them over and the Charter has the same scope and meaning as these rights have in Strasbourg case law. On the basis of all these factors I would say, under this first perspective, that it appears unlikely that making the Charter legally binding would fundamentally alter the case law of the Court of Justice in the area of freedom, security and justice. However, there is a second perspective, which is not in contradiction to what I have said but is a more indirect and longer term one, and that is that I hope, and the Commission hopes—President Barroso made that point when he made his speech on the proclamation of the Charter on 12 December—that making the Charter legally binding will be an important step in strengthening the human rights culture of the European Union because one may assume or hope that having a written catalogue of the Union's fundamental rights will incite the three

institutions, in the political process, even more to pay utmost attention to respecting these fundamental rights and, as we know, in the area of freedom, security and justice it is a constant challenge to balance the interests of freedom with those of public interest and security. I think it is in that respect that a legally binding Charter will contribute to strengthening a human rights culture. It will also do so presumably because it might help the Court to build up a richer case law on human rights, because presumably the existence of a written catalogue will prompt over time more preliminary references by national courts on human rights issues arising in the implementation of Union law. The last issue that you mentioned, accession by the European Union to the European Convention, will equally, I think, be an important step in strengthening a human rights culture. This is about the two perspectives from which one can approach it.

Q384 ***Baroness Kingsmill:*** A sort of legal underpinning and a legal buttressing of the political aspects?
Dr Ladenburger: Yes.

Q385 ***Lord Rosser:*** Could I just ask on that one and put bluntly as this, under what you have been talking about and we have been asking about on the Charter of Fundamental Rights being legally binding, will the UK have to agree to any measures, or any measures be enforceable through the courts that the UK will be bound by as a result, that the UK does not wish to be bound by or would not wish to be bound by? Does it change the situation in any way in that regard, that the UK will be, as it ultimately might put it, forced to implement something that it would not wish to do as a result of the Charter becoming the legally binding package that you have referred to?
Dr Ladenburger: I think it should be borne in mind that Article 51, paragraph 2, of the Charter itself makes it very clear that the Charter does not extend the Union's competences in any way and does not create new tasks or powers of the Union in addition to those that exist presently. The Charter instead codifies or reaffirms, makes visible, the fundamental rights which the Union institutions, and Member States when implementing Union law, have to respect. Therefore, I do not think that the Charter will prompt the Union legislator to adopt new legislation in areas where otherwise it would not and where the United Kingdom would not think it appropriate or possible legally under the system of competences to enact legislation, if that is the sense of your question.
Lord Rosser: Yes, it is.

Q386 ***Lord Lester of Herne Hill:*** In asking this question I have to declare an interest because I am in the unusual position of being the unpaid independent adviser to the Justice Secretary, Mr Straw, on whether there should be a bill of rights and responsibilities in the United Kingdom, and therefore the European Charter is of some relevance to law-makers in that context. It occurred to me, listening to Dr Ladenburger's elegant answers, with which I personally agree, that one answer to Lord Mance's original question might be given in this way, and it is the answer that Zhou Enlai gave when he was asked, "What are the consequences of the French Revolution?", to which he replied, "It is too early to tell". Is that not exactly the position that we are now in, in the broader sense, that these are all the consequences of the French Revolution but it is too early to tell?
Dr Ladenburger: I think I could not disagree with you.
Chairman: On that happy note, unless there are any other points, we are really most grateful to you. Thank you very much for your help, Mrs Durand and Dr Ladenburger.

WEDNESDAY 9 JANUARY 2008

Present	Blackwell, L	Mance, L (Chairman)
	Bowness, L	Norton of Louth, L
	Jay of Ewelme, L	O'Cathain, B
	Kingsmill, B	Rosser, L
	Lester of Herne Hill, L	

Memorandum by Ms Diana Wallis, Member of the European Parliament for Yorkshire and the Humber, Vice President of the European Parliament, Member of the Committee on Legal Affairs

A. Introduction

1. In 1997, when policies relating to visas, asylum, immigration and other policies relating to the free movement of persons were moved to the Community pillar, the United Kingdom and Ireland obtained a Protocol covering Title IV EC.[1] This Protocol grants both Member States an unprecedented level of flexibility, compared for with previous differentiation in the areas of EMU or the "Social chapter".[2] It not only constitutes an "opt-out" but also contains a mechanism to selectively "opt-in" at various stages of the procedure. It is possible to opt-in either (a) within three months after a proposal or initiative has been presented to the Council or (b) at any time after the adoption of the relevant measure by the Council.[3] If the United Kingdom or Ireland opt into a proposal but agreement cannot be reached in Council "after a reasonable period of time", the remaining Member States can go ahead and pursue the negotiations between themselves and adopt the measure which would not bind the excluded Member State.[4] Finally, Ireland alone has the possibility to unilaterally terminate its participation in the Protocol.[5]

2. This submission examines the impact of this mechanism in relation to the critical area of judicial cooperation in civil matters, a field often overlooked which comprises matters as diverse as small claims, the recovery of maintenance, and uniform rules on the law applicable to contractual and non-contractual obligations, all relevant to the daily life of citizens throughout the EU and having implications as to the homogeneity and good functioning of the Internal Market.[6]

3. The Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice adopted by the Lisbon IGC on 18 October 2007 considerably widens the material scope of the 1997 Protocol.[7] However, it does not alter in any significant way the situation in relation to judicial cooperation in civil matters. I will argue that the experience acquired over the last decade in the application of the Protocol to the area of civil law[8] reveals shortcomings in the process that already affect the United Kingdom as such, but also its long-term relationship with other Member States. It is all the more important to draw from existing experience in the light of the expanding scope of the mechanism.

B. Experience of the Protocol in Relation to Judicial Co-operation in Civil Matters

4. Back in 2004, Professor Steven Peers wrote that "in practice, the United Kingdom has opted in to all proposals concerning asylum and civil law and nearly all proposals concerning illegal migration."[9] This statement unfortunately no longer holds true, at least in the field of civil law.

5. The United Kingdom Government has recently made near-systematic use of the 1997 Protocol by not opting in at the outset to three important legislative instruments (on the law applicable to contracts—

[1] Article 69 EC; Protocol (No 4) annexed to the EU and EC Treaties on the position of the United Kingdom and Ireland (1997), Consolidated Treaties of 29 December 2006, OJ C 321 E/198, p 198 (hereinafter, "the 1997 Protocol"). The Protocol became applicable on 1 May 1999, on entry into force of the Amsterdam Treaty. Available at: http://www.dianawallismep.org.United Kingdom/resources/sites/82.165.40.25-416d2c46d399e8.07328850/Rome%20I/protocol.doc

[2] Jörg Monar, Wolfgang Wessels, The European Union after the Treaty of Amsterdam (Continuum, 2001), page 285.

[3] 1997 Protocol, Articles 3(1) and 4 respectively.

[4] *Ibid*, Article 3(2).

[5] *Ibid*, Article 8.

[6] See *inter alia* the Commission's website: http://ec.europa.eu/justice—home/fsj/civil/fsj—civil—intro—en.htm#

[7] Presidency of the IGC, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community—Protocols, CIG 2/1/07, 5 October 2007, at page 60 (Horizontal amendment 20).

[8] The author was Parliament's *rapporteur* on the "Brussels I" and "Rome II" Regulations. She also negotiated the "Rome I" regulation on behalf of her political group, and drafted an opinion for the Legal Affairs Committee on the proposal concerning Maintenance Obligations.

[9] Article written on 25 October 2004 for Statewatch, available at: http://www.statewatch.org/news/2004/oct/eu-immig-opt-outs.pdf

hereinafter "Rome I"—on matters relating to maintenance obligations and to divorce),[10] arguing that it still has the possibility to accept the instrument once it is adopted.[11] This seems to represent a political trend which we can expect to be continued and indeed expanded to other policy areas if the Treaty of Lisbon enters into force. Such an approach is problematic for several reasons.

(i) *Fragmentation of the internal market*

6. Firstly, it overlooks the fact that these civil justice issues have their roots in the Internal Market, and their unequal operation across that market threatens both its homogeneity and good functioning, to say nothing of the implications on "access to justice" for European citizens and enterprises. Indeed, an explicit link with the Internal Market even exists in the legal base for action in the field of judicial cooperation in civil matters.[12] The use of the Protocol undermines the homogeneity of the Internal Market and will prevent UK citizens from using instruments specifically designed to make their lives easier, in particular when they take advantage of their freedom to move or to trade across the EU and are then faced with a problem, such as a divorce, a spouse unwilling to pay maintenance or a debtor refusing to pay up. The United Kingdom's half hearted commitment to civil justice at a European level thus not only leads to a fragmented area of justice but also to a fragmented Internal Market. Indirectly but equally detrimentally, such an approach also threatens to limit the influence of the common law on the future development of European civil and commercial law; this is arguably a loss both for the United Kingdom and for the European Union as a whole.

7. To take a concrete example, the United Kingdom's opt-out of the "Rome I" proposal was potentially a very detrimental move for many British consumers who may not have benefited from the additional modern safeguards which it is scheduled to introduce. Conversely, a French consumer may well have decided not to bother with British traders because of the lack of coherent consumer protection regime; and ditto for consumers across all the other Member States. Business likewise would be left in a complicated position dealing with different regimes dependent on where they are trading.

8. Whilst it is accepted that the initial decision not to opt into this particular instrument may have been guided by perceived national interests centring around the so-called "mandatory rules" and the interests of the City of London, it is unfortunate and unacceptable that the decision was not made with greater openness and transparency so that all aspects of the proposal could have been weighed in the balance. This particularly bearing in mind that the issue concerning mandatory rules was solved fairly early on in the discussions, but then many interest groups in the United Kingdom continued to behave as though we were still a full player in the process, which was not the case and definitely perceived in this way by other Member States in Council. Perhaps the greatest irony was that the concerns of most interest groups centred around the disputed effects of the proposed Regulation on the Internal Market.

(ii) *Loss of influence and credibility*

9. Second, making use of the 1997 Protocol with a view to opting into an act once the UK's concerns have been addressed may appear tempting. This is however only part of the picture. The United Kingdom loses the right to vote in the Council of Ministers on a measure (although of course British MEPs retain theirs) and thus considerably weakens its negotiating position *vis-à-vis* other Member States, who remain bound by the final result. The United Kingdom participates actively in the negotiations in Council, but all parties know that it is not bound by the final result. Its European partners are of course in a different position, having no choice but to apply the act once it is adopted.[13]

10. This underlying inequality is arguably not conducive to enhanced trust between Member States, and there is no reason why the United Kingdom could not deal with its concerns through the legislative process, rather than from the sidelines, from where the shrill complaints from some interest groups make it increasingly unpopular with its partners who become less likely to take such input seriously. This is definitely not the way to make friends and influence people in Europe. How many more times will Member States and future

[10] COM(2005) 650 final, 2005/0261 (COD); Brussels, 15 December 2005, COM(2005) 649 final, 2005/0259 (CNS); Proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. See also: House of Lords 52nd Report of Session 2005–06, Rome III-choice of law in divorce, HL Paper 272.

[11] The UK Government, although not having a right of vote in Council, significantly influenced and participated in the negotiations leading up to the first reading agreement on Rome I, and has now signalled that it considers it may opt in to the legislation under Article 4 of the 1997 Protocol once the Regulation is finally adopted, subject to consultations at domestic level.

[12] Article 61(c) refers to Article 65 EC: "(. . .) in so far as necessary for the proper functioning of the internal market (. . .)". Note that Article III-269 of the Constitutional Treaty and similarly Article 2(66) of the Reform Treaty delete this condition.

[13] 1997 Protocol, Article 3(1) second indent.

Presidencies make all possible efforts to render a text as a whole, or even very specific points of it,[14] satisfactory to the United Kingdom? I would therefore submit that systematic recourse to the 1997 Protocol is counter-productive, particularly in the long term.

11. The democracy of such a procedure also has to be highly questionable, not only in respect of the transparency of the initial opt-out decision. In addition, if for example, after having had observer status for several years, the Government finally decides to opt into an instrument like Rome I after it is adopted, what kind of message does this send back home? This really appears to be control by Brussels, with the UK in real danger of becoming something like the "fax democracies" of Norway and Iceland, having to merely accept what the rest of the EU has already decided on.

(iii) *An untenable situation for British Members of the European Parliament*

12. Thirdly, British MEPs are put in an increasingly untenable situation. On the one hand, they are courted by British ministers and business who wish to influence the final outcome, but on the other hand, they are essentially making legislation for others and not, most peculiarly, for the constituents by whom they are directly elected. It is noteworthy that neither Danish nor Irish MEPs participate in the work the Legal Affairs Committee of the European Parliament.[15] By contrast to the United Kingdom, Denmark possesses a civil law system and in many respects already has a common system with the other Nordic countries, so the detriment is potentially not so great, and indeed it is interesting to note that they are now contemplating a wholesale opt-in in this area. Where the Irish have occasionally exercised their opt-out, although not in relation to civil law, their MEPs decline to vote on the issues in Parliament's plenary. For the first time, MEPs from other countries have now started openly questioning why British MEPs should debate and vote (let alone act as *rapporteur*) on legislation the United Kingdom Government has potentially refused by use of the opt-out. It may well become difficult to resist the logic of this argument.

(iv) *"Protecting the common law"*

13. Fourthly, I would like to examine an argument that is often put forward in justifying retention of the Protocol; that is by doing so we are somehow protecting or saving the common law from any further encroachment from Europe. Firstly, surely a legal system should be there to protect the interests of all of its citizens; to promote and dispense justice across society as a whole.

14. However, the courts of England and Wales (especially London) are increasingly being presented as the optional preserve of wealthy commercial litigators with little or no access for "small" claimants. The cry of those who wish to preserve the common law seems mainly to stem from the intention to provide a "Rolls Royce system" at high cost to parties from the US or elsewhere. In other words, it is about providing an "export service" rather than a system of justice. Our civil courts and legal services have become big business and some say they literally fear a "European" system that will return lucrative business to the US courts rather than to London. Such an argument is unattractive, in that it is a perverted view of what a justice system should be about, and untrue in the sense that at present any "European" system is likely to be an optional "28th" regime which will have to survive on its own competitive merits *vis-à-vis* the US or any other internal or external domestic system. Furthermore, might it not be more attractive to promote our courts as part of a European system?

15. Perhaps more importantly as a country, we have up until now been in the vanguard of influencing the development of European law in a manner helpful to the common law, which others have great respect for. There is increasing evidence of a tendency on the part of the European Commission to reduce common law participation in various schemes and partnerships, no doubt on the basis of our own non-participation and negative attitude to various justice instruments. This circular negativity can only be destructive to the very common law influences we seek to protect and nurture in the longer term. With all respect to both Member States, how will we feel if the defence of the common law in the EU is left to Malta and Cyprus?

[14] For instance, to pursue the Rome I example, the question whether the voluntary assignment or contractual subrogation may be relied on against third parties (Article 13(3) of the Commission's proposal, COM(2005) 650 final).

[15] This is the Committee having responsibility for civil and commercial issues in the European Parliament.

9 January 2008

(v) *Lack of democratic accountability*

16. Fifthly, opting out, or more accurately failing to opt in, as happens at present, fosters a culture of secrecy. Given that the decision is made by just allowing a date to pass by, there is no public debate or consultation. Only the most vociferous elements are able to influence government decision-making behind closed doors. In the event that the Government avails itself of Article 4 of the 1997 Protocol (ie the ex post opt-in), the procedure becomes a way of avoiding parliamentary scrutiny of the EU legislative process, both at national and European level. This will become increasingly apparent with the additional powers conferred to national parliaments by the Reform Treaty.[16]

C. Conclusion

17. If this is the direction we want to choose, it means less democracy, less justice, less common law influence on European law, and a real threat to the Internal Market. Under those circumstances, the central trading relationship, that one piece of the European Union that Britain was meant to be keen on, will be endangered. Open markets have to be balanced by an effective fully functioning system of justice. At present we are failing to do this, as the European Parliament's Equitable Life inquiry highlighted;[17] there should be no mobility across the Internal Market without concurrent liability and clear access to justice. At the end of the day, it will be United Kingdom citizens and enterprises that loose out when they try to go about their daily lives and work in Europe's Internal Market. Added to which, as other Member States increasingly wake up to the impact on their own citizens and the distortions of competition, they too will be less and less tolerant of an idiosyncratic British position. Accordingly, the continued use of the opt-out in relation to justice could be pivotal for the UK-EU relationship, but not for the reasons relating to criminal law that have featured prominently in the lead up to the signing of the Reform Treaty, but rather for those relating to civil law which are too often overlooked. It is hoped that this submission will go some small way to correcting that balance.

30 November 2007

[16] See for instance: Protocols 1 and 2 to be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union; Presidency of the IGC, Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community—Protocols, CIG 2/1/07, 5 October 2007, at pages 3-10.

[17] The report of the inquiry, as adopted by the European Parliament in June 2007 and all evidence submitted to it can be accessed at: http://www.europarl.europa.eu/comparl/tempcom/equi/default—en.htm

Examination of Witnesses

Witnesses: Ms Diana Wallis, a Member of the European Parliament, Mr Philip Bradbourn, a Member of the European Parliament, Mr Klaus-Heiner Lehne, a Member of the European Parliament, Mr Manuel Medina Ortega, a Member of the European Parliament, Baroness Ludford, a Member of the House, a Member of the European Parliament, and Mr Michael Cashman, a Member of the European Parliament, members of JURI/LIBE Committee, European Parliament (European Parliament, ASP 7 F387), examined.

Q387 ***Chairman:*** Thank you very much for seeing us. I am Jonathan Mance, Chairman of Sub-Committee E. Perhaps I could invite the Members of the European Parliament to introduce themselves. Diana Wallis I am glad to know very well.

Ms Wallis: Thank you, my Lord Chairman. I am Diana Wallis. I am a member of the Legal Affairs Committee and also a Vice President of the Parliament.

Mr Bradbourn: I am Philip Bradbourn. I am the first Vice Chairman of the Justice and Home Affairs Committee. I am a Conservative member.

Baroness Ludford: I am Sarah Ludford. I am a member of the Civil Liberties, Justice and Home Affairs Committee and a Member of the House of Lords.

Mr Cashman: I am Michael Cashman, a Labour member of the European Parliament and a member of the Labour Party National Executive Committee. I am also on the LIBE Justice and Home Affairs Committee as well as being first Vice President of the Petitions Committee, which is the direct interface between the citizens and the institutions.

Q388 ***Chairman:*** I do not know whether any one of the members of the European Parliament here wishes to make a more general statement before we go to the questions. We have taken a good deal of evidence which we are proposing to feed into a report that the EU Select Committee of the House of Lords has asked us to make on the Treaty with a view to issuing

that report before the House considers the bill which is going to go to Parliament to give effect to the Treaty. You can assume that we have looked at most of the issues in some depth already. The first thing we want to address is the scope of Chapter IV in the criminal justice and policing area and ask you to compare it with the scope of co-operation under the existing Title VI and identify any particular areas where you think there may be an expanded jurisdiction or where you think the new wording may have a real benefit or impact. We note that it is a more specific wording and a wording which no longer uses the French word *notamment* or "in particular" and therefore confines itself to specific areas but has the considerable benefit of clarity in that respect. Is there more to be said?
Baroness Ludford: I would not want to second-guess people like Steve Peers and Elspeth Guild who have given evidence to you. I think it is a bit of a curate's egg. On the one hand the list of substantive areas of criminality has been expanded to ten from three, beyond terrorism, drug trafficking and organised crime, but on the other hand you have this apparent limitation of the need to facilitate mutual recognition, although that has been a strong theme anyway. It has been taken as read since the Treaty of Amsterdam, and in particular the Tampere Conclusions of 1999, and we have been assuming that we have worked within those parameters. On the other hand you have got the specific mention of harmonisation of certain procedural rights, which I think some of us would strongly endorse because it is something that this Parliament has thought particularly important and, of course, there has been a failure so far to get agreement on that subject, so that is a good thing. Looking back over the last decade, one would say that probably the Council and Member States have not really felt the constraints. I am not aware of anything where they have said, "Oh, good heavens, we are straying outside the criminal law legal base" and were prevented from doing something, so I do not personally see that there is a huge change. One notes the difference in wording but I think it is quite marginal.

Q389 ***Chairman:*** Bearing in mind that qualified majority voting is now going to apply in relation to the specific areas, is this going to enable progress to be made, for example, in the field that you mentioned—rights of individuals in criminal procedure?
Baroness Ludford: One hopes so. I think we assumed that there would be a qualified majority on the framework decision, and, of course, there was strong support in the Parliament, so one would expect the Parliament to agree in co-decision.
Mr Bradbourn: Not by everybody.
Baroness Ludford: Well, strong majority support anyway, if not consensus, so my personal assumption is that yes, it would make life easier for progress on some of the more civil liberties measures.
Mr Cashman: Sarah referred to the issue of the curate's egg. It was always going to be that because what we were looking at was 27 Member States trying to find a way of going forward, and hence the importance of the UK opt-in/opt-out, which I think is a brilliant position to have bargained. I do not think we have given enough credit to our negotiators in that those countries that wish to go ahead may go ahead and the UK will still have in JHA its ability to protect its own special interests where it feels appropriate, and also we have the luxury of opting in. Where I disagree with Sarah is perhaps a perceived greater influence of the ECJ in these matters of individual rights. In so far as they refer directly to EU law, yes, but again one must look at the Protocol that the UK has achieved on the application of the Charter in relation to UK national law in that it does not create any new rights and rights cannot be struck down within the UK by the ECJ. In parenthesis, I am pleased about the whole role of QMV. Co-decision means that for the first time these matters will be debated openly in a directly elected parliament, the European Parliament, and that again enables us to work with the Council and ensure that deals that are reached are not reached as they are currently, behind closed doors, where votes and debates are held in secret. There will be direct reference to the debates, to the agreements in Council, in the Parliament and I believe that this will bring about greater accountability in our national parliaments, so I welcome the widening of the scope with, from the UK's position, the caveat of the UK opt-in/opt-out on the JHA measures.

Q390 ***Lord Jay of Ewelme:*** Can I just ask whether you think the Council will take the same view as to the relationship with you as you have just taken as to the relationship with them, ie, greater transparency, greater co-operation and a better result?
Mr Cashman: With all institutions, and the Council is an institution, the cultural changes happen osmotically. If they want an agreement with us on a first reading deal we will see a greater degree of openness and transparency, and, of course, we always have Regulation 1049/2001 on public access to all documents held, received or produced by the three institutions and the agencies set up by them, so that where there is a denial of openness and transparency between the institutions citizens themselves can access documents, agenda items, meeting notes, et cetera, which were made and

produced for the Council. However, again, what I am anxious to do through this process is to make our electorate aware that all things European are not imposed by Brussels. They are agreed by democratically elected politicians as ministers in governments, and once we get that message firmly in the open where we see the Council acting in conjunction with the Parliament more and more we will see Members of Parliament asking the minister or the secretary of state to explain why they agreed to a position that was not originally the UK's position—accountability, and I believe through this enhanced process we will get that.
Baroness Ludford: My Lord Chairman, Michael got on to the opt-outs. I do not know whether you want to come back to that later as it is a separate question, but I am glad to say that we are showing early our diversity of view because I would strongly disagree with Michael's position. I think it is very sad, and unnecessary, that the UK felt it necessary to extend the opt-out to the policing and criminal law side. I am not persuaded of the necessity for that, particularly as you have the possibility of the emergency brake, as it is called, where a Member State believes that a measure would affect fundamental aspects of its criminal justice system, and to the extent (which I personally believe has been overblown) that there have been threats to our common law system, or at least there would be under QMV, I would have thought that that would provide a serious level of protection, so I have not been persuaded that we need the opt-out. I think it has also not been made clear to the public that it is a double-edged sword in the sense that we can be pushed out as well as opting out. As Steve Peers, I think, made very clear in his evidence to you, if we do not sign up to an amended measure we can be shown the door on an existing measure if it becomes inoperable, and there are slightly different but reasonably similar provisions under both the Schengen Protocol and the so-called Title IV Protocol. It might have quite a high threshold, as I think Steve Peers said, but I think it is most likely to come in as something like a SIS III, a Schengen Information System III, where you could not expect all the other Member States to apply a third generation Schengen Information System among themselves and then apply a second generation one to the UK. The UK would be told, "I am sorry. It is not operable for you to stay in at the level of SIS II while the rest of us go on to a SIS III". There is a penalty here; it is not just a one-way street. The other angle, which again perhaps we do not want to shout about too much within the Parliament but I just put down a marker and we may come back to it later, is the threat to the position of UK MEPs and Irish and any other opt-out MEPs, especially perhaps if you have an enhanced co-operation measure. What is going to be the position?

Q391 ***Chairman:*** The West Lothian question, is it?
Baroness Ludford: Yes, the West Lothian question.
Mr Cashman: We already have it.
Baroness Ludford: Last June was the first time it happened, when there was all the talk at the summit about the UK red lines and extending the opt-out. Nobody within the Civil Liberties Committee had ever suggested that my position as the rapporteur on the Visa Information System, which I have been since late 2004, was anomalous, and indeed both the shadow rapporteurs for the two main groups were Michael Cashman and Timothy Kirkhope, two other Brits, which was quite funny really considering that Britain was not opting into the Visa Information System.
Mr Cashman: That is a good reason to have us working on it.
Baroness Ludford: But last June for the first time a teasing but a slightly barbed teasing remark was made. It is something the Parliament is probably going to have to address. The constitutional theory, of course, is that we are all equal, but politically the idea of a UK MEP being rapporteur on a measure where the UK is not opting in, because that opt-out has now become so large and not just Schengen related—

Q392 ***Chairman:*** It is one of the points that Diana Wallis makes right at the end of her submissions to us.
Baroness Ludford: Yes, and I think it is going to be not such fun for us on the Civil Liberties Committee.

Q393 ***Lord Lester of Herne Hill:*** Following that up, I asked a previous witness about the problem of the member of a club who says, "I want to have my cake and eat it at the same time, being a preferred member and an unpopular member". If you think of, say, the procedural rights for the accused problem and the failure to reach agreement, unfortunately, on that, I would be interested to know whether our influence, within the European Parliament or the Council, is diminished or not in real terms by the existence of these very broad opt-outs. Obviously, we made a huge contribution in the European Human Rights Convention on procedural rights, in particular since Articles 5 and 6 are called the Anglo-Saxon provisions, so I would be very interested to know whether we are at risk of diminishing British influence in exporting good procedural rights across Member States because of the opt-outs or whether that is a highly theoretical problem and in practice unlikely to matter very much. It is really Mr

Cashman, who gave such a lyrical and attractive account of the brave new world, that I would like to ask the question of because it seems to me there must be a price to be paid in real terms and I do not know how big a price it is.

Mr Cashman: First of all, I think the difference in relation to cake and eating it is that we are paying for the cake to be made. It is not as if we are asking for something and not contributing. The issue of fundamental human rights is expressly there, as you say, in Article 6 and in Article 7 and I just wish that we had the courage within the Council and within the Commission to enforce Article 6 and Article 7. I do not think our role is diminished or will be diminished. Indeed, going back to Sarah's point and Diana Wallis's point about the issue of will we as parliamentarians be diminished because of the so-called West Lothian question, through my aside I said that we already have the West Lothian problem here whereby we legislate and we interfere, we involve ourselves, in matters over which we do not have direct competence within the Parliament. However, what I like to see in this place is that we build up a reputation based on our expertise and based on objectivity. It is interesting. Sarah referred to the Visa Information System. I was the Parliament's rapporteur on a co-decision dossier, which is the Schengen border code, the conditions of entry into and out of the Schengen area and the conditions upon which Member States re-impose their borders. One of the arguments that were put forward by those wanting me to have the dossier was that I would come to it with a really objective attitude because the UK is not in Schengen, so I do not feel that we are losing influence. Indeed, on the issues of opt-in and opt-out, the emergency brake, there are only so many times you can apply an emergency brake before it stops being an emergency brake; it merely becomes a brake that one Member State or another is continually using. I like the fact that we can look at each of these issues on a case-by-case basis, looking at operability, looking at whether it suits us or not, because every other Member State does exactly the same. The fact that we have moved to QMV in these very important issues means that increasingly we can decide to opt in or not. I do not see it as being negative; I see it as being positive, and if I give a lyrical analysis of a bright new world it is because I think it is a bright new world that has been in existence for over 50 years and is suddenly coming into maturity with real powers in the European Parliament. I do not want us to do anything in any Member State to diminish the enormous benefits that have been derived from the establishment of the European Community and the European Union.

Q394 ***Chairman:*** Can I just take everything out of order because I have ascertained that Diana Wallis has to go very shortly and I think she would like to say something on opt-outs and civil law.

Ms Wallis: I do apologise to colleagues but I would like to have the chance just to say something very briefly about opt-outs and civil law, though I am pleased to see that my colleague from the Legal Affairs Committee, Klaus, is also here. Very quickly on opt-outs, I have submitted some evidence in writing which I hope will enlarge upon what I am about to say. I think there is a real problem, especially in the civil law area, and I would put it like this. We as parliamentarians are directly elected and we come from constituencies where we represent people. We are informed by those people's experience of the European Union—how it works, how it does not work, what their daily problems and experiences are, and we bring that experience to our legislative work here in the Parliament. That is how representative democracy works. How are we to make that system function if we are dealing with legislation which will not apply to our constituents? It is a nonsense. It drives a whole cart and horses through the idea of representative democracy. We are, as it were, doing our legislative work in a void because we are making law not for those that we represent, and I have a real problem with that, and what is more, as Sarah has already said, we are beginning to feel in some areas that our colleagues from other countries have a real problem with us taking reports where our country is not opting in. We have experienced a rash of these issues in the civil law area in the last year—Rome I, maintenance obligations, and Rome III, where the failure to opt in has been made as a choice by the Government. Again, I think this is problematic and it is problematic as we move forward into the future because once you are in the civil law area and you ask the question, "What will be the priorities for the Parliament in civil law in the future?", certainly we will continue with the matrimonial/family law area, there is a huge agenda there to do with contractual law, company and commercial law, consumer law, road traffic law, all the issues to do with the internet and e-commerce will come up and face us again. What is the common theme there? The common theme is the relationship with the internal market. The internal law market is the part of the European Union that, as I understand it, the United Kingdom is very keen on, but if we fail to engage in the area of civil justice we begin to undermine our engagement in the internal market and, more importantly, the engagement of our citizens and our enterprises, and we spoil it not just for ourselves but indeed for other people trying to do business in our own country and hoping to have the benefit of a common justice system that works throughout the internal market, so the price we pay for these opt-outs is potentially pretty huge. I am sorry; I am going to leave you.

9 January 2008 Ms Diana Wallis MEP, Mr Philip Bradbourn MEP, Mr Klaus-Heiner Lehne MEP, Mr Manuel Medina Ortega MEP, Baroness Ludford MEP and Mr Michael Cashman MEP

Q395 ***Chairman:*** Just before you go can I just say this, and I ought to disclose that I have an involvement in a different capacity as a member of the Lord Chancellor's Advisory Committee on Private International Law and therefore I have seen through that the Rome I negotiations which you have mentioned. May it not be a bit unfair to say that the United Kingdom failed to engage in those? It did not opt in because it was so engaged and regarded its interests as so engaged, and as far as I can see it has been very engaged in the negotiations which have led to a conclusion. One cannot predict ministerial decisions about whether to opt in now but, having negotiated in good faith, a conclusion has been reached which appears to the negotiators to be satisfactory. I was not one of the negotiators, of course, but that is the alternative picture which might be put.
Ms Wallis: That is the alternative picture and that is the picture that I am sure Michael would present.
Mr Cashman: I would, yes.
Ms Wallis: The problem with that is that I think you can pull that trick once, if I can put it that way, but I do not think you will be continually able to do it as we progress, and if we keep doing that we are irritating and annoying our partners.
Baroness Ludford: You sort of negotiate and lobby from the outside. You say you are not opting in but you do a lot of lobbying, particularly of MEPs and stuff, and then you --- it is bizarre.
Ms Wallis: Rome I has raised all the issues and shown us the problems. We got away with it with Rome I. We will not get away with it again is my view, and I see one of my German colleagues is nodding. I really have to catch a train, having thrown my grenade!

Q396 ***Lord Lester of Herne Hill:*** I really want to say something, disagreeing and putting a question, before Diana leaves but if you have to leave now I will not.
Ms Wallis: I am sorry, I must.
Lord Lester of Herne Hill: You know what it is about—free speech and privacy and tort law and harmonisation. I just want to say that I think it is much more difficult and complicated than perhaps—anyhow.

Q397 ***Chairman:*** Thank you very much for coming, Diana. I am sorry, Mr Bradbourn. I should have invited you to speak a long time ago.
Mr Bradbourn: I preface any remarks I make by saying that, obviously, you all understand that with the political perspective from which I look at these things most of the issues you are covering in this area I would almost reject out of hand. Having said that, we have to deal with the reality that we have in front of us and there are a couple of general points I want to make to follow up what Michael Cashman said initially in his comments and then perhaps a couple of points which appear to be tangential but I think do have a bearing on your basic approach to looking at these issues. First, I want to comment on Michael's initial reactions, and that is to do with the opt-outs and the protocols. I just wonder—and in a sense it is wondering aloud—whether these protocols that the UK has negotiated will be strong enough in the final result to withstand ECJ judgments. That is the problem and the difficulty I have. There has been a lot of talk, certainly around the general EU circles here about whether in some areas the protocols will not stand the strength of judgments down the line, so to speak. That is a more general comment. Specifically, the one big concern I have about a lot of the issues you are covering here is about data protection because that to me is key to where we see any co-operation, whether that be through the new Treaty or the existing Treaties, or indeed just through open intergovernmental co-operation. It is where we go with data protection. On that basis, if I can refer back to the Treaty of Prüm, which was, as we know, agreed last year just before the agreement on the Lisbon Treaty, in the analysis that was done on the Prüm Treaty by the European Data Protection Supervisor, he drew attention to the fact that a lot of the requirements to exchange data undertaken through the Prüm Treaty did not provide sufficient protection to individual citizens. My carry-forward on that, if you like, is to say when and if we go down the road of police co-operation, judicial co-operation and so on, where are the safeguards for the individual from information being gathered from databases, be it DNA, be it personal computer data or whatever, to be able to check that data, to check its accuracy and to challenge when personal data is being exchanged which may not be directly pertinent to the matters being investigated? That is to me a crucial and key issue across the piste with all of this. The second point is this, and this is a tangential thing because one of your colleagues asked about the issue of where MEPs see their role could be enhanced or changed or improved in any way: When I look at some of the issues that we have now coming before us, the comment I would like to make is to do with our own procedures in Parliament, because we agreed some time back something called the comitology arrangement, that is to say how the institutions relate to one another post the legislative period. We have had a very difficult time trying to preserve our right to review existing legislation and to propose changes to that legislation because, of course, under the existing Treaties the Commission, as guardian of the Treaties, has the sole right of the initiative of

legislation. What we have done in Parliament, and I make a personal comment here, is hamstring ourselves because what we have said is that in exchange for this right to review we will give up our right to impose sunset clauses on legislation proposed by the Commission, and this to me is a backward step, not a forward step. Those are the initial comments I make.

Q398 ***Chairman:*** Can I just follow up the point about your role and comitology by focusing attention on a question which we raised and that in turn arose out of some comments by Tony Bunyan and Professor Steve Peers, which commented on the number of first reading deals being reached in the area of Title IV, which is not a transparent arrangement. Is that going to continue?
Mr Bradbourn: I suspect it will grow.
Baroness Ludford: I thought a lot of that was fair comment, and indeed I think Tony Bunyan of Statewatch encapsulated that in a Statewatch paper from last September. Just this morning in our group Diana Wallis presented to us a working document and I have brought a copy that no doubt we can send to you electronically as well. There exists a working party in this House on parliamentary reform and they have produced a working document, number 12. I am quite anxious to see all the previous working documents, but this one is on co-decision and conciliation, and it does pick up the question about the potential lack of transparency and democratic legitimacy of first reading agreements. I confess that Tony Bunyan has been a little bit kind to me on the Visa Information System because he cited that as a bit of an exception, which is very sweet of him, but we did not have a committee vote on the Visa Information System before I went into negotiations with the Council. Within these four walls I might say—
Mr Cashman: Is that on the record?
Baroness Ludford:— that that might have given me a certain degree of latitude which possibly led to a rather better deal that we got out of the Council. That is my word and I am sticking to it, but on the one that I am now doing, which is a sort of daughter of the Visa Information System and is the measure about how you handle the visa applications of outsourcing and the collection of the fingerprints and the biometrics, it was precisely because of my experience on the VIS that I very deliberately wanted a committee vote, which we had in November, before we had negotiations with the Council. I think, all things being equal, it is as well to try and deal with legislation as expeditiously as possible; therefore, if we think we can deal with it in a first reading and not spin it out to two readings and conciliation, that is good, but first of all you have to make sure that your own colleagues are well informed, and I think we certainly did that under the Visa Information System by briefing both shadows and making regular reports back to the committees, and Michael is one of the shadows so it would be his judgment rather than mine which would have mattered there. However, there is an issue about the availability of documents because they do not tend to go on the website and I think personally that our committee needs to discuss this and discuss how we can improve our procedures and the transparency of them because the document which was the basis on which I went into discussion with the Council was my suggested amended report that would have gone forward to a vote in the committee, had there been one, but we stopped short of that and I was permitted by the committee to go and discuss it with the Council, but that document itself was never voted, only the final result was voted in the committee. That document was available to other members of the committee but it was not, for instance, on the Parliament website, so there is an issue there about transparency. Democratically this issue may be slightly different because I think the committee was well informed but transparency certainly is an issue.

Q399 ***Chairman:*** You used the phrase a moment ago "between these four walls", but this is on the record.
Baroness Ludford: Oh, right, okay.

Q400 ***Chairman:*** Mr Cashman?
Mr Cashman: I have a couple of references—and I do not want to make it a tit-for-tat—to something that Philip said. Data protection is absolutely essential and that is why we need EU-wide data protection, so that if you go to one country the same standards, the same protections apply there as in the other, and I do not see anything that diminishes that. Indeed, the Prüm Treaty is not about the exchange of information; it is about whether information is held. It is called a "hit/no hit system"—"Is information held by another national database?" "Yes, it is", and again once it is communitised rights and provisions apply. I became excited by what Sarah was saying and by what Tony Bunyan had been saying about the whole issue of first reading on co-decision being less transparent. I would expect Tony to say that and I am pleased that he does say that and challenges us so fearlessly on these rights. If we have a first reading deal it is the decision of the committee. No rapporteur acting on their own can engage in a first reading negotiation with the Council and the Commission, so therefore it is upon agreement with those respective shadows, the shadows being those working in the other political parties on the same

dossier. Indeed, when we generally go for a first reading deal, as Sarah said, there is continuous reporting back to the committee on the negotiations, but not in camera. These committee debates and these reports are in public. The documents are made available. There is widespread debate amongst the different political groups, so it is as transparent as it can be. However, of course, if you enter into the first reading deal it is generally because you are going to get a better deal from the Council than you would going to a second or a third reading. Again, it is the judgment that the rapporteur makes that she or he then puts to his or her committee, and then it is up to the committee in a full vote to decide whether they accept that or not. Equally, I do not want to blame the institutions. The rapporteur has the opportunity at any stage to go to the committee and say, "These are the amendments. Let us vote", and indeed this happens on many occasions where you get the committee to vote, you continue negotiating with the institution, you take it through to the plenary, you have the first vote on the amended legislative proposal and then you refer the whole thing back to committee which gives you as the rapporteur the right to enter into negotiations. The reason you get first reading deals is generally because you feel you are getting a better deal for the citizen and for the institution than you would otherwise get. It is not forced upon you. It is a decision that you personally make, taken in conjunction with your colleagues in the committee.

Q401 ***Baroness Kingsmill:*** I just quickly want to ask the MEPs for their practical understanding of how they think the emergency brake system would work alongside the enhanced co-operation aspect of things, because from a legal point of view it looks perfectly fine, but I suspect the realities of the politics of this might be a little different and I would quite like to understand how you thought it would work. It is like a mini opt-out, is it not, an emergency brake, triggering the four-month discussion, presumably, and at the same time the gang of nine or whoever get together and fight it out against the emergency brake instigator? I just wondered how you saw it working in practice. Is it going to happen? Is it an underpinning for those countries that do not have opt-ins and opt-outs?
Baroness Ludford: It has not happened so far.
Mr Cashman: I am certainly of that opinion.
Baroness Ludford: But they could have used enhanced co-operation provisions in the Treaty up to now and they did not. In the Treaty of Prüm it was not even Third Pillar. It was a pure international agreement, nothing to do with the EU whatsoever. Seven Member States got together and reached a purely international agreement. They did not use enhanced co-operation—I do not know why. It did not cross their minds—and then they put it through the Brussels machinery and it ended up as an EU decision with no co-decision, nothing, not even proper consultation, and no involvement of national parliaments practically except for national parliaments which had to ratify it as an international agreement and, as I said in a debate in the Lords a few weeks ago, I think the Bundestag had half an hour's discussion of it. The whole thing to me was a democratic scandal, the Prüm Treaty, and the way it could just get laundered through the Brussels machinery.
Mr Cashman: But that will not happen with co-decision.
Baroness Ludford: You ask me what I expect to happen. I suppose the answer is I do not know, but I know from the past that they have not used the possibilities in the enhanced co-operation provisions; in the past they used Prüm. They resorted to going outside the EU altogether, as they do with the whole G5 and G6 intergovernmentalism, which the committee has extensively commented on. Member States like that. It is cosy, it is secret, it is behind closed doors, as one of your reports was called, and it keeps the pesky MEPs out of the picture as well on the whole as national parliamentarians. That appears to have suited them in the past but I do not know whether this will be used.

Q402 ***Chairman:*** There was a numbers point, was there not, too? There were only seven at Prüm, which did not meet the minimum number for enhanced co-operation?
Baroness Ludford: Yes, that is true. In theory, if you have nine Member States going forward in enhanced co-operation the Parliament has full co-decision rights, which means the whole Parliament. I do not know; perhaps Mr Lehne might know the answer to that more than I. As I say, one has a certain wish not to debate this question because I do not want to set hares running, but what will be the position of those MEPs who come from, in this case, 18 countries which do not join in the enhanced co-operation measure? Will there be a move in the Parliament under the rules of procedure of perhaps, saying, "We want to exclude those MEPs whose countries do not take part". In constitutional theory, I think, we are all equal, being a parliament, but our nationality might count against us.

Q403 ***Chairman:*** Certainly that is not a concept that is foreign to the United Kingdom, is it, at the moment?

Baroness Ludford: No.
Mr Bradbourn: Can I add to what Sarah said because this does actually give the example? Regarding the Prüm Treaty, when Parliament was effectively consulted on the issue, as you say, there was no decision on this from Parliament. We had just about six weeks from start to finish to put our opinion forward. That is not proper democratic oversight from my point of view.
Baroness Ludford: But it is take it or leave it because it has been concluded as a Treaty anyway.

Q404 ***Baroness Kingsmill:*** Just getting back to my original question, are you saying that the Prüm experience is what is likely to inform the operation of this?
Mr Bradbourn: I suspect so.
Mr Cashman: My Lord Chairman, can I add what I said as an intervention, that, of course, co-decision will mean that the Parliament will no longer just be consulted when we have such important matters as these. There will be democratic oversight and engagement and that is again one of the reasons why I welcome the developments, not least in JHA.

Q405 ***Chairman:*** Can I ask in that context a follow-up. This is in relation to the question of criminal laws where Article 69B(2) now permits Member States under Title IV to define criminal offences and minimum sanctions in a particular area, bringing within Title IV, qualified majority voting, this jurisdiction, and leaving unspecified what the position is in relation to the existing Pillar I jurisdiction established by the environmental pollution and the ship source pollution cases. What would interest us to know is, if the Commission continued to advocate the jurisdiction established by the environmental pollution and ship source pollution cases, and indeed, if in particular it continued to seek to expand that, what would the European Parliament's attitude be likely to be? Would the attitude be that that was inappropriate and that one should deal with criminal matters now under 69B(2), which is a specific regulation? That is a purely legal question, is it?
Mr Medina Ortega: We are discussing it at the Legal Affairs Committee and we do not yet know the answer. We are discussing it and we do not have a report, and in Parliament it is absolutely impossible to know what the Parliament will decide.
Mr Lehne: We have a personal opinion but that is different.
Mr Medina Ortega: Everyone has an opinion.
Mr Lehne: I am very reluctant on this whole item because I personally believe that the European Union, not only because of legal reasons but also because of political reasons, should limit its activity in criminal law to a minimum. The simple reason for me is that just harmonising minimum and maximum penalties makes absolutely no sense because the question of criminal punishment is much more connected to the questions of measurement and enforcement, and this is so completely different in the Member States that harmonising just one small aspect of the whole system at the end does not really bring any effect; it only produces additional distortions. From that point of view I am personally absolutely against this but this is my personal opinion and my feeling is that the majority in the House are not of this opinion, but that is the way we are. We are discussing it in relation to the proposal of the Commission on the environmental criminal law and also we have to keep in mind the latest decision of the Court of Justice. They have changed their attitude a little bit and the Commission is reacting on this now and it is limiting the operation of this annex competence that they created in relation to internal market legislation.

Q406 ***Chairman:*** Does it follow from that that the focus may be on the jurisdiction to establish minimum rules relating to rights of individuals in criminal procedure, for example, if you are concerned about the actual operation of legal systems?
Mr Lehne: This is something different. On one side we are speaking about harmonising criminal law. In the area where we are not really harmonising it we are harmonising just some aspects, which in the end does not solve the problem. This is always the case. It is a complicated subject and you are just harmonising certain aspects and leaving the others out. The result may be not more harmonisation but more distortion; that may be the result of all of this. We have this very often as well in discussions on company law, which has nothing to do with this, but at the end you can see that if your opportunities of harmonising are not enough, if they are concentrated on certain aspects, then it is politically better not to do it than going on, but at the end, if we now take a look at the Lisbon Treaty, it will be a political decision case by case, point by point, proposal by proposal, of the political institutions, Parliament and Council, whether they want to go on or not. This is the way it is. For example, you have now the experience within the Council that on certain aspects, for example, combating counterfeiting, probably the Council does not want to go on because they have made the political decision not to do it. They probably have the legal opportunities to do so but the political decision is not to be used as a legal opportunity and I personally believe that this is right.

Q407 ***Lord Lester of Herne Hill:*** My question follows from what Mr Lehne was just saying. As Diana Wallis was leaving I was trying to touch on something akin to this. Whether you are dealing with criminal law or what we call tort law you are dealing with sensitive issues about social policy and the ethical values that the criminal or civil law systems are reflecting. If you take a federal system, I can understand the notion that there are some offences that are so serious and cross-border that you have federal crimes, say, in the United States, but you also have state criminal systems which respect the differences in value of smaller units. The reason why what you say I find very important is that, to the extent that you move beyond what I call federal crimes or you widen the scope without doing the job properly, you begin to create unnecessary divisiveness within the whole European system, so that in the civil law area my problem has been that by trying to harmonise what we call tort law in the area of free speech and privacy, where you contrast, say, the French and the British positions, you immediately arouse huge controversy unnecessarily.
Mr Lehne: That is the reason why we have taken it out of Rome II.

Q408 ***Lord Lester of Herne Hill:*** I know, but is there some lesson there for the future in the way that one approaches Lisbon?
Mr Lehne: I hope so.
Mr Medina Ortega: We have come to the point where we are living in a common space, so if you commit a crime in one country and move to another you might escape jurisdiction. This is why we started with pollution, with the great sea accidents. Depending on the jurisdiction of where you are going to be tried it will be completely different. This is ignoring the fact that we are already living in a community in a sense where people can move easily from one place to another and can cause harm. This is the case with pollution but there are several areas, such as money laundering and all these things, international criminality.

Q409 ***Lord Lester of Herne Hill:*** Broadcasting.
Mr Medina Ortega: So, obviously, we have to go into there to achieve it. This will be difficult but I cannot see how we could have a different criminal law from one country to another. There are many imperfections in the American system, but there are some general principles of common law but people can escape justice very easily in the United States. You can move from one state to the other, change your name and nobody can find you, and that does not make the United States very safe.

Q410 ***Chairman:*** Is not the primary solution to that a measure like the European Union arrest warrant?
Mr Cashman: Absolutely.
Mr Medina Ortega: That is one minor instrument. Of course, I supported it; I am a socialist. We represent a different point of view, and I find that we need to move into there. I have lived in the United States and the United States is one of the most unsafe countries in the world, because you have a free area with not enough controls, and I do not see how we can use the American system as a model for the European Union Community.

Q411 ***Lord Lester of Herne Hill:*** Are you not running together several different things there? Obviously, there are some social evils so great that they can only be tackled on a cross-border basis. Pollution is a very good example of that, and I call those federal crimes. Obviously, even where they are not federal crimes the need to ensure that wrongdoers are brought to book across Member States requires something like the European arrest warrant in order to ensure that that should happen as a matter of jurisdiction to get your hands on the person and so on, but those are different questions, are they not, from an attempt to harmonise the whole of criminal law or the whole of what we call tort law, where what I am suggesting is that subsidiarity, apart from anything else, needs to be respected if you are to have the confidence of the citizens of Europe that their own national systems are being respected within the overall European system?
Baroness Ludford: Yes.
Mr Medina Ortega: That is the question!

Q412 ***Lord Lester of Herne Hill:*** That is my question!
Baroness Ludford: I agree with that because I think we should firmly stick to the notion that what we are trying to do is make legal systems interoperable, not trying to create one single EU criminal justice system. It is difficult. It is an awkward match to make because, particularly when you do establish minimum rules on the definition of criminal offences and sanctions, trying to fit that into 27 different sentencing structures, and I am not an expert in this but you are,—

Q413 ***Lord Lester of Herne Hill:*** No, I am not.
Baroness Ludford:— must be quite a nightmare. I appreciate that it is very difficult to negotiate these things, which is why they have minimum and maximum, which is a pretty wide spectrum. Just to answer the Chairman's original question, I personally would have thought that once you have got this Article 69B, which is in the Lisbon Treaty

9 January 2008 Ms Diana Wallis MEP, Mr Philip Bradbourn MEP, Mr Klaus-Heiner Lehne MEP, Mr Manuel Medina Ortega MEP, Baroness Ludford MEP and Mr Michael Cashman MEP

and which provides for defining criminal offences and sanctions in areas like the environment, so you now have this new legal base, it would be difficult not to use that,—

Mr Lehne: I think so too.

Baroness Ludford:— and difficult to go back and rely on the court jurisprudence, to use the other legal basis, the environmental transport policy or whatever legal basis, and I would have thought that, even if it were legally possible, quite honestly it would be politically unwise. Obviously, the difference it makes to the UK is that the UK can opt out of the former and not the latter, but I would not have thought that there was any particular interest in forcing the UK—and I am talking particularly about the UK here—to try and join in something about criminal measures when there is another legal base which is perfectly respectable, and indeed tailor-made. There might be some people in the Parliament who might want to but I do not honestly think it would be a very clever way to proceed.

Q414 ***Lord Blackwell:*** One of the things we have learned from previous Treaties is that you cannot just take the Treaty as it currently stands; you have to anticipate the way in which subsequent decisions may go on and evolve, and so we have language here which is rooted in dealing with cross-border crimes and cross-border co-operation in the most part, although 69C, for example, talks about crime prevention without any reference to cross-border. I think some of the questions touch on what Mr Bradbourn was saying earlier, first, is there any political desire in the Parliament in Europe to use this as a basis to legislate beyond cross-border?

Mr Cashman: No.

Q415 ***Lord Blackwell:*** Secondly, even if there were not, is it practical to limit legislation so that it only impacts on cross-border without in a sense affecting the way legal systems have to work domestically, and, thirdly, even if that were the intent of the legislation can we stop the European Court of Justice interpreting the body of law here in a way that then transfers across to other countries?

Mr Bradbourn: Can I comment on that? You have identified absolutely what my biggest concern is with all of this, and that is what we term here Treaty-creep. In other words, we have a Treaty and then it is always pushed against the barriers to try and bring some new element into it that was never foreseen when the original Treaties were put together. That to me is a big concern. The other area where you have this is in terms of when there is a limitation, if you like, a principle accepted, as was described earlier, of subsidiarity. The subsidiarity argument is one that is almost dismissed, "Oh, well, we see there is a need to act". Do not forget in this new Treaty you have the ability to self-amend the Treaty and that again is something which is a significant factor in how far you can push this.

Mr Lehne: I would like to try to answer this question. First, I believe it is quite clear it is a legal base. It is just giving the opportunity to solve cross-border situations; we can only act on this area, that is exactly what you said, so we can define those federal crimes. We can as well, as we have heard, harmonise certain aspects but I personally, because I do not think it is politically wise, would not like to do so. That is the way it is, but defining them for cross-border cases and telling the Member States, "Okay, you have to do something to make sure that no-one is committing such crimes", makes sense and I personally believe is possible. The second aspect is the problem of the legal base: is there no danger that we do more? I think now we have Article 95 on internal market legislation and that is also a question. We can use this in a good manner and in a bad manner but I think it is politically not wise to use it in a bad manner, and that is the reason why the Council and the Parliament are making serious use of this instrument and are trying to make good decisions. That is a situation that exists everywhere. Whatever the legal base you can do bad things and you can do good things. It is exactly the same here. It depends on the political process and the result of the political process where Parliament, Council and Commission are involved with the whole thing. The European Court of Justice—for the first time that is connected to a subsidiarity problem. With the Lisbon Treaty we have the opportunity of the national parliaments to go to the European Court of Justice and check if there is a subsidiarity problem in there or not. That is for the first time. There is no jurisdiction of the European Court of Justice on subsidiarity now. There is one simple reason. The only ones that could go to the Court of Justice are the Member States and the Member States were sitting at the table when they were making the decisions in the Council and no-one who makes a decision is going to go to court against his own decision. That is the simple reason why we do not have jurisdiction on this. This real change, which I think is a really high quality change, in the Lisbon Treaty gives the opportunity in future for each of the national parliaments to go to the European Court of Justice and then for the first time we will probably have a jurisdiction on questions of subsidiarity. If it is possible, if it fits into the system of subsidiarity if the European Union is doing the legislation, I personally believe that this is an advantage and for the first time we may have some changes on that aspect.

Q416 ***Chairman:*** Is perhaps an alternative view that the European Court of Justice has tended to accept

the Community institutions' assertions about the need in the interests of the internal market, et cetera, for particular legislation and, as you say, there is very little jurisdiction?

Mr Lehne: Tobacco and other examples, it is true.

Baroness Ludford: The Court would have to pay attention to the wording in Article 69B(1) which talks about particularly serious crime "with a cross-border dimension". Secondly, yes, there is a danger of some spillover into domestic law and I think we have to try and limit that spillover. As I say, if you have got a Community instrument talking about minimum sanctions how does that fit in with the rest of your sentencing policy? I am sure there are difficulties there but we have to try and ring-fence it as much as we can because I personally do not want the EU harmonising all of our criminal justice system.

Mr Cashman: It is important to recognise that 69B(2) creates a specific Treaty base for criminal penalties and therefore will have to be used specifically. Let me just get on to this notion of Treaty creep. Where it has happened we have been very carefully reminded of our legal obligations under the Treaty, and indeed I will give a specific example—passenger name records, for which the proposal originally came from the Council under Pillar I, commercial activities. The Parliament challenged this. The European Court of Justice agreed on that and it had to go immediately to Pillar III over which the Parliament had no co-decision matters whatsoever, so there was a brilliant example, I believe, of us reminding the institutions that Treaty creep would be unacceptable even though arguably we suffered as a result of taking that action. Also, of course, this Treaty is not a self-amending Treaty. No Treaty is. It can only be amended by an IGC. We have to be very careful about the allegations that we make regarding the Treaty. Of course, we never know what the ECJ will do but I do know this, and thank God (and I say that as an atheist) I am not a lawyer, that one lawyer will give you an opinion and another lawyer that you pay will give you the contrary opinion. I believe that the UK has negotiated its position brilliantly and thoroughly so that when we come to that point I believe our position will be thoroughly upheld..

Q417 ***Chairman:*** I have just one final question and I do not know whether any of you wish to say anything on it. One matter which has interested us is the expanded jurisdiction of the European Court of Justice and whether the European Court of Justice will in your view need to be the subject of consideration as to its method of operation, its constitution, matters perhaps as fundamental as the way in which judges are appointed, and in view of the expanded competence is this a matter which has been or is likely to be of interest to the Parliament?

Mr Lehne: I think so. I think at the end this is progress because we have now a kind of new system that guarantees a certain quality and I personally believe that this is a real improvement. It is not necessary that Parliament is directly involved in this whole process but I think it is not really acceptable that the heads of governments at the end are making their personal decisions and that is it, and so I personally believe this is good progress.

Q418 ***Chairman:*** You are referring, are you, to the committee of wise men which vets this?

Mr Lehne: Yes.

Q419 ***Chairman:*** What about more fundamental changes, possibly even a move away from the principle of one judge per nation, for example?

Mr Lehne: That will be difficult. I personally believe that because of the specific role of the European Court of Justice it is necessary that you have a representative from every Member State. That is necessary for the involvement of all different ways of legal fielding of jurisdiction, so I personally would prefer that every country has a judge in there, but on the other side it is also clear that if the European Court of Justice, in acting on this area, makes decisions on cases in which one specific Member State is involved the specific judge coming out of that country should not be involved in the decision.

Q420 ***Chairman:*** What about the expanded competence? How do you ensure that there is within the Court skill in the criminal justice area if it is going to have substantial criminal justice competence?

Mr Lehne: That is up to the Court. I think they have enough judges; they can organise this. They simply have to make internal decisions as to how they handle this, and I personally believe that with so many highly qualified judges it should be possible to deliver specific qualifications on certain areas.

Mr Cashman: I agree with what my colleague has said. I think it is worth recalling that not only are they appointed but of course they are not appointed for ever. They are appointed for a fixed six-year term and have to be re-appointed, and will be re-appointed based, arguably, on the work they have done. I welcome the involvement of the ECJ in the broader scope. It would be inconceivable if they did not have competence within the broadened scope. However, it is worthwhile recalling that they have competence on EU law and not on domestic law.

Q421 ***Chairman:*** Are there any further points?
Baroness Ludford: I just want to say a word about data protection. Philip mentioned one aspect of data protection earlier. I just want to say that we have ambiguity in what the role of the European Parliament will be in international agreements on exchanges of data. You have the famous Article 25A in the Treaty which was put in at the last minute.

Q422 ***Chairman:*** Which is a derogation from the general rule?
Baroness Ludford: It is a derogation from the general rule and says that the Council can adopt a position on data protection rules in the area of common foreign and security policy. Given our experience on PNR, where indeed the Council ended up making an agreement with the United States on passenger name records under the CFSP provisions, which cut us out of the seam, and that was why some people said we had a Pyrrhic victory but I do not agree with that, I think we had to go to court on it, they do not even have to consult the European Parliament. My personal view is that I think the Parliament would argue that if you had an area like passenger name records or something to do with terrorism and crime which was a Title IV policy governed by the normal rules on data protection then Article 188N, where the Parliament has to consent to international agreements, should apply in conjunction with Article 16B on data protection, but I think it is ambiguous because I cannot see what the point of Article 25A is personally when you have 188 which is that Parliament has to consent. Obviously, the Council is hoping that that means that they can leave us aside but I think the Parliament will try and say, "Oh, no, you cannot. We have to consent to an international agreement which involves data exchange and data protection". I think there is ambiguity there and the potential for considerable dispute, political if not legal, because you cannot review this. There is no recourse to the Court. If the Council invokes Article 25A there is no Court review there, but we would jump up and down, I imagine.

Q423 ***Chairman:*** That is very helpful, drawing attention to the way in which you might respond, and we will have that in mind.
Mr Cashman: May I just add that it would be worthwhile, given what Sarah has just said, referring to Treaty declaration 36, which states, "The conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters III, IV and V of Title IV of Part II in so far as such agreements comply with Union law".
Chairman: Thank you very much for your participation and for meeting us. It has been very useful.

WEDNESDAY 9 JANUARY 2008

Present	Blackwell, L	Mance, L (Chairman)
	Bowness, L	Norton of Louth, L
	Jay of Ewelme, L	O'Cathain, B
	Kingsmill, B	Rosser, L
	Lester of Herne Hill, L	

Memorandum by the Law Society of England and Wales

1. The Law Society of England and Wales welcomes the opportunity to contribute to the Sub-Committee E (Law and Institutions) inquiry on the impact of the Reform Treaty in the Area of Freedom, Security and Justice. The Law Society of England and Wales ("the Society") is the representative body of over 125,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators and government in both the domestic and European arena. The Society's EU Committee is currently developing an information campaign to inform the solicitors' profession about the Reform Treaty and the future framework of the European Union.

2. Whilst the Reform Treaty is an amending treaty, one that updates the existing Treaty on the European Union and the Treaty establishing the European Community, the effect of the new institutional arrangements and decision-making procedures will have a significant impact in the area of freedom, security and justice. The Society considers that important progress is made under the Reform Treaty in this regard.

3. The Society has previously expressed concern that the creation of a pillar structure in the European Union has allowed certain areas of activity—notably justice and home affairs policy—to develop outside the framework of democratic accountability and judicial scrutiny. The Society therefore strongly supports the fusion of the pillar structure and welcomes the move to apply the ordinary legislative procedure to proposals in the field of freedom, security and justice.

4. The Society recognises that there are a number of benefits in endowing the European Commission with the sole right of initiative in the area of police and judicial co-operation in criminal matters. We note that this is subject to the right of initiative of Member States where a quarter of Member States chose to bring forward a proposal. The Society considers that this will ensure a more co-ordinated and coherent approach to legislation, planned according to long-term EU strategy and policy programming rather than being based on the pressing domestic political considerations of the day. Moreover the European Commission will be better placed to take into account other relevant Community policies such as those arising in fields of activity like social policy, equality policy or external relations. Furthermore, unlike the Member States, the Commission has the explicit role of 'guardian of the treaties' and can be held to account both by the European Parliament and European Court of Justice if it fails to give due weight to the rights of individuals as set out at a European level.

5. The ordinary legislative procedure will lead to the involvement of the European Parliament as a key, indeed equal, partner in the area of freedom, security and justice. Parliamentary right of co-decision will go someway to remedying the democratic deficit that exists to date and improve accountability and transparency. Notwithstanding the debate as to the low levels of participation in European Parliamentary elections, it is the Society's view that as the only democratically elected EU institution it remains the best place in which to conduct an open debate about the decisions that are to be taken. We believe that it is important that developments in European Justice and Home Affairs policy that affect individuals and their fundamental rights are properly debated and seen to be based on more than political compromises sealed behind closed doors.

6. Moreover, we are confident that the European Parliament will be an effective player in ensuring the balance between security, freedom and rights and we consider that it could provide a positive counterbalance to the "lowest common denominator" decisions previously taken by the Council of Ministers. Enhancing the role of the European Parliament in this field will, we consider, ensure a more even-handed approach to the balance between the need to protect the individual's rights as well as the imperative to facilitate cross-border law enforcement. The European Parliament's reports on the European Evidence Warrant proposal as well as the proposal on procedural safeguards in criminal proceedings demonstrate this.

7. We also consider that the European Parliament is the best placed institution to provide oversight and public scrutiny of the actions of Europol and Eurojust. The Society has been concerned that these institutions, particularly Europol have been created outside the normal institutional framework. This has left them in an

accountability 'limbo'—they are neither scrutinised fully by the European Parliament, nor are they accountable for their activities in the European Court of Justice. The Society supports the developments under the Reform Treaty in this regard.

8. Under the Reform Treaty the European Court of Justice will gain full jurisdiction in the area of freedom, security and justice rather than the court's jurisdiction being limited to preliminary rulings in relation to those Member States who have chosen to confer jurisdiction on it. Enhancing the role of the European Court of Justice should facilitate consistency, clarity and legal certainty.

9. The Society agrees that there are benefits in subjecting proposals in this field to the Qualified Majority Voting procedure noting that it will speed-up the decision-making process and ensure that particular Member States cannot drag their heels on a specific proposal and prevent its adoption. Proposals can no longer be "held hostage" to national veto. Again we would refer to the approach of some Member States, led by the United Kingdom, in blocking the procedural safeguards proposal—an important piece of legislation that would have gone someway to ensuring the equality of arms in the area of freedom, security and justice. However, on the other hand, the concern is that without unanimity voting certain more repressive proposals may be adopted, notwithstanding the concerns of some Member States.

10. The Society would agree that proposals in the police and criminal justice sphere do have a particular resonance for national law and procedure and that many see action in this area as stepping on the sovereign toes of the Member States. It is for this reason that the "Emergency Brake" procedure has been introduced as set out under Article 69 A (3). The Society accepts that this is a sensible mechanism through which to raise concerns of national importance in respect of domestic systems and off-set some of the perceived danger in losing the national veto.

11. The enhanced co-operation procedure under Article 69 A (3) can be viewed as a necessary counterpart to the emergency brake procedure. Whilst this may serve as a tool by which to protect national interests and ensure one Member State does not hold up the rest, the Society is concerned that it could be regarded as a step backwards in terms of a coherent approach to the development of an area of freedom, security and justice and result in a patchwork of rights, powers and procedures.

12. This argument can equally be applied to the extension of the UK's Protocol containing the right to opt-in on matters relating to judicial co-operation in civil matters to judicial co-operation in criminal matters. The Society agrees that this is a tool by which to protect UK national interests but is concerned that the Government will opt-in to measures that enhance cross-border police powers but not participate in measures trying to establish EU-wide standards of procedural safeguards and rights of the accused.

13. The Society has previously expressed very negative views on the creation of a European Public Prosecutor (EPP) as dealt with under Article 69 E. We are still opposed to the creation of such a post because we do not think that, as currently proposed, the argument for such a position has been made. We do not see the need to create a special prosecutor for a limited range of 'offences against the Union's financial interests'. There is no reason why these could not be treated as crimes in every Member State and prosecuted by the relevant national authorities on the basis of an enhanced co-operation with OLAF, the European Union's Anti- Fraud unit and Eurojust. In our view, issues such a responsibility in multi-jurisdictional cases should be dealt with by Eurojust according to pre-agreed criteria, such as the 'centre of gravity' of any multi-jurisdictional crime rather than under the remit of the European Public Prosecutor.

14. Regarding the special arrangements for family law measures and the family law passerelle, the Society considers that differences in law and procedure between Member States are significant, rooted as they are in national views of family life and local socio-economic and cultural traditions. We consider therefore that retaining unanimity in this field, but with potential to subject matters in this area to the ordinary legislative procedure in the future, is sensible from the perspective of safeguarding national interests. We are concerned however that the democratically elected European Parliament is only consulted on these proposals.

15. On the question of the Charter of Fundamental Rights, while the Charter has not been incorporated into the Reform Treaty, Article 6 will provide that it will have the same legal value as the EU Treaties—it will thus become legally binding and this will make the fundamental rights that it contains operational. On the plus side, this means that for the first time the EU has set out in one place the fundamental rights from which every EU citizen can benefit. Many of these rights are not new, but the fact that they will have the same legal value as the EU Treaties is significant because it will allow them to be recognised or interpreted in new ways that could bring positive benefits to individuals. The Charter also covers social and economic rights such as the right to fair and just working conditions and the right to family and professional life. Further, the Charter introduces modern rights which do not exist in the ECHR, such as the right of access to information and the protection

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of personal data. Further, where Charter rights correspond to those set out in the ECHR, the Reform Treaty provides that the meaning and scope of those rights will be the same—this would allow lawyers and their clients to rely on the interpretation of fundamental rights developed by the case law of the European Court of Human Rights.

16. 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.

14 December 2007

Examination of Witnesses

Witnesses: Ms Julia Bateman, Justice and Home Affairs Policy, Ms Jane Golding, EU Committee, The Law Society, and Mr Scott Crosby, Partner at Crosby, Houben and Aps, examined.

Q424 ***Chairman:*** Thank you very much indeed for coming. This is on the record and I know that Julia Bateman at least has given evidence before. We have had an extensive programme of evidence taking and this is with a view to feeding our report into a report by the European Union Select Committee which will be useful, hopefully, in relation to the bill to implement the Lisbon Treaty. I do not know whether there is anything you would like to say by way of introduction initially about yourselves or generally in relation to the subject.

Ms Bateman: Thank you, my Lord Chairman, for the invitation to appear before the Committee. If I may briefly introduce ourselves, I am Julia Bateman. I am the Law Society's EU Justice and Home Affairs Policy Adviser and currently acting head of the Brussels office. The Law Society of England and Wales represents over 120,000 solicitors and our Brussels office acts as the voice of the solicitor profession to the EU alongside the Law Society's EU Committee. I am joined by Jane Golding, who is a member of the Law Society EU Committee and an experienced EU law practitioner, and Scott Crosby, who has gallantly agreed to step in at the last minute. Scott is a colleague of Jane from the law firm Crosby, Houben & Aps and is a member of the Advisory Board of the European Criminal Bar Association and a former member of the Law Society EU Committee.

Q425 ***Chairman:*** That is very helpful and I should have said that we are grateful for the written submissions which the Law Society has made. Is there any more you want to say generally on the topic we are discussing before I ask some of the specific questions?

Ms Bateman: Just a brief point, that the EU Committee has been working on an explanatory guide to the Treaty of Lisbon which is aimed at informing the solicitors' profession and we will also be hosting an event in the House of Commons around the ratification bill in order to take part in the process and the debate. Your invites and the guide will be winging their way shortly.

Q426 ***Chairman:*** I think they have been received.

Ms Bateman: They have come? Excellent.

Q427 ***Chairman:*** Unfortunately, I think they may clash with either a meeting of this committee or of the EU Select Committee, but otherwise I am sure that members will come.

Mr Crosby: My Lord Chairman, I should perhaps point out that I am here in my personal capacity entirely. I have no mandate to represent the Criminal Bar Association or the Law Society EU Committee.

Q428 ***Chairman:*** Thank you very much. The only matter that I might point out is that I have a different role as a member of the Lord Chancellor's Advisory Committee on Private International Law which had a lot to do with the Rome I negotiations, which have been recently concluded, but we may or may not get on to them. How do you see the new Chapter IV with its detailed listing of areas of competence in criminal law in comparison with the current Title VII?

Ms Bateman: I believe this question falls to me. I do believe that Chapter IV does entail extension of co-operation in this area and clarifies and confirms through certain express references the competence of the Union to take action. If we look at the key provisions of the new Treaty, you have got, as you know, 69A and 69B split between minimum rules relating to procedure to underpin facilitation of mutual recognition and, in terms of 69B, the more substantive law rules focusing on offences and sanctions. As far as 69A is concerned, I would say the main development or extension is a specific reference to the rights of individuals in criminal law procedure. Whilst it was deemed that the EU had competence in this area under the current Treaty in terms of Articles 31 and 34, we welcome this express reference because it clarifies any debate over whether there is a legal basis in this area, again, with specific reference to victims of crime rather than a deemed competence

under the current Treaty, and a further innovation, if I may call it that, is again an express reference to admissibility of evidence, which as far as I understand it was one of the major discussion points in terms of the European evidence warrant. Those terms of 69A I would flag up. In terms of the list of offences in the new 69B, to some extent this reflects and repeats broadly what is in Article 29 of the Treaty of the European Union. There is reference to sexual exploitation and a specific reference to money laundering or computer crime (cyber crime), but I doubt this is as significant and it might appear because the EU has already taken action in these areas anyway, although I think it is worth considering 69B(1) which refers to the identification of other areas of crime, and this may be a provision that the EU will rely on later in terms of future criminal law activity being subject to that. In terms of harmonised areas of law I will leave that to the next question.

Q429 ***Baroness Kingsmill:*** Those things itemised in the areas of criminal activity did seem, to me anyway, to have rather useful specificity, if you see what I mean, as opposed to what had gone before where there was *inter alia* or as well as or examples. It is quite useful, I would have thought, to have a clear definition of those areas which are going to be specific.
Ms Bateman: Absolutely. I think that is one of the benefits, as you say, of itemising the areas or clarifying that computer crime or money laundering or the sexual exploitation of children are identified in the legal basis.

Q430 ***Lord Norton of Louth:*** Can I just pursue the point made to clarify 69A(1)? I think you were saying the first paragraph potentially had the scope for extension but is it not qualified by the second paragraph?
Ms Bateman: Yes. It is not a broad extension of powers and certain criteria have to be met but it seems to me that this is a residual provision that may be relied on later where the Council agrees unanimously to introduce new areas of activity. You are absolutely right: it is qualified, but I think it is an important provision within the article.

Q431 ***Chairman:*** These provisions are described in terms of mutual recognition and in some contexts one can no doubt understand that readily if you are going to recognise a criminal penalty or for any purpose, including implementing it. If there is legislation providing for one country to implement the decisions made by another mutual recognition is an appropriate concept, but everything in 69A(2) relating to mutual admissibility of evidence, rights of individuals, rights of victims of crimes, is described as being "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation . . . ". How is that limitation to be understood?
Ms Bateman: Broadly speaking, on the question of mutual recognition, this is the first time it has been expressly referred to in the Treaty. The principle of mutual recognition has long been relied on in Commission proposals and recently in terms of judgments of the ECJ and I do think that in order to advance the concept of mutual recognition, there are minimum rules to underpin this, in a sense to facilitate mutual recognition, as you said, my Lord Chairman, such as mutual admissibility of evidence or rights of individuals in criminal procedure. It is taking the principle of mutual recognition but having minimum rules across the board to facilitate that.

Q432 ***Chairman:*** Let us take the case of a Briton who commits a crime in Spain or a Spaniard who wants to intervene in French criminal proceedings as a *partie civile*. There is no question of mutual recognition of a judgment or judicial decision. It is simply a question of what are the rights of an individual or the rights of a victim of crime. Would there be jurisdiction to cover that situation or is the limitation in paragraph 69A(2) perhaps in some respects rather odd?
Ms Bateman: I think on a strict reading of the article it would be limited to mutual recognition in certain cases in terms of a cross-border criminal law procedure, but I can imagine the situation in terms of the broad rules in the area of freedom, security and justice. You would want to have mutual recognition in terms of fair trial rights or safeguards or guarantees; rather than mutual recognition, actual minimum rules across the board.
Baroness Kingsmill: My Lord Chairman, do you think you would read 69A(2) and 69B(1) together, in the sense that it is those crimes for which you have to have mutual recognition of judgments and judicial co-operation and so on? Would it be in relation to those particular crimes, do you think?

Q433 ***Chairman:*** My reading would be on the face of it that 69A and 69B are entirely separate. In 69B there is pretty general power but in relation to 69A(1) I am simply raising the possibility that there might be an oddity about the apparent limitation, that it would have to be worked out. Is there anything else you want to say on the subject of mutual recognition which now finds itself in crime as well as civil?
Ms Bateman: Just to the extent that it is a preferred mechanism of judicial co-operation and harmonisation and we have always supported that model. I think mutual recognition was a UK Presidency concept back in 1998, if I understand correctly. Just to add one point, if I may: the concern that the Law Society has about mutual recognition is

the over-reliance on the concept of mutual trust that is deemed to underpin this. We have numerous examples and complaints from practitioners that mutual trust does not actually exist to the extent that the policy makers would have us believe and that there are practical day-to-day concerns. That is just the counterbalance to mutual recognition in that sense.

Q434 ***Chairman:*** Was there a point you wanted to add, Mr Crosby?
Mr Crosby: That was more or less my point. I think this is best construed as meaning that it is felt that it might be necessary to shore up mutual recognition. There is a certain amount of cynicism expressed about the real meaning of the term and whether it really exists.

Q435 ***Chairman:*** Perhaps I can ask a different question which arises under 69B out of evidence we have just heard. We heard a view expressed that in fact it is not very helpful to have a provision like 69B(2) which establishes minimum rules. They do not really do much for anyone, they do not help raise standards and, if anything, they may, since they are by definition minimum rules, depress them or suggest a rather depressed level.
Mr Crosby: If I may say so, the question is, is it plausible in the abstract? I think one would have to look at what actually happens and maybe at areas where in a given Member State the level of punishment, if you like, is either non-existent or very low, so as to mean that basically there is no deterrent whatsoever. It may be the case in certain specific situations that the minimum level will bring some Member States up, but if it is a minimum it means, of course, that the court in any given case will go above the minimum in terms of sanction according to the judge's discretion.

Q436 ***Lord Rosser:*** When you said some states might be very low, are there any particular areas that you were thinking of?
Mr Crosby: You will forgive me. I was called in at the last minute and I have not really prepared myself as I would normally like to, but if I can make a couple of generalisations, in environmental law, for example, it is commonly known that in certain countries in the north of Europe, Scandinavian countries, for example, there is very strict law, and in certain countries going towards the Mediterranean there is a certain amount of laxity and if the laxity is such that there is basically no deterrent then this provision would fill the gap.

Q437 ***Chairman:*** Can I ask a different question arising out of 69B(1), which is the third question before you? Do you have any view as to how far it is either open to the Community or likely that the Community will in practice, if it is open to it, use the possibility of continuing to apply, advocate, possibly even expand, the jurisdiction under other provisions of the First Pillar established by the environmental pollution and ship source pollution cases?
Mr Crosby: My Lord Chairman, I think the answer to that is relatively simple. 69B(2) is a specific rule and specifically will be based in Community law. At least the rule of construction is that where there is a specific rule or a specific legal basis, that prevents reverting to a more general basis. I think that is all we would really need to say. I think that 69B(2) is a *lex specialis*. It would be very difficult for the EU to justify using a more general legal basis. I think it would be extremely difficult, if not impossible, to sustain an argument supporting a different legal basis before the Court of Justice. I would feel happy pleading 69B(2). I would be rather uncomfortable pleading a more general legal basis.

Q438 ***Chairman:*** Thank you very much indeed. Can we move then to enhanced co-operation? If the emergency brake under 69B(3) is applied, where a country considers a fundamental aspect of its criminal justice system is involved or affected, the question asks whether this is a desirable development. Is exceptionalism to be deplored or is the Treaty, in that it allows the UK the opt-in and generally the emergency brake procedure, something that is acceptable and possibly even welcome?
Ms Bateman: Looking across the board at enhanced co-operation and the emergency brake and touching on the opt-in, the Law Society has stated previously that we agree that the proposals in police and criminal justice do have a particular resonance in terms of national law and procedure and we can see why this is seen to some extent as stepping on the sovereign toes, if I may call it that, of Member States and the introduction of the emergency brake procedure does appear to be a sensible mechanism to protect those national interests and offset some of the perceived danger in losing the national veto. In order to make progress, however, enhanced co-operation is an important model and, an important corollary to that, a logical step. These two options put together allow those Member States who have a problem, who wish to protect their national interests, to withdraw, but those who do not want to be prevented or held back can go ahead. To some extent there are problems with this and, as you say, is this a desirable development? The problems we would identify are really that you either have a two-speed situation or you have a patchwork of legal rights and obligations where nine, ten, 11 Member States are subject to a framework decision or now a directive and the others are outside of that, and similarly it does seem to undermine the overall coherence of law and

procedure in this area and questions the goal of a single or a genuine area of freedom, security and justice, so in a sense there are benefits and disadvantages to this model.

Q439 ***Chairman:*** I want to come back to the UK opt-in, although I mentioned it a moment ago. Can I just ask about civil justice and family law measures. What are the significant changes that you identify in these areas? One difference which we have noted is the change from the limiting words of Article 65, "in so far as necessary for the proper functioning" to the words of the new Article 65 envisaging adoption of measures "particularly when necessary for the proper functioning of the internal market". How do you see that and the matter more generally?
Ms Bateman: In general terms I think it is fair to say that provisions relating to civil justice and family law are those that have changed the least and restate much of what is in the current Treaties in terms of civil judicial co-operation already being subject to qualified majority voting and co-decisions over the ordinary legislative procedure, as it is now termed. Of course, family law remains subject to unanimity and there is the new change of the role of national parliaments in terms of any mini-*passerelle*, to coin a term. In terms of the changes though, there are some that are worth highlighting. There is a specific reference to alternative dispute resolution and access to justice but to some extent this is window-dressing because the mediation directive has already been based on Article 65 of the current Treaty.

Q440 ***Chairman:*** Was that not under the alternative methods of dispute resolution provision and is that not in the existing Treaty? No, I think you are right. That was not. That is another new provision.
Ms Bateman: Exactly, my Lord Chairman. It is almost stating what has already gone ahead in terms of judicial co-operation. It is just the express reference because I believe this is something that is deemed a priority in this matter.

Q441 ***Chairman:*** But presumably now that one observes that they have added both "effective access to justice" and "the development of alternative methods of dispute settlement", "effective access to justice" is presumably supposed to add something to alternative ADR, is it not?
Ms Bateman: Yes.

Q442 ***Chairman:*** Have you any idea what it is? It could be interpreted widely; it could be interpreted narrowly, could it?
Ms Bateman: I think it is just using the opportunity in terms of redrafting an article to state the principles that have been relied on and pin them down into a Treaty article as opposed to a broad understanding.

Q443 ***Chairman:*** What about the change from "in so far" to "particularly"?
Ms Bateman: I think to some extent, again on a fairly strict reading of the provisions, "in so far as is necessary" could mean that the provision that is proposed has to be necessary for the good functioning of the internal market. "Particularly" suggests that this is a priority proposal or a particular angle, but I do not think we should be too alarmed by the change because to my mind the main development is cross-border implications. That has been spelt out in the first or second sentence, so whilst there is some extension in terms of the language used I think the provision is sound in terms of the impact in regard to cross-border litigation.
Mr Crosby: My Lord Chairman, if I may interject, all this process is subject to the principle of proportionality and the additional checks that Parliament will be allowed to make and subsidiarity.

Q444 ***Chairman:*** Did you want to say something, Ms Golding?
Ms Golding: Yes. I was going to go on and say that perhaps also the wording takes into account the fact that here we are also looking at cross-border family matters where there will not always necessarily be an internal market issue, or not a direct internal market issue.

Q445 ***Chairman:*** I think that sounds a very convincing possibility. What you are saying is that it is not a particularly appropriate phrase, "the internal market", in relation to family matters?
Ms Golding: Yes.

Q446 ***Lord Blackwell:*** My Lord Chairman, can I just ask a question which I raised in earlier discussions? To what extent do you think it is possible for the EU to legislate in some of these areas on cross-border civil law without it consequently becoming part and parcel of domestic law?
Ms Bateman: The issue of the cross-border implications I know is very politically sensitive, so I say this from my personal opinion. I think it is possible to the extent that the legislative provision that is proposed has to be based on cross-border situations and cross-border cases. However, there will have to be some tweaking, if you like, of domestic provision to allow those cross-border pieces of legislation to come into effect. For example, the European Enforcement Order or the European Payment Order are relating to cross-border situations but the civil procedure rules had to be amended to give effect to that, so it will touch on domestic procedure but only to give effect to the cross-border piece of legislation, if I can put it that way.

9 January 2008 Ms Julia Bateman, Ms Jane Golding and Mr Scott Crosby

Q447 *Lord Lester of Herne Hill:* Can I perhaps ask on an example I make up myself? We know that questions of jurisdiction for divorce are now settled under EU law by a process which ensures that only one court has jurisdiction in some situations, all very sensible. Suppose you have a husband who does not want to pay his wife a lot of maintenance and under the law of state A it is much less generous to the wife than under the law of state B. At the moment that is not regulated, but in order to harmonise and ensure equal protection and equal treatment will it not be likely that the substance of that area of law will need to be equalised so that the woman or the man can expect more or less equal treatment irrespective of the part of the European Union where he or she lives?
Ms Bateman: I will attempt to answer that. Exactly: it is the Brussels II Regulation that deals with jurisdiction in terms of parental responsibility and matters linked to that. As far as I understand it, there is essentially a race to court to claim jurisdiction and after that the applicable law rules in England would be the law of the forum. Other private international law rule systems in the other Member States would indicate what law would apply in those circumstances, and, of course, the Rome III regulation on applicable law and jurisdiction is trying to address the very situation that you are referring to. I do think personally that it is a complicated situation of on the one hand you are trying to harmonise, if you like, the applicable law rules to assist in this situation, whilst on the other avoiding any harmonisation of family law. From the perspective of an individual you might say you should have the same law around the European Union to offset the problems that you have identified in your case example. On the other hand, family law is so specific and particular to each Member State that that would not happen, and in my opinion should not happen, in terms of harmonisation.

Q448 *Lord Lester of Herne Hill:* But the problem still is, as you have just rightly said, that under Brussels II you get forum shopping still in a sense and there is a race to get your petition filed in the way that suits the spouse best, and therefore you get great inequality in outcome according to that rather arbitrary system.
Ms Bateman: I agree.

Q449 *Chairman:* And that is no doubt the basis on which there are current proposals for harmonising the proper law which would be applicable.
Ms Bateman: Yes, absolutely.
Mr Crosby: Perhaps I could add two words in picking up on Lord Blackwell's question. There is an issue which may come to the fore, and that is the recognition of civil partnerships. They are recognised in some countries, such as Britain, Belgium,—

Q450 *Chairman:* Spain, I think.
Mr Crosby:— and in some countries they are not. What happens on death in terms of inheritance law? If one country recognises that there was a bond and another country does not, that can lead to all sorts of problems, and I think that is an area which has to be settled across our big happy family, but there are some countries which simply think that civil partnerships are immoral—not the partnerships but that the people who are in them are living immorally, assuming they are the same sex. If legislation ever went through enforcing mutual recognition for civil partnerships right across the Union then some countries would have to make quite considerable concessions in terms of the current law. I do not think Britain would be affected but others would be.

Q451 *Chairman:* Yes. There is no emergency brake in relation to family law. I see that, and I think the same problem arises perhaps in relation to matrimonial matters (opposite sexes) in relation to Malta, does it not?
Mr Crosby: Yes.

Q452 *Chairman:* I am not sure one can resolve that: if family law is a matter for unanimity.
Mr Crosby: Yes, quite.

Q453 *Chairman:* Thank you. Let us move on to the opt-outs generally. Obviously, we have heard a good deal of evidence about how they operate and we have identified the likelihood that, in relation to measures building on Schengen *acquis* to which we are party, the UK would have a wider opt-out than it has now. Are there other points about the general opt-out, which of course applies now across the board to police and criminal matters, everything in Title IV, that you want to make? Do you see potential problems about the general opt-out? How do you see the matter working pragmatically? Would it be feasible pragmatically for the UK to refuse to opt in frequently? It has done so in three recent civil law matters and Rome I is the obvious example where there have been concluded negotiations.
Ms Bateman: I will steer clear of the Schengen Protocol if I may because I do not feel confident in addressing that question. In terms of the general opt-in, as you say, the extension of the opt-in to all matters in the area of freedom, security and justice is a significant development under the Treaty. The question is whether it would adequately protect UK interests, and I think that "adequately protect" is probably too weak a notion. I think the opt-in option that the UK has secured strongly protects the UK interest and in a sense has an advantage that no other Member State, with the exception of Ireland, of course, has the privilege of. 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 that. In terms of the problems, again I touch on the points I made in terms of enhanced co-operation and the emergency brake. You have some Member States that are party to provision and the UK and/or Ireland who are outside of it and that does again undermine the one area of justice goal or the goal of a single European area. Again, a marginally political point that I am also concerned about is that we have seen in terms of procedural safeguards legislation and the future European Supervision Order that these have not been widely welcomed by the UK, if I can put it that way, so my concern is that, having an opt-in option, the Government will choose to opt into 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. That is the main concern that we have, that the pick-and-choose option is a good one but we are also concerned how that option will be exercised.

Q454 ***Chairman:*** I was interested to hear you suggest that the UK had not welcomed the proposed measure relating to supervision. I am not sure what that is based on.
Ms Bateman: I may stand corrected. I am very aware that I have been welcomed into the Permanent Representation! But I have been concerned that in terms of priorities or supporting an initiative those that have not become a top priority have been the European Supervision Order and the procedural safeguards proposal.

Q455 ***Chairman:*** Yes. We noted what you said about the procedural safeguards proposal, though the draft that this sub-committee saw represented, it might be thought, a fairly weak set of procedural safeguards which may have been felt not to add very much.
Ms Bateman: Certainly how the framework decision was at the end of the negotiation there was very little in that framework decision that would have had an impact in the UK, so it would not have raised any standards, but our focus has always been in terms of the other Member States in the European Union and the coherence, if you like, of procedural safeguards overall.
Lord Blackwell: My Lord Chairman, on the general opt-out point we have been told that for an existing Pillar III measure, if it is amended, the amendment will become part of the commoner Pillar I, as it were, and the Court of Justice and all the rest of it will apply, but the original base measure will remain in Pillar III, outside the scope and all that. In practical terms, if you look at the kinds of amendments that are made, is it realistic to think that you can have words added and sentences changed in existing legislation and still have it split between different procedures like that, and indeed the UK could opt out of the amendment and still stay in the base? Does that seem to you practical?

Q456 ***Chairman:*** Or we might ask whether you share the view that has been put. Is that your understanding of the Transitional Protocol?
Ms Bateman: We have not got any particular experience of this, so this is just an attempt to address your question. Transitional provisions are bound to be necessary in terms of the changes in relation to the ECJ and the legislative procedure and what-have-you and direct effect in terms of the ECJ, but I am not sure how, in terms of amending the legislation, that will take place. Your question referred to the speed at which the amendment might be made or in terms of whether there will be express reference to this as an amending provision. It does seem to be quite a convoluted process and one that I imagine is going to be fit with problems. I noted from previous evidence given to your committee that there was a discussion as to whether at the end of the transitional period the UK would have to opt in or pull out of all measures under the Third Pillar or again select, or elect, if you like, and I do not feel equipped to answer that, but that is an example of the kinds of problems that are going to come out of the transitional provisions, as you have mentioned.
Chairman: I think the question may have been directed to the precise language of the Transitional Protocol and what it meant when it said that measures should continue to have their existing legal effect unless amended. We can come back to it if need be.

Q457 ***Lord Lester of Herne Hill:*** Can I go back to the stance taken by the UK Government in relation to procedural safeguards? I have heard at a different occasion from one of the Commission people the allegation made—and it is no more than that—that the UK Government did not play a strong and constructive role at all, but on the contrary sought, surprisingly (or the officials thought it was surprising), to water down the safeguards. We will have the opportunity of asking the Minister about this but is there any evidence at all that you have (that is evidence and not just rumour) indicating what position was taken?
Ms Bateman: I would have to answer that question very carefully. I have been very involved in the proposal on the framework decision and the Law Society have worked for a long time on it. I think it is widely known that there were six Member States who were taking a certain position in terms of the framework decision and the 21 other Member States were wanting to go ahead and the UK was one of those six Member States, and as a strong Member

State and a leading Member State I think was able to—"influence" is perhaps the wrong word—bring on board other Member States to their position, but I do not feel I am able to comment in terms of individual officials.

Q458 ***Lord Lester of Herne Hill:*** Thank you very much.
Mr Crosby: May I just come back to Lord Blackwell's question again? The question is that the UK may be governed by some Third Pillar measure at the moment but may be outside any amendment to that, so your question was what happens to the original Third Pillar measure.

Q459 ***Lord Blackwell:*** Yes, and can it be split between the amendment and the original?
Mr Crosby: Personally, I think it is a very peculiar arrangement. I can imagine all sorts of difficulties. I can imagine all sorts of difficulties in negotiating what happens. However, the point I would like to make is that it is not yet certain what is going to happen to Third Pillar measures once all this is adopted. They might all lapse. I am not saying they will; I am not saying they will not.

Q460 ***Chairman:*** When you say "they might all lapse", what do you mean by "lapse", because if they remain in force then at the end of five years the ECJ acquires jurisdiction over them, does it not?
Mr Crosby: The question in the Legal Service of the Commission is what happens when this Treaty comes into force: should all the Third Pillar measures be re-adopted as something else or should they stay as they are? If they stay as they are there is no problem. If they are re-adopted there may be a gap.

Q461 ***Chairman:*** If they are re-adopted are you not concerned with Article 9 of the Transitional Protocol, which says that the legal effects of acts of the institution shall be preserved until those acts are repealed, annulled or amended, and one reading is that if they are repealed, annulled or amended they operate as new acts subject to the jurisdiction of the European Court of Justice.
Mr Crosby: That may be the answer.

Q462 ***Chairman:*** The alternative is the one that Lord Blackwell was putting to you, that if they are simply amended you have the situation where the original act is not subject to the jurisdiction but the amendment is, which is one view we have heard, which would be an interesting situation.
Ms Bateman: Tortuous.
Mr Crosby: Yes. I think it is one that in an ideal world one would wish to avoid.

Q463 ***Chairman:*** I do not know whether you have any view as to whether in practice existing measures are likely to be re-adopted, re-amended and made appropriate for being subjected to the jurisdiction.
Mr Crosby: I am not privy to that sort of information.

Q464 ***Chairman:*** Do you have a view about the jurisdiction of the European Court which will be expanded, at least at the end of five years, to cover all areas of freedom, security and justice and subject to the points you just made about the UK's right to opt out of everything and then opt back in to individual bits of the existing *acquis* if it chose to? The European Court is going to have to have an expanded jurisdiction over a wider workload covering different areas from those it is already involved in. Does that create any problems?
Ms Golding: My Lord Chairman, I think this question falls to me to answer, and we have also taken views from other members of the EU Committee on it. I think that in terms of civil justice and judicial co-operation in civil matters, eg, asylum and immigration, it is important. It is good because in terms of consistency and interpretation there will be a change from the current situation where you have some Member States which have granted jurisdiction to the ECJ and others which have not. You therefore can have variances of interpretation between different Member States and also between Member States and the Member States' courts and the ECJ currently. We also generally think that it is an improvement in terms of granting similar treatment to cross-border litigation matters, such as taking of evidence in cross-border cases, service of documents, Rome I and Rome II, compared to the treatment that currently other areas of European law, such as employment and competition law, benefit from. Also, there is another advantage, we think, in terms of a unified judicial architecture. What I mean by that is that currently under the Treaty only courts of last instance must refer. This obviously would change.

Q465 ***Lord Lester of Herne Hill:*** What about the Protocol on Subsidiarity which allows either House of a bicameral Parliament like ours under Article 8 to refer to the Luxembourg Court a question as to whether a legislative measure complies with subsidiarity? Is there a danger, if that is used, of a high degree of politicisation of the political issue by a judicial body?
Ms Golding: That is a question that, I must say, we have not really considered.

Q466 ***Lord Lester of Herne Hill:*** Nor have I because I only discovered it this afternoon. It is in Article 8 on page 165 of the version we have got.

Mr Crosby: If I may interject, I believe that the principle of subsidiarity is, as we speak, justiciable.

Q467 ***Lord Lester of Herne Hill:*** I understand that, but nevertheless we know that if national parliaments, or one chamber of them, decide to argue about the matter and refer it to the court, although, of course, I perfectly understand that it is a legal question, it is a legal question with a high political content since it involves drawing a line between what is proper within competence on the basis of a very loose criterion. My only point is, when thinking about the jurisdiction of this court, should we not also have in mind this expanded jurisdiction? That is the point really. We may have to ask the Minister about that.
Ms Golding: It may be something that we can think about and come back to you in writing on as well.
Mr Crosby: If I may say so, the issue will only arise after the event. In other words, whether or not the principle of subsidiarity has been infringed can only be put to the court after the act in question has been adopted, so it is not going to delay the legislative process.

Q468 ***Lord Lester of Herne Hill:*** No. I am talking about the danger of politicising the court itself.
Mr Crosby: To an extent that it is not politicised already?
Lord Lester of Herne Hill: Yes.

Q469 ***Chairman:*** Does any of you have any view as to whether the Court needs itself any restructuring to cater for the enhanced, increased, expanded and different workload?
Ms Golding: I think, my Lord Chairman, that our general feeling was that we did not see the floodgates of cases being opened by this extension of jurisdiction.

Q470 ***Chairman:*** Even though one is having potentially references from first instance criminal courts from any country?
Ms Golding: I think perhaps, my Lord Chairman, that they may think quite carefully before they make the preliminary reference in view of timescale.

Q471 ***Chairman:*** It depends on the criteria. Unless the criteria are changed they may not have any option.
Ms Golding: Yes.

Q472 ***Chairman:*** We are very short of time, and, obviously, I want to thank you, but if there is anything you want to say on the final question, the Charter of Fundamental Rights, which is absolutely fundamental, then do. We are well aware of the complexities of the Charter, and indeed of the interpretation of the protocol.
Ms Golding: Again, it falls to me to answer this question and I have thought about it in quite a lot of detail.

Q473 ***Chairman:*** I do not think we will stop you, but be very quick!
Ms Golding: I will try to be as quick as possible. I believe that Article 6 will have an impact on the protection of fundamental rights in this area. Although in principle I could see that there ought to be little difference of substance since the Charter is a declaration of existing rights so it does not actually introduce any new substantive rights, the manner in which these rights will now apply in EU law will, of course, change because currently the ECJ can refer to the Charter for inspiration when interpreting general principles of EU law in the same way as it can refer, for example, to the European Convention on Human Rights, but the source of law remains the general principles, of course. What the Treaty of Lisbon will do is give the same status to the Charter as the Treaties and as such it will constitute primary law of the EU, and this means the rights enshrined in it can be applied directly. They will be directly justiciable before the EU courts, and at the very least this will allow a body of case law to develop based on direct application of Charter rights, so I think perhaps there is not a change of substance but a change in the way the rights will be applied. It is quite similar to the position of the European Convention on Human Rights before the Treaty of Lisbon and post the Treaty of Lisbon. It is the same situation that currently the European Court can refer to the European Convention on Human Rights as inspiration for interpreting the general principles of EU law but cannot apply articles of the convention as such directly in EU law. For example, this difference was highlighted in the competition law field, which is an area in which I practise, in the *Mannesmannröhren-Werke AG* case, where the Court made it quite clear, when the applicant tried to raise two articles of the European Convention on Human Rights before the Court, that it was not possible to do so because the European Convention did not apply directly as such. I think that will be a change. We do not know exactly what effect that will have in the future but there will be a change in the application.

Q474 ***Chairman:*** So will the Protocol cut back the effect of that change in relation to the UK significantly or at all?
Ms Golding: As far as the opt-out is concerned, this in my view seems to be a case in which the UK wished to be 100 per cent certain that it had covered all the angles and that it was clear exactly how the Charter would be interpreted in UK law. We understand that

there was some concern that certain general rights would be created as a result of recognition of the Charter as having the same status as the Treaties. The first point I would say about that is that it should be remembered always that the application of the Charter is limited to the activities of the EU institutions and also only where EU Member States are implementing EU law. I know that there was some concern that a general right to strike might be created under the Charter, but I think if one looks at Article 28 of the Charter, first of all, Article 28 itself does not provide for a general right to strike. The right to strike is just one of the rights of collective action which are provided for in Article 28 and they are limited by the words that they should be interpreted "in accordance with Union law and national laws and practices", and there is extremely recent case law, which I had a look at before I came, decided on 11 December and 18 December 2007, two cases before the ECJ, the *ITWF* case and the *Laval un Partneri* case, which make it quite clear that Article 28 is subject to national laws and practices, so there is no general unlimited right to strike. That is one point. I do not know whether other rights were of concern but it is also worth pointing out that a number of the rights that might become important under the Charter are actually analogous to rights that exist in the European Convention on Human Rights and must be interpreted in accordance with it, so again there we do not see any great problems.

Chairman: Thank you very much. I think we ought to draw a line and thank you very much indeed for very clear evidence. If there is anything you want to add by way of afterthought when you have seen the transcript please do.

Supplementary memorandum from the Law Society of England and Wales

Thank you once again for the opportunity to address the Committee on the justice, freedom and security aspects of the Reform Treaty (Treaty of Lisbon). The Law Society would like to take the opportunity to submit some follow up comments in relation to the extension of jurisdiction of the European Court of Justice (ECJ) in this area.

In relation to matters currently falling under Title IV TEC for example, immigration, asylum, judicial co-operation in civil matters, the Law Society supports the provisions under the Treaty of Lisbon relating to the extension of the jurisdiction of the ECJ as regards the preliminary reference procedure. Article 68 TEC only provided for the courts of last instance "against whose decisions there is no judicial remedy under national law" to raise matters of interpretation of Title IV or on the validity or interpretation of acts of the institutions.

The Law Society has previously considered that this constitutes a severe restriction on the right of a national court to obtain an authoritative interpretation of an issue of European Community law. Whilst Regulations are to be applied with binding force in all Member States and it is reasonable to expect each national court to apply a Regulation to the best of its ability, the restricted access to the ECJ is capable of leading to variances of interpretation between different national courts. Thereby leading to gaps between interpretation by Member State courts and the ECJ. Moreover it appears to counteract the argument that European Community law should be a part of mainstream legal life rather than a specific and expert area of law.

This is indeed a helpful development. Whilst the workload of the court may expand to a limited extent we do not expect problems due to an increased workload, particularly due to the increase in the number of Advocate Generals assigned to the Court.

As regards the area of police and judicial co-operation, traditionally third pillar matters, the Law Society supports the provision under the Treaty of Lisbon to allow for full jurisdiction of the European Court of Justice in this area. Thus ending the procedure whereby Member States elect the Court's jurisdiction under article 35 TEU. Moreover subjecting this area of European law to the full jurisdiction of the ECJ will allow for infringement proceedings and greater oversight in terms of implementation of measures. This is an improvement as to date this lack of consistency of interpretation and limited enforcement power has undermined many of the objectives in this area.

21 January 2008

WEDNESDAY 16 JANUARY 2008

Present	Blackwell, L	Mance, L (Chairman)
	Bowness, L	O'Cathain, B
	Burnett, L	Tomlinson, L
	Jay of Ewelme, L	Wright of Richmond, L
	Kingsmill, B	

Examination of Witnesses

Witnesses: Rt Hon Jack Straw, a Member of the House of Commons, Lord Chancellor and Secretary of State for Justice, Ms Rebecca Ellis, Lawyer, Ministry of Justice Legal Group, Ministry of Justice; Mr Kevan Norris, Lawyer, Home Office Legal Group, examined.

Q475 ***Chairman:*** Secretary of State, thank you very much indeed for coming. We are most grateful. We are in the final stages of evidence-gathering to assist us to prepare a report to feed into the Select Committee report on the Lisbon Treaty. There will be a transcript of today and for the record, Lord Wright and I have made declarations of interest. Mine is the rather interesting reversal of role as a member of your advisory committee on private international law, which has looked at the Rome I proposal and other proposals which may be touched upon today. We would be very grateful if you have an opening statement to make, and perhaps you would like to introduce the colleagues you have with you.

Jack Straw: Thank you very much, My Lord Chairman. Let me first introduce the officials who are on either side of me. Rebecca Ellis is a lawyer from the Ministry of Justice Legal Group and Kevan Norris, who is from the Home Office Legal Group. Thank you very much for the invitation to come before you. If I may, I would like to make a short opening statement, which may assist. When I was Foreign Secretary, I not only supported and helped to negotiate the Constitution for Europe, but I also signed it, so I was satisfied that it was going to be in the United Kingdom's interest. But I was aware, of course, of the great controversy surrounding it. Having said that, I think the deal which has been negotiated in Lisbon and is now encapsulated in the Lisbon Treaty is different and better—first of all, it is an amending treaty, it is not a Constitution—particularly in areas of justice and home affairs. Secondly, I am clear that these changes mean there will be no loss of the United Kingdom's sovereignty on matters of fundamental importance to the United Kingdom and it does not change the fundamental relationship between the European Union and its Member States. In that sense it is, if anything, I think probably less significant than either the single European Act or the Maastricht Treaty. Let me just deal with the key differences between the Lisbon Treaty and the Constitution, particularly in areas of justice and home affairs. Unlike the Constitution, the Lisbon Treaty provides us with the power to choose whether to opt into police and criminal judicial cooperation measures and that, in my judgment, represents a very significant strengthening of the United Kingdom's position in this field. It enables us to protect the unique features of our law and our legal system if we need to. You will also be aware that in addition to the Horizontal Articles, which we thought were the strong protection for the United Kingdom's position in respect of the Charter of Fundamental Rights, we now have a Protocol which we and Poland have signed and I think anybody who reads it will understand that it is complete protection. The language is unusually clear for an EU instrument in being remarkably unambiguous in the protection it provides. All of this, I think, needs to be seen in the context, which is that I am in no doubt, and neither is Her Majesty's Government, that it is in the interests of the United Kingdom and its citizens to be involved in wider and deeper cooperation on justice and home affairs. That is something which is pretty obvious for those who deal day to day with these questions, but it is sometimes less obvious to my constituents. Constituents who attend public meetings and come to see me and say, "This is all terrible. You shouldn't be involved," I then ask them where they go on holiday and I ask them—and the answer is in the affirmative in a surprising number of cases, including those on a relatively low income—whether they or anybody they know has got a house in Spain or Italy and whether they know anybody who has made use of his or her right to work in other European Union countries. A huge number of people take holidays abroad elsewhere in the European Union, including for weeks and weeks at a time if they are pensioners. A significant number of my constituents on average or below average income have got access to houses in Spain or Italy, or elsewhere, and these days you cannot go into a firm in my constituency which has not got both quite a number of EU citizens working for it and which is making use of the right of free movement of labour abroad as well. I then say to them, "Well, okay, that's fine. So let's go through where you would be if you were going on holiday and you ran into trouble with

the police and you weren't within the EU area. You'd have far fewer rights. Within Europe you would have the ECHR but nothing much more. What we are seeking to do by the JHA programme is to provide you with serious rights which are equivalent to those you are able to exercise here if you do run into trouble with the law." I have got two cases on at the moment, one in respect of someone who has run into property difficulties in the EU state and another who has run into property difficulties in a European state which is not inside the EU. In neither circumstance is the situation satisfactory in the way in which we would see it, but the possibilities of remedy, legal but also political, of actually getting the systems to work are much more significant in the EU Member State than in the non-EU Member State. People complain about the foreign trucks going up and down the M6 and the M65. Then I say to them, "If you have an accident or there is a collision and the foreign truck driver is to blame, shouldn't we have clearer remedies against these people and not just allow them to disappear and for there to be no remedy?" That also requires cooperation. When I am able to do that, people start relaxing about this and they can then see the benefits as well as—and no one really argues about this—the benefits of cooperation on terrorism and, for example, organised crime. This then leads on to the issue which I think is part of the argument about the new Treaty, which is whether it is acceptable for decision-making to be made principally by a qualified majority rather than by unanimity. There are people around your table, Lord Mance, who have had much longer experience than I have had of negotiations with the European Union, but all I can say is that even at 15 the old system within the JHA of trying to secure agreement essentially by international treaty, by convention, was creaky. I will give one example of this. Ten years ago exactly we had the EU Presidency. I was in the chair of a JHA Council and we had before us a draft convention on the mutual recognition of driving disqualifications—not the world's most earth-shattering matter, but quite important—and there was a difficulty because one Member State had a maximum driving disqualification period of 28 days and all the other Member States had a minimum of a calendar month. So you can imagine that there was a wonderful argument about how these were compatible. After hours and hours and hours in the Council we finally gained political agreement and subsequently we gained legal agreement. It took an immense amount of effort and it was signed, but it is significant that this instrument, ten years on, has still not been ratified and has not come into force. Meanwhile, what that means is that bad drivers who get disqualified in one jurisdiction cannot have a disqualification enforced against them in another and that has not been in the public interest across Europe. The other point I would just like to make, and it is my final point, about the use of qualified majority voting is a slightly paradoxical point. Some people see this as some kind of sacrifice of our national interest and implying, as it were, that we will always be in a minority and always on the wrong side. I do not accept that for a second. One of the things people forget when they are calling for unanimity—which has its place, let me say, and I am very clear about that, in other areas—is that it is in the nature of negotiations where unanimity is required that you quite often, in the interests of seeking agreement, reduce and reduce and reduce to the lowest common denominator and you end up then with an instrument which is actually not satisfactory to anybody—the driving disqualification is quite a good example of that—whereas, in my view and my experience, on the whole because we are one of the largest Member States in the Union we have, I think, an influence in the Union which is at least proportional to our size and our economy, and in many areas larger, and we can and we do win arguments and it is rare for us to be in a minority. If and when we do face a situation or we anticipate a situation where we are going to be in a minority and we think it is not in our national interest to accept a majority vote, we can decide not to opt in in those areas where that applies and in certain areas, as you know, we can apply the emergency brake and it is the judgment of the Government. But that is quite sufficient protection, an additional protection, for the United Kingdom's interests. Thank you, My Lord Chairman.

Q476 ***Chairman:*** Thank you very much indeed. Unless there is anything more you want to add, I think that probably answers the first question, what has prompted the changes introduced by the Treaty of Lisbon in the areas of Freedom, Security and Justice, the merging of the First and Third Pillars?
Jack Straw: I think so, My Lord Chairman, and there is the overall issue, which is the more there is movement of people for whatever purpose and of business across borders in Europe the more you have got to have a high degree of cooperation and mutual recognition on legal matters. The second thing is to say that of course when the Constitution failed we were able to take stock and to seek improvements, which perhaps had not been possible at the time of the Constitution.

Q477 ***Chairman:*** Lord Jay has a general question. Can I just ask you first, you have indicated some areas where there have been problems? Do you feel that the changes are in practice likely then to be significant? The driving disqualification proposal, would that have received the relevant majority?
Jack Straw: If you take that, it is a second order example, but I am pretty clear that we could have come to a much better situation on that. The Member

State concerned which had this difficulty at a political level accepted that they should really go ahead, but it was just going to cause immense problems within their own parliament, whereas if there had just been a qualified majority for it they would have said, "Well, we accept it." I think on the whole it will work to the benefit of people in Europe and not just to the governments.

Q478 ***Chairman:*** There will be a significant expansion in Community activity and legislation in this area, Freedom, Security and Justice?
Jack Straw: Yes, and as I think you may have gleaned when you went to Brussels, the Commission is preparing for that and so are the Member States, but we have good relations with the Commissioner and people in the Directorate-General and I have confidence in the Commission itself that it is going to do this in an inclusive way and seek the views of Member States about what the priorities are.

Q479 ***Lord Jay of Ewelme:*** I may say, first of all, it seems rather odd to be sitting here asking the questions rather than sitting beside you trying to fend them off!
Jack Straw: It is worse for me, Lord Jay!

Q480 ***Lord Jay of Ewelme:*** I want to ask a question which is a slightly broader institutional question than the one you addressed and really drawing on your own experience of the Justice and Home Affairs Council under classic Third Pillar arrangements and your experience of the European Council over a number of years. I wondered whether you thought that the new Third Pillar arrangements—QMV, the greater role of Parliament, and so on—would alter the institutional balance between the European Council and the Council of Ministers and the Council and the European Parliament? Again, it is specifically in relation to justice and home affairs, freedom and security?
Jack Straw: I think what we will see is the Council of Ministers, the JHA Council, in practice making the final decisions in more areas than was the case before. That is my instinct. Of course, the emergency brake aside, it is open to a Member State, the head of government, to insist that a particular item goes on the agenda of the European Council, and you have seen how the system works. That is certainly my instinct. So the JHA will be doing more because it can do more, because it is much easier for it to make decisions, and I think probably the agenda of the European Council will be less dominated (to the extent that it has been dominated by JHA matters) than it has been before. On the European Parliament, obviously they will be much more involved and we will have, as a government and country, to be more involved with the European Parliament on these issues.
Lord Jay of Ewelme: Thank you.

Q481 ***Lord Blackwell:*** One of the provisions on judicial cooperation in civil matters is framed by reference to cross-border issues. If one ends up with harmonisation around things such as cooperation in the taking of evidence, access to justice, particularly in areas like family law, is it naturally realistic to think that one would end up with a separate body of law for cross-border issues and for domestic, or will not in effect the cross-border harmonisation ultimately cause harmonisation in domestic law as well?
Jack Straw: I think, my Lord, you are referring to the new Article 65. It does speak of approximation of the laws and regulations of the Member States, but it is preceded by the statement 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 decisions in ex-judicial cases. It then goes on to say it may include the adoption of measures for the approximation of laws of Member States and it then has a list of circumstances when it should apply. I know the wording of this is different from the Article it replaces and some people have taken the point that the phrase "particularly when necessary for the proper functioning of the internal market" suggests that it is wider. It does not exclude other matters with that phrase, but it then provides an exclusive list of where these measures could be taken. On the issue of approximation versus mutual recognition, one of the things we managed to achieve—and it goes back ten years ago, and I am proud to say I played quite a part in that when I was Home Secretary—was to get the principle established in the JHA area that we should move forward by mutual cooperation and mutual recognition rather than by approximation wherever possible. That is now well-established and well-understood and it is obviously very important for the four communal countries particularly. My sense is that the anxieties you have will not apply. I think the idea that we would end up with a harmonised family law, if you do not mind me saying so, is for the birds! Why would anybody try? There are only 24 hours in the day, 365 days in a year. What purpose would that serve? How would the domestic politicians in each country explain why we were—each of us, not just in this country—subscribing to a significant change in our family law when this has been very much a matter for domestic jurisdiction? Do you want to add anything on this, Rebecca?
Ms Ellis: Only to build on what the Justice Secretary said and to note that Article 65 is clear that it is concerned with mutual recognition, which is a helpful clarification in the language.

Q482 ***Lord Blackwell:*** If I could just clarify, my point was not so much that somebody might try to do that but that it would be the inevitable consequence of having cases decided with appeal to the ECJ that in effect set laws for, for example, cross-border family law that you could not easily disregard when you were then dealing with domestic cases.
Jack Straw: That partly, of course, depends upon how far the ECJ defines its jurisdiction on cross-border matters, and I know that is an issue. I cannot say where we will be in 25 or 50 years' time, but it is not an anxiety which I have. To the extent that the work of the Council of Ministers and the ECJ produces greater clarity and by that process and mutual recognition a move towards the norm so that cross-border families have clearer rights, I do not think people would complain about that in any case. It is to do with the process by which that is achieved and I am satisfied about the process. Is there anything you want to add?
Ms Ellis: In family law in particular the unanimity provision is retained under Article 65 and there is a *passerelle* that has to be used on a unanimous basis and Parliament will have an opportunity also under the new provision to have a say on whether that *passerelle* is used. So in family law in particular I do not think there is a particular concern.

Q483 ***Baroness O'Cathain:*** Does that mean, Secretary of State, tracking back to what you said about your constituents, who travel a lot to mainland Europe and who now have holiday home or even homes in Europe, that family law which applies in France, for example, in terms of inheritance of property, is going to be harmonised with family law on property here?
Jack Straw: If you ask me, I would put no money at all on that prospect. I know a tiny bit about inheritance law in France and family law and the idea that the French people or the government would allow that to happen—

Q484 ***Baroness O'Cathain:*** Or that we would synchronise with them?
Jack Straw: No, of course not. I have no fear whatever that our family inheritance law is going to be taken over by the French. Whatever else I worry about, that is not one of the things. I have no fear about the German code or anything like that. Aside from the very important point Rebecca has made, I do not see what would prompt the Commission to come forward with a proposal in this area and to spend a lot of officials' time when it is hard to see what the public benefit would be and what the percentage would be for the politicians concerned. The Commission may propose, but it is made up of politicians who are rooted in their own national identities.

Q485 ***Baroness O'Cathain:*** Then they would say no?
Jack Straw: Yes.

Q486 ***Chairman:*** The proposal we have seen in this Committee relates to the governing law in respect of, for example, a Briton who owns a house in France when it comes to inheritance and clearly there is a lot to be worked out there, but one can see, I think, as this Committee has said, possible advantages both ways?
Jack Straw: Indeed, and those issues are going to arise all the time. They are an inevitable consequence of people living and working outside their original country, and there are more and more cross-border marriages as well both ways.

Q487 ***Lord Burnett:*** As the Lord Chairman mentioned, we have actually been looking into this proposal about wills and successions which recently emanated from the EU and we have made certain comments. In the event that the EU brought forward wills and succession policies which were really not in our national interest or which were alien to our common law system and particularly prevented people from making their testamentary arrangements as they saw fit rather than as laid down by some statute, what could we do to thwart that if we are in the minority of one?
Jack Straw: First of all, there is the issue, again picking up Rebecca's point, about whether this is subject to unanimity. This seems to me extremely important and my guess is that it would be. I think it is a very academic idea. You may not. Rebecca, is there anything further you want to say on this?
Ms Ellis: No, just –
Jack Straw: Wills!

Q488 ***Lord Burnett:*** It is particularly succession, is it not, rather than wills?
Jack Straw: Yes. We attach great weight to the freedom of testamentary disposition!
Baroness Kingsmill: It has taken up a great deal of our time, the issue of cottages in France, I have to say.
Chairman: I do not think we want to go into it in detail today.

Q489 ***Lord Burnett:*** Are we thwarted if we are in the minority of one?
Jack Straw: Are we thwarted? Well, it depends—

Q490 ***Lord Burnett:*** How do we stop it happening?
Jack Straw: I would have to get much more advice, I am afraid, than I can offer you just now and I will come back to you, if I may, My Lord Chairman, with a memorandum about this.

Q491 ***Chairman:*** Yes. There is a question which you mentioned, Secretary of State, whether it is a matter of family law, and if it is not a matter of family law then there is the opt-in, which we will come to, and in the last resort there is the emergency brake?
Jack Straw: The emergency brake, yes.[1]

Q492 ***Lord Burnett:*** Just to follow on that and perhaps really ask the question that we are talking about family law as if it covers all aspects of the family law in the most general sense. Is it family law as we tend to talk about it in this country—matrimonial law concerning matrimonial issues and children and matrimonial property—or are you reading it as including all the things the Committee is discussing? We probably normally talk about succession in the context of probate.
Jack Straw: I am not going to offer my own definition of this. Do we have a definition?
Ms Ellis: I think it would have to be interpreted in the context of the particular instrument. We would need to look at what was the most appropriate legal base, but I think it is clear from both the specific reference to family law and the general legal basis for civil measures that the emphasis is as far as possible on having cross-border implications. That is in the Treaty and whilst there will be grey cases, as there always are with any line, that distinction is drawn and I think we would hold that to be significant.

Q493 ***Chairman:*** Can I just wrap up this issue Secretary of State, by asking this: you touched upon the deletion of the absolute requirement that the measure should be necessary for the proper functioning of the internal market. It is now only a particular situation when there is competence. What areas were in mind, can you help us, by the deletion of the requirement that it should be absolutely necessary for the proper functioning of the internal market?
Jack Straw: I do not think I can help you on that. Have you got a guess on this?
Ms Ellis: I think the provision in the current Article 65 has in practice been interpreted in quite a broad way, so having a closed list of areas which can be targeted by measures is actually more helpful in clarifying what this covers than the previous restriction to things which were not absolutely necessary to the proper functioning of the internal market in light of how things have developed.

Q494 ***Chairman:*** Another subsidiary question. Are you able to help us as to the expanded wording which you mentioned of 65(2)(e), which now includes, amongst other things, the effective access to justice as well as elimination of obstacles to the proper functioning of civil proceedings. Was anything in particular in mind under this head? Could it be quite broad in practice? One of the new heads in the list is this effective access to justice, which everyone, I imagine, approves of but could it in fact be quite a broad head?
Ms Ellis: Again, I think you do need to pay some attention to other requirements in Article 65, as I have said, the mutual recognition provision, the cross-border element. I am not aware that there were any specific proposals in mind when that specific paragraph was included.

Q495 ***Chairman:*** Can we move on to criminal justice, unless any Member has a specific follow-up question? The question is whether the Union's competence in the area of criminal justice and policing would be extended by what are now much more detailed provisions on action by way of mutual recognition and also by way of harmonisation in respect of certain offences under the Lisbon Treaty?
Jack Straw: My Lord Chairman, the scope for cooperation on criminal matters under the new Treaty is not considerably wider than in the existing Treaty. There is a new and express legal basis for action on criminal procedure in Article 69A(2) which resolves the current dispute over competence in this field and the provision should also be seen against the additional safeguards introduced by the new Treaty. The opt-in will apply to any proposal, so we have a choice whether or not to participate, and in respect of criminal procedural law under 69A(2) there is also a so-called emergency brake. On substantive criminal law the scope for action is similar to that envisaged in the existing Treaty and with the exception of measures to tackle the illegal trafficking of arms or the sexual exploitation of women the JHA Council has already adopted framework decisions on the offences listed in Article 69B(1)(i). That said, there is one issue of scope and there is another issue of activity and because, not least, we are moving to the Community method there will be more activity. It goes back to what I said by way of my introduction. We have to judge each proposal on its merits and I hope most of them will be in the interests of British citizens.

[1] The Secretary of State for Justice has since written to clarify that the so-called "emergency brake" would not apply to legislative proposals based on Chapter 3 of Title IV (judicial co-operation in civil matters) of the Treaty on the Functioning of the European Union. As per Articles 69A(3) and 69B(3), in the context of the area of Freedom, Security and Justice the emergency brake would apply only to certain aspects of Chapter 4 of Title IV (judicial co-operation in criminal matters) of the Treaty on the Functioning of the European Union.

Q496 ***Chairman:*** Can I take one that we have looked at again in this Sub-Committee, that is minimum rights in criminal proceedings, where there was certainly criticism. We took evidence from Lord Goldsmith and we heard the comment that you have made today about the lack of value in the lowest common denominator. Is that, for example, an area where UK support under QMV may lead to meaningful progress, the video recording or tape recording of suspects' interviews and that sort of protection?
Jack Straw: What I gather is that we were one of the six countries to suggest an alternative way forward based on a resolution for practical action and proposals to make a difference to the citizen on the ground, such as in relation to interpreters and the recording of suspects' interviews. That goes back really to what I said by way of introduction. It is in the interests of British citizens without any question and I would suggest that the basic rights which we afford particularly to suspects but also witnesses are probably at the higher end of the spectrum across Europe and that is what people are used to in the United Kingdom as well, so this is very much in the interests of the United Kingdom's citizens. But, as ever, we have to judge proposals which come forward upon their merits and then argue about them if we do not like them.

Q497 ***Chairman:*** Theorising, perhaps, if another country resisted this measure and if it pulled the emergency brake, is this a sort of area where the United Kingdom might actually itself be party to enhanced cooperation?
Jack Straw: It is perfectly possible. I know some people find the idea of enhanced cooperation somewhat neuralgic, but I think this is a sort of fancy term for there having to be some flexibility within European decision-making when it is such a large and diverse Union, and people cannot have it both ways. They cannot both say that they object to this dreadful institution called Europe imposing its will and suggest that the country should have greater flexibility and then object to the facility when countries can have a greater degree of flexibility. I will just say one other thing on that, which is that I would far rather enhanced cooperation (with a small "e" and a small "c") be done within the EU treaties than outwith them as, for example, happened over Schengen, because what happens then is that these instruments external to the Union are then bolted on.

Q498 ***Chairman:*** Yes. Within Pillar 1 or within the new Lisbon Treaty they will also be seen by the parliament?
Jack Straw: Yes.

Q499 ***Chairman:*** Unless there is any follow-on question, can we then move to the rather specific subject of the environmental damages and ship source pollution cases which identified in the First Pillar a legal basis for measures defining criminal offences and to a degree sanctions. The question I wish to ask is whether such measures will in future have to be adopted on the basis of the new Article 69B(2), which also envisages criminal competence, or could they still be defined under, for example, the provisions on the environment, in other words outside Title IV and so outside the opt-in?
Jack Straw: The advice I received very clearly is that they had to be decided under the new specific Article and I understand there is a general presumption within EU jurisprudence that a specific legal base, where available, is always to be preferred over a general one and this one was designed to provide a clear express legal base for legislation on criminal matters and sanctions where this is needed to ensure the effective enforcement of harmonised rules in other policy areas. We have no reason to believe that legislation in this area will not be brought forward under 69B(2).

Q500 ***Chairman:*** Thank you, and as such therefore would be subject to the opt-in?
Jack Straw: Yes, because the anxiety of the people who raised this is that if it came under some other instrument it may be an instrument under which we do not have an opt-in power.

Q501 ***Chairman:*** So even in the areas of the environment and ship source pollution in future amendments and fresh measures will be, in your view, under 69B(2)?
Jack Straw: This is my view and also, more importantly, the clear advice I have received.

Q502 ***Chairman:*** Thank you. Can I move on then to the emergency brake and enhanced cooperation, questions 5 and 6? How will the Government approach use of the emergency brake in the field of criminal cooperation and judicial matters, bearing in mind the existence of the UK opt-in in the whole area? I think the question there is the issue of whether it is really conceivable that it will be used.
Jack Straw: It is certainly conceivable. We would not have spent quite so much time working on it and on the precise mechanisms of the opt-ins/opt-outs if it were not conceivable. My Lord Chairman, how often it would be used I cannot be certain. What we would like is a situation where the measures which come forward are ones which we support in principle and then after a period of negotiation we support in detail and they go through. We have not got a list of possible proposals from the Commission where we say, "Not on your life, whatever happens. We are

either going to opt-out or, if we start negotiations to opt in, we will pull the emergency brake." However, even were the emergency brake to be not actually exercised in the five years or so it does not mean that it serves no purpose because the nature of negotiations (any negotiations but particularly those in Europe) is that the fact that you have a possibility of doing something which could be inconvenient and literally just occupy a lot of time in the European Council, particularly the emergency brake, would be in certain circumstances a negotiating card which you could deploy to your advantage. So I think it is helpful, as I say, but also in terms of the opt-ins it is an important protection. It means that in the areas where the emergency brake applies if we support the principle of an instrument which is being put forward we can opt into it and in extremis, having opted into it but then some unforeseen difficulty arises from the way in which it is being negotiated which does affect "some fundamental aspects of our criminal justice system", then we can pull the emergency brake. So it is an additional protection and I think really rather an important one. Again, it is quite a paradoxical point but I think the effect of it may be to provide greater confidence to British Government to get involved in opting into instruments, which is actually in principle what we want to do, and having done that then some additional surety which will get a satisfactory answer so that we do not have to apply the emergency brake.

Q503 ***Chairman:*** Jumping ahead, can I ask whether the UK can in effect opt back out of the measure into which it has opted, for example where the measure has been significantly amended?
Jack Straw: Once a measure has become law and we have not exercised the emergency brake, we do not have a right to opt-out at that stage. That would produce a situation which nobody could tolerate because you have to make decisions. It does not amounting to opting out of a measure, but it does mean, as I have described, that we could opt in and take part in the negotiations and then find that there is some really overwhelming difficulty with the instrument as drafted and we are in a qualified minority, and we then decide to pull the brake.

Q504 ***Lord Blackwell:*** I have two specific questions, if I may, one on the emergency brake. Could you clarify what legal distinction there is between the emergency brake and the old Luxembourg Agreement, the Luxembourg compromise? Is the emergency brake effectively a political agreement? If we said this was against our fundamental whatever the words are and the others said, "Come on, you're having us on. We want to go ahead with this anyway," is there any legal basis to this emergency brake and who would adjudicate?
Jack Straw: There is certainly a legal basis. Ultimately the adjudication would fall to the ECJ, but I think one fundamental difference is that the Luxembourg compromise is a political agreement and no more. It is about how the Union should operate in practice but it has absolutely no legal basis whatever, whereas this has a legal base, so I think it changes the terms of trade very significantly indeed. I am trying to think whether I remember witnessing in the European Council in the five years I sat in it to someone deploying the Luxembourg compromise, but others around the table are better informed than I am.

Q505 ***Lord Jay of Ewelme:*** Normally one uses the words as a threat to strengthen the negotiating hand.
Jack Straw: Yes.

Q506 ***Lord Blackwell:*** I accept the political impact is quite powerful, but I am just wondering whether in reality there are any legal teeth to this.
Jack Straw: I think the practical effect of the emergency brake will be stronger precisely because it has a legal basis, and that then means the Commission has to engage in the matter. Of course it will engage where the Luxembourg compromise is exercised, but it is a different degree of engagement. It is not a loosely drafted compromise going back to the 1960s, it is in the current legal base.

Q507 ***Lord Blackwell:*** So in the final degree it would be the ECJ, if it came to it, that would opt to it?
Jack Straw: Well, they would, but it is extremely rare for the ECJ to arbitrate over the decision-making process in the European Council. I wish them well! What happens in the European Council is that the pressure in the European Council is to seek agreement, or if there is not agreement at least to seek agreement about a form of words so that everybody can go home. No one should underestimate that pressure if you have been stuck in one of those airless rooms, as some people around this table have. Also, it is just the desire for the Union not to appear to be divided. Both arrangements have the same principle, which is to accommodate a particular and overriding national interest, as one of the Member States sees it. But as I say, the interesting thing now is that there is a legal base for it.

Q508 ***Lord Blackwell:*** Yes. The second specific, if I may, is that under enhanced cooperation one of the things which can happen is for a group of countries to go ahead with the European Public Prosecutor. Is it envisaged that a European Public Prosecutor would be eligible to execute a European Arrest Warrant?

Mr Norris: The starting point is that unanimity is required to establish a European Public Prosecutor. If that unanimity was not forthcoming and a number of Member States went and established a European Public Prosecutor just in relation to those states, then that development would not affect the non-participating countries. So what you could not have is a European Public Prosecutor being developed by nine Member States under the enhanced cooperation procedure and, assuming the UK was not part of those participating Member States, for the UK then to be affected by that development for a European Arrest Warrant.
Lord Blackwell: Thank you.

Q509 ***Chairman:*** Can we move to the question of opt-ins, which again you have already directed some remarks to, and can I ask first, in June 2004 Mr Browne, MP, set out the Government's policy for opting in under the existing Title IV Protocol and said that it was to review each proposed measure individually and to opt in when it is in the interests of the United Kingdom to do so. Is that policy likely to change?
Jack Straw: No, and one of the reasons it is unlikely to change is because Mr Browne, when he set out the Government's policy in June 2004, quoted the statement I made as Home Secretary in March 1999, so that seems to be a good base for this. I do not want to disagree with myself, although one is entitled to! The thrust of that was that we wished to cooperate in areas of justice and home affairs but maintain control of our own borders. I have already set out that we want to see cooperation. It is in our interests. There is a separate issue about border control where I believe, and so does the Government, that for reasons with which everybody here is familiar there are overwhelming arguments for us having separate border controls, but that does not stop very intense cooperation, including within the Schengen system.

Q510 ***Chairman:*** Can I then go back to the question of the flexibility given by the opt-in. You have already mentioned that there will be now an opt-in for policing and criminal justice, although at present subject to unanimity, and there will also be a right not to opt into Schengen building measures in areas where we do cooperate. At present we are bound to opt in, so that I think this Committee has identified as a change which gives greater flexibility. Is there any other point which arises in this context?
Jack Straw: I do not think so, unless either Rebecca or Kevan want to add one.
Mr Norris: I think the only addition is that it has now been put beyond any doubt that the opt-in applies to amendments to measures, which are amending measures that we are participating in, which we would argue is already the position under the Protocols, but insofar as there was doubt in that respect that has now been resolved, so that is quite clear.

Q511 ***Baroness O'Cathain:*** So in theory you can make a statement that you are always going to be opting out on that no matter what amendments are brought in, is that it?
Mr Norris: It will come to a situation where we opt in to a proposal which is adopted and, maybe a few years later, amendments are brought forward to that proposal which take the proposal in a direction that we would not support.

Q512 ***Baroness O'Cathain:*** So we could opt out?
Mr Norris: I am quite clear that we are not bound to participate in that amendment. So not only do we have a choice whether to opt into the original proposal but we also have a choice whether to opt into any subsequent amendment to that proposal.

Q513 ***Baroness O'Cathain:*** Although you have actually opted in?
Jack Straw: Yes.
Mr Norris: We have opted into the original, for example the European Arrest Warrant, but if there was an amendment brought forward to that measure which we did not support then we have a right not to participate in that amendment.

Q514 ***Baroness O'Cathain:*** I see, because earlier on you said that once you opt in you have had it.
Mr Norris: There are two different things.

Q515 ***Baroness O'Cathain:*** Yes, but this, of course, is due to the amendments because the thing changes?
Mr Norris: There are two cases. If we opt into 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. But if in two or three years' time a new proposal is brought forward to amend that measure, then the opt-in clearly applies and we again can decide not to opt in at that stage.

Q516 ***Lord Jay of Ewelme:*** But then the measure unamended would continue to apply to us, would it?
Mr Norris: Yes, it would continue to apply to us, unless the fact that we are not participating in the new amendment would render the original measure inoperable.
Jack Straw: This was the subject of very great argument in negotiating the relevant provisions of the new Treaty and some were suggesting that this would mean that wherever we exercised our opt-out in respect of an amendment to the existing measure we would pay a very high price, but I am satisfied that

that would not be the case and in fact the language used is such that the –

Q517 ***Chairman:*** Inoperable, I think was the word.
Jack Straw: Yes, it is inoperable, and also words to the effect that everybody has to work to accommodate all the Member States. But it would be if it was inoperable. That is a high test, in our view.

Q518 ***Lord Wright of Richmond:*** Do you draw any conclusions from our rather anomalous relationship with Frontex, which I think is classified as a Schengen building measure, and would the provisions under the Reform Treaty change that anomalous relationship?
Mr Norris: They will not. As you know, the provision under Frontex was that it is a regulation which was adopted to establish a European border agency. The UK was not allowed to participate on the basis that that is building on a part of the Schengen Acquis in which we do not participate, the external border part of the Schengen Acquis and the European Court of Justice said that in those circumstances the UK is not allowed to participate in the building measure. There is nothing in the Protocols which will change that position, so that will continue to be the case under the new Protocols.

Q519 ***Chairman:*** May I ask this question, Secretary of State: what about the practicalities of not opting in? I am afraid this is a slightly long introduction to the question, but if I can go on and say in relation to Rome I the United Kingdom did not opt in but was able to participate in negotiations and this Committee has on its agenda today a letter from your Under Secretary of State, Bridget Prentice, MP, recording the Government's assessment that the negotiations have led to a good outcome on many of the concerns identified and she says there will be a further consultation, including with this Committee, on whether to opt in now. There have been two other occasions in quick succession where the UK did not opt in, Rome III on choice of law in divorce and the proposal on maintenance orders. Last week in the European Parliament the British Vice-President, Diana Wallis, a supporter of close participation in Europe, said to us that not opting in with a view to negotiating and later opting in (as may be the case with Rome I, we wait to see) was, although it is expressly permitted by the Protocol, a one-off, non-repeatable exercise. Reading the transcript, she had in mind, as I understand it, Community goodwill and harmony, the ability to maintain cooperation and influence in other areas. In other words, she was suggesting that the UK's practical or at least its tactical freedom to refuse to opt in may be limited. Do you see it that way?
Jack Straw: I do not, as a matter of fact. I think Rome I is an interesting example of this. You have to make judgments on the merits of the case, in other words the draft instrument or the draft proposal. I do not think there is a rule here, but what I would say—and I was not aware that this had been said to you—is that I do not accept the conclusions which Mrs Wallis came to. Since becoming Justice Secretary in late June, I have been heavily involved in the negotiations to straighten out what is actually Article 13 of Rome I so that we are now in a position to opt into it, subject to the consultation which Bridget Prentice has set out. I think it is fair to say I know the EU and its institutions pretty well, but I have no sense whatever in the negotiations in which I was directly involved with the Commission, for example with Spain or France, that they resented the process which we were following, and here is why: first of all, we are self-evidently one of the three largest countries in the European Union, but in the field covered by Rome I we have a disproportionate weight because of the strength of our financial markets and all the instruments which are traded through London and other financial centres in the United Kingdom. Secondly, we wanted to see a situation where we could sign up to Rome I, but those from the legal industry will know that Article 13 was about which proper law should apply to deft instruments which have been assigned. The original proposal was one which was completely unsatisfactory to this country's interests and particularly those involved in these trades. There was no way we could have opted into it as drafted, or you could pretend that we were going to opt into it as drafted, but also what is significant is that other Member States realised that they had a common interest in us being part of the instrument, because had we not been part of the instrument—and it still may happen—and say they stuck to the original wording in Article 13, there is no question, in my view, that none of them would have ended up with a further competitive advantage over the European financial centres which were subject to Rome I. When I discussed this separately with the French and the Spanish justice ministers and had quite detailed discussions with them about what was wrong with it—and I have to say I could not understand what the merits of it were from their point of view either because it was going to lead in practice to huge uncertainty about what proper law would apply, and so on—they were in the same place as I was in wanting to reach agreement and trying to understand why we had a point of view. There was then further negotiation, which I think has resolved the matter in principle satisfactorily. That is a good example where I think the approach taken by the British Government—and it was not I who made the original judgments here—was absolutely correct. There may be other circumstances in which we judge

that the political market is going to operate in a different way and that it is sensible for us to get in and say that we are going to opt in. Then, depending on what the legal base is, we may have a right to apply the emergency brake, but as I say it is making judgments on the particular circumstances of the instrument. I certainly do not accept what was said, that this was a one-off, because there are plenty of further cases where our disproportionate involvement in the field of commerce, the financial business, means that the other states have got an equivalent interest to us in getting us within the instrument.

Q520 ***Chairman:*** Can I just ask one further question then? That deals with the situation, assuming the UK is successful in the negotiations and a satisfactory result emerges. Suppose the negotiations fail to satisfy United Kingdom's concerns and as a result the refusal to opt in is maintained. Is there any problem about that? Do you see any disadvantage or ill-will resulting from that?
Jack Straw: People always talk about ill-will and it is sometimes said, and I have had this put to me myself, that I ought to concede a point because otherwise there will be ill-will. I then say, "Do you think the officials of country X or country Y would be saying the same thing to their ministers, or would they be saying, 'We should dig in. We have got our national interest'?" I am afraid to say I take the rather crude approach of saying that we are going to dig in. That sort of point is normally put to you by people who want you to shift and they will come up with any argument to get you to shift. There are plenty of arguments the other way. My own sense from working within the European Union over these years is that you have to have a serious approach. You have to show you are committed to the purpose of the institution. You do not think that anybody who lives across the Channel has got two warts and a tail and gets up in the morning to try and worst the United Kingdom. I do not think any of those things. Then you develop good personal relationships with people and of course you are willing to help them to where they have a national interest. Where it is second to the United Kingdom and they have a national interest, you can help them, and I think provided you do all those things doing what we have done in respect of Rome I can be—can be—a perfectly appropriate and potentially successful approach, but other approaches may also be appropriate.

Q521 ***Chairman:*** I perhaps might mention, although it is a little outside the scope of what we have been looking at in this inquiry and I do not think we should go into it too deeply, one other point mentioned by Mrs Wallis was a feeling of concern as a British European MEP about situations in which they were participating (in her case I think as Rapporteur) on a proposal where the United Kingdom had not in fact opted in, a sort of West Lothian question in the European Parliament.
Jack Straw: I think in a sense . . . No one has taken this point against us, that in those situations our MEPs should not take part in the vote. What we would be seeking to do in those circumstances is to provide our MEPs of all parties with briefing about how, although we were not opting in, they could make the instrument more satisfactory because it is bound to have some kind of impact upon us. It would be very, very odd, I think, to say that the Members of the European Parliament, who are elected by voters, should have their ability to vote on individual instruments determined by the position of the government of their host country, with which they may have profound disagreements. I am not bothered about that argument.

Q522 ***Lord Jay of Ewelme:*** It was not just the voting but that there might be a disposition not to elect, as Rapporteur of the group or a member of the committee, into a measure or an area on which the UK was opting out. I think that was the new departure in the European Parliament.
Jack Straw: If I may say so, My Lord Jay, that is a good point! You would expect me to say that.

Q523 ***Baroness O'Cathain:*** I think Baroness Ludford also had the same view because she was in a similar position.
Jack Straw: Yes. In the world in which we are living we are not signing up to this Treaty with the idea that we are going to opt out of all the instruments. We will be signing up to it with the idea that we are going to cooperate to the maximum extent consistent with our national interests and we will opt into matters. So I think it is going to be less of a problem than she anticipates.

Q524 ***Chairman:*** Can we move on to national parliaments. Sir David Edward, the former British judge on the European Court of Justice, as well as the Law Society of Scotland have highlighted the need for close consultation with devolved institutions regarding both the exercise of the opt-in and the monitoring of subsidiarity. May we ask what plans the Government has to ensure that such consultation takes place?
Jack Straw: My Lord Chairman, there are very well established arrangements for cooperation with the devolved administrations at the moment and the principal machinery for that is the joint ministerial committee on Europe, which is chaired by the Foreign Secretary or in his or her absence the Minster for Europe of the day. The representatives of the devolved administrations attend that. There are also

good and satisfactory arrangements for resolving most matters by correspondence in the normal way. They seem to have worked and I hope they continue to work. In addition to that there is a longstanding protocol which I think was originally devised at the time of the devolution settlement in 1998/9 about matters such as the attendance and speaking of ministers of the devolved administrations. It is done on a case by case basis but at the last two JHA Councils I have attended the Scottish Executive has asked if one of their Ministers, in fact the Solicitor-General for Scotland, can attend. He has and he has been fully involved in the briefings. On one occasion, which was about suspended sentences, which has always been a matter for devolved jurisdictions, because he had a direct interest in it he spoke on the matter.

Q525 ***Chairman:*** Just to take the examples of Rome I, Rome III and the maintenance proposal which we were discussing, there was no problem about differences of view between different parts of the United Kingdom about that?
Jack Straw: I have certainly received no information about that.
Ms Ellis: No, not to my knowledge.
Jack Straw: When I told the Council that we were minded to opt into Rome I, subject to all the things we are having to do, the Member of the Scottish Executive was in the room at the time and he fully participated in the briefing, and so on.

Q526 ***Baroness O'Cathain:*** Are you satisfied that the others—obviously Scotland seems to be deeply involved, but Scotland does take its responsibilities quite seriously—what about Wales and Northern Ireland? Do they actually have any locus in this and do they regard it as important?
Jack Straw: Because the Wales Act is not a separate jurisdiction at all, and although Northern Ireland is it has the same common law base as England and Wales, there are fewer issues that arise. In any case, at the moment justice is not a devolved matter in Northern Ireland, so I am not aware of any of these issues arising. For Wales part of the settlement is that justice, home affairs, policing, all of this, really the whole dossier within the JHA field is covered by the United Kingdom Government.

Q527 ***Baroness O'Cathain:*** Is that likely to continue, because there are moves obviously to give them more devolution?
Jack Straw: The British Government has no plans to change the devolution settlement for Wales. There are some provisions in the latest Wales Act.

Q528 ***Baroness O'Cathain:*** Yes, I saw them.
Jack Straw: But the overall sentiment is that it should be a single jurisdiction, and I can explain why. One look at the border between England and Wales gives one an appreciation that it is a rather different kind of border than that set by Hadrian's Wall, I can tell you. It would be immensely complicated.
Baroness O'Cathain: Offa's Dyke!

Q529 ***Chairman:*** I think we will not cross that border! Can I ask then—and I hope we can deal with this quite quickly in order to get on to the Charter—on the transitional provisions what does the Government in fact anticipate will happen regarding re-negotiation or conversion? Does it anticipate that there will be large-scale conversion by amendment in order to bring existing Pillar 3 measures within the jurisdiction of the European Court of Justice, and in that context what does the Government understand constitutes an amendment under the Protocol?
Jack Straw: My Lord Chairman, as you will be aware, under the terms of declaration 50 for the Protocol, the Commission and Council in the European Parliament are invited to make rapid progress in repealing and replacing existing Third Pillar measures to bring them under a First Pillar legal base. It is unlikely to be able to repeal or replace all of those, but we expect that the Commission will table measures repealing some of the more significant existing Third Pillar measures. For example, this could include the European Arrest Warrant or the Eurojust Council decision. It has been the subject of informal discussions with the Commission, including discussions I have had with Commissioner Frattini, and I think they are going to approach this in an obvious way and they will deal with the areas which are most significant and maybe most in need of amendment or of coming early to the First Pillar legal base, because they all come into the First Pillar legal base after five years in any event. I want the British Government out of the JHA departments to be heavily involved in that because one of the problems with some of the existing instruments is because a Third Pillar is in different language and there may be ambiguities in the language which is satisfactory in the absence of any ECJ jurisdiction but not with that becoming a reality. Do you want to say any more on this, Rebecca?
Ms Ellis: No.
Jack Straw: Then apparently it was the right answer!
Chairman: Thank you very much.

Q530 ***Lord Blackwell:*** Can I just ask, one of the consequences of moving into the First Pillar, as I understand it, is that the ECJ has jurisdiction?
Jack Straw: Yes, that is the consequence.

Q531 ***Lord Blackwell:*** Does the Government have any concern about that applying to any existing measures?
Jack Straw: This was the subject of very considerable negotiation. There will come a moment when there will be a number of measures, more important ones, which have been amended, because they have been amended or put into the First Pillar, which we can make judgments about those, and they almost certainly will be amended. On the rest, those which are still extant after the five years, they will get imported into the First Pillar and we have a power to opt out of the lot.
Mr Norris: Yes, that is right. There is a five year transitional period, after which ECJ jurisdiction will apply, but six months before the end of that period the UK can opt out. It can decide, rather than accept ECJ jurisdiction, to opt out of the existing Third Pillar measures.

Q532 ***Chairman:*** We can then opt back into individual ones, can we not, under Article 10(5) of the Protocol?
Mr Norris: Exactly, yes.

Q533 ***Chairman:*** And there is an incentive to do so in the sense that one might bear some financial consequences if we opt out of the whole lot?
Mr Norris: Correct.
Jack Straw: What this means, My Lord Chairman, is that we have an incentive to go through it.

Q534 ***Chairman:*** The amendment process?
Jack Straw: The whole lot, to identify those where it frankly does not matter if they are just imported into the First Pillar and make sure that it is those which are actually in the unamended list after five years.

Q535 ***Chairman:*** Is there going to be a problem? I asked about the meaning of the word "amended" because on the face of the language any amendment in the next five years automatically brings it, so to speak, under the jurisdiction of the European Court of Justice however minor, is that right?
Mr Norris: I think that is right, yes, but of course it will only bring it within the jurisdiction of the ECJ vis-à-vis the UK if we opt into the amendment.
Chairman: I see, yes.

Q536 ***Lord Jay of Ewelme:*** Do you see circumstances in which they decide, on something like Eurojust, that it was important and they wanted to bring it under the new arrangements, so they would repeal the existing measure and then just put forward precisely the same one but under Community arrangements, i.e. with the ECJ operating?
Jack Straw: Against earlier ECJ jurisdiction, as it were?

Q537 ***Lord Jay of Ewelme:*** I am thinking of something which is now under the Third Pillar but which, rather than waiting for the five years or amending it, they decide simply to repeal it but then introduce precisely the same measure except for the change in institutional arrangements. So the question for us would then be, do we opt into something which on the substance is exactly the same as now, which we are opted into, but it is just the institutional arrangements that are changing?
Jack Straw: I think if that were the case—and I assume the argument for that, rather than just leaving it for the five years, would be that there was a desire to have ECJ jurisdiction at an early stage—I cannot see any other practical advantage of that if it is the same instrument. It would depend, Lord Jay, on the case, but if we had been opted into the instrument and it had not been causing us any problems and we were signed up to it, I think there would have to be a very significant case made to opt out of it at that stage. I cannot think of an example.
Lord Jay of Ewelme: Thank you.

Q538 ***Chairman:*** May we move on to the Charter of Fundamental Rights? The first question is a general one: what impact, if any, will the new Article 6 of the Treaty of the European Union declaring the binding nature of the Charter of Fundamental Rights have?
Jack Straw: That Article obviously has to be read in the context of our Protocol and the Protocol, as I said in my introduction, My Lord Chairman, is very clear in not extending the ability of the ECJ to find that the laws, regulations, admin provisions, practice or actions of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles which it reaffirms. It goes on to add extra belts and braces to that.

Q539 ***Chairman:*** Can I just follow that up? The Charter, and in particular I think the recitals to the Protocol repeat it, does no more than reaffirm rights and principles which already apply at some level. If they already apply, then it might be said, might it, that it is not the Charter which is extending the ability of the Court of Justice of the European Union, it is the already existing rights and principles which we should worry about, or consider at any rate?
Jack Straw: It is a nice point. Rebecca, go on.
Ms Ellis: I think the Court already makes reference to the Charter in its decision-making and we do not expect that to change. Article 6 of the new Treaty in the European Union will essentially set out very clearly what effect we expect it to have. It will make the Charter legally binding but will not change the level of protection which is afforded for particular rights. The rights which exist already in existing sources are things which are already justiciable in a

number of different ways depending on what that particular source is.

Q540 ***Chairman:*** Is there this point, that we now have in the form of the Charter a legally binding statement as to what the existing rights and principles are and that in that sense it would now be difficult to argue in the European Court of Justice or anywhere that in fact those rights and principles are not in existence?
Ms Ellis: To what extent would we want to argue that they are not in existence? Insofar as they derive from existing sources they are in existence. As the explanations to the Articles make clear, some of the provisions are principles which are intended to guide the legislature and the ECJ when it is looking at that sort of legislative measure or implementation by Member States.
Jack Straw: I understand the point you are making, My Lord Chairman. To a degree it can be argued that these are the reaffirmation of rights which already exist, but there was a substantial debate about whether the original decision of, I think, the Berlin Council in 1999 to have a political declaration, a Charter, which was how this started, should be translated into a document which had some legal base. One of the reasons why we resisted that and then got the Horizontal Articles and now this Protocol was because of anxiety that it was going to significantly extend rights and also adversely affect the UK's interests. Only time will tell and who knows, the ECJ may decide to follow down the rabbit hole which you have set and see where it ends up! My sense is that this will provide us with very significant protection. It is quite interesting that there has been far less attention paid and fears raised about the Charter this time round with the Protocol than there was last time. Maybe if the Horizontal Articles provide a lot of protection they would be quite difficult for people to understand.

Q541 ***Chairman:*** Just one follow-on. Is it the position that that the Protocol was necessary, or was it simply a precaution?
Jack Straw: One way of putting it, which indeed was Rebecca's at my briefing meeting, is that it puts beyond doubt what should have been obvious from other provisions, which I thought was really good.
Baroness O'Cathain: That is very neat!

Q542 ***Lord Bowness:*** Lord Chancellor, is it not the case, having personally sat through the drafting of this Charter of Fundamental Rights and the Convention, that in fact this is addressed in the institutions of the Union and the Member States only when it is implementing Union legislation, which seems to me to be an important point to make? You referred to the Horizontal Articles which were achieved at your Berlin meeting. I think Lord Goldsmith, as your Government's representative at that Convention, really fought all other Member States to achieve the original Horizontal Articles and the provisions in those Articles which refer to the rights being applied in accordance with national law. Maybe you would not agree, but perhaps the Protocol is a little superfluous given that all that was there in the first place?
Jack Straw: Just picking up on the point I made, Lord Goldsmith did a brilliant job. You have said we have got Horizontal Articles to protect people, and this was raised with me by constituents. When you start talking about Horizontal Articles people think you have gone bonkers, basically. They have not got a clue what they are about. Then you start to read bits of them out and it gets worse! So what this does is it pins it down in language that anybody can understand. It really is unambiguous language. I can read this out at a party meeting in the town centre of Blackburn and where I get questioned about this, let me say, raised at meetings I pull it out of my pocket and say, "This is what it says and I will get you a copy afterwards," and people will be reassured. It is a possible point to answer as to whether or not this provides more protection than the Horizontal Articles alone would have provided had they been the only protection in force. I think it just makes it clearer and less likely that we will be under attack in this area.

Q543 ***Lord Burnett:*** I remember going to a dinner in 1999 celebrating the emasculation of the Charter by Lord Goldsmith. It has obviously come back. It would be interesting to hear from you, Lord Chancellor, the Government's reasons—and I do not disagree with the reasons for the Protocol and maybe staying out of the Charter, but could you list for us the reasons why the Government really wants to sideline or stay out of the Charter?
Jack Straw: First of all, because it started life as a political declaration. That was the basis on which it was sold to people in Berlin, and so there was a very significant resistance within British Government circles to having what was sold as a political declaration later on turned into part of the legal instruments of the Union. Secondly—and this is a point away from our basic framework of thinking in this country, it collides with Continental thinking and particularly the framework of law—many Continental jurisdictions are used to having declaratory statements in their constitutions and in a sense a hierarchy of what is enforceable and what is not, and a sense by everybody, including of course their higher courts, of the fact that different parts of their legal instruments have different force. That is not the case in common law systems and we are much more literal and we look at the words on the page and

think, "Hang on a second. How will that apply in these circumstances?" So there was anxiety about that and that was why we first got the Horizontal Articles and now the Protocol. I am aware, Lord Burnett, that there are people right across the political spectrum in the United Kingdom who say, "How can you object to this part, this right?" or "How can you object to that right?" The answer is that in principle many of the statements made are either very good or time-prosaic, but there is a separate issue about whether, as it were, these should become part of our law on top of the Human Rights.

Q544 ***Lord Burnett:*** Do you think it is confusing, for example?
Jack Straw: Yes.

Q545 ***Lord Burnett:*** Do you think there could be competing decisions from different courts and things like that?
Jack Straw: Yes, all of that.

Q546 ***Lord Burnett:*** I do not disagree with the recent kicking it into touch, in fact I strongly support them. I would like not to see this Charter at all, but nevertheless we are landed with it!
Jack Straw: We are more or less on the same side! You have got to explain when negotiating history, as they say, about the Charter and we recognise that other Member States are in a different position from us. Then we got the Horizontal Articles, and now we have got the Protocol. Do I think this has been an exercise worth the effort by the European Union over the last ten years? No. Do I understand why the exercise has been undertaken? Yes.

Q547 ***Chairman:*** You do not sound too convincing on that latter point!
Jack Straw: I have never been convinced about working the Charter into these instruments. What I have, however, been convinced about is that if others wanted it we should accept it and then we should manage it, and we have managed it satisfactorily.

Q548 ***Lord Blackwell:*** Could I just ask a specific question on the Protocol? The purpose of the Protocol, as I understand it, is to limit the opportunity for the European Court to adjudicate on the Charter in respect of the UK. The limitation here is constrained to laws which are provided within the UK national law. I take it that since the UK will have enacted the Treaties and under those Treaties provided the European Union with competencies, then the exercise of those competencies is by definition provided for under UK national law. Therefore, since the ECJ is the interpreter under these Treaties of the competencies, the ECJ ultimately does in fact have power to decide that under UK national law we have provided a certain competence and that the Charter applies to it?
Jack Straw: Could I just say that this Protocol would be worthless if the only laws to which it referred were laws which were completely outside the activity and competence of the European Union. How would the issue arise? An argument about the right of way of a footpath, or something. I think it means what it says.

Q549 ***Lord Blackwell:*** But any comment to the EU is provided for *de facto* by UK national law?
Jack Straw: Yes.

Q550 ***Lord Blackwell:*** So the wording is meaningless?
Jack Straw: No, I am taking the opposite point about the wording. A lot of our laws, regulations, administering provisions, practices and actions (which is what it says) derive from decision-making made inside the European Union and relate to the overall competence of the European Union as translated by us. Those are the matters which go before the Courts of Justice. So it has to refer to matters within the European Union's competence, otherwise it is worthless, and what would have been the point of us wasting time in negotiating this if it were not to refer to the activities of the European Union as we put them into force in this country in terms of laws, regulations, administering provisions, practices and actions.
Ms Ellis: I absolutely agree!

Q551 ***Lord Blackwell:*** Just to be clear, if the ECJ decides that the competence the European Union has in, for example, social policy across the European Union allows it to interpret one of the passages of the Charter in respect of that competence and that the ECJ decides that competence does apply to the UK, that is *de facto* covered, the fact that we have not separately legislated for it in national law? It is part of UK national law by virtue of being an EU competence as defined by the ECJ?
Ms Ellis: I think the language of Article 1 is quite clear and we certainly have not had any doubt about its meaning. The inter-relationship between European legislation and what is UK law by virtue of it having been registered at European level is of course a somewhat vexed question, but I think we are happy that this provision covers what it needs to cover in respect of UK laws and it is says "laws, regulations or administrative practices".

Q552 ***Chairman:*** Can I just identify then the three types of provisions which are identified in the Charter as either rights or principles, and they are obviously the fundamental rights set out in the European Convention on Human Rights, which we are familiar with, the fundamental rights resulting from

constitutional traditions common to Member States, which is in the existing Treaty, and now in the Charter a number of other rights derived from international treaties in the main. What I want to ask is about the distinction between rights and principles, which is something Lord Goldsmith has spoken about in the past. Rights are obviously rights and the three categories of rights which I have mentioned are identified in the Horizontal provisions you have mentioned, Secretary of State, and the Horizontal provisions go on to include a new provision, Article 52(5), which tells you what the effect of principles is. These require to be implemented. They are not axiomatically enforceable. They are judicially cognisable only in the interpretation of Acts of the Union of Member States and in their ruling on the legality of Acts. So there is a distinction; which is clarified. The question I want to ask is this: does the Charter help us with any precision as to how you apply the distinction between rights and principles, what are rights and what are principles? We find in the explanations a few examples of principles, and apparently the explanations took the view that some of the social and economic rights might be rights rather than principles, so that the Protocol may have a bite there, but otherwise we do not find much of an explanation. Is that a weakness in the Charter itself?
Ms Ellis: We do not think so. Looking at the source of the rights combined with the explanation, it is clear which are rights and which are principles and the explanations are specifically referred to in Article 6, so that due regard must be had to them.

Q553 ***Chairman:*** It is not a comprehensive explanation. In fact there are three examples of principles given in the explanations relating to rights of the elderly, persons with disabilities and environmental protection, and then there is the one I mentioned where it is suggested that some social and economic rights are not principles, which I think would be contrary to what Lord Goldsmith said in 2000, but may be redressed or answered by Article 1, paragraph 2, perhaps. That was the point I wanted to press. Except perhaps for lawyers, it is not very helpful to have uncertainty.
Jack Straw: I agree with that, and we thought we would try to deal with it—not so much the uncertainty but the complexity. That is one of the benefits of the Protocol.
Ms Ellis: I think Article 1, paragraph 2, is certainly helpful in pointing to Title IV and the explanations I think are a very good source of guidance as to the meaning of these particular rights, but the fact that something is not identified as a principle does not necessarily mean that it does not contain at least an element of principle.

Q554 ***Chairman:*** It was presumably found impossible, either in 2000 or last year, to identify which were rights and which were principles?
Ms Ellis: I am not sure –

Q555 ***Chairman:*** Otherwise, more than examples would have been given, would they not? They would not just have contended themselves with instances in the explanations if this had been an easy distinction?
Ms Ellis: I think we are happy that the instances referred to in the explanations are examples rather than being a comprehensive list.

Q556 ***Chairman:*** Are there any follow-up questions? Secretary of State, unless there is anything more that any of you wishes to say, that has been extremely helpful for our purposes. We are most grateful.
Jack Straw: Of course.
Chairman: If there is anything you wish to add, having seen the transcript, please do.

Written Evidence

Memorandum by the Brethren Christian Fellowship

We are thankful for the opportunity to provide this submission in response to your Lordships inquiry.

Before commenting in detail perhaps we could refer you to our Mission Statement on Europe which is appended.

The four founding freedoms of the Treaty of Rome have provided the conditions and impetus for the economic stability and prosperity of the Community through the Single Market Programme. The single currency has contributed to this success even though Britain has not yet become part of the euro-zone.

The "pillar" arrangement of the Maastricht Treaty has been instrumental in maintaining the essential national interest of individual governments in the sensitive areas of Common Foreign and Security Policy and Justice and Home Affairs.

The present Reform Treaty now completes the process started with the Amsterdam Treaty bringing freedom, security and justice under Community competence, by involving the European Parliament with the Council in the co-decision procedure. This is a great disappointment. At best, such an arrangement can only be arrived at by the lowest common denominator; hence British protections and specific needs may be lost. With the further extension of QMV and the prospect of further involvement by the European Court of Justice in the sensitive areas of freedom, security and justice it will be at the expense of national sovereignty and the very fine influence of British courts.

We are thankful that there is still provision for the British Government to choose whether or not to participate in measures affecting these areas; but are concerned that the consequential increased powers of the European Court of Justice to intervene will increasingly limit national government options. No one can anticipate the implications of the collapse of the third pillar.

One particular concern that we have is the area of family law measures—so many of which are derived from the Christian heritage of Britain, established over centuries, and thankfully still protected by consecutive British Governments. We fully support the concept of mutual recognition between Member States in this area, but we have already observed that elsewhere in 2005, (Response to Commission Green Paper on Divorce) that in the move to address the problems of divorce laws in cross border connections, there is always the tendency for the "creep" factors to come into play.

The uncertainty created by the ECJ Case 176/03 involving criminal sanctions in the event on environmental damage, continues to provide evidence of the ECJ's outlook in extending the boundaries of Community competence. The extent of the ECJ's powers as the final arbiter of Community law is proving to be without bound. If this trend continues, we fear what the consequences may be of the ECJ's judgement in the whole area of freedom, security and justice.

29 November 2007

Memorandum by the Centre for European Reform

In response to some of the specific questions in your call for evidence:

— The move to co-decision/QMV in JHA + the application of the Charter in JHA: In the run-up to the original agreement to apply QMV/co-decision in JHA, the phrase "faster, more accountable decision-making in JHA" was used to the point of cliche by officials selling the benefits of this move. In reality, QMV may make decision-making faster, but only in the Council—co-decision with the parliament could well slow things down and will certainly change the dynamic of JHA decision-making. Co-decision is likely to water down security-based EU measures in favour of safeguards to ensure they do not adversely affect innocent citizens. We think this is a good thing: the speed of JHA

decision-making is not nearly so important as the quality of the decision taken. Recent concerns about the efficacy of recent EU legislation banning liquids on flights are a good example of this: the legislation impacts millions of Europeans day-to-day; yet the governments' assertion that the legislation as enacted is effective and proportionate to prevent the smuggling of explosive substances on-board planes was not properly tested prior to adoption. This is bad policy-making.

The charter is also likely to add grist to the mill of civil liberties activism against security-based EU measures since it applies to EU law and since the parliament will be empowered to take cases based on its provisions. Therefore it should be possible to establish a proportionality test, based on the charter, for EU measures that impact on the liberty of the citizen. However, the treaty also clearly limits the Unions power to determine internal security conditions in the Member States in two main clauses: one dealing with the power of the Court's rulings over measures that impact national law enforcement and another on the power of the EU in general over national security.

— The special opt-in provisions for Britain and Ireland, now covering the whole JHA area: We agree that this was the "least worst option", reflecting political and legal realities which have often prevented agreement on JHA initiatives in the past. Our view is that these are best acknowledged rather than ignored when co-operating in such sensitive policy areas. We think that in practice Britain and Ireland will opt into most measures to tackle terrorism, crime and illegal migration anyway. We also think there is little danger to either country from the clauses stipulating that they must bear costs if their non-participation renders some forms of co-operation inoperable. However, both countries are likely to remain aloof from measures to harmonise court procedures in the criminal law field. Given that many other EU partners see internal security co-operation and the harmonisation of court procedures as necessary complements, there is a possibility that this could eventually provoke protests from other EU countries. If the rest of the EU decide that non-participation by the main common law countries in EU legislation guaranteeing defendants rights or harmonising court procedures renders them unsuitable partners in the operation of instruments like the European arrest warrant then this is a very real problem. However, it is our view that Britain and Ireland already guarantee a high degree of protection for defendants in court proceedings, including for non-citizens and that, in most cases, these are amongst the highest in Europe. Other EU partners will no doubt exert pressure for Britain and Ireland to opt-in to such legislation but, in our view, this will stop short of isolating either country from measures to strengthen internal security, such as the EAW.

— Eurojust and the establishment of a European public prosecutor. In the past we have been unsure about proposals for a European public prosecutor (see piece below from 2004). While we are in favour of the treaty provisions to strengthen Eurojust, we do not feel that the case for an EPP has been adequately or clearly made, and worry that it may politicise Eurojust in a way that is unhelpful. We would prefer to see Eurojust develop more incrementally and continue to build on an already impressive reputation for promoting and co-ordinating effective judicial co-operation. Based on their clear opposition to the idea of an EPP, Britain and Ireland could stand to lose valuable co-operation through Eurojust if the unit develops into an EPP and they are forced to opt out. But given that the treaty only allows for the possibility of an EPP and that such an office can only be established by unanimity as well as being covered by the "emergency break" procedure, we feel adequate safeguards exist to protect those countries that do not wish to agree to such a move at present. We are, however, worried that the Commission has not yet understood the need to make a clear evidence-based case for an EPP, based on recent remarks from Commissioner Frattini that he intends to push for the establishment of the office as soon as the treaty provisions enter into force.

— The application of the passerlle provisions in the area of JHA. We are unconcerned about the inclusion of the passerelle clause in general. Passerelles have existed in the treaties since the Single European Act and have only been used once, to switch decision-making on immigration and asylum policy to QMV in 2004. We believe this was a necessary and welcome move and has improved the institutional environment in which these decisions are made. In Britain, the debate over the general passerelle clause in the Lisbon (reform) treaty studiously ignores the fact that if member-states do choose to switch a particular area of decision-making to QMV from unanimity under the clause, such a decision must first be taken unanimously and, even then, any one national parliament can block the move. The clause cannot be used for issues with military implications (these may be relevant in the area of counter-terrorism) We feel these are sufficient safeguards and the clause ensures a desirable degree of flexibility into the treaties that will hopefully delay a return to treaty-writing in the future.

We would also point out that the threshold for the number of national parliaments required to trigger the "orange card" procedure to block unwanted EU legislation is lower in the JHA policy area (a quarter as opposed to a third for other policy areas), something often over-looked in the UK debate.

3 December 2007

Memorandum by Professor Damian Chalmers, London School of Economics and Political Science

The Move to Qualified Majority Voting and Co-Decision in Areas of Criminal Law and Policing

Considerable evidence exists to suggest that the differences between qualified majority and unanimity voting in the Council is, in the round, overstated. Unanimity voting does not appear to slow down the pace of legislation or prevent salient or contentious measures from being adopted (Golub, "In the Shadow of the Vote? Decision Making in the European Community" (1999) 53 *International Organisation* 733–64; R. Schütze, "Organized Change towards an 'Ever Closer Union' Article 308 EC and the Limits To the Community's Legislative Competence" (2003) 22 *Yearbook of European Law* 79). This is almost certainly due to the culture of consensus and compromise that operates in the Working Groups that precede the formal vote (Wallace *et al*. "When and Why the EU Council of Ministers Votes Explicitly" (2006) 44 Journal of Common Market Studies 161). Nevertheless, there are occasional measures where a member State would wish to exercise its veto, which it will not be able to do where there is qualified majority voting.

The British position with regard to the new provisions in the Reform Treaty is here not a completely easy one. On the one hand, the "opt-in" secures a situation whereby EU legislation cannot be imposed on the United Kingdom against the British Government's wish. The United Kingdom will simply not participate. On the other hand, the reality confronting the British Government is that most choices are a little more nuanced. It 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 of Title IV on immigration and asylum is that the British Government has usually adopted the former strategy. However, this has been against a backdrop of predominantly unanimity voting in these fields. Other governments are aware of the shadow of the British veto and this provides incentives for them to listen, whilst the British Government is aware that if the discussion does not go its way it can always not participate. This dynamic is not available where there is qualified majority voting. There is no shadow of the veto and other governments have less incentive to listen as they can argue there is always the possibility of British non-participation. There is, therefore, a real risk of diminution of influence.

The other danger of the opt-in is in regard to the British exercise of the emergency brake provision. Probably, the legal availability for the British Government to refer a matter to the European Council is there. The political costs are, however, significant. Other States might challenge this before the Court of Justice on the grounds that the opt-in somehow restricts this right as if the matter was so fundamental right, the British Government could choose not to act. As the action would be something that would not be taking place on British territory, there would also certainly be a frosty reception in the European Council.

The use of co-decision also raises the question of the new role of the European Parliament. Experience suggests that there will be very little exercise of the veto by the Parliament but that it will successfully introduce significant numbers of amendments. The degree of influence enjoyed by the European Parliament in this can be overstated. Many are put at the behest of national governments; some are trivial; and many are accepted only in a qualified form by the Council. That said, the expression in freedom, security and justice is that the European Parliament does, at times, see itself as the guardian of civil liberties against the Member States and the Commission. There has thus been litigation about both PNR and the Family Reunification Directive (Joined Cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-4721; Case C-540/03 *Parliament v Council* (family reunification) [2006] ECR I-5769. This could translate into greater use of the veto in this field than elsewhere.

Provisions on Eurojust and the Creation of a European Public Prosecutor

The bringing of Eurojust and Europol within supranational structures will make them more accountable to both national and supranational actors. They will be able to be taken before the Court of Justice, which is not currently the case, and subject to greater evaluation by both the European Parliament and national parliaments (Article 69h1 TEU). This is to be welcomed. In terms of possible concerns about greater intrusion, the new Article 69h(1) TEU makes clear that Eurojust's mission is to support and strengthen cooperation

between national investigating and prosecuting authorities. Its role is further confined by the new provision that internal security is exclusively the responsibility of the Member States. That said, the duty of cooperation and assistance required of national authorities may be stronger than is currently the case. Such a duty does apply currently in the third pillar (C-105/03 *Pupino* [2005] ECR I-5285), but it is arguably not as strong as the duties under Article 10 EC, which will probably apply on ratification of the Reform Treaty. In particular, Member States are required to assist EU institutions to meet their obligations under the Treaty. This requirement could be interpreted as tempering the degree of discretion national authorities currently have with regard to joint investigations, duties to provide information and Eurojust requests to carry out investigations on their territory.

The Legal Base For Criminal Measures

The current point of contention is that Article 47 TEU was used by the Court of Justice to expand the EC Treaty over the other two pillars in Case C-176/03. This will no longer be possible because the new Article 1 TEU gives equal legal value to all parts of the Treaty. The test will therefore be whether the predominant aim and content of a measure falls within a particular legal base (the current test within the EC pillar). This will undoubtedly open the question of whether criminal legislation currently adopted under the EC pillar (eg firearms, money laundering, transport offences) should now be given a different legal base, namely Article 69f TEU. Indeed, the new Article 69f(2) TEU suggests this to be the way forward by providing a procedure for areas currently subject to harmonisation measures. For many governments, subject to my comments above, there may paradoxically be an attraction to this. It allows the use of the emergency brake procedure and gives the British Government the possibility of non-participation.

The Court of Justice and the Third Pillar

I would refer to my oral evidence to the House on this point. Research carried out by myself in 2000 suggests that the policy fields in which there is both heavy use of EC law by national courts and use of the preliminary reference procedure to be very limited indeed (Chalmers, "The Positioning of EU Judicial Politics within the United Kingdom" (2000) 23 West European Politics 169). Most EC law is market regulation and, typically, these fields do not involve significant judicial activity. This is not true of the new Title IV—immigration, asylum and crime. These are the very heartlands of national judiciaries, and one would expect in due case significant deployment of EC law in national courts in these fields and considerable references. This may well change significantly the profile of the docket of the Court of Justice and perceptions of it. High-profile judgments in these fields will inevitably be highly contentious. There is also a danger because of the sheer quantity of judicial activity in these fields crowding out other fields of law, particularly as a priority is given to these fields via the requirement that a precedence be given to references where a party is in custody.

20 November 2007

Memorandum by DG Justice, Freedom and Security, European Commission

The move to qualified majority voting and co-decision in areas of criminal law and policing

The move from unanimity to qualified majority voting and co-decision will provide a higher degree of efficiency and legal certainty and will improve accountability and democratic control as the European Parliament becomes more directly involved.

Qualified majority voting and co-decision will be extended to legislation concerning police and judicial cooperation in criminal matters (except for operational police cooperation and the European Prosecutor).

The emergency brake and flexibility procedures in criminal law and policing

If a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council, in which case the legislative procedure is suspended. After discussion, and in the case of a consensus, the European Council shall—within four months of the suspension—refer the draft back to the Council, thus terminating the suspension of the legislative procedure. Within the same time-frame, if the disagreement persists, enhanced cooperation may be established if at least nine Member States wish to do so.

Provisions on Eurojust and the creation of a European Public Prosecutor

According to the Treaty, 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 shall determine Eurojust's structure, operation, field of action and tasks.

The Treaty also allows for the establishment, from Eurojust, of a European Public Prosecutor, responsible for investigating, prosecuting and bringing to judgment perpetrators of, and accomplices in, criminal offences against the Union's financial interests. This would require a regulation adopted by the Council acting unanimously with the consent of the European Parliament. Its powers may also include serious crime with a cross-border dimension if the European Council so decides by unanimity.

The special arrangements for family law measures and the family law passerelle

Measures concerning family law will not be subject to qualified majority voting. This is an exception from other judicial cooperation in civil matters with cross-border implications. Nevertheless, a *passerelle* provision states that, by unanimity and after consultation with the European Parliament, the Council may decide to apply the ordinary legislative procedure to those measures. However, the proposal for such a decision has to be notified to national parliaments; if a national Parliament makes known its opposition to this draft decision within six months of the notification, the decision shall not be adopted.

The operation of the opt-ins contained in the Schengen Protocol and the Protocol on the position of the UK and IRL in respect of the area of Freedom, Security and Justice

Under the new Protocol on the position of the United Kingdom and Ireland, the UK will maintain and even extend its op-outs. In particular, the UK's exemptions are extended to judicial cooperation in criminal matters and police cooperation, whereas currently they exist only for asylum, immigration and civil law (Title IV of the EC Treaty).

At the moment, once the UK has opted into a measure, it must also accept subsequent amendments. Under the new Treaty it seems that the UK may decide not to opt into a subsequent amendment. However, the Council may decide that the UK no longer participates in the original measure if refusing the amendment makes that measure "inoperable".

The Council may also decide on financial consequences if the UK leaves a cooperation measure in which it has participated before. This should not be seen as a penalty against the UK but as a measure to deal with the "necessary and unavoidable" financial consequences of the decision taken by the UK.

If the UK leaves an existing cooperation, the new provisions guarantee it the full right to accept the same measure later at any subsequent moment.

The new Treaty will amend the Schengen Protocol to make provision for a new procedure for the participation of the United Kingdom and Ireland in measures building on the Schengen *acquis* ("Schengen building measures").

Under the Treaties as they now stand, the United Kingdom and Ireland, although as a general principle they do not take part in the Schengen system, have been authorised by the Council to join in sections of the Schengen *acquis* provided that they take part automatically in any subsequent measure building on the system in that area. The amended Protocol allows them to decide not to take part in such building measures, but in that event a Council decision may exclude them from the Schengen *acquis* to the extent judged necessary on the basis of the criteria set out in the Protocol. Failing a decision by the Council or by the European Council, the decision will be taken by the Commission.

Protocol (no 10) on transitional provisions

A transitional period of five years after the entry into force of the Lisbon Treaty applies in the field of police cooperation and judicial cooperation in criminal matters. During that transition period, the powers of the European Court of Justice and of the Commission, as guardian of the treaties, remain limited (see Article 10 of the Protocol on transitional provisions) as far as the pre-existing third pillar *acquis* is concerned and so long as such *acquis* is not amended.

By the Declaration to Article 10 of the Protocol on transitional provisions, the Commission, the European Parliament and the Council are invited to seek to adopt, where appropriate, legal acts amending or replacing the acts of the current third pillar *acquis*.

The jurisdiction of the European Court of Justice in relation to the FSJ area

Today we have an exceptional situation in which the Court of Justice does not have jurisdiction for all areas of EU legislation in the area of freedom, security and justice.

The Treaty of Lisbon enables the Court to become fully competent eventually in the area of freedom, security and justice—including police and judicial cooperation, subject to one limitation: the validity and proportionality of police operations and measures taken by Member States to maintain law and order or safeguard internal security remain outside the Court's jurisdiction.

In the area of police and judicial cooperation and regarding the legal acts adopted before the entry into force of the Treaty of Lisbon, the competence of the Court of Justice will be subject to a transitional period of up to five years after the Treaty's entry into force. After five years the UK must decide whether to accept the Court's jurisdiction or opt-out completely from the pre-existing third Pillar *acquis.*

The application of the Charter of Fundamental Rights in the FSJ area

The Treaty will make the Charter legally binding. Its provisions will apply to acts of the institutions, bodies, offices and agencies of the Union and to Member States when implementing Union law, subject to particular provisions regarding Poland and the United Kingdom A protocol stipulates that the Charter does not extend the powers of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. The protocol stresses that nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. Furthermore, in the case of a provision of the Charter that refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom).

The EU will also be required to accede to the European Convention on Human Rights, subject to a unanimous agreement of the Council and ratification, by all Member States, of the Council's act of concluding the accession treaty.

The effect of the general passerelle provision (Article 33) in the area of FSJ

The general *passerelle* provision (now, article 48 (7)) will allow the European Council to decide by unanimous vote that, in future, where the Treaty on the Functioning of the European Union or Title V of the Treaty on European Union provides for the Council to act by unanimity in a given area or case, the Council may decide by qualified majority voting or by the ordinary legislative procedure (co-decision). The Treaty also provides that any national parliament may block the European Council's decision and prevent the implementation of the *passerelle* provision.

In the area of freedom, security and justice, this concerns operational police cooperation and the European Public Prosecutor.

17 January 2008

Memorandum by Mr Torquil Dick-Erikson

I might say by way of prefacing my remarks and introducing myself, that I am a British citizen, I have been living in Italy for the last 38 years, and have been studying the area of comparative criminal justice and procedure for the last 25 years, having been published in various papers and journals and spoken from various platforms from time to time. My name has been cited in debates in the Houses of Parliament four times, in particular in January 2003 when Nick Hawkins MP read aloud a 6-page briefing paper I had prepared on aspects of Italian criminal procedure, in Standing Committee, debating the European Arrest Warrant. In April 1997 I was invited as a guest of the European Commission to a seminar in Spain where they unveiled the Corpus Juris project for a single system of criminal justice to be enforced throughout the EU; subsequently I contributed written evidence to the HoL Report on Corpus Juris (9th Report, 1998–99, HL Paper 62—pp 117–119).

The evidence I wish to submit to you is as follows—very briefly:

(1) The new Reform treaty will ensure that criminal justice is eventually brought under the decision-making powers of the central authorities of the EU, and JHA will lose its present status as an exclusively national prerogative.

(2) There are two broadly, and profoundly, different families of systems of criminal justice in Europe today—the inquisitorial system, prevalent throughout the continent of Europe, and the adversarial system, which is in use only in the "island jurisdictions" of the UK, Ireland, and Malta.

(3) One problem we have is that little is known about continental systems of criminal justice. It is an area that has hardly ever been studied. There are no university chairs of comparative law that specialise in comparative criminal procedure, anywhere in the British Isles.

(4) The proceedings during the seminar in Spain and an examination of the *Corpus Juris* proposal, as well as the demands put forward by Commissioner Franco Frattini last year, show clearly that there is a firm determination on the part of the EU's central bodies to set up a single system of criminal justice for the whole of the EU, based on the Inquisitorial model. A very recent report says that Signor Frattini wishes to start enacting those parts of the Treaty concerning security and justice even before it has been ratified see <http://euobserver.com/9/25117/?rk = 1>.

(5) *Corpus Juris* effectively erases the legal safeguards of individual freedom which have been at the basis of our system since Magna Carta, viz:

(6) Article 26.1 of *Corpus Juris* provides that cases shall be heard by professional judges, excluding "simple jurors and lay magistrates". This is how cases are heard and tried all over the continent (where there are "lay assessors" they retire to the jury-room with one or more professional judges, so the influence of the "judge on the jury" can be very heavy indeed and is exercised in secret). So there is an *end to trial by independent jury.*

(7) Article 20.3.(g) grants powers—denominated powers of *investigation*—to the European Public Prosecutor to order the *incarceration* of a suspect, for a period of up to six months, renewable for three months at a time. This "order" is countersigned by the so-called "judge of freedoms" on the continental Napoleonic model. These two work together in tandem on case after case, and are colleagues and members of the same professional brotherhood—the career judiciary, from which the defending lawyers are excluded. The decisions on pre-trial detention are taken in the *privacy of the judge's office*, and there is *no obligation* on the "judge of freedoms" to examine any *evidence* that his colleague may, or may *not*, have collected to show that there be a *prima facie* case to answer. So there is an *end* to *Habeas Corpus*.

(8) Article 27.2 provides quite simply that the Prosecutor may appeal against a verdict of acquittal. So there goes our *protection against double jeopardy*.

All these changes will irk the common sense of fair dealing and justice to which our fellow-citizens have been accustomed for centuries. They will appear oppressive and unjust. They will however not appear unusual or strange to our new "fellow-citizens" on the continent, for they have never known anything different. There is this deep cultural difference between the two sides of the English Channel, and since they are in the far greater majority, in a union between the two their system will eventually come to be imposed on us, and our system will be effaced.

There is another highly significant difference between our traditions and theirs, and it is in the area of policing.

Ever since the police was first instituted by Sir Robert Peel, nearly 200 years ago, our police have always been:

(a) locally recruited and locally accountable;

(b) regularly unarmed;

(c) non-military in their nature and their organisation, since each single constable is a self-propelling law enforcement officer, whose prime duty is to apply the law; and

(d) the underlying ideal to which our policing policies aspire is "policing by consent". We set high store on the ordinary members of the public willingly assisting the police by stepping forward and volunteering information.

On the continent, in contrast, the police forces are:

(a) centrally controlled, by central government, and moved around the country so they are, more often than not, not local people in the area where they operate;

(b) always carrying lethal weapons at all times;

(c) military, stationed in barracks, equipped for battle against a hostile populace. Their prime purpose is to maintain public order; and

(d) our notion of "policing by consent" is basically unknown. The police are designed as an instrument whereby the central government imposes its will on a population, parts of which are expected may be hostile. It is closer to what we would see as an army, than a police force.

In line with the Napoleonic tendency to uniformity and centralisation, not only has Europol been set up, but also the less-well-known European Gendarmerie Force, which has been drilling in a base in Vicenza, Italy, since around 2003. These are specialised riot batallions. Even less well known is the fact that on 18 October last the five countries participating in the EGF signed a Treaty in Velsen, Holland, under the auspices of the Portuguese presidency, establishing the EGF itself on an official footing. Under this treaty, they may be deployed in any third state with the agreement of that state (art 6.3)—and presumably this means just the agreement of the government of the day of that state, which will not have had to consult its Parliament far less its people on such a momentous step. Under the Reform treaty, we will see that with JHA passing under the jurisdiction of the ECJ, any supposed opt-out for Britain will not last, so that it will be possible to deploy the EGF by majority decision at the centre, which will over-rule any lack of consent given by the state concerned. We can therefore expect to see them at some stage on the streets of British cities.

Any opt-out will be subject to an opt-in to be decided swiftly and easily by the British Government of the day without recourse to Parliament far less to the people. And once the immunity of an opt-out has been relinquished it may never be recovered, under the well-known ratchet mechanism provided by the doctrine of acquis communautaire.

The announcement of this Treaty of Velsen by the Portuguese Presidency spoke of the possibility of drawing recruits not only from Member States but also from candidate states (art 44), and mentioned with satisfaction that Turkey had shown interest in providing recruits to this nascent force.

I attach a paper I wrote in August on the Eurogendarmerie, with two photographs taken from their own official website: <www.eurogendfor.eu>.

The announcement of the new treaty of Velsen is on this page:
<http://www.eu2007.pt/UE/vEN/Noticias_Documentos/20071015MAIEurogendfor2.htm>.

These websites, created by organs of the EU itself, supply vivid documentary evidence of the truthfulness of what I have written.

9 November 2007

Memorandum by Mr Brendan Donnelly, Director of the Federal Trust
(evidence submitted in a personal capacity)

THE SIMPLIFICATION OF JUSTICE AND HOME AFFAIRS

1. Since 1992, when the Maastricht Treaty established the "Justice and Home Affairs" (JHA) pillar of the European Union, the constitutional landscape of JHA has been in a continuous state of evolution. In 1997, the Amsterdam Treaty transferred many of the less politically sensitive areas of JHA (visas, asylum and immigration) from the intergovernmental third pillar to Title IV of the Community pillar, leaving Police and Judicial Co-operation in Criminal Matters in the third pillar. In 2004, the scope of Qualified Majority Voting in JHA was greatly extended under a procedure envisaged in the Amsterdam Treaty. The European Constitutional Treaty of 2004 would in its turn have greatly reduced the scope of intergovernmental decision-making in JHA. Contrary to the expectation of some, the Lisbon Treaty of 2007 seems likely to maintain this movement away from intergovernmentalism. Those areas which, in 1992, made up the EU's JHA pillar will, when the Lisbon Treaty comes into force, constitute the "Area of Freedom, Security and Justice" (AFSJ) in the EU's Community pillar. With isolated exceptions, JHA decisions will be taken by QMV in the Council of Ministers, with the European Parliament enjoying a full legislative role through the co-decision procedure and the ECJ (in time) having full jurisdiction to enforce JHA decisions.

2. By these significant changes in the field of JHA, the Reform Treaty will achieve at least one goal of the European Constitutional Convention, namely that of simplification and consequential enhanced transparency in the Union's decision-making structures. Until now, JHA has been an area of the Union's activities enormously difficult for the citizen, or even the scholar, to understand, full as it was of exceptions, anomalies and ambiguities. In its future operation, JHA will be, in so far as it directly affects most citizens within the European Union, a much simpler and more easily comprehensible field of policy and legislation. Unresolved questions indeed remain for the United Kingdom's role and participation within JHA. But within the whole of the JHA system, these questions represent the exception and not the rule. The Lisbon Treaty's provisions on JHA represent the culmination of a remarkable process whereby within fifteen years almost all Member States of the European Union have come to believe that their interests in the field of JHA were better served

by the "Community method" rather than by the intergovernmental system which they instituted in 1992 for JHA and the Common Foreign and Security Policy (CFSP). While the latter remains essentially an intergovernmental matter within the European Union, "communitarisation" has clearly won the day in the sphere of JHA.

Opting In and Opting Out

3. In the Amsterdam Treaty of 1997, the British Government obtained the right to decide on an ad hoc basis whether it wished to participate or not in new measures of JHA adopted under the "Community method" rather than intergovernmentally. The public rationale of this arrangement derived from the United Kingdom's geographical separation from "mainland" Europe and its common law legal system, the impact on the latter of a civil law criminal code being a particular source of concern (and debate). An analysis of the British Government's use of its opt-in/opt-out arrangements since the Amsterdam Treaty is however instructive. The UK has made good use of its right to stand aside in areas such as legal migration and visas and borders, where it has only occasionally participated in new legislation. It has on the other hand opted in, *as a matter of course* and without exception, to asylum law and civil law measures, a consistent pattern of behaviour suggesting that it might well have been possible, had the British Government wished, to accept in 1997 or later a more circumscribed arrangement for the British opt-in/opt-outs. It is difficult to avoid the impression that over the past ten years the British Government's attitude to the supposed necessity and desirability of the opt-in/opt-out system in JHA has been coloured in part at least by a general suspicion of the "Community method" of decision-making and a wish to emphasize in its public discourse to a domestic audience all manifestations of British particularism within the European Union.

4. This impression has been reinforced by the British Government's negotiating tactics in regard to the European Constitutional Treaty and, more particularly, the Lisbon Treaty. Far from seeking to limit the scope of its anomalous and arguably not wholly necessary opt-in/opt-out arrangements, the British Government sought and has obtained in the Lisbon Treaty a generalised right to opt in and opt out of all measures brought forward under the now substantially "communitarised" JHA. In the Constitutional Treaty, it had been content with a much less wide-ranging right to opt in or opt out of newly-"communitarised" legislation, apparently being content with the potential operation of the "emergency brake", an important feature of the Constitutional Treaty. It is not easy to see what objective changes in the British national interest occurred between the signature of the Constitutional Treaty in 2004 and the Lisbon Treaty of 2007. Some doubt exists, moreover, whether the position of the British Government in future negotiations relating to JHA will genuinely be improved by the effective swapping of a generalized British "opt-in/opt-out" for the use of the "emergency brake." (See para 8).

5. Further doubt is cast upon the general proposition that it is always in the British national interest to enjoy the right of opting out of proposed European legislation by two specific issues connected with the Reform Treaty: the precise terms of the United Kingdom's right to opt in to JHA legislation; and the role of the European Court of Justice. Ironically, in the former case the British Government finds itself pleading two cases before the European Court of Justice where it would like to participate in JHA measures, but is currently prevented from doing so by controversy over the operation of its opt-in/opt-out arrangements.

6. This controversy arises from the fact that the "system" of British opt-in/opt-outs in JHA is based on two separate Protocols agreed in the Amsterdam Treaty, the "Title IV opt-out" affecting most JHA measures and the "Schengen opt-out" affecting matters arising from the Schengen agreement. Of these, the latter is more restrictive for the position of the British Government. First, a British opt-in is subject to the approval of other Member States (though a British request has not so far been rejected). Second, a British opt-in to a Schengen measure *binds* the UK to participate in all provisions subsequently "building upon" this measure. Equally, the UK is *unable* to participate in Schengen measures "building upon" preceding measures into which the UK has not opted. The UK has opted in to some, but not all, "strands" of Schengen measures. This latter circumstance has served to exclude the UK from European arrangements in which it has wanted to participate, such as the Regulation establishing security standards for national passports. Similarly, the UK's predicted exclusion from the establishment of two related data systems, the Schengen Information and Visa Information Systems, has potentially far-reaching implications, deeply undesirable to the British Government. The British argument that the measures from which it is excluded are not Schengen-related, but rather Title IV provisions, is currently being considered by the ECJ. It is likely that even if the Court rules on this occasion in the UK's favour, uncertainty will remain over the distinction between Schengen and Title IV measures, with real implications for the UK's ability to opt-in in future to whichever JHA provisions it chooses.

The European Court of Justice

7. In the medium term, another unwelcome decision will confront the British Government of the day, arising from the British approach to opt-ins/opt-outs. The Reform Treaty extends the normal, "Community" jurisdiction of the ECJ to all JHA provisions adopted after its coming into force. Those provisions adopted previously under the intergovernmental framework of the JHA pillar, will continue to be subject only to the limited jurisdiction of the ECJ for a transitional period of five years, when the European Court of Justice's normal jurisdiction will be extended to cover all prior legislation in policing and criminal matters. The UK will at this stage have the choice of accepting the jurisdiction of the ECJ or "opting out" of it. Should the UK choose to "opt out", all that legislation which has become subject to the ECJ's extended jurisdiction will cease to apply to the UK. In theory, the United Kingdom, having "opted out" of the general jurisdiction of the ECJ, could attempt to "opt back in" to individual measures on an ad hoc basis. Whether the British Government would wish to go down this road in five years time must be more than questionable. 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 seek to opt back in to most of these measures, would expose the British Government to something little short of ridicule. Nor is it clear that the United Kingdom's partners would be eager to help the British Government in what many of its partners see as a self-created dilemma.

The Emergency Brake

8. If generally the Reform Treaty simplifies and makes more coherent the Union's working in the JHA field, one exception to this standardisation of procedures is provided by the "emergency brake" system, which will apply to (almost all legislative) areas of policing and criminal law. The initial effect of this procedure—when invoked by any member state that considers a legislative proposal "would affect fundamental aspects of its criminal justice system"—is to suspend for four months the legislative process relating to that proposal. If, after four months' discussion, no consensus results, a group of Member States, numbering at least nine, are then entitled to proceed with the proposal on the basis of "enhanced" co-operation. It will be a matter for careful reflection on the part of the British Government how it approaches the question of the "emergency brake" on matters where it has decided not to exercise its right of opting out at the beginning of the process. The political cost to the United Kingdom of "pulling" the emergency brake would inevitably be greater than for other Member States, since the United Kingdom would have had the option of not participating in the proposed new legislation in the first instance. The British system of opting in/opting out from JHA matters could well in consequence have the paradoxical effect of making more difficult for the United Kingdom the use of an option the British Government had been eager to secure—and which other Member States retain—precisely in the area of criminal law, which traditionally has been so important to the British Government.

Conclusion

9. Whereas for most Member States of the Union, the Lisbon Treaty has marked a radical simplification of the JHA policy area, the British system of opt-in/opt-outs has ensured that for the United Kingdom at least many uncertainties and complications remain in this field. Some of these uncertainties will be resolved five years after the coming into force of the Lisbon Treaty, while others, such as the interaction between the "Title IV" and the "Schengen" opt-in/opt-out, are likely to remain a source of friction and even embarrassment to the British Government. Those who believe that the geographical position of the United Kingdom and its common law system constitute an overwhelming case for placing some limits on British participation in the "communitarised" JHA may well argue that these uncertainties are a price worth paying for the United Kingdom's exceptional arrangements in the JHA field. Those anyway unpersuaded of the need for special British arrangements in these matters will simply regret the uncertainties. Those who see some case for a limited number of British exceptions to the general new pattern of "communitarised" decision-making in the JHA field may wonder whether in time the British Government may not wish to reassess its approach, to limit and confine the scope of its opt-in/opt-outs in a way that simply reflects clearly-defined national interests. It would be difficult to argue that such is today the case or that it will be so in the years immediately after the Lisbon Treaty.

November 2007

Memorandum by Mr Andrew Duff MEP

1. The Sub-Committee may be aware of the oral evidence I gave recently to the European Union Committee, now published in the 35th Report. This memorandum supplements that.

2. To recall my interest in these matters, I served on both of the European Union's Conventions on the Charter of Fundamental Rights and on the Constitution, and was the Parliament's co-rapporteur on the Charter. Lately, I represented the Parliament in the Intergovernmental Conference (IGC).

Schengen, Justice and Home Affairs

3. The Treaty of Lisbon will make radical changes to the way the Union develops its area of freedom, security and justice. The Treaty deconstructs the third pillar and integrates it with the first. This means QMV in the Council plus co-decision with the Parliament, full right of initiative for the Commission (although one quarter of Member States may also take initiatives), and a widening of the scope of the EU Courts (with only police operations excluded).[1] Where consensus cannot be found, the majority of Member States will be propelled forward into enhanced cooperation. The establishment of the European Public Prosecutor may be the first practical example of enhanced cooperation.

4. The current institutional obstacles to integration in this sector are therefore removed. Entrenchment of fundamental rights means that the citizen is better protected from any abuse of the greater powers now vested in the EU. Overall, therefore, the changes on offer in the new Treaty are greatly to be welcomed. At the same time, the Schengen area enlarges. So in these matters close to the citizen one can expect rapid legislative progress, more relevant jurisprudence, and an overall higher quality of policy and level of ambition. The Union will enjoy a greater capacity to act effectively to meet pressing contemporary challenges of security, liberty and freedom of movement.

5. That is the good news. The bad news is that the United Kingdom has negotiated derogations from many of these positive advances. Government policy has retreated since 2004 from the positions it was apparently happy to accept in the Treaty establishing a Constitution. Nobody quite knows why. There has been no adverse referendum on the constitutional treaty in this country; nor has there been a negative vote in either House of Parliament. Despite entreaties, the government gave no explanation to the IGC of why it feels the need to opt out of so many of these key areas of integration. Neither has it accepted an invitation to appear before the Constitutional Affairs Committee of the European Parliament. I hope your inquiry can get ministers to be forthcoming.

6. With respect both to the Schengen *acquis* and Schengen building measures and to the third pillar *acquis* and future development of freedom, security and justice policies, the IGC was obliged, at the behest of the British, to negotiate complicated protocols. As a result of these tortuous negotiations, the UK and, reluctantly, Ireland (and to a lesser extent Denmark) are to be allowed to either opt into or opt out of EU common policies. The scope of the British derogation widens from asylum, immigration and civil law under the Treaty of Nice to cover police cooperation and criminal law. But I am satisfied that the UK may exercise its privileges only according to terms, conditions and timetables to be established in each case by the Council and Commission (who will try to maximise both participation and coherence).[2] The UK may not opt in at the beginning of a legislative procedure and, then, at the end, opt out. Nor may it stick with an existing policy if the others agree to revise it. Nor may it continue to participate in existing common policies if, after a transitional period of five years, it refuses to accept the new powers of the Commission, Parliament or Court.[3]

The Charter

7. The situation is more serious with respect to the Charter of Fundamental Rights. The Charter becomes binding and has the same legal value as the Treaties, although its text will not be in the Treaties.[4] The Charter will be solemnly proclaimed at a plenary session of the European Parliament by the Presidents of the Parliament, the Council and the Commission on 12 December and published in the Official Journal.[5] A Protocol introduces specific measures for the United Kingdom and Poland seeking to establish national

[1] The stipulation that one quarter of Member States are needed to make a legislative proposal is a significant improvement on the present situation in which any one state can so act (Article 76 TFEU).

[2] Article 5 of the Schengen Protocol & Declarations 39b, 39c, 39d, 39e; Protocol on position of the UK and Ireland in respect of the area of freedom, security and justice.

[3] Article 10 of the Protocol on transitional provisions & Declaration 39a.

[4] Article 6(1) TEU.

[5] *Official Journal* C series. The Charter's explanatory memorandum will also be published here. However, when the Charter becomes legally binding (on the entry into force of the Treaty), it will be re-published in the L series—leaving behind the explanations, which are not justiciable, in C series.

exceptions to the justiciability of the Charter.[6] The Treaty provides a new legal basis for the accession of the Union to the European Convention on Human Rights.[7] The Council will decide this by unanimity, with the consent of European Parliament and the approval of national parliaments.

8. British opposition to the Charter is hard to credit. The Charter is seen elsewhere (including in Poland) as a key part of the constitutional evolution of the Union, helping to bridge the credibility gap between the EU and the citizen. It is a comprehensive and visible catalogue of the rights, values and principles which both reflects and informs contemporary European society. It makes the Union better prepared for subsequent advances in integration as well as further enlargement.

9. The Charter was drafted as if it were or could become mandatory. For that reason, I opposed the decision of the 2000 IGC merely to render the Charter as a political code of conduct on the grounds that this was bound to aggravate the legal uncertainty that its drafters, including Lord Goldsmith, had been so anxious to avoid. Consequently, the change of heart by the next IGC in 2004, after long discussion both there and in the Giscard Convention, was wholly welcome. The decision to make the Charter binding on the European Union institutions and on the agencies of the EU, including member state governments and courts when and in so far as they apply or interpret EU law and implement EU decisions, is a huge step forward for the European citizen.

10. The agreement in 2004 on how the Union should deal with fundamental rights was a carefully constructed compromise. All parties to the negotiation, including the European Parliament, made concessions. Any retreat from that package, therefore, is a solemn matter with serious consequences not only for the quality of the outcome with respect to fundamental rights but also for the trustworthiness of the whole constitutional process from 1999 onwards.

11. The UK and other states accustomed to common law traditions, had, in playing a leading part in the negotiation of the Charter, contributed very significantly to the Union's capacity to take this leap forward. Particularly relevant here are the four horizontal articles at the end of the Charter which set out very clearly its scope and limitations, its field of application, the difference of interpretation between rights and principles, the level of protection afforded, and the prohibition of abuse of the rights.[8]

12. You ask specifically about the application of the Charter to measures in the field of freedom, security and justice. It should be recalled that the Charter confers no new competences on the Union, and is relevant only within the area of competence as conferred on the Union by the Member States and in relation to the explicit powers of the EU institutions. The Treaty makes the Charter binding on Member States only in respect of the application of EU law and subject to the principles of subsidiarity and proportionality.[9]

13. The Charter's principles in respect of justice and home affairs policy become significant only as and when articulated in terms of EU legislation or executive action within the area of conferred competence. Competences not conferred on the Union remain with Member States.[10] And, in any case, the Union is beholden to respect national constitutional structures and essential state functions, including the maintenance of law and order and the safeguard of national security.[11]

14. Too much is made, in my view, of the difference between countries with common law and Roman law traditions. The UK is not alone in having to adapt its legal and penal systems to the gradual emergence of the EU into civil and criminal law. A binding Charter is at least as necessary for common law Member States, if not more so, when confronted by and contributing to the rapid development of the EU's supranational legal order. The fact is that the Union is engaged in a long process of approximation, by one means or another, of national codes of civil and criminal law. Mutual cooperation between national authorities, if it is to be purposeful, needs some basic element of uniformity at the EU level.

15. The Charter is our common response to how these transnational legal developments impact on civil liberties. The Treaty of Lisbon enhances the authority of the European Court of Justice to check how the EU exercises its powers over citizens. The Charter made binding will allow the Luxembourg Court to develop case law in all matters relevant to the Charter, subject to the external supervision of the European Court of Human Rights at Strasbourg, with which it will enjoy exactly the same relationship as that enjoyed by national supreme courts—especially once the EU has itself signed up to the ECHR.

16. The UK was thought to have done very well in the negotiation of the Charter. The idea of a British success was reinforced by statements to the Commons in 2004 by Tony Blair and Jack Straw. Hence the profound disappointment felt by Britain's partners in the recent IGC about the UK opt-out. Indeed, their efforts to

[6] Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom.
[7] Article 6(2) TEU and Protocol on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. See also Declaration 1.
[8] Charter Articles 51–54.
[9] Article 5 TEU.
[10] Article 4(1) TEU.
[11] Article 4(2) TEU.

persuade their own parliaments and public of the virtues of the Reform Treaty are being complicated by the British derogation from the Charter and, especially, by British efforts to downplay the social dimension of the single market.[12]

17. An exemption by one member state from the full force of the Charter is not simply to be equated with opt-outs from specific common policies. The Charter has a symbolic value that the Schengen Agreement, for example, does not. There are external and as well as internal ramifications. We can be assured that the lesson of the UK opt-out will not be lost in Moscow, Belgrade or even Ankara. The sight of the European Union being picky and choosy with its own rights regime is hardly edifying.

18. In the European Parliament, needless to add, the UK Protocol has provoked scorn. It is very difficult to explain to colleagues why the UK wants to resile from the agreements reached in 2004, and what it is exactly that the UK hopes to gain from its opt-out. 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.

19. It is clear that other Member States harbour serious doubts about the legal efficacy of the British opt-out. British courts will be unable to avoid the Charter being invoked in trans-national cases. British citizens resident in other Member States or British firms at work elsewhere within the Union are bound to get involved in litigation in which the Charter features. Furthermore, whatever happens in the UK, courts in other Member States and the EU Courts themselves will be minded to develop jurisprudence in the field of fundamental rights, blind to nationality, which interprets and seeks to apply the provisions of the Charter in full.

20. As the Charter addresses the system of the Union as a whole and not just parts of it, once it becomes justiciable such case law will be elevated eventually into general principles of EU law which have to be applied uniformly in order to ensure legal certainty and coherence throughout the Union, applicable to all Member States equally. This is the line likely to be taken not only by the courts at Luxembourg but also at Strasbourg. So it is only a matter of time before the lock gate the British Government has sought to erect against the impact of the Charter begins to leak. Some day the flood tide of EU rights law will find its way up into Lord Denning's famous rivers and estuaries. But, regrettably, Britain will have had no part in directly shaping that regime because of its self-exclusion from the initial, crucial phase of litigation.

21. However, there is a real worry that, in the shorter term, the UK Protocol might contaminate the whole legal system of the Union and devalue the force of the Charter. This is because every Member State is committed to the key general principle of EU law that recognises fundamental rights as stemming from the common constitutional traditions of all Member States.[13] The UK notwithstanding, by way of its opt-out, is now seeking to assert that it will only recognise those rights as legislated for in UK national law. The Protocol says that only UK law may be invoked in UK courts as the source of litigation on the Charter. This may well lead to the UK being found in breach of EU primary law.

22. On top of the risk of legal contamination, we have political spill-over. Any sympathy in the IGC for British particularism was dispelled as soon as Poland decided, for reasons best known to itself, to join the UK opt-out. Overall, it is difficult to escape the conclusion that the British opt-out from the Charter is not only a fair juridical nonsense but also a serious political misjudgement.

23. In these circumstances, it was all the more regrettable that the UK rejected a proposal made to it at the IGC to accept the addition of an "escape clause" which would have permitted it to unilaterally abrogate its opt-out once it had been reassured about the quality of jurisprudence in cases where the Charter was invoked.[14] Alas, in the absence of such a flexibility clause, the full paraphernalia of another IGC will now be needed if the UK is ever to participate fully in the Union's fundamental rights regime.

22 November 2007

Memorandum by Professor Jacqueline Dutheil de la Rochère, University Paris II (Panthéon-Assas)

1. *The move to qualified majority voting and co-decision in areas of criminal law and policing*

1.1 In that connection, what appears most significant is the drafting of Art 61 of Chapter I (General provisions), previous Art III-257 of the Constitutional Treaty which confirms the existence under a single legal regime of the area of freedom, security and justice which had been introduced by the Amsterdam Treaty. The principle of mutual recognition of judgments in criminal matters, of judicial and extrajudicial decisions in civil

[12] I do not deal here with the issue of Title IV of the Charter, but will do so in a submission to the related enquiry conducted by Sub-Committee G.

[13] Article 6(3) TEU.

[14] For an example of such a provision, see Article 7 of Protocol No 5 to the present Treaties on the position of Denmark.

matters which, as from the Tampere Euopean Council of October 1999, had been considered as the core aspect of judicial cooperation, is now inscribed in the treaty. Concerning more precisely criminal law and policing, it is interesting to observe the order of the terms used in Art 61.3 as to the actions envisaged at Union level in order to prevent and combat crime, racism and xenophobia; the order is as follows: (1) measures for coordination and cooperation between police and judicial authorities and other competent authorities, (2) the mutual recognition of judgments in criminal matters, and (3) if necessary, the approximation of criminal laws. The approximation of criminal laws is clearly presented as subsidiary to other tools such as administrative cooperation and mutual recognition of judgments.

The legal instruments provided in the Reform Treaty are significantly modified. The decisions and framework decisions of the present so-called third pillar are replaced by directives; the third pillar conventions disappear. Further, whilst according to the present treaty rule, unanimity in the Council is needed and the European Parliament is consulted, under the Reform Treaty, directives are adopted in accordance with ordinary legislative procedure: co-decision with the Parliament and qualified majority voting in the Council. However the right of proposition remains shared between the Commission and a quarter of the Member States, according to the provisions of Art 68 which apply to Chapter 4 (Judicial cooperation in criminal matters) and Chapter 5 (Police cooperation), plus Art 67 of Chapter 1 (administrative cooperation in the area of freedom, security and justice).

1.2 When we look at Chapter 4 devoted to *judicial cooperation in criminal matters*, provisions on mutual recognition of judgments and judicial decisions come first. Art 69e (former Art III-270 of the Constitutional Treaty) replaces Art 31.1 TUE. It provides a stronger and clearer legal basis to EU acts aiming at developing mutual recognition, such as the European warrant arrest (framework decision of 13 June 2002). The European Union will also find in Art 69e a legal basis not only to prevent, but also settle conflicts of jurisdiction between Member States. A legal basis is equally explicitly provided to the EU in order to support the training of judiciary and judicial staff.

New provisions of Art 69e, para 2 and 3 impose various conditions to the adoption of EU legislation, limited to what is necessary to facilitate mutual recognition of judgments or to facilitate police and judicial cooperation in criminal matters having a cross-border dimension; such rules must take into account the different legal traditions of Member States. Further, three domains are defined in which directives may be adopted: mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, the rights of victims of crime. These three domains correspond to areas in which the Commission has recently made proposals. Other specific aspects of criminal procedure could be added to these three domains if the Council so decides unanimously and with the consent of the European Parliament.

1.3 Art 69f (former Art III-271 of the Constitutional Treaty) deals with the establishment of minimum rules concerning the definition of criminal offences and sanctions. Approximation of substantial criminal law was introduced in the TEU (Art 31(e)) by the Amsterdam Treaty, in the domains of organised crime, terrorism and illicit drug trafficking. This legal basis has been extensively used in order to adopt EU measures for the protection of environment or to prevent sexual exploitation of children. Taking account of the needs so expressed, the new drafting of Art 69 f retains two alternative criteria of EU competence for approximation of substantial criminal law and sanctions:

— either the criminal offences are particularly serious, with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on common basis;

— or, the approximation of criminal laws proves essential to ensure the effective implementation of the Union policy in an area which has been subject to harmonisation measures.

The offences corresponding to the first criteria are listed in para.1 of Art 69f. The list is not exhaustive; other items may be added by the Council acting unanimously, with the consent of the European Parliament. The second criterion corresponds to an old demand of the Commission which created conflicts with the Council as to the appropriateness of the legal basis of certain provisions, namely concerning the protection of the environment and the use of criminal sanction. The entry into force of this provision should give an easy solution to the question raised in Case C-176/03 of 5 April 2005.

The legal instrument of approximation of substantive criminal laws will be directives adopted according to the ordinary legislative procedure, qualified majority in the Council and co-decision with the Parliament.

1.4 The Reform Treaty (Art 69g) provides that the same ordinary legislative procedure may be used to establish measures to promote and support the action of Member States in the field of crime prevention. In that connection, any harmonisation of the laws and regulations of the Member States is excluded.

To sum up, even if some important limitations remain, a very important step is made by the Reform Treaty, in line with the Constitutional Treaty. Approximation of certain aspects of substantial criminal laws becomes possible, under the ordinary legislative procedure.

2. *The emergency brake and flexibility procedure in criminal law and policing*

2.1 The mechanism adopted at Art 69e and 69f of the Reform Treaty is similar to that of the Constitutional treaty (Art III-270 and 271), with slight adaptations. When a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. Within a period of four months, the European Council refers the draft back to the Council. The other possibility which existed in the Constitutional Treaty, which was to ask the Commission or a group of Member States to submit a new proposal, has disappeared in the Reform Treaty.

The special mechanism of enhanced cooperation has been maintained. In case of persistent disagreement on the draft after reference to the European Council, if nine Member States so wish, they may establish enhanced cooperation on the basis of the draft directive concerned, without having to obtain the authorisation to proceed which is normally required under Art 10(1) of the Treaty on European Union and Art 280 d(1) of the Treaty on the European Community as reviewed by the Reform Treaty. The Constitutional Treaty referred to a third of Member States where the Reform Treaty refers to nine Member States, which will make the use of this flexibility clause easier with new enlargements.

2.2 The general idea of the provision remains the same. Make the perspective of approximation of criminal law more acceptable to Member States as they will be allowed to maintain the fundamental aspects of their respective criminal justice system. On the other hand, a Member State wishing to go further in the direction of more approximation will not be prevented to do so, as long as it finds at least eight other Member States sharing the same views. This reasonable balance was the result of negotiations in the Convention on the future of Europe inscribed in the Constitutional Treaty.

3. *Provisions on Eurojust and the creation of a European Public Prosecutor*

3.1 Art 69h of the Reform Treaty on Eurojust (former Art III-273 of the Constitutional Treaty) is a more ambitious substitute to Art 31.2 TUE as modified by the Nice Treaty. The entity in charge of judiciary cooperation, Eurojust, was created by a Decision of the Council of 28 February 2002. This type of decision under present EU law requires unanimity in the Council; further, it is deprived of any possible direct effect. According to the new provisions of the Reform Treaty, Eurojust's structure, operation, field of action and tasks shall be determined by means of regulations adopted in accordance with the ordinary legislative procedure, that is to say qualified majority in the Council and co-decision with the Parliament. No doubt any regulation adopted on such legal basis will have direct effect. As regards the right of initiative, the general conditions of Art 68 will apply (Commission or a quarter of the Member States).

In comparison with the Decision of 28 February 2002, the competences of Eurojust will be strengthened. Presently it may only ask competent national authorities to initiate criminal investigations on precise facts and to operate a coordination of investigations. Under the new provisions, Eurojust will be entitled to initiate criminal investigations and to coordinate investigations and prosecutions conducted by competent national authorities. Eurojust will also have the task of strengthening judicial cooperation, which will include resolution of conflicts of jurisdiction. One may infer from the drafting of Art 69h that it may imply, as the case may be, removal of a case from a court.

On the other hand, as regards the initiation of prosecutions, the competences of Eurojust remain unchanged; it may only propose and not proceed. Further, it is specifically provided that in the prosecutions, formal acts of judicial procedure are carried out by the competent national officials, without prejudice of the possible future creation of a European Public Prosecutor as provided for in Art 69i.

3.2 Art 69i (derived from Art III-274 of the Constitutional Treaty) is new. It makes it possible to establish from Eurojust a *European Public Prosecutor* by means of regulations adopted in accordance with a special legislative procedure—unanimity in the Council and consent of the European Parliament. In the absence of unanimity the system of reference to the European Council at the request of at least nine Member States applies, and equally the possibility to proceed to enhanced cooperation without previous authorisation in the conditions explained here above. This possibility did not exist in the Constitutional Treaty; it is an innovation of the Reform Treaty with a view to encourage flexibility.

The powers of the European Public Prosecutor are limited to crimes affecting the financial interests of the Union. However, the European Council may at any time adopt a decision amending Art 69i, para 1 in order to extend the powers of the European Public Prosecutor's Office and include serious crime having a cross-border dimension. In this connection, the European Council acts unanimously after consulting the Commission and obtaining the consent of the European Parliament.

4. *The legal basis for criminal law measures and continuing impact of Case C-176/03 in the context of the Reform Treaty amendments*

4.1 In the case referred to here above the Court says in essence that the correct legal basis of provisions aiming at a correct implementation of EC environmental policy is Art 175 EC. Art 47 EU provides that nothing in the Treaty on European Union is to affect the EC Treaty; the same requirement is also found in the first paragraph of Art 29 EU which introduces Title VI of the Treaty on European Union (police cooperation and judicial cooperation in criminal matters). Therefore, according to the interpretation of the TEU retained by the Court, the framework decision must be annulled as it infringes Art 47 EU by encroaching on the powers Art 175 confers on the Community. The amendments introduced by the Reform Treaty should modify significantly the situation as regards the correct legal basis for the adoption of measures of approximation of criminal sanctions intended to ensure the effectiveness of EC environmental law. First, Title VI of the Treaty on European Union disappears; Art 29 to 39 of the Title VI TEU on judicial cooperation in criminal matters and police cooperation are replaced by Art 61 to 68 and 69e to 69 l of the Treaty on the functioning of the European Union. Therefore, the provisions of Art 47 EU—replaced by Art 25 in the Reform Treaty—if they keep a certain degree of significance as regards CFSP because of the maintained specificity of that area in the new treaty, are without object in the domain of judicial cooperation in criminal matters which, in the future, should fall under the ordinary EU rule.

4.2 Secondly, in order to prevent any doubt, the new Art 69f(2) provides without ambiguity: "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of the Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". Therefore it should be possible to combine Art 69f(2) and Art 175 as legal basis for the adoption of measures necessary for a correct implementation of environmental policy; the risk of competition with a third pillar legal basis will no longer exist. Further, the new provision prevent the risk of differences in legislative procedures, as Art 69f(2) provides: "Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Art 68 (proposals by the Commission or by a quarter of the Member States)".

5. *The jurisdiction of the European Court of Justice in relation to the FSJ area*

Following tightly the wording of the Constitutional Treaty, the reform Treaty establishes the full jurisdiction of the ECJ as regards the FSJ area, putting aside most of the limitations presently imposed by Art 35 EU in the area of judicial cooperation in criminal matters and police cooperation and by Art 68 EC in the area of border checks, asylum and immigration and of judicial cooperation in civil matters. The new provisions of Art 230(c) TFU enlarging the access to the European Court of individual and legal persons may have some effects in the area of FSJ.

The only limitation concerns Chapter 4 and 5 of Title IV relating to the FSJ area. Art240 ter of the Treaty on the functioning of the Union provides—in line with equivalent provisions of the Constitutional Treaty—"In exercising its powers regarding the provisions (of said chapters) the Court of Justice of the European Union 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". These provisions will have the effect of limiting the efficiency of procedures for failure to act initiated by the Commission against a Member State in the relevant domains. It may also induce some limitations on the freedom of the Court when delivering a preliminary ruling which might indirectly imply an evaluation of the validity or proportionality of an operation carried out by services of Member States in said domains. On the other hand, one should mention the new provisions added to Art 234 according to which if a preliminary ruling concerns a case in which an individual is prisoner, the Court of Justice should decide as quickly as possible. As a general remark, it is clear that the relaxation of the restrictive conditions should have the effect of multiplying the number of preliminary rulings with the consequence that the delay for judgment by the Court will increase.

On the whole, as regards the jurisdiction of the Court, the improvement is significant.

6. *The application of the Charter of Fundamental Rights to FSJ measures*

6.1 Although the Charter—proclaimed in Nice in December 2007—is not part of the treaties, one knows that the Court of Justice, under a certain pressure from its advocate generals, has after a period of hesitation, decided to refer explicitly to the Charter as a source of EU law, confirming the content of fundamental rights as general principles of Union law. For instance, the Court in *Unibet* (C-432/05, 13 March 2007) quotes Art 47 of the Charter as establishing the right of everyone to an effective remedy before a tribunal. The recognition by the Constitutional Treaty of the legal value of the Charter of Fundamental Rights and its inclusion in part II of said Constitutional Treaty would have given a stronger legal basis to the reference to the Charter in court in connection with FSJ measures. With the Reform Treaty, part II containing the Charter is suppressed; however, Art 6 of the Treaty on European Union is modified, establishing that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights, which shall have the same legal value as the treaties". On the ground of symbolism, the status of the Charter declines while other symbols of constitutionalism disappear (flag, hymn, Minister of Foreign Affairs, law). However, one should appreciate the fact that as from the entry into force of the Reform Treaty, the question of the legal value of the Charter is no longer under discussion, within the limits intentionally imposed: the text referred to is that adopted by the ICG concluded in October 2004 and not that of the Charter proclaimed in Nice in December 2000; for that reason, the Charter will have to be re-proclaimed. The final provisions of the new text insist once again on the fact that the Charter does not extend the competences of the Union and refer to the "explanations" as instrument of interpretation.

6.2 Further, in order to satisfy the reluctance of the United Kingdom and Poland, a Protocol (n°7) on the application of the Charter of Fundamental Rights to Poland and to the UK has been added.

Art 1.1 of the Protocol aims at preventing the Court of Justice of the Union and any court of Poland or the UK from judging the conformity of "the laws, regulations or administrative provisions, practices or actions of Poland or the UK" with the rights and principles guaranteed by the Charter. Art 1.2 specifies in particular the application of this rule to Title IV of the Charter (Solidarity) which deals with social rights and principles. We will observe that the preamble to this protocol recalls that the Charter confirms rights already existing in the Union and does not create new rights; therefore the UK is already bound by these rights as a matter of general principles of law. This seems to confirm that the essential objective of the UK when requiring this special protocol, subsequently followed by Poland, was to rule out application of the social principles contained in the Charter insofar as these principles were not enshrined in British law. Art 2 of the Protocol saying that to the extent that the Charter refers to national laws and practices, law or practices of Poland or the UK shall only apply sounds extremely tautological. In the end one may expect that this Protocol will nourish numerous comments by lawyers but perhaps not so much case law. In effect the ECJ should manage to interpret the Charter as it has done before, as the reservations imposed by this Protocol do not subtract anything significant from what had been carefully drafted in the Charter. Further, concerning the theme under scrutiny, it appears that the questions raised in connection with the area of FSJ have usually little to do with social matters therefore the Protocol n°7 should be of few consequences.

28 November 2007

Memorandum by Sir David Edward[15]

The Third Pillar was not an area of EU activity that came before me when I was a judge of the ECJ and I have not studied it in any detail. My evidence is perhaps impressionistic rather than the product of deep study and reflection.

In presenting my evidence, I have relied heavily on Statewatch Analyses Nos 1 (version 3) and 4 prepared by Professor Steve Peers, and on the consolidated provisional text of the Treaties as amended by the Lisbon Treaty prepared by the (Irish) Institute of International and European Affairs.

As regards matters of technical detail, there is little I can add to the evidence of Professor Jo Shaw.

I address the following points:

—"Communitarisation" of the Third Pillar.

—The involvement of national Parliaments.

—The role of the European Court of Justice.

—The UK opt-outs.

[15] Judge of the CFI 1989-1992, and of the ECJ 1992-2004.

"Communitarisation" of the Third Pillar.

In my opinion, there are two reasons why it is important to bring the Third Pillar activity of the EU into the Community system. The first is that the line of demarcation between Third Pillar activity and Community activity under the EC Treaty is becoming increasingly difficult to draw. This is illustrated by Cases C-176/03 and C-440/05 (on which I comment below).

It is true that, even after incorporation of Third Pillar activity in the Community system, questions are liable to arise as to the legal basis of particular measures, affecting the procedure to be followed, the safeguards and the opt-outs. Nevertheless, the institutional context (and therefore the "constitutional" context) within which measures are adopted will be clearer and the nomenclature of the measures adopted will be uniform. This may assist public understanding.

The second, and more important, reason for bringing FSJ within the Community system is to ensure that the measures adopted are subject to proper Parliamentary scrutiny and judicial control.

Measures taken in the area of FSJ are liable directly to affect the liberty of the individual. At the moment, Third Pillar activity is essentially inter-governmental and, as Professor JDB Mitchell observed, "There is a need for discipline in government . . . Governments and governmental bodies have as many reasons for conniving among themselves as they have for opposing each other."[16]

We have recently discovered in this country how important it is to have adequate parliamentary scrutiny and judicial control of measures falling within the scope of FSJ. In particular, we have discovered the importance of adequate measures to protect personal data held by governmental agencies, and this will be even more vital in the context of cross-border exchanges of data.

Lord Falconer recently contended (at an event at the Royal Society of Edinburgh) that "We must be guided by principle developed by collaboration between politicians and the courts". I respectfully agree.

Involvement of National Parliaments

The involvement of national Parliaments, albeit indirectly, seems to me to be a further strong argument in favour of the proposals. I am aware of disquiet amongst judges and lawyers, academic and professional, in other Member States, including states with a "Napoleonic" judicial system, about failure to "establish the facts on the ground" before making proposals that affect the working of the national judicial systems. (The "continental" judicial systems are quite as disparate as are the "common law" systems of England and Wales, Scotland, Northern Ireland and the Republic of Ireland, if not more so).

National Parliaments could play a significant role in ensuring that FSJ proposals take due account of the needs and particularities of national systems.

It should, however, be noted that the proposed Article 63 TFEU would impose a *positive obligation* on national Parliaments to *ensure* that the proposals submitted under Chapters 4 and 5 (judicial co-operation in criminal matters, and police co-operation) comply with the principle of subsidiarity. Failure adequately to perform that duty might affect the admissibility of arguments at a later stage to the effect that particular measures infringe the principle of subsidiarity.

This would entail, not only further development of the "internal" (UK) parliamentary scrutiny arrangements, but also the development of close co-operation between the scrutiny committees of the UK Parliament and the Parliaments of other Member States.

Within the UK, and particularly as between England and Wales and Scotland where the judicial system comes almost entirely within the competences of the Scottish Parliament, it would be essential to put in place effective machinery to ensure that Westminster is fully informed as to the potential effects of FSJ proposals for the working of the different internal judicial systems. If Parliament is to exercise its role (and duty) effectively, this cannot be left to civil service departments.

The Role of the European Court of Justice

There is much misunderstanding in this country of the role of the Court of Justice and, in particular, of the effect of the judgment in Case C-176/03. The issue in that case was essentially whether the power to provide for criminal penalties in respect of serious environmental breaches fell within the powers of the EC institutions under the First Pillar or exclusively within the powers of the Council under the Third Pillar. It was not in

[16] Inaugural Lecture as Salvesen Professor of European Institutions at the University of Edinburgh, "Why European Institutions?" 3 November 1968.

dispute, in colloquial terms, that "Brussels" had the power to require the Member States to criminalise certain types of conduct—the issue was "which Brussels?"

The type of question that arose in Case C-176/03 (involving the respective powers of the institutions) has frequently arisen in the context of the First Pillar. The underlying issue has normally been preservation of the prerogatives of the Commission and the European Parliament, representing the peoples, vis-à-vis the Council, representing the governments of the Member States. The approach adopted by the Court has been to insist that the respective prerogatives of the institutions, granted by the Treaties, must be respected. The basic principle is that the governments of Member States having contracted to act together in a particular way, and having created institutions for that purpose, cannot then bypass or override those institutions.

The limited effect of Case C-176/03 is shown by the subsequent judgment in Case C-440/05 which (paragraph 70) preserves the power of the national system to determine the type and level of criminal penalties. The reasons for the distinction are very fully explained in the Opinion of Advocate General Mazák of 28 June 2007.

In the event of Third Pillar activity coming with the Community system, the function of the ECJ would be its normal function of resolving inter-institutional (or inter-Member State) conflicts and issues of *vires*, and ruling on the interpretation of legislative and regulatory measures. Since such issues are brought before the Court by others and cannot be sought out or invented by the Court itself, it is difficult to see in what way the exercise of this normal judicial function in the field of FSJ would, as the *Economist* put it in a recent article, provide opportunities for the Court to "meddle".

Having said that, I foresee two potential difficulties in bringing FSJ measures fully within the jurisdiction of the ECJ.

The first concerns the degree to which the members of the Court can be expected to deal with an ever-growing range of legal subject-matter.The problem does not, as I see it, arise in direct actions but rather in references from national courts. Normally, a case before a court of last resort such as the ECJ will have been considered by two or more courts below. Even where the ultimate court does not have detailed expert knowledge of the legal subject-matter, this will normally have been explained and the issues clearly defined by proceedings in the courts below.

By contrast, the ECJ is quite 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. This could present a serious problem in a field as technical and nationally oriented as criminal law and procedure.

The second problem will arise in cases concerning accused persons in custody. The proposed new fourth paragraph of Article 234 requires the Court to "act with the minimum of delay". The 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. I am told that discussions are in progress to find a way of cutting down the time taken, but it depends very much on the willingness of Member States to forego their normal right to intervene in writing and orally. The obligations of Member States (and therefore of the EU) under Article 6 of the ECHR must be weighed against the advantages of uniform interpretation of FSJ acts.

Even the minimum possible delay would present a serious problem for observance of the 110/140 day rule in Scotland, and would require legislation by the Scottish Parliament.

The UK Opt-outs

I am allergic to the proliferation of opt-outs. It is true that, with 27 and possibly more Member States, some degree of variable geometry is almost inevitable. But a combination of opt-outs and schemes of enhanced co-operation would be bound to impair both prompt and efficient action and also the transparency, objectivity and impartiality of the system.

This is particularly so where, on the one hand, the EU and its Member States are faced with growing threats that call for prompt and efficient action and, on the other hand, the measures to be taken inevitably affect the rights of the individual. One must, in the latter connection, have in mind the problems of comprehensibility that are likely face a national lawyer who is asked, perhaps at very short notice, to represent a person who is (or may be) affected by, or entitled to rely on, an FSJ measure—let alone the problems faced by a local judge.

Although the subject-matter of Cases C-77/05 and C-137/05 (*UK v Council*) was somewhat special, the Opinions of Advocate General Trstenjak in those cases illustrate the wider political difficulties that opt-outs may create.

Nevertheless, given the special characteristics of our systems of criminal justice, it may be safer that the UK should opt out of the FSJ provisions in the way it has. The "emergency brake" system might not prove sufficient to avoid the adoption of a measure that would create serious difficulties for our legal systems. For clarity, it seems better that the extent of the opt out be enlarged as now proposed, by contrast with the partial opt out negotiated earlier in connection with the Constitutional Treaty.

Lastly, the possible advantages of a policy of opt-out rather than reliance on the emergency brake procedure can be illustrated by the uncertainties hidden behind four of the provisions in the FSJ Title:

— Article 69e(2), second paragraph under (a): "the mutual admissibility of evidence" has a very different connotation in the common law systems from that of *l'admissibilité mutuelle des preuves* in the French system. How, in practice, would the contents of the *dossier* in a French criminal process become "evidence" in a UK court?

— Article 69e(2), second paragraph under (c): "the rights of victims of crime". Many continental systems provide for victims of crime (or their families) to be represented in criminal proceedings and, in some cases, to seek civil remedies in the same proceedings. Our systems do not, for the time being at any rate.

— Article 69d(2)(h) and Article 69e(1)(c): "training of the judiciary and judicial staff": the practicalities of such training are quite different in our system as compared with systems that have a professional judiciary and legally trained officials (who are often members of the judicial corps themselves).

— Article 69i(2): "The European Public Prosecutor's Office . . . shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences". Application of this principle would raise very serious problems in England and, in a different way, in Scotland, quite apart from other Member States.

These problems are not insurmountable, but it may be unwise to assume that they can always be negotiated away.

3 December 2007

Memorandum by EUROJUST

PROVISIONS ON EUROJUST AND THE CREATION OF A EUROPEAN PUBLIC PROSECUTOR

SUMMARY

The substantive provisions on Eurojust in the Lisbon Treaty are unlikely to have a significant impact on its operations.

By contrast, the Treaty's procedural provisions, especially in light of proposed amendments to the Eurojust Decision, will have a significant impact on Eurojust's structure and operations in the medium and longer term.

The Treaty possibility of establishing a European Public Prosecutor's Office "from Eurojust" will focus debate on whether Eurojust is an alternative or precursor of the EPPO.

The substantive provisions of the Treaty of Lisbon and Eurojust

The substantive Lisbon Treaty provisions on Eurojust (Article 69D) are similar to but differ from those proposed in the Constitutional Treaty. It is not possible to say that the provisions point unequivocally in one direction.

At first sight, the Lisbon Treaty extends Eurojust's mission by comparison with the proposals in the Constitutional Treaty. The Constitutional Treaty (Article III-174.1) described Eurojust's mission as supporting co-ordination between national *prosecuting* authorities, while Lisbon Treaty (Article 69D.1) puts the mission in terms of co-ordination between both *investigating and prosecuting authorities*.

This difference is repeated in the description of Eurojust's tasks. The Constitutional Treaty provided for the initiation and coordination of criminal *prosecutions*, (Article III-174.2). By contrast, the Lisbon Treaty refers to both investigation and prosecution when describing the tasks of Eurojust. These tasks may include the *initiation of criminal investigations* as well as proposing the initiation of prosecutions, and the *co-ordination of investigations and prosecutions* (Article 69D.2).

However, the impact of these changes in themselves is unlikely to be significant. First, the Lisbon Treaty reiterates that Eurojust acts on the basis of operations and information from the authorities of Member States and Europol (Article 69D.1). The initiation of criminal *investigations* thus continues to depend not only in practice but by Treaty provision on prior investigations by national authorities and Europol.

Second, the existing Treaty on European Union Article 31.2(b) already refers to Eurojust's role in supporting criminal *investigations* in cases of serious cross-border crime. In this context, the wording of the Lisbon Treaty does not represent a significant change to the current position.

It is also worth noting that the Lisbon Treaty's reference to "*proposing the initiation* of prosecutions" (Article 69D.1a) marks a dilution of the position in the Constitutional Treaty. There it was proposed that the tasks of Eurojust should include, without other qualification, the *initiation* and co-ordination of criminal prosecutions.

The Indirect Impact of the Lisbon Treaty and Eurojust

By contrast with substantive provisions, the move to first pillar procedures is more important for the future development of Eurojust, and also less predictable (see the variety of MS responses in the attached summarised questionnaire, *not printed with this report*, on the future of Eurojust). Qualified majority voting, the extended jurisdiction of the European Court of Justice, the greater role for the Commission and the European Parliament etc, will probably lead to changes in Eurojust's structure, operation, field of action and tasks. Whether the UK accepts such changes is, of course, a different matter.

The amendments to the Eurojust Decision, currently under discussion (see attached, *not printed with this report*), give an indication of the changes which, if not adopted under current procedures, may well be brought forward under the Lisbon Treaty. They include provision for common tenure and minimum powers for Eurojust prosecutors, an "Emergency Cell for Co-ordination" to respond in urgent cases, the appointment of liaison magistrates in third countries, improved information flows between Eurojust and Member States, etc. It is not appropriate to consider these amendments in detail here, but an example may assist.

A set of minimum powers for Eurojust national members is likely to be established. This is against the background that, in terms of cases registered, Eurojust has grown dramatically in the five years of its existence. More than 1000 cases were registered in 2007 (with the UK last year as the member state making most use of Eurojust), which represents a five-fold increase over 2002. This increasing caseload could suggest that Eurojust operates successfully with the current distribution of powers among national members.

However, it could equally be seen as illustrating the need to build on success and to secure more effective and pro-active co-operation. Here, a move towards common powers for Eurojust prosecutors is likely to gather momentum under the Lisbon Treaty. An example is the power to make requests for mutual legal assistance. Members of an organisation dedicated to improving MLA between EU states should presumably have the ability to issue requests for such assistance (at least in urgent situations). For example, drug traffickers are about to transport heroin across 6 Member States to dealers in France or the UK. Judicial authorisation from each member state is necessary for intrusive surveillance during the operation, and each MS has differing legislation on the topic. In this type of urgent situation, it makes sense for prosecutors at Eurojust, directly advised by their colleagues of the legal requirements in each jurisdiction, to formulate and issue such requests, without the delays involved in transmitting the request for issue by their home authority.

Other suggested powers may be more controversial. One is the proposal in Article 9a.2 that a national prosecutor appointed to Eurojust should be able to issue orders for search and seizure. This draws on the model of a prosecutor or examining magistrate who directs the police. (The proposal recognises that "constitutional rules" in some MS might make this amendment difficult, and suggests that the Eurojust prosecutor should be empowered to request the measure in such circumstances, see proposed Article 9a.6). This type of change, if not accepted under current arrangements, may advance under the new procedural arrangements in the Lisbon Treaty.

The Reform Treaty and the European Public Prosecutor's Office.

The question of common minimum powers for Eurojust prosecutors has links to the possible establishment of the European Public Prosecutor's Office. As the Treaty provides that the EPPO may be established "from Eurojust" (Article 69E), one impact of the Treaty will be to focus debate on what Eurojust should be in the future. There is an important qualification, that Eurojust's remit is far wider than that envisaged for the EPPO. The Lisbon Treaty provides that the EPPO's role would first be to combat crimes affecting the financial interests of the Union (Article 69E.1) Eurojust's tasks include this, but the mission extends generally to serious crime affecting two or more MS. Nevertheless, although arguments may not be directly expressed in terms of

Eurojust as alternative or precursor of the EPPO, the underlying debate will take this form. Does Eurojust's success make an EPPO more or less likely?

Aspects of the debate are foreshadowed in that around amended powers in the Eurojust Decision. If Eurojust is to have a strictly co-ordinating role, common minimum powers may not be necessary. If a co-ordinating role in urgent cases requires the exercise at Eurojust of prosecutorial powers which are available in some national jurisdictions (such as authorization of controlled deliveries, proposed Article 9a.2), then common minimum powers may be required. Given the variety of powers held by prosecutors in MS, it is not possible to predict the outcome of this debate.

4 February 2008

Memorandum by Fair Trials International

About Fair Trials International

1. Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

2. FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

3. Although FTI usually works on behalf of people facing criminal trial outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy, and, in October 2007 launched an ongoing campaign on protecting and promoting fundamental rights in relation to criminal justice throughout the EU.

4. FTI welcomes the Sub-Committee's decision to conduct an enquiry into the new arrangements for Freedom, Security and Justice which would be introduced by the EU Reform Treaty.

The Impact of the New Decision Making Process in the Area of Freedom, Security and Justice

Co-decision and Qualified Majority Voting

5. The Reform Treaty has a significant impact on the decision-making process for Freedom, Security and Justice. While the general principles of mutual recognition and subsidiarity remain at the heart of policy-making, the Pillar structure will be abolished and decision-making will follow the co-decision process, which is the norm on other areas of EU policy.

6. The Treaty therefore extends the Qualified Majority Voting (QMV) rule to a number of new areas currently under the unanimity requirement. These include asylum, immigration, police cooperation and judicial cooperation in criminal matters.

7. The QMV rule is designed to facilitate efficient decision making. The lowering in the decision threshold under the new rules should improve efficiency by increasing the probability of proposals being approved, and decreasing the likelihood of governments blocking proposals. In principle, this is a positive development that may help break the deadlock in debate over areas such as minimum procedural safeguards for suspects in criminal proceedings.

8. FTI supports this commitment to more efficient decision-making, and hopes that greater democratic accountability and transparency will come with the co-decision process—factors that have sometimes been lacking in policy-making on co-operation in policing and judicial matters to date.

9. However, the QMV rule will be balanced by flexibility mechanisms that will apply to proposals establishing minimum standards in criminal law. Such flexibility mechanisms will not apply to matters concerning mutual recognition, since these require the participation of all Member States and depend on the condition of reciprocity.

Emergency Brake mechanism

10. The first of these is the "emergency brake" mechanism. This allows a single Member State to refer a legislative proposal to the European Council when it has concerns that the proposal might affect fundamental aspects of its criminal justice system. This will result in the suspension of the legislative procedure for a period of up to four months, during which the Council will need to come to a unanimous agreement over the proposal.

11. In order to speed up the decision making process, the Council is not able to ask the initiating party to make amendments or propose a new draft. If the Council is not able to reach an agreement then the second of the flexibility mechanisms—the "enhanced co-operation" process—may be employed.

Enhanced co-operation

12. Enhanced cooperation allows a minimum of a third of all Member States to move forward with the original proposal and adopt legislation that will apply among them, but not in the other Member States. The only requirement to enter into enhanced cooperation in this way is that the Member States notify the European Council, Parliament and Commission.

13. FTI acknowledges that it is difficult to reach an agreement between as many as 27 Member States. The deadlock in discussions on the draft Framework Decision on minimum procedural safeguards for suspects in criminal cases is a perfect example of the sensitivities and difficulties that make unanimous agreement on the Area of Freedom, Security and Justice issues so elusive.

14. In that sense, the application of enhanced cooperation in JHA matters is positive, as it allows one third of the MS to move forward and adopt legislation within the scope of the EU. Such legislation, even if not common to all Member States, will have to comply with the EU standard of fundamental rights principles (including those expressed in the Charter). Moreover, it is possible that recalcitrant Member States will opt-in to such legislation in the future.

15. However, by removing the possibility of the Council requesting the submission of a new draft, the Reform Treaty risks suppressing adequate discussion and debate. That it will be easier for Member States to use enhanced cooperation risks undermining the search for, and preventing the adoption of, more consensual solutions.

16. FTI is concerned that removing the possibility of the Council requesting further discussion and redrafting of proposals, and the ease of entering into enhanced cooperation, may lead to the adoption of unbalanced proposals without adequate scrutiny.

Lack of impact assessment under the shared right of initiative

17. The Reform Treaty provides for a shared right of initiative between the European Commission and a minimum of a quarter of Member States. However, Member States are not required to conduct the same kind of extensive and rigorous impact assessment that the Commission must carry out.

18. FTI has strong concerns about this new provision. The impact assessment is of paramount importance in producing balanced and effective policy, and FTI regrets that Member States will not have to produce similar preparatory work when using their initiating power.

Conclusions

19. While FTI welcomes the commitment to improving the efficiency, transparency, and accountability of decision-making in JHA issues, we remain deeply concerned about the potential consequences of the flexibility mechanisms.

20. Application of the emergency brake and enhanced cooperation mechanisms may lead to fragmented decision-making, resulting in a move away from harmonisation and increasing the complexity and opacity of EU policy on co-operation in criminal matters. The profusion of a complex and fragmented system of rules would make understanding judicial cooperation more confusing, both for the citizen and for the national bodies and officials responsible for implementing cooperative measures. The flexibility mechanisms therefore have the potential to significantly undermine the efficiency of cooperative efforts and hamper the creation of an area of justice, freedom and security.

21. FTI therefore urges Member States not to use enhanced cooperation as a means to bypass proper debate, scrutiny and assessment or to avoid compromise, and to bear in mind that the creation and sustainability of an area of Freedom, Security and Justice relies on Member States progressing together on matters of judicial cooperation.

22. A lack of uniformity brings a greater need for visibility and transparency in all measures, both to allow appropriate scrutiny and to ensure the practicability of such measures. Ensuring such transparency should be a key responsibility of all EU institutions and Member States.

The Charter of Fundamental Rights

Compliance of EU laws with fundamental rights

23. FTI supports the Charter's ambition to strengthen protection of fundamental rights in light of changes in society, social progress and scientific and technological development, and to increase the clarity and visibility of fundamental rights protections so that EU citizens can be better informed about their rights, and better armed to defend themselves against fundamental rights violations.

24. FTI welcomes the cross-reference to the Charter of Fundamental Rights in the new Treaty, which will render the Charter legally binding for all EU institutions, as well as for Member States in the implementation and application of all EU laws.

25. We particularly welcome the fact that all new proposals, whether initiated by the Commission or by Member States, must conform with the provisions laid down in the Charter.

Opt-outs from the Charter

26. The UK has negotiated a Protocol that provides an opt-out, meaning that the Charter will not be applied in the UK, and that it cannot be used to challenge existing UK legislation in the courts or to introduce new rights in UK law. Ireland and Poland have also retained the right to join this protocol and opt-out of the Charter.

27. FTI is deeply disappointed by the British Government's negotiation of an opt-out from the Charter. Opt-outs of measures adopted within the area of Freedom, Security and Justice and from the Charter will undermine the basis of the EU by considerably increasing the complexity of the EU legal landscape, and consequently jeopardising its practicability.

28. More importantly, the negotiation of an opt-out from the Charter puts in question the level of the UK's commitment to securing fundamental rights for all EU citizens, and for its own citizens abroad.

29. In terms of rights of suspects in criminal proceedings, UK citizens generally enjoy more extensive rights than the minimum standards set out in the Charter. UK citizens take for granted the right to legal representation, the presumption of innocence, and the right to an impartial, public hearing. However, those rights cannot be taken for granted in all corners of the European Union (for more details on the discrepancies existing within the EU, see the case studies we submitted in March 2007 to the Home Affair Select Committee—attached).

30. The UK's opt-out sends a disappointing signal about its commitment to securing equal rights for all EU citizens, and its commitment to protecting the rights of British citizens facing criminal proceedings in other European countries.

31. The very fact that the UK was able to negotiate this opt-out also sends a negative message about the EU's commitment to fundamental rights. The Treaty on European Union states that respect for human rights and fundamental freedoms is one of the founding principles of the EU. As such, allowing any exception in this domain is not only inconsistent but it undermines the very basis of a union of values. It sends a poor signal of the importance the EU attributes to human rights. By accepting different standards in this area the EU seriously compromises its credibility and undermines the effectiveness of its human rights policy as a whole.

Risks of judicial overlap

32. FTI is also concerned that the Charter risks creating overlap and confusion between the spheres of competence of the Court of Human Rights and the Court of Justice. It is not clear what would happen if rulings made by the Court of Justice contradict judgments made by individual national states and the European Court of Human Rights. There would currently be no way to resolve the conflict apart from political negotiations. However, the risk of jurisprudential contradiction is limited as each Court takes account of the other's jurisprudence in its own decisions.

33. The intention of the Charter is that those rights which correspond to ECHR rights should be interpreted consistently with ECHR rights. However the existence of two separate texts might create confusion and FTI therefore welcomes the possibility of accession of the EU to the European Convention of Human Rights.

Exclusions of internal security measures from the scope of the Charter

34. Maintenance of law and order and the safeguarding of internal security will remain the sole responsibility of Member States. FTI is concerned that the Reform Treaty, while specifically excluding EU involvement in these matters, explicitly allows for extra-EU inter-governmental cooperation and coordination.

35. FTI has significant concerns about the transparency, fairness, and democratic accountability of previous arrangements such as the G6 group and the Prüm Treaty, which have been developed outside of the EU's normal processes, but wield significant influence over EU policy-making. FTI is deeply convinced that minimum provisions for the protection of fundamental rights need to be systematically extended to these areas.

36. FTI therefore urges all Member States to commit themselves to carefully balancing the interests of security with those of freedom and justice when legislating. Moreover, Member States should always respect the principle of proportionality when adopting anti-terror and other measures related to their internal security.

November 2007

Memorandum by Maria Fletcher, Lecturer in European Law, University of Glasgow (Comments are submitted on an individual basis only)[17]

1. **The legal basis for criminal law measures**. First, it is noteworthy that Article 4(2) TFEU (Treaty on the functioning of the European Union) clarifies that the AFSJ is an area in which the EU shares competence with the Member States.

2. The Reform Treaty offers a welcome clarification of EU competences in respect of criminal law. Such clarity is lacking in the present Treaty settlement which has resulted in some awkward legal wrangling. Competences in matters of criminal justice under the TFEU are expressly organised around the sometimes competing methodologies of mutual recognition and approximation of laws (Article 61(3)). Mutual recognition was expressly endorsed as the cornerstone of judicial cooperation in criminal matters by European leaders at the Tampere European Council in 1999. Until now, it has had no express basis in the Treaties. The ECJ has on numerous occasions endorsed this principle and used it as a prism through which to interpret legislation adopted pursuant to the mutual recognition agenda and indeed legislation which predates even the Amsterdam legal settlement ie Article 54 of the Convention implementing the Schengen Agreement which contains the principle of *ne bis in idem*. Despite the sometimes contested manifestation and consequences of the principle of mutual recognition, it is the key ordering principle of the EU's criminal justice agenda and it looks set to remain so upon entry into force of the Reform Treaty.

3. As for the specific competences, the Reform Treaty provides a clear distinction between criminal procedure (Article 69e TFEU) and substantive criminal law (Article 69f TFEU). On procedural issues Article 69e further distinguishes between those *procedures that will coordinate criminal justice systems of the Member States* (Article 69e(1) (a) the blanket mandate to "lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions";(b) to "prevent and settle conflicts of jurisdiction between Member States";(c) to "support the training of the judiciary and judicial staff"; and (d) to "facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions) and what might be called 'forensic' criminal procedure ie domestic criminal procedures applicable in a specific trial"; (Article 69e(2) (a) "mutual admissibility of evidence between Member States"; (b) "the rights of individuals in criminal procedure"; (c) "the rights of victims of crime"; and (d) "any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament"). This latter provision highlights the hierarchical relationship between mutual recognition and approximation since it states that approximation of the listed aspects of forensic criminal procedure shall only be pursued *to the extent necessary* to give effect to mutual recognition.

4. The competence basis in Article 69e(1)(a) TFEU is written as, and clearly intended to be, a catch-all basis for the implementation of the principle of mutual recognition. Approximation of forensic criminal procedure is thus only justifiable if the simple mutual recognition of the different laws and procedures is for some reason unacceptable. This ought to ensure maximum coordination while according maximum respect to national traditions. It should be pointed out however that given the lack of criteria by which to assess whether mutual recognition would be acceptable, the new provisions are unlikely to settle the argument as to the proper division of labour between the two methodologies in criminal procedure generally.

[17] However, I would like to acknowledge Robin Lööf, Doctoral candidate at the European University Institute, Florence for his input to this evidence. I should also acknowledge the forthcoming book— M Fletcher, R Lööf and W G Gilmore, "EU Criminal Law and Justice" Edward Elgar, 2008.

5. Also of note is Article 69e(1)(b) TFEU which gives the EU express competence not only to prevent conflicts of jurisdiction—which is the present mandate under Article 31(1)(d) EU—but also to *settle* such conflicts.

6. Article 69g TFEU confers a supporting role upon the EU in the field of *crime prevention*. Harmonisation of national laws and regulations is expressly excluded.

7. When it comes to substantive criminal law, the criteria governing EU intervention are a *priori* unrelated to mutual recognition. Instead, the criteria provided by the TFEU depend on a division of criminal legislation into "*core*" or traditional criminal law, and what can be called "*regulatory criminal law*". In the case of the former, Article 69f(1) TFEU lays down that EU action is limited to approximating legislation in 10 areas: "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". This list can be expanded by unanimous decision in Council and with the consent of the EP. Article 69f TFEU justifies the selection of these specific areas because they are "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". Presumably, any area which the Commission or Council propose to add to this list will have to fulfil this general criterion. In the case of regulatory criminal law, Article 69f(2) TFEU provides an independent legal basis for the approximation of provisions of criminal law sanctioning the breach of EU regulation in other policy fields. In short, if the EU has adopted regulatory measures in any area and the effectiveness of those regulations is deemed to require the application of criminal sanctions, the EU shall be competent to approximate such offences and the sanctions to be applied.

8. Impact of **Case C-176/03** (*Environmental crimes*) in the context of the Reform Treaty. Article 69f(2) TFEU provides a neat solution to the rather complex situation which arose as a result of the judgment in *Environmental crimes* and which unfortunately remains after the ruling in **Case C-440/05** (*Ship-source pollution*). It confirms, in effect, that the reasoning of the ECJ in *Environmental crimes* can be applied to the other objectives and policy areas of the EU ie the EC's competence to legislate in the field of substantive criminal law can extend beyond the field of the environment to any area of Union policy which has been subject to harmonisation measures—in so far as criminal law approximation is deemed essential to ensure the effective implementation of that policy.

9. **Decision-making and institutional arrangements**. The move to the "ordinary legislature procedure" ie qualified majority voting and co-decision in areas of criminal law and policing is a most welcome development. The shift to qualified majority voting (QMV) removes the right of veto from any single MS as a matter of course (although see comments on the emergency brake procedure below.) QMV is made more palatable by the simultaneous clarification of criminal law competences envisaged in the Reform Treaty. It may help to avoid political stagnation in the decision-making process (which is made more likely following the recent enlargements of the EU) and will force discussions and consensus building rather than immediate resort to purely national positions/red-lines. Unanimity voting traditionally results in "lowest common denominator" legislation and therefore it is to be hoped that a move to QMV will have a *qualitative* impact on legislative output. One example of a piece of proposed legislation that began life as ambitious and for the most part welcome, but which has ended up as an unwieldy, disappointing and still unadopted text is the Framework Decision on a European enforcement order and transfer of sentenced persons between Member States of the EU. The same argument about quality applies to the shift to the co-decision procedure. A greater involvement of the European Parliament and the conferral upon it of real power in the decision-making process is long overdue in this field. It will lend legitimacy to the European criminal justice project—something which has been sorely lacking to date. We would emphasise the disciplining effect of parliamentary scrutiny both in terms of the proposals actually made and the quality of legislation once adopted.

10. In the "General provisions" of the AFSJ, Article 68 TFEU provides a blanket derogation from this "ordinary procedure" as applicable to criminal justice and police cooperation in that it ensures that the right of initiative continues to be shared between the Commission and the Member States. It is difficult to see what the rationale for this derogation is, especially in the context of a supranational decision making structure. The practical experience of Member States submitting proposals in the field of criminal law has been problematic to date (they tend to either reflect the interests of the individual state to a disproportionate degree (eg the Council Framework Decision 2004/68/JHA combating the sexual exploitation of children and child pornography) nor be inadequately framed (eg Greek proposal for a Framework Decision on *ne bis in idem* OJ [2003] C100/4.) The Commission, acting in the interests of the Union and with the capacity to consult widely and conduct impact assessments is far better placed to submit legislative proposals.

11. A few specified decisions are subject to a special decision making procedure (Article 69e(2)d, 69f(1) para. 3, Article 69i). This is modelled on the present system with unanimity in Council and mere consultation of the EP.

12. One of the most welcome aspects of the new TFEU is that it does away with the specific legislative instruments found in Article 34(2) EU. Henceforth, legislation in the area of criminal justice is done by way of directives, regulations and opinions.

13. The extent to which the adoption of the "ordinary legislative procedure" combined with the emergency brake and enhanced cooperation procedure will prevent future resort to inter-governmental negotiations outside the framework of EU law on criminal and policing matters remains to be seen. The Prüm Treaty was negotiated in this way and later incorporated into the EU law framework. Indications suggest that the Prüm group of states wish to continue to work together to make progress on judicial cooperation.

14. The **emergency brake** and **enhanced cooperation** in criminal law and policing. The inclusion of this possibility suggests that criminal justice remains an area requiring additional safeguards for the Member States. If a measure approximating laws is contemplated and a member of Council is of the opinion that it would "affect fundamental aspects of its criminal justice system", the ordinary legislative procedure can be suspended for up to four months for discussions in the European Council. At this point, one of two things can happen. Either the European Council reaches a consensus and the matter is referred back to Council for decision pursuant to the ordinary legislative procedure or, in the absence of consensus and if at least nine members of Council wish to proceed, the measure will be adopted as a measure of enhanced cooperation. On the one hand, this system raises the spectre of the normative fragmentation of EU criminal justice. On the other hand, it is to be hoped that the political pressure will be such that mere opportunistic blocking of approximation measures is minimised. It should also be pointed out that measures implementing mutual recognition are not subject to this special procedure. In addition to approximating measures which are adopted using the ordinary legislative procedure, whenever a special legislative procedure is provided for, so is generally the possibility of enhanced cooperation. This will prevent unanimity from constituting an automatic block to EU action although, again, there is likely to be considerable political reticence to too frequent recourse to enhanced cooperation.

15. The **jurisdiction of the ECJ** to FSJ measures. The general restructuring of the treaty framework envisaged by the Reform Treaty brings with it a sea change as far as judicial oversight by the ECJ of EU criminal justice is concerned. Henceforth, the Commission will be able to introduce infringement proceedings for Member State failure to fulfil their obligations under the new Title IV TFEU (Articles 226-228 TFEU), the direct action against legislative acts is opened up to include acts adopted under Title IV TFEU (Article 230 TFEU), and the typical Community preliminary rulings procedure is generalised (Article 234 TFEU). The somewhat patchy system of judicial oversight that exists presently will be replaced by the full raft of mechanisms traditionally associated with mainstream Community law. This will secure more effective judicial oversight of EU developments and enhance legal certainty. It is hoped that the application of the infringement procedure to crime and policing measures will encourage and secure a better application and enforcement of EU criminal law at the national level.

16. Provisions on **Eurojust** and the creation of a **European Public Prosecutor**. An entire Treaty article is dedicated to Eurojust but it may be a disappointment to some. Absent is a provision for Eurojust to be able to initiate prosecutions on its own accord. On the other hand, Article 69i TFEU lays down a special procedure for the establishment of a European Public Prosecutor "from Eurojust" and "[i]n order to combat crimes affecting the financial interests of the Union". This remains a controversial development in many quarters and it is unlikely that the required unanimous support will be achieved in the short to medium term. Notably, the Reform Treaty calls for arrangements to be laid down for involving the EP and national Parliaments in the "evaluation of Eurojust's activities".

17. **Protocol on the position of the UK and Ireland in respect of AFSJ and the Schengen Protocol**. The Treaty of Lisbon amends the existing protocol on the position of the UK and Ireland annexed to the Amsterdam Treaty and makes it applicable to the whole of the Title IV TFEU—ie the scope of application of the protocol extends beyond police and judicial cooperation in criminal matters to policies on border checks and asylum and immigration and judicial cooperation in civil matters. Article 2 of the protocol maintains the principle that no legal instrument adopted in pursuance of the EU's AFSJ, or any judgment of the ECJ interpreting such instruments are applicable to the UK and Ireland. Article 3 gives the UK and Ireland the opportunity to declare that they wish to participate in any proposed legal instrument in this area. Article 3(2) makes it clear that if either the UK or Ireland, after such a declaration, nevertheless makes life so difficult for the other Member States, such that the measure cannot be adopted after a reasonable period, they will be excluded. The UK and Ireland will thus not be able to opt in only to sabotage a proposed instrument. Article 4 gives the UK and Ireland the chance to accept an instrument after it has been adopted, however a new Article 4a is inserted by the Reform Treaty which in effect, asserts some political pressure upon the UK and Ireland to opt-in to measures that amend existing measures by which they are already bound. The pressure derives from the potential legal consequences of non-participation—although the principle of non-participation applies even

for these amending instruments, according to Article 4a(2), if they decide not to opt in, and the Council determines that the non-participation of the UK or Ireland would make the application of that measure "inoperable" for other Member States or the Union, the *original* measure will cease to apply to them. In effect, the UK and Ireland could be frozen out of a measure which they had previoulsy signed up to. This means that an existing instrument such as the EAW, if an important amendment is proposed and, say, the UK decides not to participate in this amendment, can cease to apply to the UK. It is hoped that all sides will show political restraint in the use of these provisions to prevent a too significant fragmentation of EU criminal justice. A finding of "inoperability" would of course be open to challenge before the ECJ.

18. The application of the **Charter of Fundamental Rights** to FSJ measures. The direct legal impacts of the Charter may not be as dramatic as some might have envisaged—this is because the EU institutions and MS when implementing AFSJ legislation already have to respect human rights, since respect for human rights is deemed to constitute one of the general principles of EC/EU law. Pursuant to existing Article 6 EU (new Article 6(3) EU), the sources of such rights include the constitutional traditions common to the Member State and the ECHR. Indeed, other international human rights instruments have also been accepted as sources of rights. In Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* the ECJ recognised the principles of legality and equality before the law as general principles of EU law and in C-305/05 *Ordre des barreaux francophones et germanophones and Others v Conseil des Ministres* the ECJ did the same with regard to all the aspects of a fair trial. If theECJ were to acknowledge all the rights contained in the Charter as general principles of Union law the distinction between the two becomes irrelevant for practical and legal purposes—the Charter would simply be another source of rights as general principles and any formal attempt to limit the legal effects of the Charter would make little or no difference to a State's human rights obligations pursuant to EU law. Only to the extent that there may differences between the general principles and the Charter rights will it be possible to limit Member States human rights obligations by limiting the legal effects of the Charter (as the UK has done by way of Protocol.) Finally in this context, it should also be borne in mind that the new Article 6(2) EU provides that "[t]he Union shall accede to the [ECHR]". However, given that Article 188n(8) TFEU specifies that Council shall adopt the act of accession unanimously, this may not be as straightforward as perhaps expected.

26 November 2007

Memorandum by The Freedom Association (TFA)

We are a long-established membership organisation which campaigns on issues of personal freedom. Our submission is in two sections: General objections to the Lisbon Treaty; and specific problems in the area of Law and Institutions.

General Objections to the Treaty

The TFA is strongly in favour of trade and voluntary intergovernmental cooperation in Europe (and beyond Europe), but is opposed to political union in Europe. We believe that the EU as currently constituted is inimical to Britain's interests: it is making us poorer, and less democratic, and less free.

Making us poorer: Figures from the EU Commission itself show that the costs of regulation in the Single Market exceed trade benefits by nearly four times (€600 billion per annum vs €160 billion). That is without accounting for the very high costs of the CAP, and our direct EU budget contributions. The EU is a Customs Union. We believe that this is an old-fashioned and sub-optimal structure unfit for the 21st century. We believe that a European Free Trade Area would better serve our interests. We note that the pattern of the EU's external trade agreements with third countries is biased against the Anglosphere (former British colonies) in a way that militates against our trade interests, and against the Commonwealth.

Making us less democratic: The outstanding example is the Lisbon Treaty itself. The EU institutions have shown contempt for public opinion, by bringing back essentially the failed EU Constitution, despite its rejection by referendum in France and Holland in 2005. More generally, we recall John Stuart Mill's remark that "Where people lack fellow feeling, and especially where they read and speak different languages, the common public opinion necessary for representative government cannot exist". Democracy requires more than counting votes. That is merely arithmetic. It requires a people (as Enoch Powell said) "who share enough in common in terms of history, culture, language and economic interests that they are prepared to accept governance at each others' hands". That situation obtains in the nation state. It clearly does not obtain across the EU.

Making us less free: Our people are bound by laws to which they did not agree and to which our government may not have given assent. They are under a system of governance in which they can no longer dismiss the people who make most of their laws. Moreover the defence of the realm, secured within NATO for many decades, is now under threat from the EU's defence pretensions, which while adding no new resources to our military nevertheless divide NATO and create confusion in our defence forces and military planning.

The government's arguments against a referendum do not bear a moment's examination.

"This is a quite different document". Frankly, this claim is an insult to our intelligence. Only this month (October), Valery Giscard d'Estaing, Chairman of the Convention that drafted the Constitution,again insisted that the Treaty was essentially the Constitution with cosmetic changes. European leaders have queued up to claim that the Treaty is 90%, or 96%, or 98% of the Treaty. We especially note the Open Europe study which shows that 400 clauses of the Constitution appear relatively unchanged in the Treaty. But the smoking gun is surely Angela Merkel's letter (she was then President-in-Office) to Member States in the spring of 2007 when she proposed "Presentational changes and different terminology ***but with the same legal effect***" (my emphasis). This is cynicism and deceit of a high order.

"**We have our red lines**". But we had them with the Constitution in 2005. If they did not render a referendum unnecessary then, neither do they render it unnecessary now. In any case, as the European Scrutiny Committee has observed, "The Red Lines leak like sieves". No one in Brussels expects them to survive challenge in the ECJ, and such challenges are currently being planned.

"**We never had referenda on previous Treaties**". Just because we made mistakes in the past, that is no reason to repeat them. There is a much greater awareness now of the extent of EU integration, and much greater public concern.

"**We are a parliamentary democracy—we don't do referenda**". This from a government that has held dozens of referenda, on Scottish and Welsh devolution, on a Regional Assembly for the North East, on a mayor for Hartlepool. The government has de facto conceded that significant constitutional changes require the assent of the people, and this is the most important change of all. Even if the government had a manifesto commitment for the treaty, it would be arguable that so great a constitutional change required separate public assent. But it has no such commitment. On the contrary, it has an explicit commitment hold a referendum, and it is a constitutional outrage that it should now try to talk its way out of that commitment.

"**People won't understand it—it's too complicated**". The average voter might be unable to write an essay on all the policy areas dealt with in a General Election, but we still accept the people's verdict. That's democracy. The idea that political decisions are too difficult for the public to assess is the road to totalitarianism. It also shows a vast contempt for the voters.

TFA demands a referendum on the renamed Constitution.

Observations Specific to Law and Institutions

We oppose **qualified majority voting on criminal Law and policing**. These are fundamental national issues, and it is the first duty of our government to protect the citizen from arbitrary arrest at the behest of a foreign power. This is an especially important point since our legal system is so different from continental systems. We shall end up with a dog's breakfast of conflicting provisions. Indeed we do not see any advantage in deciding these matters "at the European level". We also oppose the European Arrest Warrant, which allows British people to be taken abroad, without due process, to inferior legal régimes where traditional British liberties are not respected, and even in certain cases to be tried for behaviour which would not be a crime in our country.

"**The emergency brake**" is merely 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.

TFA absolutely opposes the development of **Eurojust and a European Public prosecutor**. It is a transparent attempt to diminish national police and justice systems and to create a Europe-wide system based on the Napoleonic model. It must be stopped.

We do not see any need for **family law measures** at the EU level, and we absolutely condemn the *passerelle* clause in any EU context. We cannot trust our government to defend Britain's interests even when faced with a Treaty and a ratification procedure. How can we trust them with decisions made in private behind closed doors?

We are opposed to any British engagement with **Schengen**, which would undermine our ability to run an effective immigration policy.

We oppose any enhanced role for **the ECJ in FSJ issues**: indeed we need to reduce its role.

We oppose any application of the **Charter of Fundamental Rights** in the UK. It would promote judicial activism. It would transfer law-making powers from politicians (whom at least we can sack) to judges whom we cannot sack.

On the general *passerelle* provisions, see above comments on the *passerelle* in family law.

31 October 2007

Memorandum by JUSTICE

1. JUSTICE is an all-party law reform organisation, dedicated to advancing human rights, access to justice and the rule of law. It is the United Kingdom section of the International Commission of Jurists.

2. We welcome the House of Lords European Union Committee Sub-Committee E (Law and Institutions) Inquiry into the EU Reform Treaty and are grateful for the opportunity to submit evidence. JUSTICE has been one of the leading UK organisations working on policy and human rights issues in the field of EU justice and home affairs. In recent years we have, *inter alia*, completed projects on the European Arrest Warrant and the EU Charter of Fundamental Rights and Freedoms, and responded to consultations and calls for evidence on issues relating to freedom, security and justice in the European Union.

Summary

3. In this response we will not attempt to address all the issues raised by the inquiry but will focus upon certain areas of particular interest to JUSTICE. Specifically, we will here comment upon:

- Changes to the legislative process in criminal law and policing.
- The operation of the opt-ins contained in the protocol on the position of the UK and Ireland in respect of the area of freedom, security and justice.
- The emergency brake and flexibility procedures re criminal law and policing.
- The application of the Charter of Fundamental Rights to FSJ measures.

4. Our evidence here highlights our main views and concerns regarding the operation of the Treaty in the above areas. If we do not mention a particular provision of the Treaty, this should not be taken for endorsement. Our comments relate to the provisions of the Reform Treaty and its Protocols as agreed on 18 October 2007 and do not reflect any amendments that may have been made to the texts between 18 October 2007 and the 13 December 2007 treaty signing.

Changes to Voting Procedures: Criminal Law and Policing

5. We believe that there are both potential advantages and potential disadvantages arising from the move to the new "ordinary legislative procedure" in relation to criminal law and policing matters. The current system of unanimity in Council is, we believe, inappropriate for a Union of 27 Member States—a number that may increase further in the future. The need for a unanimous political will to achieve measures in this area has encouraged delay in the legislative process while negotiations take place; the watering down of certain legislative instruments in order to satisfy Member States' concerns; and the inability to pass some proposals altogether. In this context, JUSTICE has been concerned that while co-operation measures facilitating prosecutions, such as the European Arrest Warrant, have successfully negotiated the legislative process, it has been difficult for instruments protecting the rights of suspects and defendants to do so. In particular, JUSTICE has long called for a binding Framework Decision on procedural rights for suspects and defendants in criminal proceedings, but the proposed instrument has been opposed by a minority of Member States and has therefore failed to become law. This imbalance is particularly unfortunate because in order for mutual cooperation measures to be fully effective, judges and others must have trust and confidence in the quality of justice available in the criminal justice systems of other Member States.

6. In theory, we believe, the move to a qualified majority voting system in Council in relation to policing and criminal justice measures should result in legislation passing through the Council more rapidly and, we expect, with fewer concessions granted to individual Member States in order to allow it to pass. However, this point is subject to caveats. First, the existence of the emergency brake in relation to some measures may mean that some of the characteristics of the old system are retained at EU level (see below). Secondly, the move to a more streamlined procedure will not necessarily be of substantive benefit to citizens and residents of the Union since this will depend on the content of the legislation being passed. Objections to legislation by one or more Member States made on the basis that it insufficiently protects human rights or the rule of law, for example,

may now be overridden more easily. The human rights provisions of the Reform Treaty are welcome but may not provide sufficient protection against this.

7. However, a greater focus on the rights and interests of individual citizens and residents may be obtained through the enhanced role of the European Parliament (EP) under the ordinary legislative procedure. We strongly welcome the new role of the EP in this context, since we believe that the former primacy of the Council in the legislative process has been one reason for the "pro-prosecutorial" emphasis in EU legislation in criminal justice cooperation. Further, from the standpoint of democracy and the rule of law, the pre-Reform Treaty system suffered from a "democratic deficit" in this area. The EP's role was limited, and while our national Parliament implemented Framework Decisions through domestic legislation, it was in practice difficult for it to reject their provisions once agreed by the UK government in the Council. In our view, it is undesirable for any legislative process to be dominated by the executive in this way. We note, however, that there are concerns regarding the role of the national parliaments under the EU Reform Treaty.[18]

8. We remain concerned that low voter turnout in UK elections for Members of the European Parliament continues to compromise the democratic legitimacy of the EP.[19] However, it is to be hoped that the increasing importance of the EP results in better engagement with the electorate. In this regard, we highlight the need for transparency and simplicity in EU institutions and legislative processes.

9. In general, however, it is important to recognise, as we said in evidence to the House of Commons Home Affairs Select Committee in October 2006,[20] that changes in voting procedures should not be seen as the "panacea" in relation to the progress of freedom, security and justice in the European Union. We are concerned that while legislative cooperation measures have proceeded, practical barriers to just and effective cooperation in the field of policing and criminal justice remain. First, there is a need for training for judges and lawyers in relation to the criminal laws and criminal justice systems of (now, a large number of) other Member States: without this, it is very difficult to implement measures such as the mutual recognition of previous convictions correctly. Second, the success of the cooperative measures depends upon the ability of authorities to trust in a generally high standard of policing and criminal justice procedure in other Member States. We are concerned that these objectives have not yet been fulfilled in practice across the Union and that, without them, there is a risk that individual rights may be compromised and that injustices may result.

10. In conclusion, while we believe that the new legislative procedures for policing and criminal justice cooperation will be, procedurally, more effective, the substantive benefits to be gained depend upon the political will of the Member States. The likely effects of the new procedures must also be judged in the context of the emergency brake and flexibility procedures, where applicable, and in the light of the UK's opt-in provisions.

The Operation of the Opt-ins Contained in the Protocol on the Position of the UK and Ireland in Respect of the Area of Freedom, Security and Justice

11. We have chosen to deal with the above protocol's opt-in provisions at this juncture, since any consideration of the new voting procedures as they relate to the United Kingdom is significantly affected by the UK's ability to choose whether to opt into proposed legislation. The UK's opt-in represents the retention of an enhanced safeguard for national sovereignty in the light of the loss of the requirement of unanimity in Council. We presume that this reflects strong public and/or governmental feeling regarding any potential loss of national control over policing and criminal justice measures posed by the Reform Treaty.

12. We cautiously welcome the UK's opt-in in these areas, since we believe that it is necessary to retain a safeguard, in the field of policing and criminal justice, against being bound by legislation that is oppressive and/or inappropriate in the UK context. While the "emergency brake" does provide such a safeguard it only applies to certain policing and criminal justice measures under the provisions of the Reform Treaty (see below). We regard the opt-in provision as being of particular importance in the context of Article 69f of the Reform Treaty (definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension) as EU legislation in this area could conflict with existing—recently enacted—UK laws defining criminal offences and sanctions. While recognising the benefits of appropriate levels of

[18] See the House of Commons European Scrutiny Committee, *European Union Inter-Governmental Conference*, 35th report of session 2006–07.

[19] Although voter turnout in the UK increased from just 24% in the 1999 EP elections to 38.5% in 2004: see "Lessons learnt from European Parliamentary elections, 2004" Electoral Commission news release, 21 December 2004, www.electoralcommission.org.uk.

[20] JUSTICE *Evidence to the House of Commons Home Affairs Committee inquiry into current issues affecting Justice And Home Affairs at EU Level*, October 2006.

harmonisation, we regard the substantive criminal law as an area where it is particularly important for strong safeguards for national sovereignty to be retained. We are particularly concerned that such safeguards should exist in relation to terrorism, where, for example, secondary offences such as those relating to speech and membership of organisations may compromise fundamental rights to freedom of expression and association.

13. While we welcome the provision for opt-in for the UK for those important reasons, we recognise that its operation may also cause difficulties. If in future the UK decides not to opt into, for example, laws on data protection or procedural safeguards in the policing and criminal justice field, this could compromise the mutual trust of other Member States for the UK system and therefore undermine other aspects of cooperation such as the European Evidence Warrant and criminal records exchange. The opt-in should therefore be regarded as a useful tool to protect democratic sovereignty and/or individual rights where necessary.

14. It should also be recalled that since the UK will now have an opt-in rather than a veto in policing and criminal justice, there is a possibility—in areas where the emergency brake does not apply—that the UK may be bound by legislation with which it disagrees having initially opted into it. This situation would be undesirable and decisions whether or not to opt-in will therefore have to be taken very carefully.

The Emergency Brake and Flexibility Procedures in Criminal Law and Policing

15. From a UK perspective, because of the possibility that the UK could opt in to a measure and then be outvoted in Council, the emergency brake procedure provides a further useful safeguard against the UK's being bound by the text of a measure to which it has not agreed. However, there are two caveats to note in this context. The first is that the emergency brake does not apply to the entirety of Title IV, Chapters 4 and 5 (judicial cooperation in criminal matters and police cooperation). Second, use of the emergency brake, if the flexibility procedure is subsequently invoked, could result in the development of "two-tier" systems of cooperation. Third, the use of the emergency brake could replicate some of the problems of the existing system of unanimity in Council, creating delay and watering down measures in order to avoid its over-use.

16. The emergency brake does not apply to important aspects of criminal justice cooperation: for example, Article 69e(1) is not covered, meaning that the procedure cannot be used in relation to measures to prevent and settle conflicts of jurisdiction between Member States or to lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions. Such measures could affect fundamental rights (for example, the right to a fair trial, to liberty and to private and family life may all be affected by the choice of forum state for a criminal trial). Further provisions using the ordinary legislative procedure upon which there is no emergency brake include Article 69g (crime prevention measures), which is very broadly drafted; Article 69h (Eurojust: structure, operation, field of action and tasks); Article 69j(2) (police cooperation: information—including storage and exchange; training and exchange of staff, etc.; common investigative techniques re serious crime), and Article 69k (Europol: structure, operation, field of action and tasks). In this context, the existence of the UK's opt-in is to be welcomed.

17. Flexibility procedures appear in the Treaty's criminal justice and police cooperation provisions in relation to the emergency brake and also in relation to provisions requiring a unanimous decision of Member States where such unanimity cannot be obtained. While this procedure helps to avoid the stalling of legislation that occurred under the pre-Reform Treaty unanimity provisions, there are undesirable aspects to flexibility. Where groups of states negotiate an agreement outside the ordinary legislative procedure, we are not aware of any provision for democratic involvement at EU level: without involvement by the EP the democratic deficit would be greatly heightened. Further, as with the Treaty of Prüm, a difficult "two-tier" situation is developed whereby some states cooperate more closely, or have different obligations regarding criminal law and policing issues, than others. Other states are then presented with a fait accompli—if they want to join arrangements regarding say, mutual admissibility of evidence between Member States, but an agreement exists developed through the flexibility procedure, it will be difficult to do other than accept that agreement or remain outside the cooperating group. This is undesirable.

The Application of the Charter of Fundamental Rights to FSJ Measures

18. We will not deal here with the Charter of Fundamental Rights (the Charter) in its general application to freedom, security and justice measures but will consider it in the context of the UK's opt-out to the Charter by virtue of Protocol No 7 to the Reform Treaty, and as it relates to criminal law and policing.

19. The opt-out provides that the Charter will not create justiciable rights in the UK and, in so far as it refers to national laws and practices, will not affect those of the UK that do not comply with the Charter. However, the Charter will be applicable to EU legislation in the field of freedom, security and justice and therefore, we

believe, any legislation negotiated by parties including the UK at the EU level in this field will necessarily have to be Charter-compliant. This latter aspect is, we believe, very welcome.

December 2007

Memorandum by Professor Maria Kaiafa-Gbandi[21]

Summary

According to the Reform Treaty the EU becomes the primary holder of competence in the area of judicial and police cooperation in criminal matters, while on the other hand the exertion of its competences on a Community basis means that it can bind its Member States in the criminal field much more effectively. Through the Reform Treaty the EU expands and deepens its competences in the area of substantive criminal law and attempts to assume for itself, in view of the desired approximation of laws between Member States, the demarcation of minimum standards of criminal acts for a vast ambit of fields, open to further expansion in the future. This decisive specification of the breadth of criminal repression (as far as its starting point is concerned) combined with the cardinal aim of security, on which the EU focuses its attention, provokes justifiable anxieties, because the democratic deficit which used to characterize the EU, despite its retreat, does not disappear. On the other hand the principle of judicial decisions' mutual recognition, as a harbinger of an effective, simplified criminal law with minimum requirements at the level of procedural guarantees, becomes the basic instrument for promoting the security aim which runs through the field of EU criminal law competences according to the Treaty on the Functioning of the EU (TFEU). The criminal procedural law according to the latter will be developed in the EU in order to facilitate the recognition of judicial decisions and thus attain a function which violates its historical identity as a Charter of free people. Even though the EU expands through the Reform Treaty the competences of its existent organs in the field of penal repression (Europol, Eurojust) in a way that gradually surpasses their coordinating role or even promotes a central model of criminal prosecutions (European Public Prosecutor's Office), it does not accomplish to surmount considerable well-known deficits of the present system. Furthermore, and this is more perilous, although the power of the Public Prosecutor's Office may principally infringe upon people's rights, it is set on the basis of a democratic deficit which remains essentially intact in relation to its present form. Lastly, the weighty novelty of the entrenchment of fundamental rights (art 6§1 TEU) and the judicial protection provided for them (art 230 fourth phrase TFEU) unfortunately cannot recant the worries created by certain provisions of the Reform Treaty related to criminal law, because despite the significant progress made by the institutional recognition of the European Charter of Human Rights and the accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms the essence of certain rights becomes relative through the Reform Treaty itself.

I. General Remarks

1. The Reform Treaty (CIG 1/1/07, REV 1, Brussels, 5. October 2007) abolishes the pillar distinction and unifies the EU structure by establishing a supranational organization, which is much more cogent and potent, because now all the EU competences conferred by the Member States are invariably exerted on a *Community basis* (art 1 last phrase TEU: "The Union shall replace and succeed the European Communities"). In this way the current field of transnational cooperation (Third Pillar), where all criminal matters are subsumed, ceases to exist and this means that the EU role in the area of criminal law is perspicuously reinforced.

2. Certainly every competence of the Union remains granted (art 5 Treaty on the Functioning of the EU-TFEU). Nevertheless, to the extent that the judicial (art 69f and subsequent TFEU) and police cooperation (art 69j and subsequent TFEU) in criminal matters are categorically defined as an area of shared competence between the EU and the Member States (art 4§2j TFEU), the EU competence in the field of criminal law cannot be questioned. Moreover, the fact that this competence is characterized as a shared one should not make us jump into the conclusion that the role of the EU and the Member States is coequal. On the contrary, according to the TFEU when the Treaties confer on the Union a competence shared with the Member States in a specific area, . . . the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its own (art 2§2 TFEU). This practically means that the shared competence becomes from the moment of its exertion an exclusive one. Hence, to the extent that the shared competences displace those of the Member States according to the "rule of prevention", it is clear that *the EU has the precedence in the area of judicial and police cooperation in criminal matters*.

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3. The above findings lead to a first important conclusion: according to the Reform Treaty the EU becomes *the primary holder of competence* in the area of judicial and police cooperation in criminal matters and consequently the choice of a *concentrating model* appears as evident. Beyond this issue, the exertion of the EU competences on a *Community basis* means that the EU can bind the Member States in the criminal field much more effectively through the imposition of sanctions if they do not comply with the measures that it determines (art 228§2 TFEU), while the enactment of these measures generally requires majority and not unanimity.

4. At this point one might contend that the cooperation in criminal matters between the Member States favours by its own nature an EU primacy and under this context the aforementioned inferences should not be faced with caution. Nonetheless, the clarification of the *leading aim of the EU competences* in the sensitive area of criminal law is of decisive importance, before one adjudges whether the unquestionable transfer of power to the supranational organization of the EU and the commensurate retreat of the state sovereignty takes place with the perspective of serving the people of Europe and their freedoms.

5. From article 61§3 of the TFEU, the first provision devoted to the area of freedom, security and justice, it clearly stems that the EU has placed as a predominant aim the guarantee of "a high level of security", which is endeavoured to be fulfilled through the enactment of various measures, including measures of preventing and combating crime, judicial and police cooperation in criminal matters etc. So, although one would expect that the EU interventions in the area of criminal law would express beyond the aim of the protection of legal interests the guarantee of people's freedoms—especially after the institutional recognition of the Charter of Fundamental Rights from the Reform Treaty (art 6 TEU)—*the established imbalance through the institutionalized priority to security is apparent*.

II. Substantive Criminal Law

6. In order to facilitate in the long term the mutual recognition of judgments (art 69e§1 TFEU), the Treaty foresees the EU intervention in the field of substantive criminal law too. This is an intervention that seeks to approach the legislation of the Member States in areas of particularly serious criminality with cross-border dimensions. The TFEU does not certainly open the prospect of creating a "Model of European Criminal Code". However, the areas—in which the EU competence of intervention is recognized—are not only open to expansion in the future (art 69f§1TFEU) but also they have such amplitude already that any scrutiny of the EU actions in the field of criminal law within its granted, specialized and restricted power is made excessively difficult. The Reform Treaty enumerates areas in the field of criminal law with ambiguous content such as those of organized crime, corruption etc.

7. On the other hand if we compare this adjustment with the currently valid provisions (arts 29 and 31 TEU) we will ascertain that the EU competence to intervene in the area of criminal law through minimum rules, even for the definition of criminal offences and sanctions, is significantly expanded as far as the possible fields of criminal activities that can become subject-matter of its intervention are concerned. Furthermore, the EU expressly now attains the competence to enact *even by itself* (ie through a regulation) measures for combating and thus criminalizing the fraud against its financial interests (art. 280§4 TFEU), a power which was not granted by its founding Treaties. In other words, the Reform Treaty *clearly expands and deepens the EU competence* in the area of substantive criminal law.

8. If we leave aside the special adjustments for combating crime against its financial interests, we will ascertain that the EU becomes competence according to the TFEU to enact *minimum rules about the definition of criminal offences and sanctions*. However, this does not mean that its relevant competence retains its present form, because the power to enact minimum rules according to the Treaty (and in view of its exercise on a Community basis) begets a much more effective commitment on the Member States, which can now be obliged to transfer the European legal act in their internal legal system even through the imposition of sanctions (art 228§2 TFEU).

9. However, one would object perhaps that any reservations should recede to the extent that the European legislative acts in this field require now the co-decision of European Parliament, at least in the matters like this one where the normal legislative procedure is followed (art 251 TFEU). Undoubtedly, the co-equal participation of European Parliament in the Union's legislative process reduces the democratic deficit which constituted the basic core of criticism regarding the EU intervention in the area of criminal law. Here indeed one should acknowledge that the change in the EU legislative process is a significant progress from a formal as well as a substantive point of view, because it signifies the transition from an organization governed by powerful executive organs (which include representatives from the Member States) to a democratic union in which the legislative function is delegated on equal terms to the elected representatives of European people. And this is indisputably a very important progress on institutional level too. Moreover, one would argue that the normal legislative procedure, as it is now foreseen by the TFEU, expresses the dual legitimizing base of the

Union as a union of people but simultaneously as a union of European Member States too which participate in the legislative procedure through the Council.

10. Nevertheless, the question that still remains, according to my opinion, is whether the enactment of directives concerning the establishment of criminal acts or minimum binding rules for them satisfies the democratic principle. The cornerstone of the legal principle *nullum crimen nulla poena sine lege*, which is constitutionally embedded in numerous Member States, does not depend upon the name of a regulating rule as law but upon its identity as expression of the democratic principle. Despite the fact that the participation of European Parliament in the legislative procedure clearly improves the situation, as it provides an outlet for the democratic principle's expression, it does not solve the problem. According to the legislative procedure prescribed by the TFEU it is possible to enact a European legislative act even when there is no majority within the European Parliament. This can happen if the European Parliament at the second reading does not express its views within three months from the time the Council informed Parliament of its position. In this case "the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council" (art 251§7a TFEU). The same applies if the European Parliament does not succeed in rejecting, by a majority of its component members, the Council's position (art 251§7b). In the aforementioned instances the European legal act will be issued simply because it obtained the Council's approval by majority. Nonetheless, restrictions and interventions in people's freedom imposed by criminal law as ultima ratio according to the tradition of the European legal civilization can only be determined by an organ, which conveys with the most representative way people's sovereignty. Certainly, this organ cannot be other but a Parliament elected by a free, co-equal, general and secret balloting. Thus the well-known problem of governmental enactment of law, which predominantly characterized EU as an institution, is reduced but not extinguished. And understandably one cannot contend that at least in the directives the democratic principle is duly kept through the intervention of national parliaments. Because the fact that the definition of criminal acts in the sense of minimum rules is binding for the Member States obviously constitutes a preordained decision of utmost importance.

11. On the other hand, I do not deem as convincing the argument that the situation in EU could not be different, since the EU is a union not only of European people but also of states which must express themselves through the legislative process even in the field of criminal law. This is the case because in the internal legal system of the Member States also the legality of the enactment of criminal laws rests upon the parliament and not upon the executive power. Hence, the participation of Member States within the EU, particularly at this issue, ultimately requires parliamentary expression. This participation can take place either by granting exclusive competence to the European Parliament *especially for the enactment of European legal acts concerning criminal matters* (procedural and substantive), and with a majority, that expresses the majority of the European people, or at least, if one insists upon the Council's participation, by amending the TFEU (art 251) so that the enactment of *European legal acts related to criminal matters* will not be feasible unless a qualified majority of the European Parliament expressing the majority of European people exists.

12. The preceded analysis shows that through the Reform Treaty the EU expands and deepens the field of its competences in the area of criminal law and attempts to assume for itself, in view of the desired approximation of laws between Member States, the demarcation of minimum standards of criminal acts for a vast ambit of fields, open to further expansion in the future. This decisive specification of the breadth of criminal repression (as far as its starting point is concerned) combined with the cardinal aim of security, on which the EU focuses its attention, provokes justifiable anxieties because the democratic deficit which used to characterize the EU, despite its retreat, does not disappear.

III. Procedural Criminal Law

13. The provisions concerning the law of criminal procedure have apparently greater significance for the EU, since they primarily underpin the aimed judicial and police cooperation. Besides, for the first time in the primary law related to criminal matters, *the mutual recognition of judgments and judicial decisions* is proclaimed as a fundamental principle, while furthermore it is categorically stated that the judicial cooperation in criminal matters includes also the approximation of Member States' laws and regulations in the areas of criminal law and criminal procedural law according to what is stipulated more specifically in following provisions (art. 69e§1 TFEU).

14. An initial observation is that the principle of mutual recognition can be compatible with the field of free movement of goods, from where it originates, but this does not connote that its transfer in the field of criminal judicial decisions can take place without severe disputes for the rule of law, as the basic objective for this transfer in the field of criminal law is *its detachment from the principle of double criminality*. It is evident of course that the promotion of the principle of the judicial decisions' mutual recognition is capable of securing the *maximum possible effectiveness with the maximum possible simplification*, because the provisions of the

member state from which we would petition for the recognition of a decision would not need to be taken into consideration or could not impede the proceedings. Since a measure like this cannot become unquestionably acceptable, the TFEU envisages the establishment through a directive of *minimum rules* of evidence, procedural guarantees and other specialized elements of criminal procedure as well as minimum rules regarding the definition of a range of crimes and their sanctions.

15. However, one must not overlook two points: first it is obvious that, exactly because the recognition of judicial judgments and decisions is envisaged to unconditionally cover *all their range* (art 69e§1) while the approximation of the substantive and procedural criminal law through minimum rules between Member States is initially foreseen only for certain areas (arts 69e§2 and 69f§1), the TFEU considers as given the possibility for the judicial judgments' recognition even in areas where such an approximation may not have taken place. Hence, to name but one example, the possibility a member state to be called to recognize in the future a convicting decision of another member state against a citizen of its own or a legal entity located within its territory with all the consequences that this might entail, cannot be ruled out, although this might concern an act which according to its own legislation is not criminalized. This possible scenario has already been validated by the framework decision of the European arrest warrant for a certain list of offences.

16. As one can understand, such an outcome, touches the hard core of the rule of law, since we cannot argue that this constitutes merely "a transnational criminal procedure", where *lex* is the criminal law of the state having jurisdiction and consequently that the law of the member state where the decision is executed is immaterial. This is the case because when *coercive actions with the maximum possible constraint for people's freedom* occur in the member state, where the recognition or execution of a foreign convicting decision takes place, this state can indeed have the pretension, even if it executes the decision on behalf of another state, *to keeping the limits that it has set for itself* when it issues or executes convicting decisions within its national borders. And it is self-evident that the existence of double criminality appears as a minimum precondition at this issue. Hence it becomes apparent that *the generalized acceptance of the principle of the judicial decisions' mutual recognition between Member States leads inevitably to the dominance of the most punitive criminal legislation*.

17. On the other hand, we must also not overlook the point where exactly the actions of facilitating the aforementioned procedure through directives establishing *minimum rules* for the mutual acceptance of evidence, the rights of victims etc. will lead to. These obligatory minimum rules will in turn be transferred to the internal law of Member States, which is of course not hindered to provide a higher level of protection (art 69e§2 TFEU). Subsequently it becomes evident that in order to facilitate the use of the principle of mutual recognition *procedural guarantees of two speeds* are created: those which the EU promotes as minimum rules for facilitating the above principle and those providing higher protection perhaps, which could be valid only within a state's territory. But what is the logic of such a structure? Apparently the logic is that what one enjoys as a right in one state does not mean that one will also enjoy it in an internationalized procedural criminal law within the EU. And what about the future of such a structure? Rationally the dominance of the minimum rules content, because no state that exerts power and is prone to be subjected to the minimum possible restrictions will sustain in the long run a minimum and maximum level of protection. Hence, sooner or later the flattening of guarantees towards the lower level is inescapable, since this will be the level where precisely the EU will accomplish to find the minimum points of consensus between Member States in order to describe these minimum rules. What the EU needs is not minimum rules for the mutual recognition of judicial judgments between Member States but primarily a consensus concerning *the necessary standards of the procedural rights' protection* or, in other words, a model of protection which is not ruled by considerations of effectiveness or simplification but which defines the unswerving, indispensable level of protection for a law community with principles inherited by the national constitutions and ECHR.

18. In accordance with the above inferences we can add one more important conclusion to those we achieved deducing till now: *the principle of judicial decisions' mutual recognition*, as a harbinger of an effective, simplified criminal law with minimum requirements at the level of procedural guarantees, becomes the *basic instrument* for promoting the security aim which runs through the field of EU criminal law competences according to the TFEU. The criminal procedural law according to the latter will be developed in the EU in order to facilitate the recognition of judicial decisions and thus attain a distorted function which violates its historical identity as a Charter of free people.

IV. EU Organs Related to Penal Repression

19. If we now turn our attention to the provisions of the TFEU concerning the EU organs in the field of criminal repression we observe that, apart from the expansion of the current organs' competences, ie, Eurojust and Europol (arts 69h–l TFEU), the possibility of creating a new but highly contested organ, the European Public Prosecutor's Office, is also foreseen (art 69i TFEU).

20. It is evident that Eurojust as well as Europol transcend through the TFEU their coordinating character and expressly acquire decisive competences for all the serious crimes affecting two or more Member States. Thus, it is foreseen that Eurojust, apart from coordinating the prosecutions and reinforcing the judicial cooperation between Member States, may also undertake through the enactment of a regulation the *initiation of criminal investigations as well as the proposition of the initiation of prosecutions conducted by competent national authorities* (art 69h§1a TFEU).

21. As far as Europol is concerned it is foreseen correspondingly that regulations shall determine its action and duties and may assign to Europol, apart from the duty of data collection and processing, the coordination of investigations and operational actions of Member States, *their organization as well as their implementation* in cooperation with the competent authorities of the Member States (art 69k§2b TFEU).

22. Moreover, the evident problems in the relationship between Europol and Eurojust remain intact. As it is well known in the EU Europol was established first as a police coordinating organ for combating interstate criminality. Nonetheless, the function of Europol even in the field of its original competence, ie the collection, analysis and supply of information to the relevant authorities of the member-states, quickly made clear the rule of law deficits that accompany its role. It suffices here to recall two points: First, that Europol's action is extended even to a stage of a pro-proactive policing, since the collection of information may concern people who cannot be deemed as suspects for committing crimes even in the future (art 10 para1(4) of Europol Convention). Second, that the level of legal protection which is provided to the people for their right of informative self-determination towards the function of Europol presents very serious deficits, especially due to Europol's immunities. The provision for lifting Europol's immunities is completely incompatible with the principles of our legal civilization, because this decision is always taken by its director (after considering Europol's interests) and scrutinized by the Council, ie by an organ of primarily executive power. Hence, it becomes obvious that the exerted criticism for the fact that Europol has obtained through its competences a *de facto* leading role in the administration of pre-trial evidence is justified since this procedure should be in the hands of justice. For the purpose of overcoming these serious deficits it was deemed necessary to establish in the area of criminal matters a judicial coordinating organ *as a counterbalance*, the Eurojust, on which various expectations were trusted. Nonetheless, even the way the TFEU eventually regulated Eurojust's and Europol's competences clearly shows that Eurojust was not given the competence to judicially control Europol's actions. This might be considered as justified due to the primarily coordinating character of Eurojust. However, if one considers that the action of Europol even in the field of its original competence constitutes basically collection of pre-trial material which should be judicially scrutinized then one can perceive the deficit left unfortunately unsettled by the TFEU.

23. Additionally, according to the TFEU the EU aspires to establish an aggregate model of criminal prosecutions through the creation of a *European Public Prosecutor's Office*, which will stem from Eurojust's context and will be initially competent to combat crimes affecting the EU financial interests. However, the powers of the European Public Prosecutor's Office can be extended to include *all serious crimes having a cross-border dimension*, if subsequently the European Council adopts unanimously a relative European decision after obtaining the consent of the European Parliament and after consulting the Commission. Although these novelties are of decisive importance, since they are related to the creation of an EU organ with the most sensitive for people's rights field of action, the European legal act, which will envisage the foundation, the regime, the conditions governing the performance of its functions, the procedural rules governing the activities of the Public Prosecutor's Office, the admissibility of evidence and the rules for the judicial review of its procedural actions will be according to the TFEU a regulation adopted in accordance with a special legislative procedure that will merely require the European Parliament's consent in advance (art 69i§1TFEU).

24. Hence, we observe that even though the EU expands through the Reform Treaty the competences of its existent organs in the field of penal repression in a way that gradually surpasses their coordinating role or even promotes a central model of criminal prosecutions, it does not accomplish to surmount considerable well-known deficits of the present system. Furthermore, and this is more perilous, although the power of the Public Prosecutor's Office may principally infringe upon people's rights, it is set on the basis of a democratic deficit which remains essentially intact in relation to its present form. Therefore, although the EU obtains organs with more decisive powers in the field of criminal repression, it parallel binds them much tighter on to the executive power of the Council, which demarcates the most significant of their competences for European citizens. Undoubtedly, this favours the efficacious achievement of security that the EU deems as a priority aim, but it abrogates a traditional principle of European legal civilization, which demands the most intense interventions in people's freedoms to be commensurate with their democratic legitimation.

25. According to the aforementioned thoughts which run through the area of substantive as well as procedural criminal law it becomes understandable that the role of the Member States' national penal systems remains indisputable. This can be clearly seen even from the provisions of the TFEU regulating the Eurojust's

and Europol's competences or the European Public Procecutor's Office. However, the development of a criminal law which is co-determined in decisive aspects by the EU intervention justifiably focuses our attention on the issue of its potential democratic deficits, because it is exactly this *European criminal law*, which will influence decisively the character of the national penal systems, since they will be called to function within its frame at least in the cases of crimes with cross-border dimensions which are primarily regulated by the provisions of the TFEU concerning criminal law.

V. The Protection of Fundamental Rights in the Field of Criminal Matters

26. On the other hand the weighty novelty of the entrenchment of fundamental rights (art 6§1 TEU) and the judicial protection provided for them (art 230 fourth phrase TFEU) unfortunately cannot recant the worries created by certain provisions of the Reform Treaty related to criminal law. Certainly, this development is decisive, especially if one takes into account that amongst the rights that will institutionally bind the EU organs and be protected by the EU judicial mechanism there are the prohibition of death penalty, the prohibition of torture and inhuman or degrading treatment or punishment, the protection of personal data, the right to an effective remedy and a fair trial, the presumption of innocence and right of defence, the principle *ne bis in idem* and the basic principles of legality and proportionality of crimes and sentences.

27. Nevertheless, despite the significant progress made by the aforementioned adjustments, it must be made clear that through the same Treaty the essence of these rights becomes relative. The specific provisions from the TFEU regarding the police and judicial cooperation in criminal matters have shown, to name but one example, that the classical powers of Europol regarding the selection and processing of personal data are not subject to any judicial scrutiny *during their exertion*, although they are linked to the investigation of punishable acts. Certainly this fact can generate significant problems for the rights of the defence of the accused, the respect of which according to the Charter of Fundamental Rights must be safeguarded. Likewise, the judicial protection which is expanded significantly in the Union and it is foreseen to be offered by the European Court of Justice in criminal matters by granting the right of an individual action (art. 230c TFEU), although it is extremely important, it cannot but be restricted in its scope by the limits set by the TFEU itself.

28. Lastly, one should welcome the accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms. Despite the difficulties that it faces, the ECtHR is the most noteworthy model of protection of these rights that we presently have because the European Court of Human Rights (ECtHR), contrary to the Court of the Union, functions *exclusively as a mechanism of protection for the fundamental rights* and as an *external to the states or the European Union institutional mechanism*, ie, to the systems of power from which the fundamental rights are violated. The EU is not justified any more not to participate in this mechanism, especially when we recall the increased powers that it has lately attained. For this reason it is very positive that the amendment according to which the EU shall accede to the ECHR (art 6§2 TEU) has been eventually accepted while a relative protocol has been annexed to the Reform Treaty amending TEU and TEC.

VI. Conclusion

29. The EU will be marching in the years to come through more and more intense forms of co-existence between its members. The crucial point during this course is not to abandon conquests of its legal civilization that made its presence distinctive and which are interrelated to people's freedoms, particularly in sensitive areas such as the criminal law. The Reform Treaty represents a significant effort towards this direction by diminishing the democratic deficit in the legislative procedure and institutionally safeguarding fundamental rights. However, more steps need to be taken. It is of utmost importance to convert the current European criminal law of intergovernmental enactment, which primarily serves the aim of security, into a democratically legitimate, European criminal law that along with the protection of legal interests will effectively guarantee the rights of people in a transnationally developing criminal trial.

17 November 2007

Memorandum by The Law Society of Scotland

Introduction

The Law Society of Scotland ("the Society") welcomes the opportunity to put forward evidence to the House of Lords European Committee Sub-committee E (Law and Institutions) as part of its inquiry into impact of the EU Reform Treaty in the areas of freedom, security and justice.

General Comments

EU legislation and policy arising out of the area of freedom, security and justice are of clear importance to all legal systems in the EU encompassing, as they do, part of the core relationship between the citizen and the state, the nature of each person's legal relationship with each other in such personal issues as family life and death, and the rights of the individual in society.

Notwithstanding the legislative limits of the current EU powers under the third pillar, important steps in legislating on criminal law have already been taken—such as the European Arrest Warrant—and proposed—such as pre-trial supervision and the exchange of information on conviction. Taken with the significant work which is being carried out in relation to matrimonial law, proposals on succession law, and legislation on civil justice matters such as a European payment order and a future European small claims regime, a significant body of EU intervention is being built up in this area.

This increased involvement of the EU seems an inevitable consequence of the logic of the internal market. Nevertheless, in these areas, probably more than any others, the traditions and norms of national justice systems must be treated with care and the principle of subsidiarity carefully adhered to. In addition, in particular in the area of criminal law, although it is likely there will be greater co-ordination of law and practice in these areas in the future, and it is generally in the interests of all to ensure the efficient cross-border functioning of our justice systems where that is required, it is also essential to ensure that such steps will be carefully balanced by fairness in the treatment of those affected.

The Society considers that the twin aims of ensuring the smooth functioning of the internal market and the appropriate protection of national systems are not always mutually exclusive. It is possible, through carefully drafted legislation with well-considered and thorough pre-legislative consultation to produce proposals which provide the framework for harmonisation where that is required, and which can be implemented in a way that is compatible with national systems. EU law can moreover enhance equality of arms by raising procedural standards in criminal matters across the EU where this is required as a counterbalance to increased state and prosecution co-ordination.

The Reform Treaty's provisions on the future EU regime for dealing with family law, criminal law, succession law, and criminal and civil procedural law also have an additional significance in Scotland. Firstly, these involve what are important areas of competence devolved under the Scotland Act 1998 and therefore largely within the competence of the Scottish Parliament and the Scottish government. In addition, and importantly, these are also areas where Scots substantive and procedural law are often different from the rest of the UK, and Scottish institutions—such as the Procurator Fiscal Service, the courts, the prisons and the legal profession—form separate and distinctly regulated bodies. In a UK context these factors make the Scottish position potentially more complex and add a particular dimension not only to implementation of legislation but also pre-legislative policy considerations and negotiations.

Specific Comments

The Society is not able to comment on all issues raised in the Call for evidence, but has the following specific comments to make.

Changes to legislative procedures in criminal law and policing

The Society considers that one of the concrete benefits of reforms under the Treaty will be the transfer of criminal law and policing to the ordinary legislative procedure of the Union. This should provide a welcome consistency in the framework for law-making in this area and thus in transparency and comprehensibility. The Society also supports, as set out in the Society's evidence to Sub-committee E in June 2006 on the criminal competence of EU, the move to co-decision procedure and the increased importance of the European Parliament in that process. In an area of law of such importance to EU citizens, it is essential to ensure proper democratic input through the Parliament, especially with the introduction of qualified majority voting.

The Society also considers that the shift of emphasis in the right of initiative in legislating in this area to the Commission and away from Member States can only help increase the possibility of coherent and high quality policy-making and help to avoid the potential pitfalls of a system where policy proposals can be largely driven by issues problematic for only certain Member States.

The Society also notes the safeguards in place to protect the position of the UK with regard to criminal and policing matters. The adoption of an opt-in system along the lines of that used previously in the area of civil

justice would appear logical given the position adopted by the UK on justice issues and the EU since Tampere, and it can be seen from the civil justice field that the UK government does in practice decline to opt-in to some proposals. The Society has supported that position in the past, for example in relation to recent family law initiatives on divorce and matrimonial property. However, as the Society has consistently argued to UK and Scottish government, and EU institutions, it is essential that the 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. These have been the subject of legislative proposals for some years now which have been blocked by the UK Government along with some other Member States. Whether a system of opt-ins will promote the adoption of such measures, or whether rather there may be a temptation to adopt those measures which in effect increase state powers cross-border, but not necessarily those which provide the balancing right for those being dealt with by the system, remains to be seen, and the Society hopes that the government will take a positive approach to this important issue in the future.

A system of opt-ins could, in addition, create specific issues for devolved administrations in this very important area of devolved competence. Although the ability of the UK Government to choose not to opt in to criminal proposal is a potential safeguard for the Scottish criminal justice system, such a system will add a layer of complexity to the already involved arrangements required for inter-governmental negotiations led by the UK Government where the views of the devolved administrations and parliamentary bodies must also be taken into account. It can be envisaged that situations may well arise where the view regarding an opt-in will be different north and south of the border and this protection would have to be seen in that light. Moreover, although the Society welcomes the enhanced and formal role of national parliaments in scrutinising policy proposals under the Treaty, it is submitted that where the proposal consulted on is within an area of devolved competence under the various devolution settlements in the UK, such as criminal justice, devolved bodies must be included in the consultation process in order that a comprehensive and meaningful UK response can submitted to the EU. Whilst the Society considers that this process is essential, it is recognised that this will also contribute to the complexity of the system. Firstly, the extremely short timescales for the consultation of national parliaments set out in the Treaty mean that meaningful consultation of any body other than Westminster will be in practical terms very difficult. In addition, the question needs to be asked: what happens if there is no agreement in this very public arena between the UK Parliament and the Scottish Parliament on the response to an issue, for example, of criminal policy with particular resonance in Scotland? Whilst it is clear from the Treaty that the official position is that adopted at a UK level, there are potential issues of political tension which may have to be dealt with.

The jurisdiction of the European Court of Justice

The Society considers that the extension of the powers of the European Court of Justice in relation to the area of freedom, security and justice is a natural concomitant of the move to qualified majority voting and the bringing of this area of legislative power within the mainstream of EU legislative process.

European Public Prosecutor

Treaty provisions create the possibility of the creation of a European Public Prosecutor, on the unanimous vote of all Member States. The Society has previously expressed its concerns about earlier proposals to create a function of European Public Prosecutor[22] and, pending the production of a more detailed proposal on this issue, these concerns remain.

The Society's principal concerns are:

1. *The respective roles of the European Public Prosecutor and the national prosecutor*

   The creation of a European Public Prosecutor will necessarily cut across the function of national prosecutors, each with a different legal basis and constitutional role. The function of the prosecutor, how it is carried out and the supervision of that role are issues of complex constitutional law and practice and give rise to domestic political tensions in all legal systems. How a European Public

[22] Evidence of the Law Society of Scotland to the House of Lords European Communities Sub-committee E on prosecuting fraud on the Communities' finances, February 1999.

Prosecutor operating directly in the courts of Member States would fit into the various national legal systems in practice is a question potentially fraught with political and other implications.

In addition, there exist a number of issues regarding the potentially concurrent functions of the two prosecutors. Will the European prosecutor have the unique power to bring forward prosecutions for fraud on the EU finances, however that is eventually defined, or if the European prosecutor declines to prosecute will the national prosecutor also be personally barred from acting?

This is of particular concern in Scotland in view of the fact that, under the devolved constitution set out in the Scotland Act 1998, the Lord Advocate is entrenched as head of the system of criminal prosecution in Scotland.

2. *The definition of the crime prosecuted*

   It can be assumed that there is no one definition of fraud which applies across all EU Member States. Previous attempts to introduce the idea of a European Public Prosecutor have put forward a single definition to apply to all frauds to fall under the new Prosecutor's competence, which has been at odds with the current definition of fraud in Scots law. The experience of providing the single definition of a crime at EU level has not been successful, for example in the cases of terrorism and racism, and it does not seem likely that it will prove an easier task.

3. *System of prosecution to be adopted*

   The previous corpus juris proposal envisaged the investigatory stages of a prosecution being directed by a judge. Such a system is unknown in Scots law and it is difficult to see how it could be operated in practice in any part of the UK. This highlights a more general problem of the substantive differences in the prosecution systems of the different EU Member States and the potential of a European Public Prosecutor, whatever the model adopted, conflicting with the constitutional principles of at least some jurisdictions.

All of these issues, and a number of others, such as provisions as to investigatory powers, relationship with the police and other reporting bodies, remand, sentencing, and standard and burden of proof require to be satisfactorily addressed before, in the Society's view, any proposal for the actual establishment of a European Public Prosecutor can be considered appropriate.

EU Charter of Fundamental Rights

The Society notes that the Treaty is intended to make the EU Charter of Fundamental Rights binding in its application to EU law. However, there seems to be a lack of clarity in the UK as to what the actual effect of the Charter will be in practice, which creates an unfortunate lack of legal certainty. In particular, the inter-relationship of rights under the Charter and those under the European Convention on Human Rights has not yet, it would appear, been well mapped out. This is of particular importance in Scotland as legislation passed by the Scottish Parliament is required under the Scotland Act 1998 to be compatible with both Convention rights and Community law (section 29). Where this stipulation is breached, the provision in question is "not law", and thus the issue of clarity in the application of the Charter is all the more acute in areas of competence devolved to the Scottish Parliament. It is in particular important that there should be no inconsistency between the requirements of Convention rights and the Charter.

The Society notes that a Protocol specific to the UK on the application of the Charter of Fundamental Rights is annexed to the Treaty. Although this is intended to supply some clarity in this important area it has not, in the Society's view, made it more apparent what the effect of the Charter will be. It can be expected that this will only be settled through the courts in due course.

Family law measures and the family law passerelle

The Society notes that, under the Treaty, family law measures remain subject to the unanimity rule unless, on a unanimous vote, their consideration is moved into the ordinary legislative procedure. In both cases, the UK will be able to decide whether or not to opt into each family law measure as it arises.

The Society notes the pace of the creation and enactment of legislation in this area has been great and can give rise to difficulties in properly managing implementation. As stated above, the Society considers that UK has appropriately used its option of not opting in to proposals in areas such as applicable law on divorce and matrimonial property. The impact of legislation that has been enacted so far is still uncertain and, in the Society's view, time is required for it to be properly integrated into national legal systems before more is

introduced. The Society recognises however that in this sphere, as in others under the mantle of the area of freedom, security and justice, there is a danger of isolation in repeated decisions not to participate in particular areas of legislation and commends the UK's practice of continuing to be involved in discussions during the evolution of legislative proposals in this area even once the decision not to opt in has been taken.

12 December 2007

Memorandum by Dr Valsamis Mitsilegas, Queen Mary University of London

General Remarks

1. Thank you for your invitation to submit written evidence on the impact of the Reform Treaty in the European Union area of freedom, security and justice. This is a timely and important inquiry. The abolition of the pillars by the Reform Treaty will have far-reaching consequences for EU action in Justice and Home Affairs, in particular as regards action in matters currently falling under the third pillar on which this submission will focus. The application in principle of the "Community method" of decision-making into third pillar matters will change the way in which Member States operate as EU legislators in the Council as regards EU criminal law (with the move from unanimity to qualified majority voting) and grant the role of co-legislator to the European Parliament addressing to some extent the democratic deficit in the field. The extent to which this fundamental constitutional change will have an impact on the volume and content of the measures adopted in the field of EU criminal law remains to be seen. However, the move to the "Community method" of decision-making coupled with a number of substantive criminal law provisions in the Reform Treaty as well as the relevant transitional arrangements seem to provide, as will be seen below, a fresh impetus for a number of new, extensive legislative initiatives in EU criminal law.

2. Along with any impact on decision-making, the Reform Treaty will have far-reaching consequences for the development of EU criminal law in terms of its interpretation and enforcement. The Court will in principle assume full jurisdiction on matters currently falling under the third pillar, with restrictions on national courts regarding sending preliminary references to Luxembourg being lifted—thus enabling a meaningful dialogue between national courts and the ECJ on matters which, as has been demonstrated by a number of cases (in particular those relating to the European Arrest Warrant) may have fundamental constitutional implications for both the Union and Member States. Moreover, the Court will assume jurisdiction on infringement proceedings brought by the Commission against Member States for deficient or non-implementation of current third pillar matters. This change, along with the potential direct effect of legislation in these matters, strengthen considerably both the centralised and the decentralised enforcement mechanisms of EU criminal law. Last, but not least, the express binding force of the Charter of Fundamental Rights may have a considerable impact on the interpretation of EU action in criminal matters.

3. The potential impact of these changes on state sovereignty in an area where, until recently, the European Union had little to do with, has rekindled the debate over the extent of EU competence in criminal matters. The sensitivity of the issue resulted in battles between Member States and the Commission before the ECJ, and in a series of compromises in the text of the Reform Treaty. It is from the perspective of competence that this contribution will attempt to demonstrate the impact of the Reform Treaty on future EU action in criminal matters. In doing so, the analysis will focus on the impact of the Reform Treaty on: the adoption of EU legislation on criminal law and procedure; the role of EU bodies such as Eurojust; and the future development of the EU legislative agenda in the field in the light of provisions seemingly safeguarding state sovereignty (in particular emergency brakes and transitional provisions).

The Reform Treaty and EU Competence to Legislate in Criminal Law and Procedure

Substantive criminal law

4. The recent ECJ rulings on the environmental crime[23] and ship-source pollution[24] cases clarified to some extent, but not fully, the extent of the Community competence to adopt criminal law. The definition of criminal offences (but not the imposition of specific criminal sanctions) falls currently under Community competence if Community action is necessary for the protection of the environment, deemed by the Court as an essential Community objective. However, it is not clear whether Community competence extends to other Community objectives or policies if the latter do not include the objective of environmental protection. The Reform Treaty attempts to clarify the situation in Article 69(f). Its first paragraph contains a strict delimitation

[23] Case C-176/03, *Commission v Council*, judgment of 13 September 2005, [2005] ECR I-7879.
[24] Case C-440/05, *Commission v Council*, judgment of 23 October 2007.

of Union competence in adopting *minimum rules* which relate to the definition of both offences and sanctions in a number of areas of crime (relating mostly to transnational crime) which, at least in the English version of the Treaty, are exhaustively enumerated. The EU competence in the field thus appears narrower than the current EU competence under the third pillar. However, Article 69(f)(2) extends EU competence in the field if criminal law approximation "proves essential" to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures (explicitly allowing the adoption of criminal offences and sanctions).

5. There are a number of elements that are unclear in Article 69(f)(2). First of all, what is the meaning of "essential" to ensure *effet utile*. The concept is not clear and is highly likely to be the subject of ECJ litigation. Secondly, it is not clear which institution will "prove" that a criminal law measure is essential in this context. Will for instance the case-law of the Court be taken into account in this context? Again, the wording is a prime candidate for litigation, as it is highly likely that there will be disagreements between the Council on the one hand and the Commission and the Parliament on the other on what will "prove essential" in this context. Last, but not least, it is not clear whether Article 69(f)(2) is a sufficient, self-standing legal basis for the adoption of criminal law or whether a dual legal basis (in conjunction with the specific EU sectoral provision) will be necessary in this context. As has been pointed out to the Committee in its oral evidence sessions, the answer to this question may have an impact on the participation of Member States which have negotiated a right not to opt into criminal law measures. The Court's case-law and Article 69(f)(2) of the Reform Treaty indicate that criminal law is treated not as a self-standing Union policy, but rather *as a means to an end* with the ultimate aim being the effective implementation of a Union policy.[25] If this is the case, then the answer must be that a Member State which has participated in and is bound by the underlying Union policy is also bound by measures adopted under Article 69(f)(2). Otherwise the effectiveness of Union law may be seriously jeopardised.

6. Another issue which causes uncertainty regarding the exact scope of EU competence on substantive criminal law stems from different parts of the Reform Treaty. A development that may imply that the Union's criminal law competence may extend beyond the offences enumerated in Article 69f is the deletion of the last sentence in current Article 280(4) TEC.[26] This sentence states that measures to combat fraud (an area which are not listed in Article 69f(1) but may be included in 69(f)(2)) will not concern the application of national criminal law and the national administration of justice. With the deletion of this sentence, the Union will now have competence under Article 280(4) to adopt "the necessary measures in the fields of the prevention and fight against fraud affecting the financial interests of the [Union] with a view to affording effective and equivalent protection in the Member States". It is not clear whether the wording here (in an area dealing with issues closely related to criminal law) signifies that the Union has competence under Articles 280(4) to adopt criminal laws on fraud without the need to have recourse to Article 69(f)(2).[27]

Criminal procedure

7. The Reform Treaty contains an express legal basis in Article 69(e)(2) for the adoption of minimum rules in a number of areas of criminal procedure, including rules on the mutual admissibility of evidence (a measure that may be deemed a useful corollary to the European Evidence Warrant) and rules on defence rights. The Reform Treaty thus addresses the current controversy regarding the existence and extent of such competence in the third pillar, vividly demonstrated by the ongoing negotiations for a Framework Decision on the rights of the defendant in criminal proceedings. However, it must be noted that Union competence in the field of criminal procedure applies only *to the extent necessary to facilitate mutual recognition* of judgments and police and judicial co-operation in criminal matters—with mutual recognition being elevated by the Reform Treaty as the basis for judicial co-operation in criminal matters in the EU (Article 69(e)(1)). While the potential of the Reform Treaty to result in the adoption of protective measures for the individual is welcome, it must be noted that criminal procedure measures—and the human rights implications which they may have—are clearly subordinated to the efficiency logic of mutual recognition. Moreover, and similarly to the provisions on substantive criminal law, Article 69(e)(2) may lead to extensive litigation on the interpretation of whether EU criminal procedure rules are "necessary" to facilitate mutual recognition. The link between criminal procedure rules and the facilitation of mutual recognition is not always straightforward or direct. The Committee may recall the Commission's justification of the proposal on the rights of the defendant, where it

[25] On criminal law as a means to an end in this context, see V Mitsilegas, "Constitutional Principles of the European Community and European Criminal Law", in *European Journal of Law Reform*, vol 8, 2006, pp 301–324.

[26] See doc CIG/1/1/07 REV 1, point 276.

[27] It should also be noted here that in the case of fraud, the Reform Treaty provides for a separate legal basis for the determination of offences affecting the financial interests of the Union—new Article 69i which envisages the future establishment of a European Public Prosecutor's Office from Eurojust.

was argued that harmonisation of criminal procedure would lead to mutual trust which would then lead to the facilitation of mutual recognition.[28] However, the concept of mutual trust is highly subjective and potentially difficult to be assessed by both legislators and judges.[29]

The management of investigations and prosecutions

8. Another effect of the Reform Treaty may be to create the momentum for new EU legislation on Eurojust and Europol. The Treaty contains specific and detailed legal bases outlining the future development of these bodies (Articles 69h and 69k respectively). This appears to pre-suppose the need for a change in the mandate and role of these bodies. As far as Eurojust is concerned, the debate is centered on whether the body should be granted powers to oblige national judicial authorities to initiate investigations and prosecutions. At present Eurojust can only ask such authorities to do so, but its requests are not binding.[30] A parallel debate concerns the extent to which Eurojust should co-ordinate national investigations and prosecutions, in cases where more than one Member State can claim jurisdiction (this is particularly the case for transnational offences). At present such co-ordination is happening on an informal basis, with Eurojust having established a series of indicative criteria for the allocation of jurisdiction in such cases. The debate on the role of Eurojust becomes increasingly relevant in the construction of an "area" of freedom, security and justice, where freedom of movement and the abolition of internal frontiers is matched by an attempt to ensure effective co-ordination between national authorities.

9. The Reform Treaty may result in significant changes in the nature and powers of Eurojust. According to Article 69(h)(1), the Parliament and the Council will determine (in accordance with the ordinary legislative procedure) Eurojust's tasks. These may now include "the initiation of criminal investigations" (69(h)(1)(a)). This is a major change to the current Eurojust powers. It is not clear whether this will mean that Eurojust will be able to act itself, as a College, in national criminal justice systems and initiate prosecutions, whether its national member for the respective Member State in their capacity as national public prosecutor would do this, or whether this would be translated to a binding request from Eurojust to the national criminal investigation authorities. The Treaty does not give to Eurojust an equivalent power to initiate prosecutions (this being limited to proposing the initiation of prosecutions). However, Article 69i of the Reform Treaty provides the legal basis for the future establishment of a European Public Prosecutor's (EPP) Office "from Eurojust". This provision may be seen a triumph of the Eurojust model of investigative and prosecutorial co-ordination over for instance OLAF. The EPP's Office will be responsible for "investigating, prosecuting and bringing to judgment" perpetrators associated with fraud offences and will "exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences" (Article 69(i)(2)).

10. The challenges that the future role of Eurojust and the EPP if established to state sovereignty have been the focus of the debate regarding the future of judicial co-ordination in criminal matters, and have resulted in a number of exceptional provisions as far as the establishment of the EPP is concerned. Along with the issue of the precise role of Eurojust or the EPP in the national criminal justice systems, another element which may cause tensions extends to cases of positive conflicts of jurisdiction: where co-ordination from above might in practice lead to situations where a Member State may be *refused* the right to prosecute in cases where another Member State having jurisdiction is deemed by Eurojust better placed to prosecute.[31] In this context, a less highlighted issue has been the impact of such co-ordination on the rights of the defendant. A particular concern in this context is whether the granting to Eurojust of a potential monopoly to decide on where to prosecute will lead in practice to a kind of "forum shopping" resulting in choosing to prosecute in the jurisdiction where a conviction might be secured more easily.

Transitional provisions and emergency brakes as a boost for European integration in criminal matters

11. The significant constitutional changes that the Reform Treaty will bring about with regard to the third pillar have resulted in attempts by a number of Member States (in particular the UK) to limit the application of the "Community method" as far as they are concerned. Techniques used include the extension of the "opt-in" Protocols to criminal matters, the introduction of a so-called "emergency brake" where

[28] See in particular the Report on *Procedural Rights in Criminal Proceedings*, 1st Report, session 2004–05, HL Paper 28.

[29] For a more extensive analysis of this point and the constitutional arguments regarding the relationship between the defence rights proposal and mutual recognition see V Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union", in *Common Market Law Review*, vol 43, 2006, pp 1277–1311.

[30] For details on the debate regarding Eurojust's mandate see the Committee's Report on *Judicial Co-operation in the EU: the Role of Eurojust*, 23rd Report, session 2003–04, HL Paper 138.

[31] Article 69(h)(1)(b) includes in Eurojust's tasks the coordination of investigations and prosecutions. Moreover, Article 69(e)(1)(b) calls for the adoption of rules on preventing and settling conflicts of jurisdiction between Member States.

sovereignty-sensitive proposals on EU criminal law and procedure will be referred to the European Council, and the introduction of transitional periods regarding the applicability of existing third pillar law resulting in a choice for the United Kingdom on whether to participate in EU criminal law or not. The details on the issues arising from the UK's position have been touched upon in the oral evidence given to the Committee thus far. This contribution will focus on the broader point of the impact of these clauses on the future adoption of EU criminal law and point out that, while for non-participating countries these clauses may act as a safeguard (at least as regards attempts to justify the Reform Treaty to domestic voters), for Member States willing to move ahead with the adoption of new legislation on EU criminal law, life becomes much less complicated in comparison with the current unanimity requirement in the third pillar. In particular, the "emergency brake" is accompanied by a simplified flexibility clause in the second sentence of Article 69(f)(3) which enables at least nine Member States to push on. The momentum of this clause for the adoption of EU criminal law should not be underestimated. Moreover, and perhaps more significantly, Articles 9 and 10 of the transitional provisions Protocol actually provide an impetus for a new wave of EU criminal law measures, which in practice will be mostly Directives replacing and repealing existing third pillar Framework Decisions (with the legal instrument of a Framework Decision no longer existing in the Reform Treaty). The need to align the existing legal framework with the changes brought by the Reform Treaty may thus lead to a combination of proposals amending current third pillar law (such as the European Arrest Warrant and, as seen above, the Eurojust Decision) by expanding the scope of these instruments, with proposals on new areas of criminal law (in particular criminal procedure).

12. As far as the UK is concerned, the possibility not to opt into criminal law measures may in practice lead (as is currently the case with Title IV measures) to complex legal and practical questions, in particular in the light of the increased inter-relationship between the various Treaty provisions and the move towards an increasingly integrated EU action in criminal matters. To take one example: judging from the UK's stance in third pillar negotiations thus far, it would seem likely that the UK would choose to opt into legislation amending the European Arrest Warrant Framework Decision, but not participate in legislation aiming at establishing minimum standards for defence rights. However, given that the justification—and the legal basis—of the defence rights proposal will depend on its aim to facilitate mutual recognition, in practice the operation of the European Arrest Warrant between the UK and other Member States which have opted into the defence rights legislation may become problematic—with the UK deemed not to provide the required minimum standards enshrined by EU law. The situation may become legally complicated should for instance the Commission choose to table and aim at negotiating these proposals in parallel, or include in the EAW proposal cross-references to the defence rights measure. A complex question which may arise in this context is whether the non-participation of the UK in one measure (in this example the defence rights proposal) may render the application of another measure (the European Arrest Warrant) inoperable for other EU Member States.[32] 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.

30 November 2007

Memorandum by Baroness Nicholson of Winterbourne MEP

A. Summary

1. I support the Charter of Fundamental Rights as a restatement of the core values of the European Union since its inception.

2. To date, these values have been expressed in the *acqui communautaire* (chapter on home affairs), which incorporates key United Nations conventions as the foundation stone of the European Union value system, such as the Declaration of Human Rights, the International Labour Organisation Convention and the United Nations Convention on the Rights of the Child (UNCRC). In addition the European value system is decoded in the European Convention for Human Rights and a subsequent judgement by the European Court of Human Rights on that Convention.

3. The importance of the presence of the UNCRC in the *acqui communautaire* is exemplified by the 1998 statement of the Council of Ministers that Member States' failure to implement the UNCRC would place them in breach of the Treaty of Rome.

[32] A similar situation may arise with regard the European Evidence Warrant on the one hand and possible future legislation on the admissibility of evidence on the other.

4. The Charter of Fundamental Rights should in my view be strengthened immediately by suitable protocols to bring the relevant UN Conventions inside the Charter which would, *inter alia*, bring it in line with the acqui communautaire. This would avoid the risk of a mistaken assumption of priority for the Charter over the European Charter of Human Rights (ECHR) or the acqui communautaire.

B. Further Reasoning

1. The European Union Charter of Fundamental Rights does refer briefly to the rights of children but it fails to acknowledge the substantial United Nations Convention on the Rights of the Child (UNCRC).

2. There are articles in the Charter which do refer specifically to children, most notably Article 24 which is the children's rights article. This is very brief but incorporates some of the more important central principles in the treatment of children, such as a commitment to their welfare as a primary consideration, their right to be heard and their right not to be separated from their parents without good cause.

3. Other articles in the charter are relevant to children. Article 14 (3) refers to parental rights in the context of education, Article 21 prohibits discrimination on account of, inter alia, age and this might be thought to prohibit discrimination against children for that reason (it should however be said that any argument that children should be treated identically to adults would be certain to fail). Then there is Article 32 prohibiting child labour and providing for the protection of children at work and Article 33 which deals with employment protections following the birth of a child.

4. The UNCRC is far wider in terms of its protections and the rights it asserts for children than the articles in the ECHR mentioned above.

5. In the United Kingdom the courts do, at times, make reference to the UNCRC and occasionally it has a significant influence on the outcome of cases, however, usually it does not. This is because when a treaty is not incorporated into domestic law it is nowhere near as effective as when it is. The ECHR in contrast is now part of English law and the decisions of the courts, public bodies and so on have to be compatible with it.

6. The EU Reform Treaty ought to incorporate reference to the UNCRC, or it might miss the occasion to strengthen children's rights in the European Union and run the risk of undermining the high standards of the UNCRC.

7. All Member States of the European Union as well as the vast majority of nations throughout the world have signed up to the UNCRC. Therefore it should be natural for the Charter of Fundamental Rights to incorporate the UNCRC.

14 December 2007

Memorandum by Mrs Anne Palmer JP

This is my personal individual contribution to the Call for Evidence by Sub Committee E (Law and Institutions) inquiry: Area of Freedom, Security and Justice: Impact of the reform Treaty. I do not belong to any Political Party.

1. ***The application of the Charter of Fundamental Rights to FSJ measures***. The main concern is, will the Government's Redlines and opt-in/out hold? My opinion is, they will not. I am mindful of the Letter from Mr Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman of the Committee, 31 July 2007 and note in particular "The UK Protocol confirms that nothing in the Charter extends the ability of any court to strike down UK law. In particular, the social and economic provisions of Title IV of the Charter give people no greater rights than are given in UK law". However, I will give you a "for instance" for I am also mindful of the sentence in **Art 4, of the Reform Treaty, paragraph 2, "that National Security will remain with National Governments". "In particular, national security remains the sole responsibility of each Member State".** That seems clear enough. However, through the EU's Protection of Critical Infrastructure, the EU, using Article 308 may, (and very likely) for the very first time in the history of this Country, allow others-the EU- to involve itself in the very sensitive issue of National Security, again, allegedly because this is yet another matter that transcends National Borders. National Security is to come under the EU's umbrella through a legally binding Directive. Why then is that statement in Art 4 included in the Reform Treaty?

2. If our National Security is transferred to the EU, it is one of the greatest betrayals of all, because, in war time, any information given to the enemy (and who knows who the next enemy will be?) it is a matter of treason, and for which others in the last war were hung by the neck until dead. In the detailed information the EU may want are, what weapons we hold, where they are, whom we share some with etc. How can we, as a separate independent Country, that we are continually told we are, give our defence and attack secrets away?

How will the giving of that information away to others affect our relationship with those we already stand shoulder to shoulder with? It is not just my country at risk if these security secrets are given away to foreigners; MP's are putting other nations at risk as well as future generations. Their own children and grandchildren. I truly hope my "for instance" is noted.

3. At the moment the Charter is as a solemn Declaration and annexed to the Treaty of Nice and as such has no legal force, although it was, I believe, always intended that it should become legally binding, It has of course, been "referred to" when making decisions, and indeed some people have felt that it should become an entrenched Bill of Rights. Some Countries and possibly some Unions here in the UK want the entire Social Rights—the right to strike etc, applicable. Should there be a dispute, I cannot see the EU Court of Justice **not** over-ruling those Redlines—they **will** leak like a sieve.

4. How long will the Redlines hold, when in other parts of the Reform Treaty (if Ratified), when particular attention is drawn to, Art 4 (3) "The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives", or Article 8c "National Parliaments shall contribute actively to the good functioning of the Union" even without the word "SHALL" the meaning is very clear, and on both counts the ECJ may well enforce those paragraphs, sweeping away any Redlines before it. The people though, have never been told what the Unions TRUE "objective" is. They should be told.

5. The waters here seem to get a little muddy should the EU also, as it so wished, enter into the field of The European Convention of Human Rights? At the moment the ECJ (and ECHR) can and does overrule our Courts and also our Parliament (in other words, because of the casual transferring of sovereignty by "today's" British Governments, our Parliament is no longer supreme or sovereign and neither will the new "Supreme Court" be supreme) now, should the EU as one entity sign up to the ECHR, will any decision that that Court makes, override the EU Charter of Fundamental Rights and the European Court of Justice itself?

6. I looked at whether the EU and the separate Nation States came under the United Nation's authority when they joined Kyoto, but the EU and Member States joined simultaneously on 31 May 2002, and Kyoto came into force 16.2.2005. So, if the UK falls behind in their targets, is it answerable to the UN and not to the EU? Therefore, questionably, the UK should not be admonished, fined or set "targets" by the EU at all? The UK is, I suggest, directly responsible to the UN? I do not believe the EU was in a position to "speak" for all its Member States at that point in time. It is, I would suggest, a debateable argument and well worth a legal challenge by the UK especially if the £180 million a year fine is implemented by the EU if the UK falls behind with their self imposed targets. And what, if time proves Kyoto is all just a tax collection service? Will the UK get a refund? An "Ice Age" was predicted in 1950/60s, that didn't happen.

7. However, if the EU becomes party as a whole to the ECHR, by joining at a later date than the others, will it too, as well as all nation states become under the auspices of the ECHR Court? To me, there might well be a conflict of Treaties. If we look at the Vienna Convention on the Law of Treaties, the ECHR was signed in Rome on the 4 November 1950 and the ECC Treaty in 1957, the latter Treaty could take precedence and as such all Member States may no longer be bound by the ECHR? But surely that cannot be true? The EU is joining the ECHR, meaning it is to recognise the ECHR as it's better? When the UK joined the EU Treaties, even though at a later date, it cannot take precedence as under International law, it is agreeing to the contents of those Treaties it has signed up to. The same must then, apply to the EU as a whole when it joined Kyoto and the same when the EU and Member States joined it, the United Nations remains the force. (In Charge)

8. One of the reasons given why America did not join Kyoto, was because it did not want to lose sovereignty to the UN.

9. As regards the ECJ and the ECHR Court, I leave the sorting out to others, **I have just posed a small part of the bigger problem**, although I do believe it was a grave mistake for the Labour Government to incorporate the Human Rights Act into our legal system rather than just refer to it, especially as our Government was asking for a derogation after only a few months after incorporating it into our system, however I do understand that ALL EU Member States had to sign up, as part of their involvement in the EU, and was "a condition" that they signed up to the ECHR as would the EU as a whole when the time came.

10. As decisions made by the Highest Court in our land can be over-turned by the ECHR, I now wonder whether the time may come, whether decisions of the ECJ can be challenged directly by the ECHR. We live in interesting times for the United Kingdom of Great Britain once upon a time thought that our Parliament was "Supreme", will the doctrine of the Supremacy of EC Law fall the same way, I wonder? More importantly, what will happen if it does?

11. This I think answers the question of ***"The Jurisdiction of the European Court of Justice in relation to the FSJ Area"***.

12. I understand that these red lines were also in the "Treaty Establishing a Constitution for Europe", and the people were promised a referendum on that Treaty and that promise was also established in the Government's Manifesto pledge. The people deserve, and should have that promised referendum. It might be difficult to ask the people of this Country whether they would like to place the governing of this Country permanently to the European Union, yet that is what is proposed. The EU could make any laws it wanted to and no one could prevent them from doing so, not even our own Prime Minister.

13. I do not see how any Government whose first loyalty and solemn Oath of Allegiance is to the Crown and this Country could possibly ask the people to destroy their own Constitution nor can I understand how any Government could accept and ratify such a constitutional Treaty which, when fully implemented with the use of a self amending Article included in it that would eventually destroy everything the people fought for (Freedom and Liberty) in 1939.

14. ***The Legal Base for criminal law measures and the continuing impact of Case C-176/03 in the context of the reform Treaty Amendments?*** *Commission of the Communities v The Council of the European Union*. I have questioned above the very base of this legislation, and although Case C-176/03 was part of a Consultation previously, I simply highlight a couple of points from the case. Point 6, "**Each Member State shall take the necessary measures to establish as a criminal offences under its domestic law, when committed with negligence, or at least serious negligence, the offences enumerated in Article 2**". Here is a body telling this great nation what to do. Actually many new criminal offences that did not exist before have sprung from this particular ruling.

15. Proof enough already that the EU already has power to make criminal law and even criminal law that the UK may not even want, yet can do nothing other than apply it. It is offensive to me that this once great country has to be told what to do, and it also actually has to do it. If the EU can do this now, what can it do, and without doubt will do when it gets more powers from the EU's Reform Treaty? In Case C-176/03, the Court struck down a Framework Decision on criminal sanctions applying to environmental protection which had been adopted by the Council on a **Third Pillar legal base**. In the Reform Treaty the **Third Pillar will no longer exist**, and if ratified, we will have accepted two new Treaties, which we would have to implement.

16. To comply with the instructions re length of my contribution, for the remaining points suggested in your Paper, I feel sure the Committee already know what the move to the vast increase in Qualified Majority voting would do to this Country. There is absolutely no doubt at all about the consequences of such an agreement re Qualified Majority voting.

17. I will therefore concentrate on this Government's proposal of giving to the European Union the use of Her Majesty's "Royal Prerogative". Government Ministers use the Royal Prerogative on behalf of the Crown at the moment. Although, Government Ministers did not have to ask Parliament for permission to go to war with Iraq the matter was indeed put before Parliament. What was made very clear to the people of this Country, was, in spite of Parliament being given "a say", without the correct information laid before them, errors and decisions can still be made and our forces were sent to war. The deaths of a great deal of innocent women and children and our forces that happened may have been prevented had Parliament been presented with the exact and correct facts.

18. A Government Minister at the moment uses the Royal Prerogative for Treaty and War Making Powers on behalf of the Crown and Prime Minister Brown has suggested that these war-making powers should be given to our Parliamentarians to make it more "democratic". It is not in the "Government's gift" to transfer the Royal Prerogative to any other body of people, especially to foreigners, yet I note that Article 32 of the **Reform Treaty states that, "The Union shall have legal Personality". It is the Royal Prerogative** that this Government is giving to the European Union. To give this extraordinary Constitutional change away to the EU, the people should have a say along with the Crown.

19. Article 33, "**The treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures**, with clear instructions beneath as to how this can be done. No suggestion in the Reform Treaty re "war making powers" given to EU? Yet look to the proposals for an EU Army and the new proposals for a European Council on Foreign Relations (EFCR) that is demanding that the EU develop a more coherent and vigorous foreign policy. For the EU to "speak with one voice", "should be backed up with all of Europe's economic, political, cultural and, as a last resort, military power".

20. Debates are already on going on whether Parliament should be always allowed a say. The title "Royal Prerogative" may also become simply a "title" of the past, and, as with all matters that Parliament still might have a say on, these powers will eventually become a Competence of the European Union, if so, a British Parliament will never have a say again. No powers have ever been returned that have so casually been given to the EU.

21. Under the Royal Prerogative are "Treaty Making Powers" and as we already know the Union has, as a whole, and on behalf of its Member States, entered into five Treaties. **I do question the legal base for these**. Parliamentary sovereignty on the EU treaties is only maintained, in their conflict with existing great statutes **still in force**, by the constitutional doctrine of implied repeal or disqualification. This principle of alleged "loaned" sovereignty has **never** been widely debated and now that up to 80% of our laws come from Brussels, Parliament is in an increasingly vulnerable position of over extending their **deficit of trust** with the Electorate. If in the future the people, ***who themselves are sovereign***, decide that their "loaned" parliamentary sovereignty with the political "bank" of the EU is too great, posing a threat to our present constitutional settlement, a crisis of great magnitude would likely ensue—it being the declared position that the trust of the people and therefore their sovereignty, is returned to them intact every five years.

22. **Whatever is in the Treaties the EU may sign and ratify on our behalf**, laws, regulations, alterations, transfer of our territorial seas and oceans as proposed in the EU's "Motorway in the Sea" etc, even world maps changed to suit. Our Parliament, our Government (if they still exist then) will have no opportunity to alter anything, in exactly the same way that once the Government has accepted the Reform Treaty, British Committee's can only scrutinise, they cannot alter even now.

23. **At the moment, the Reform Treaty can be rejected**. If, having voted for Members of Parliament to represent us the people, to speak on their behalf, knowing full well that the vast majority of people do not want any further integration into the European Union, to ratify the Reform Treaty would be a betrayal. The putting forward of this Consultation Paper, for the few people that may read of it, shows that our MP's have grave doubts as to the wisdom of any Government handing over these great powers that are held in the Reform Treaty which is indeed of great constitutional importance and dangerous changes to this our once sovereign independent Country.

5 November 2007

Written Evidence

TO THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE F)

Letter from Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office

Thank you for your letter of 20 November 2007, in relation to the Lords EU Select Committee's inquiry into the impact of the EU Reform Treaty. I have endeavoured to answer the questions posed in that letter, and in doing so, I have co-ordinated responses from colleagues across Government.

The Committee will wish to note that since your letter the numbers of the Articles have been updated in the Treaty of Lisbon. In this response we cite both the Articles that you refer to, and the new Article numbers, as set out in the Treaty of Lisbon.

The responses to your questions are set our below.

Internal Security and National Security

What, in your view, is the description of "national security", and how does it differ from internal security?

The Lisbon Treaty explicitly confirms that national security remains the sole responsibility of each Member State. It is necessarily for each Member State to determine both the matters that are relevant to its own security as well as the arrangements and measures that are necessary to deal with the threats to its own security.

The equivalent term in UK legislation is not itself defined, reflecting the fact that it is, as the Judicial Committee of the House of Lords have confirmed, a "protean" concept whose scope necessarily evolves to cover those matters which a State may consider necessary to protect its security.

The term "internal security" has not been defined either in legislation or by the European Court of Justice. As a result, it is open to interpretation, and is used in a variety of contexts in EU treaties and legislation. A minimalist interpretation is 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.

Whatever your view on the meaning of "national security", will it not be possible for the Court of Justice to give it (and hence the derogation in Article 4) a narrower meaning than you might have wished?

The provision in Article 4 (Article 3a in the Lisbon Treaty) is not a derogation from EU rules but rather confirms that national security remains the sole responsibility of Member States. While it cannot be precluded that the interpretation of the term "national security" would arise in proceedings before the Court, we consider it unlikely. In such cases we would expect the Court to give full weight to the position of Member States regarding their own national security as Article 4 requires.

If the expression "internal security" is open to misunderstanding, why is it used in at least four provisions of the Treaties?

We judge that the legal clarity provided by Articles 4 and 5 (Articles 3a and 3b in the Lisbon Treaty) provide sufficient protection of our interests in this area. Article 5 provides that "competences not transferred to the Union remain with Member States".

Further work to define the precise meaning and scope of "internal security" will be necessary in the implementation of the Treaty, notably in the establishment of the Article 65 Committee (Article 61 D in the Lisbon Treaty).

What are the existing bodies concerned with internal security? How will the standing committee on internal security to be set up under Article 65 differ from them? How will it differ from the informal groupings for co-operation/co-ordination on national security permitted under Article 66a?

Existing EU bodies which would regard themselves as being concerned with matters of internal security (in this context, EU internal security), include the Article 36 Committee and its various subcommittees, notably the Terrorism Working Group, the Civil Protection Group and the Multidisciplinary Group on Organised Crime. Also, the Strategic Committee on Immigration, Frontiers and Asylum and its subcommittees. There is also the Customs Working Party, which has a Counter-Terrorism subgroup and a Counter-Terrorism Action Plan.

The detailed remit of COSI (the Article 65 Committee—Article 61 D in the Lisbon Treaty) has yet to be defined and will be addressed during implementation of the Treaty. However, it will include promoting and strengthening operational co-operation in areas such as policing, data sharing, counter-terrorism and drugs.

Article 66a (Article 61 F in the Lisbon Treaty) deals with arrangements that are wholly distinct from those in Article 65. It simply acknowledges that co-operation in relation to national security may take place but this is wholly a matter for Member States. This underlines the confirmation in Article 4 that national security is a matter for Member States alone.

In the United Kingdom, which are the "administrations responsible for safeguarding national security"?

For the purposes of Article 66a (Article 61 F in the Lisbon Treaty), the competent departments could comprise:

— the Security Service, given its statutory function "to protect national security";

— the Intelligence Agencies (GCHQ and SIS), given that they are empowered to act "in the interests of national security"; and

— those Government Departments charged with responsibility in these areas (chiefly the Home Office but also FCO and, potentially at least, MoD).

Data Protection in Relation to Foreign Affairs

Article 15a of the Treaty of the Functioning of the European Union (TFEU) is now Article 16b and Article 24 of the Treaty of the European Union (TEU) is now Article 25a. The text of these Articles is set out below.

The Committee raised several questions concerning "data protection in relation to foreign affairs". Article 24 TEU (now Article 25a in the Treaty of Lisbon) reads:

> ARTICLE 25a TEU
>
> In accordance with Article 16 B of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

What is the purpose of having a specific provision on data protection dealing with the Union's external action, and why will the Council be responsible for it alone, rather than jointly with the European Parliament?

A separate provision for data processing by Member States when carrying out activities within the scope of CFSP is appropriate given the distinct, intergovernmental character of CFSP. For that reason too, the adoption of measures in the areas of CFSP is a matter for the Council alone.

What will be the line of demarcation between rules on data protection measures being adopted under Article 24 (Article 25a in the Treaty of Lisbon) rather than under the more general Article 15a of the TFEU (Article 16b)? Under which Article would protection of PNR data fall?

Any data protection proposals are likely to be brought forward under Article 15a TFEU (Article 16b in the Treaty of Lisbon), unless it relates to the processing of personal data by Member States when carrying out CFSP activities, in which case it will be brought forward under Article 24 TEU (Article 25a).

The two successive PNR agreements concerning the transmission of PNR data to the Department for Homeland Security have been negotiated under the third pillar (Articles 24 and 38). The recently released proposal for the protection of EU PNR data is also proposed as a third pillar measure. It is likely, therefore, that international agreements on the use of PNR data will be adopted under the TFEU.

How is this affected by Declaration 9 to the TFEU? What are the specific characteristics of the matter referred to in that Declaration (which have no equivalent in the French)?

Declaration 9 (now Declaration 20) relates to the application of Article 15a (now 16b) and does not therefore affect the demarcation between Article 15a (16b) and Article 24 (25a). "The specific characteristics of the matter" clearly refer to the particular concerns relating to national security and the fact that nothing prejudices the comprehensive character of the national security carve-out.

What are the independent authorities responsible for controlling compliance with data protection rules in the field of foreign affairs, and how will they exercise control?

Article 24 (now 25a) relates to the processing of personal data by Member States. The processing of personal data by data controllers within the UK is governed by the Data Protection Act 1998. The Information Commissioner is responsible for regulating the Act. The arrangements for independent authorities will vary from Member State to Member State.

Given that the Court of Justice has no jurisdiction under Title V, how will lawfulness of a Council decision adopted under Article 24 (25a) be verified?

On ECJ jurisdiction, the exclusion of ECJ jurisdiction over CFSP measures is a long-standing, existing arrangement. All Member States are clear that they must comply with their legal obligations in this area—just as they must comply with obligations arising under all international agreements.

References

ARTICLE 15a

1. *Everyone has the right to the protection of personal data concerning them.*

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the 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, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 25a of the Treaty on European Union.

Declaration 20. Declaration on Article 16 B of the Treaty on the Functioning of the European Union

The Conference declares that, whenever rules on protection of personal data to be adopted on the basis of Article 16 B could have direct implications for national security, due account will have to be taken of the specific characteristics of the matter. It recalls that the legislation presently applicable (see in particular Directive 95/46/EC) includes specific derogations in this regard.

Civil Protection and the New Solidarity Clause

What precisely does the Solidarity Clause amount to in practical terms?

The Solidarity Clause establishes a duty for Member States to co-operate with each other and with the European Union in managing disasters and terrorist attacks. European Councils have already agreed from time to time packages of measures to respond to terrorist attacks and natural or man-made disasters. The Solidarity Clause reflects this concern of Member States to offer each other and the Union support in dealing with major disasters on their territory, including terrorist attacks. Any support provided to assist an affected Member State in the event of a disaster or terrorist attack would only be in response to a specific request by the Member State.

Declaration 37 on the Solidarity Clause, attached to the Treaty, indicates that it is for each Member State to determine the most appropriate means to discharge its solidarity obligation towards the requesting Member State. So for example even if the Union has acted to give a particular sort of assistance to a State, the States have a discretion to give a different sort of assistance. In practice, the extent of the duty is likely to depend on the particular circumstances of a case and on the nature of co-ordination among Member States in Council to which the Clause refers.

The Clause also envisages regular assessments by the European Council of the threats facing the Union and that the Union shall act to prevent and protect against such threats. This might include supporting Member States to develop national capabilities.

In terms of the solidarity obligation of Member States to the Union, the Solidarity Clause language on the Union mobilising "all the instruments at its disposal, including the military resources made available by the Member States" affords discretion to Member States. For example, any offer of military resources by an individual Member State would be at the sole discretion of that Member State. Again, in practice, the extent of any co-operative duty is likely to depend on the circumstances at the time.

Apart from co-ordination by Member States among themselves in Council, the arrangements for implementing the Clause will be defined by a Council decision. There is no requirement to develop new permanent structures to allow the Clause to be activated. Council would be assisted by the Political and Security Committee as well as the support of, if appropriate, those Council Secretariat structures dealing with European Security and Defence Policy (ESDP) and by a standing committee for operational co-operation and co-ordination set up under Article 65 (61D in the Treaty of Lisbon). The Council will act by unanimity under CFSP procedures where the decision has military or defence implications.

The UK is generally sufficiently well equipped to deal with most emergencies without the need for external assistance. However, emergencies may develop in unpredictable ways so we cannot rule out such a possibility. As such the Solidarity Clause might be of direct benefit to the UK.

What action would the United Kingdom take to assist other Member States in the event of a natural or man-made disaster?

The United Kingdom is committed to assisting other Member States in the response to disasters where we have the deployable capability to get to the scene in a timely way and can add value. Requests for assistance are considered on a case-by-case basis.

Member States and the European Commission are currently implementing the Civil Protection Mechanism (Recast) which provides for specialised task-specific modules in disaster response, based on Member States' assets and enabling them to contribute where they are willing and best able to do so.

In what circumstances might the United Kingdom ask for help from other Member States?

The United Kingdom uses an all-hazards approach to risk assessment, preparedness planning and response co-ordination. It is possible to speculate about a range of low probability but high impact events which could stretch our response capabilities to the extent that we felt it prudent to call for assistance from others.

Such a call could in principle be made through the EU's Monitoring and Information Centre to all its participating countries, through other multilateral channels including NATO, on the basis of existing bilateral ties, or through some or all of these mechanisms. For example, during the 2007 floods we sought and received international assistance for portable bio-degradable lavatory facilities; and a number of EU Member States on their own initiative made offers of assistance, for example with high volume water pumps, which we found it unnecessary to take up.

Inevitably, in most cases, international assistance would take some time to arrive. Within a framework of rigorous national risk assessment, the Government's policy is therefore to build national resilience through preparedness at all levels so as to ensure that a fast and effective response can be deployed to address a full range of risks.

Why is action at EU level thought appropriate, given that in the case of the proposal for a Civil Protection mechanism the Government is arguing strongly (and in the view of this Committee rightly), that this is a matter only for the Member States concerned and that the principle of subsidiarity excludes action at EU level?

In EU *fora*, the Government has consistently encouraged Member States to enhance their resilience at all levels on the basis that emergency preparedness and response can best be addressed through national action with support at the EU level to facilitate the sharing of good practice and mutual assistance where necessary. Strengthening the national capability of Member States would also enhance Europe's collective ability to deal with an overwhelming emergency where significant mutual assistance is most likely to be needed while reducing the pressure for EU-level action in more routine situations.

EU-level action envisaged under the Solidarity Clause in the event of a natural or man-made disaster could be taken only at the request of the affected Member State's political authorities. The Government welcomes the Clause as an expression of shared desire by Member States to provide mutual assistance in a spirit of co-operation in extreme circumstances and to take some action at a wider level to assess and prevent threats where multi-national action is needed.

The Civil Protection Clause (Article 176c) provides a specific new legal base under which further measures would be decided by qualified majority and co-decision with the European Parliament. This provides for EU action to support and complement Member State activity, and to promote co-operation and consistency in international civil protection. Its terms exclude harmonisation of existing Member State laws and regulations. The recently adopted Recast Civil Protection Mechanism and Financial Instrument accord with these terms.

15 January 2008

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE G)

THURSDAY 17 JANUARY 2008

Present	Gale, B	Uddin, B
	Lea of Crondall, L	Wade of Chorlton, L (Chairman)
	Perry of Southwark, B	Young of Hornsey, B
	Trefgarne, L	

Memorandum by Barnardo's, Children's Rights Alliance, 4Children, National Children's Bureau, NCH, the Children's Charity, National Society for the Prevention of Cruelty to Children (NSPCC), Save the Children and The Children's Society

Children's charities welcome the inclusion of children's rights in the new EU Reform Treaty (Lisbon Treaty). The Treaty is a significant step forward for efforts to protect children and promote their rights in the UK, across the Europe Union and beyond. We urge MPs and Lords from all parties to take this into account in forthcoming debates on the Reform Treaty.

Why is the Reform Treaty relevant for children?

1. *It will help ensure that EU laws and polices are child proofed, and contribute to promoting children's rights and interests.*

Many EU policies have a direct or indirect impact on children, including consumer protection, environment and trade policies, or cooperation to combat crime. Yet up to now, the EU has not had to consider the effects of its actions on children, or to ensure they are in line with international children's rights standards, despite the fact that all 27 member states have ratified the UN Convention on the Rights of the Child (1989). Opportunities for the EU to address risks to children which have a cross-border dimension have also been limited by the lack of legal base for children's rights.

The Reform Treaty introduces[1] the protection of children's rights among the EU's objectives for its internal and external policies.

> "The Union . . . shall promote . . . protection of the rights of the child . . . In its relations with the wider world, the Union shall contribute to . . . eradication of poverty and the protection of human rights, in particular the rights of the child . . ." (new article 3 of the Treaty on European Union, TEU)

This is the most significant change for children's rights introduced by the Reform Treaty. It will provide a basis for the EU to implement effective measures to ensure that children's rights, including the "best interests of the child", are taken into account or mainstreamed in all relevant policy areas.

This does not create new powers for the EU. In policy areas where the EU already has powers, it will enable actions to be taken specifically aiming to protect children's rights, for example to protect children from sexual exploitation. It allows the EU to provide sufficient resources to integrating a children's rights approach in its work, such as by undertaking a child rights impact analysis of EU policies. It also means that children's rights will automatically be considered in negotiations with countries who wish to join the Union.

Notwithstanding the UK's "opt-out" from the Charter of Fundamental Rights, the strengthened legal status of the Charter (new article 6 TEU), which includes an article on children's rights (Article 24[2]), is also a contribution to improving the place of children's rights in EU policy making.

[1] This briefing compares the Reform Treaty to the Treaties currently in force, rather than the rejected Constitutional Treaty text. Many of the advances for children were also in the Constitutional Treaty.

[2] Article 24 "The rights of the child" 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Articles to ensure that all EU policies and activities aim to help combat discrimination[3] (new article 10 of the Treaty on the Functioning of the European Union[4]), and take into account requirements linked to the fight against social exclusion and a high level of education and protection of human health (new article 9 of the same), are also likely to have positive impacts for children.

2. *It will be easier for the EU to adopt policies which help protect children from abuse and exploitation—but the UK can choose not to take part*

EU "freedom, security and justice"[5] policies are particularly significant for implementing children's right to protection from exploitation and abuse. Child traffiking and sexual exploitation of children—both of which have a cross-border dimension—are already dealt within EU activities to combat cross-border crime, but the Reform Treaty will help make sure a stronger children's rights perspective is integrated in these activities.

The Reform Treaty will also make it easier for the EU to adopt proposals strengthening cooperation to protect children from these crimes[6] by bringing them under standard decision-making processes. This means that legislation can be adopted by a "qualified majority" instead of unanimity among all 27 Member States, and it also increases democratic scrutiny by giving the European Parliament a bigger say. The UK will be able to decide whether or not to opt in to rules in this policy area.

3. *It will help ensure that children's rights NGOs, and children themselves, are involved and listened to in EU decision making.*

Taking into account the expertise and views of European Union citizens, including civil society organisations, is a crucial part of the EU democratic process. The Reform Treaty lays down a formal obligation on the EU institutions to ensure that "citizens and representative associations" are given the opportunity to make their views known in all areas of EU action, and to "maintain an open, transparent and regular dialogue with representative associations and civil society". This article also creates a new possibility for citizens (including children) to invite the European Commission to initiate a legal act by collecting a million signatures (new Article 8b TEU). A formal obligation of the EU institutions to listen to citizens will considerably strengthen children and young people's participation rights.

12 December 2007

Examination of Witnesses

Witnesses: Ms Kathleen Spencer Chapman, NSPCC European Adviser, and Ms Louise King, UK Policy Adviser, Child Rights and Protection, Save the Children, examined.

Q1 ***Chairman:*** Good morning. Can I welcome you both to this meeting of the Select Committee where we are looking into issues in relation to the European Treaty and those issues that interest this particular Committee and, as children's affairs and health et cetera is one of our issues, then we are delighted that you are able to be here today so we can investigate some of these issues with you. Could I make a few points to let you know that this session is open to the public and that things are being recorded for public broadcasting? A verbatim transcript will be taken of your evidence and this will be put on the public record in printed form and on the Parliamentary website. A few days after this session your office will be sent a copy of the transcript to check it for accuracy, and please advise us of any corrections that are needed as quickly possible. You may submit supplementary evidence after the session to clarify or amplify any points which you have made during your evidence session and any questions which may come later. Could I draw your attention to the fact that an accurate record is being made and, therefore, we would be grateful if you would speak as clearly as possible for that record, and would you, please, start your evidence by stating for the record your names and your official titles? Do you wish to make an opening statement before we begin?
Ms Spencer Chapman: Yes, just a brief one.

Q2 ***Chairman:*** Very good. If you would like to do that and then, following that statement, we will move into the questions.
Ms Spencer Chapman: My Lord Chairman, firstly, I would like to thank you for inviting the NSPCC and Save the Children here today. My name is Kathleen Spencer Chapman; I am the European Adviser for the NSPCC. As our submission explained, we believe the Treaty is a step forward for children. The NSPCC's mission, as you will be aware, is to end cruelty to children and it is in this light that we have been active at EU level since the mid-1990s in recognition of the increasing impact that the EU has on children's lives in the UK. We consider that participating in EU policy-making is an important

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[3] Based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
[4] Currently called the "Treaty establishing the European Community".
[5] Including policies on border checks, asylum or immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; police cooperation.
[6] New Title IV of the Treaty on the Functioning of the European Union, Articles 61-69.

dimension of ending cruelty to children to ensure that its policies and activities have a positive impact on children. The NSPCC and Save the Children are both founding members of the European Children's Network, Euronet, which has been working to promote the better integration of children's rights in EU policy-making, also since the mid-1990s, and Euronet is now made up of 35 national and transnational children's organisations from across the EU. It can claim a significant role in achieving the inclusion of children's right in the EU Treaty, which we are discussing today.

Ms King: My Lord Chairman, my name is Louise King; I am the UK Policy Adviser for children's rights. Save the Children, since its establishment, has worked to seek the realisation of children's rights from 1919 until the present day. Our concern, primarily, is with the implementation of the UN Convention on the Rights of the Child and we work both in the UK and internationally. Save the Children UK is a member of the Save the Children Europe Group, which is basically an organisation made up of organisations of Save the Children's working in the European Union, and we have an office in Brussels where we lobby to seek the realisation of children's rights at that level.

Q3 ***Chairman:*** Thank you very much. I will ask you the first question. In your written evidence, you explain that, up to now, the EU has not had to consider the effects of its actions on children or to ensure that they are in line with the international children's rights standards and that opportunities for the EU to address cross-border risks to children have been limited. Could you provide us with some examples of the instances in which the current legal framework has proved to be an obstacle to protecting children's rights?

Ms King: Yes. Clearly, EU policy does have a clear impact on children. Yet, despite this, we have found, working at a Brussels level, that quite often policy, when it is made, does not actually consider whether or not it has an impact on children's rights. It is very ad hoc. There is nothing systematically put in place to ensure that it happens across the board. Where it does actually happen it tends to be because particular individual MEPs have an interest or it is because NGOs, like NSPCC and Save the Children, have worked to raise the issue to ensure it gets considered. The lack of legal base has also meant that other considerations, basically, take precedence rather than children's rights considerations, for example commercial or industrial concerns. A key example of this, in terms of other concerns taking precedence is consumer protection that has impact on children, this was highlighted by the European Child Safety Alliance, and they have called for an evaluation of a number of EU regulations, standards and directives to make sure that certain things are actually making sure children are safe. For example, in terms of child restraint systems in cars, pedestrian protection, building safety, child care articles, a whole range of things, where they feel other interests have taken precedence over actually considering safety implications for children. Another key example is in the area of asylum and immigration, where many directives are actually made at EU level. Quite often the policy is made thinking primarily about the impact on adults without actually considering how it impacts on children as well. A key regulation which has had a very strong impact on children is the Dublin II Regulation, which you might be familiar with. This policy was established to ensure that asylum seekers were not able to claim asylum in several different Member States so that, if they were unsuccessful in one State, they could then go to another State. It also set up the EURODAC database, which stores fingerprints. Therefore, if an asylum claim is made, their fingerprint is checked on this database to see if they have claimed asylum in another State and, if that is the case, they are returned there. This also applies to children, and in our work we find it has quite a drastic impact on children. Could I cite a particular example we came across following some research carried out by Save the Children UK and impacts on trafficked children in the UK? We came across a case where a child from the Democratic Republic of Congo had actually been separated from his family during the civil war. He was then taken in by a man who subsequently trafficked him to Spain, where he was forced into prostitution. He was then subsequently trafficked to France and then to England. When he got to England, fortunately, a sympathetic person put him in touch with the local authorities; he was taken into care in this country; he then claimed asylum; so he was actually safe for once, for the first time in many years. After he claimed asylum, checks against the database found that he had previously claimed asylum in Spain. The Home Office then returned him back to Spain. The local authority could not intervene, despite him actually disclosing to them the situation and the problems that he had experienced—the fact that he had been trafficked and had gone through his horrific situation. He was then returned and we now have no idea what has happened to him since. That is just an example where policy has been made without actually thinking about the impact it can have on children, and quite a drastic impact as well. Another example to give about how difficult it is sometimes to ensure that policy remains thinking about children is the Returns Directive, which is currently being discussed at the moment at EU level and it is in tri-dialogue. Initially there was a principle in it that the best interests of the child would be considered when returning a failed asylum seeker back to their country of origin, which is, obviously, quite a clear safeguard for children to make

sure their best interests are considered in any decision-making processes. We are now concerned this might actually be removed, because there are discussions between Member States on whether or not it is necessary to have that principle included. We are concerned that this is going to be removed and that safeguard will not actually exist; so we have to work hard to ensure that it actually remains. That is just a few initial examples in that policy area where it has actually had a negative impact on children.
Ms Spencer Chapman: My Lord Chairman, may I add one or two other points to that question? Another obstacle in the current legal framework, we found, is that it is very difficult to target EU funding specifically at children. An example of this is the Daphne Programme, which funds projects which contribute to combating violence against women and children. This was adopted in 1998 but it was very difficult to find a legal basis for that programme, which decision-makers at that time agreed was an extremely important priority to adopt, but, despite that, it was very difficult to find a legal basis because of the lack of reference to children's rights in the EU Treaty. Eventually a legal basis was found, luckily, but the debate around that emphasised the obstacles. Another obstacle caused by the lack of legal base is that it has been quite difficult to establish sufficient institutional mechanisms to ensure that children's rights are taken into account across EU policy-making, even where there is some recognition that that is important. For example, the European Parliament yesterday adopted a resolution about a proposal for a European children's rights strategy. The report calls for a European Parliament unit to be set up to co-ordinate actions for children's rights, but it says this should be done in accordance with the Lisbon Treaty, and this indicates that, without this Treaty, it is very unlikely that this kind of unit or co-ordinating mechanism could be set up to make sure that children's rights are better integrated.
Chairman: I think we might just want to move on now, if we may, unless there are any supplementary questions to that first answer.

Q4 ***Lord Lea of Crondall:*** Could we just clarify: is there just one reference in the Lisbon Treaty that you are alluding to, or are there more than one? Could you give us the numbers that you are referring to?
Ms Spencer Chapman: The primary article which we are interested in is Article 2, which is the objectives of the European Union, and children's rights are included both in relation to internal policies and external policies of the Union in that article.

Q5 ***Lord Lea of Crondall:*** Is that new?
Ms Spencer Chapman: That is new, yes. Children's rights have never been included in that article previously.
Ms King: Which is why some of the problems have become apparent, because there has been that lack of legal base previously.

Q6 ***Lord Trefgarne:*** Ms Chapman referred to an organisation could Euronet. That is a European grouping of organisations like the NSPCC, is it?
Ms Spencer Chapman: That is right.

Q7 ***Lord Trefgarne:*** You are President, are you?
Ms Spencer Chapman: That is right.
Chairman: We will move on to our second question. Lady Perry.

Q8 ***Baroness Perry of Southwark:*** Could you articulate for us in what way the changes relating to discrimination, social exclusion, education and the protection of human health add value for children over and above the current legal framework?
Ms Spencer Chapman: Yes. The Treaty changes referred to there, the two new so-called horizontal articles, 5A and 5B, will lay down obligations on the EU to take into account requirements linked to social protection, social exclusion, education and health across EU policy-making and also requirements related to discrimination, and that includes combating discrimination on grounds of age, which is particularly relevant for children. The reason we have highlighted these articles is that, of course, 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, also impact on children. We believe that these changes, while it will remain to be seen to what extent they have a real impact on policy-making, will hopefully have an impact in making sure that those considerations are taken into account across EU policies, whether it is internal market policies, for example making sure that air travel is accessible for people with disabilities including children. That is one example where the European Disability Forum has raised a lot of concerns. Another example is in relation to liberalising services in the internal market, when there was a proposal from the Commission a number of years ago there was no real impact assessment of what impact that proposal could have on social protection issues and social services, and eventually social services were excluded from that directive, the Services Directive, thanks to lobbying from a number of groups; but it just shows that at the moment those concerns are not being taken into account and that these articles should ensure they would be, which will benefit children as well, we believe.

Q9 ***Baroness Young of Hornsey:*** Good morning. Could you tell me: are there any, or do you think there should be, specific arrangements for children in

institutional care across Europe? Obviously that has been a big issue of over the years, and it is slightly different in each country, but I am just wondering if there is anything specific that needs to be articulated.
Ms Spencer Chapman: That is not an issue that we have raised as a particular area for EU action, but obviously it is a problem in a lot of Member States, and we believe it is an area where it can be useful, and we discussed this in the network of NGOs that we referred to, to actually exchange experience and learning between Member States. There is a lot of value in that, but it is not an issue that we have specifically raised at European level as NSPCC.
Ms King: It is an issue of concern to Save the Children, although we have been working more internationally rather than at an EU level to try and end these institutions for children, because we do not think that is the best place for children to be; we prefer them to be based in the community if they do need to be looked after. In terms of the EU, in terms of the accession criteria, we think, because there is now a reference to children's rights in the Treaty, when they are actually looking at new states coming in they will have to take into consideration children's rights issues, and so things like whether children are held in institutions will actually be considered, so hopefully it will be able to add leverage to countries where it is a big issue to actually address some of those concerns. We found before it has been quite ad hoc whether or not these issues have been raised before.

Q10 ***Lord Trefgarne:*** How do you handle the matter of new countries coming into the EU where clearly, very often, their standards are very poor? There was a piece the other day on the television where in Romania, for example, the children are being kept in little cages. Are you able to lobby on those sorts of things?
Ms Spencer Chapman: What we are saying about the Treaty is that we believe that having children's rights in the objectives will help make sure that those kind of issues are taken into account during accession negotiations, which was to some extent the case with Romania and Bulgaria, though more with Romania. There has been improvement since then, and what we have found with other Member States is that being part of the EU and being involved in processes—there is an open co-ordination process on combating poverty and social exclusion, for example—those issues can be raised within those processes.

Q11 ***Lord Trefgarne:*** You lobby on these issues, do you?
Ms Spencer Chapman: As NSPCC, we do not. As the European Children's Network these issues are discussed but not specifically lobbied on at the moment.
Ms King: Save the Children does. One of its protection objectives globally is about ending the institutionalisation of children. That is one of the things that we actually work on at a UK level and at an EU level but globally as well.

Q12 ***Lord Trefgarne:*** This relates to the enforcement of existing provisions, not what may arise from new ones.
Ms Spencer Chapman: As far as I am aware, there is no EU provision specifically about how children are treated in institutions—certainly no legally binding provisions—but, as I said, we believe that having children's rights in the Treaty will help put pressure on these countries to do more, more quickly.
Ms King: Within the countries that have ratified the UN Convention on the Rights of the Child, that is very clear about how children should be looked after, and there are clear standards, and it would not be advocating institutional care for children. There is obviously that mechanism already, and we think that is not always as effective as it could be. Having that added base at the EU level in terms of children rights is extra pressure to be put on them. Especially if they are keen to join the EU, it is obviously quite a good mechanism to put on a country.

Q13 ***Lord Lea of Crondall:*** You say that changes in the decision-making processes in justice and home affairs will facilitate the adoption of child protection initiatives. Does that mean legislation competence? Can you give us an example of the sort of problem which does require European level competence? Is that the transfer of competence from the nation state? Are there other articles in the Lisbon Treaty that we are talking about, because you have mentioned number two. Did you say numbers 5A and 5B?
Ms Spencer Chapman: Yes.

Q14 ***Lord Lea of Crondall:*** The old 5A and 5B, because I cannot see in the new text where the 5A and 5B comes from.
Ms Spencer Chapman: This is in the Treaty on the Functioning of the European Union, which is the second part within there. It is confusing.

Q15 ***Lord Lea of Crondall:*** I see. We are not really ourselves up to speed on this because it is quite hard to follow, but the first reference is in the front part?
Ms Spencer Chapman: Yes, that is right.

Q16 ***Lord Lea of Crondall:*** Can I summarise my question again then. I am sorry; it is a question of relating it to the Treaty. Can you give us an example of where the competences will give the possibility of, presumably, justiciable things like a directive, to give an example, or are we just talking about some principles here? Is that the same as giving a

competence to produce directives on children's rights across Europe? Can you just enlarge on that?
Ms Spencer Chapman: Certainly. In relation to the broader inclusion of children's rights, that does not give any extra competence. What it does is put more pressure and a greater ability to make sure that children's rights are taken into account in areas where there is already a competence. In the area of justice and home affairs, or freedom, security and justice, there is no extra competence specifically in relation to children, but the changes in decision-making procedures, we believe, will help lead to the adoption or strengthening of legislation, which is helpful, in our view, for the protection of children, and on those issues I can give a few examples. The NSPCC is currently calling for EU action to address the current difficulties in vetting workers from other EU countries to ensure that unsuitable persons, such as convicted sex offenders, are not able to gain employment with children by moving between Member States. There was a proposal for a piece of legislation which would make sure that one Member State would recognise a disqualification imposed by another Member State on someone from working with children if they had been convicted of a sexual offence against a child. This particular initiative, although there was general agreement about the importance of the idea, never got anywhere, and arguably this was, as well as it being a complex issue, because of the prospect of needing unanimity to adopt such a proposal. We believe that with changes to this area where it will, firstly, enable the EU to adopt directives rather than only framework decisions, which are more legally binding but also make it easier to adopt legislation by not requiring unanimity, it will enable adoption of more progressive legislation. If I can expand on the problem with framework decisions, the main distinction between directives and framework decisions—there are two main distinctions—framework decisions do not entail direct effect and the Commission cannot take legal action before the Court of Justice if a Member State fails to implement a framework decision; so it is harder to ensure that the Member States implement these decisions which they have greed to. There is a framework decision from 2003 on combating the sexual exploitation of children and child pornography, and the European Commission has recently reported on the implementation of this. There are some gaps in implementation and also some gaps in reporting from Member States on how far they have implemented it. We believe, under the new provisions, it would be possible to make such a framework decision a directive, which would just give a bit of an extra push to ensure that these proposals, which we believe are in the interests of children, are adopted and implemented.
Ms King: There are similar examples with child trafficking as well where there have been framework decisions which are positive and will have a positive impact, but, again, if they are a directive they would be a lot stronger in terms of making sure that countries adhered to those directives; so it would help in the battle to actually try and combat child trafficking. There are a number of areas where this will strengthen legislation in terms of addressing some of these serious issues.

Q17 ***Lord Lea of Crondall:*** So it is not a direct competence of producing a directive on this question, it is that other areas where a directive is already possible, or will be possible, can cover some of these possibilities?
Ms Spencer Chapman: Yes. To clarify again, it does not bring in new broad competence for children's rights, but in the area of freedom, security and justice, which we refer to, it changes slightly the decision-making procedures on areas where they can already adopt initiatives which relate to child protection. It changes the decision-making procedures, which will slightly strengthen those possibilities.

Q18 ***Baroness Gale:*** My question is: could you comment on the implications for children's rights of the UK opt-out, which would allow the UK to choose not to participate in measures promoting and protecting children's rights in the area of freedom, security and justice?
Ms Spencer Chapman: On this issue the biggest impact that we see is the political impact, that it weakens the UK's negotiating position in this area. One comment which I have heard, the issue that I have just mentioned about mutual recognition of bans on unsuitable people from working with children, is the UK has been very supportive of EU action in this area, which we welcome. The prospect of its opt-out under the Treaty weakens its negotiating position if it wants to encourage action under these articles of the Treaty, and that has already been reflected to me as a possible problem in terms of winning other Member States over to its point of view, and also, when it negotiates on any initiatives in that area, it has got the potential to weaken its negotiating position. Of course, in terms of the concrete impact, it would depend very much on what this concrete initiative was that it was opting out from, and we would, of course, hope that the UK Government would always choose opt-in on any initiatives which were beneficial for children.
Ms King: There is an issue that if they did choose to opt-out, then we could end up being quite out of sync with what is happening and some positive things going forward, we could actually fall behind that, so that is obviously an issue, and our organisations will be working hard to ensure that they did opt into anything which was going to have a positive impact on children. Just to reiterate, I think the main concern is the fact that if the UK Government wanted to actually bring in something positive for children, it would be very

difficult to actually persuade other Member States to do that if they were not so keen, because they could just say, "Well, you do not have to opt into some of these things when we want to do something, so why should we listen to you." So, it could actually cause some problems there.

Q19 ***Baroness Gale:*** The UK can opt out, and some other countries can opt out of whatever the issue is?
Ms Spencer Chapman: It is only countries who have actually agreed provisions in order to be able to opt out in the Treaty.
Ms King: No, they will not be able to do it going forward. Unless they have said that they are going to opt out now, it is not possible in the future. It is because of the changes in the decision-making process that the UK decided that they would want to opt out—that is the reason for them doing it—but not all countries have decided that they are going to have that opt-out clause.

Q20 ***Baroness Gale:*** Do you think that could cause problems for children's rights?
Ms King: If there was going to be something which was very positive happening, the UK has got that opt-out clause; so they could, in fact, decide not to do it and, obviously, that would be negative if they were not going to opt into some of those more positive things.

Q21 ***Lord Lea of Crondall:*** Can I declare an interest coming from a trade union background. Over the years, there are a number of directives that we have negotiated in Brussels, including four weeks' paid holiday, plus the bank holidays, of course, and others like the equal rights for part-time workers. My recollection is that your organisations have noted and welcomed the fact that there are younger children and slightly older children and so on and the possibility of parents being at home, and being able to have a better relationship between home life and work life, and so on, has an enormous impact on the welfare of children. Could you comment on how far what people call Brussels is relevant in that broader sense, because I am not quite clear? Is the area we have been talking to you about, the only area, or are there other areas, slightly more indirect, where the welfare of children, which at the moment leaves something to be desired in many fields, is also enhanced?
Ms Spencer Chapman: I think it is an important point. I am not able to comment specifically on details of EU initiatives regarding issues around employment, but the general point about children's rights being more visible within EU policy and police-making, I believe, will also help make those issues that you have referred to better taken account when there are discussions around the reconciliation of work and family life, within, for example, the Lisbon Strategy which deals with growth and jobs. We believe that there is a broader impact, and by increasing the visibility of children's rights and interests in those debates, that will be beneficial.
Ms King: What we envisaged happening as a result of the new child's rights reference within Treaty is, when policy is being developed, that there is a child's rights impact assessment on those policies, and we will be working to make sure children's rights are actually mainstreamed across a whole range of areas so they are actually considered. I know a lot of policies are made when you would not initially think they will have an impact on children's rights, but they obviously do; so it is about making sure that it is part of the decision-making process, it is in the forefront of people's minds when they are making policy, that they actually consider it, and as a result of that we think there will be positive benefits for children on a whole range of areas which the EU has competence on.

Q22 ***Baroness Young of Hornsey:*** You believe that the new citizenship arrangements will considerably strengthen children and young people's participation rights. Can you say what some of the barriers to doing that have been so far?
Ms King: In terms of the dialogue that the EU currently has with children, it is very similar to how children's rights are actually considered. It is very ad hoc and quite piecemeal, there is not anything systematic in place in terms of engaging with the children in policy-making, and we hope that this will change. There is just not a culture of participation at the moment embedded within EU institutions, and although there have been one or two good examples of where children have actually been engaged, it is very much down to organisations such as ourselves pushing for that to happen and also about the individuals, like particular MEPs that are very into this issue and championing it, rather than actually being across the board. But to talk about some specific barriers, they have quite a lot of relevance in this context in the UK as well as in the EU, although we are somewhat further down the road at the UK level. First of all, I think a lot of adults do not really know how to engage with children; they feel quite intimidated; they do not often know how to talk to them at their level; they do not often see them as equal and think that they have a view that should be taken into account. So, I think it is trying to change attitudes to a certain extent but also supporting people to be to be able to talk with the children, give them training, all of that kind of thing, and it is also about not using language which is full of jargon and acronyms. I think when people are working within institutions it is very easy to get institutionalised and forget that there is an outside world that does not know what all these acronyms and jargon things mean; so it is about addressing those kinds of concerns. There is also a lack of child-friendly

information. If we want children to engage in an issue, they need to know what it is about. There is no point presenting a child with a huge document full of detail; they are not going to understand it. It is about setting up mechanisms for children to be able to discuss and find out about what the issue at hand is actually about. Also it is not given the priority it deserves sometimes. Save the Children has a project at EU level to try and promote participation, and part of that was doing a series of training for various members in the Commission, and we found that it was cancelled sometimes at the last minute, that training, if something else came up which was of more priority; so it was quite low on the agenda sometimes and it goes if something else more important comes up. It is also about consulting with children and the correct timing. There was an attempt to engage children in the European Communication White paper, which is key because it is about how the European Union actually communicates, and that was during the summer holidays, where children are away, so that it was quite difficult to get children involved; so it is quite practical things. Another point is about not trying to fit children into adult structures but actually setting up mechanisms where children feel comfortable. There was a debate in the European Parliament to discuss the Children's Rights Strategy, which was a really good step forward, and it had NGOs, MEPs and also children and young people there, but the way the debate was set up would have been the same probably whether or not children were there. It is quite intimidating for children, it is quite difficult for them to slot into the way adults work, but it is actually thinking about how we can do things with them in partnership. I think a key thing underlining some of these things is the lack of resources. It is very easy to say on paper we are going to engage with children and we are going to have participation, but actually putting it into practice takes time, and you do need resource to do it, especially at EU level when there are a lot of practical considerations. Those are some of the main barriers, I think, at the moment, but because of the new Article 8, which emphasises trying to get a more participatory democracy, we think that could, again, make a difference, along with Article 2, which talks about children, to actually enhance the fact that participation of children is actually a good thing and is something that they should be doing. Just to demonstrate how that can sometimes get taken forward: in the domestic context, in the *Every Child Matters* agenda, one of the outcomes is about making a positive contribution and we have really seen in recent years in this country how the Government has gone forward in terms of engaging with children in policy-making, and I think the UK Government in this context does have quite a role to play in terms of showing the EU institutions how it is possible and how it is beneficial for children but also for policy-makers.

Q23 ***Lord Lea of Crondall:*** I do not want to sound like a dinosaur, but perhaps I cannot avoid it, but how do you consult children? I am not clear. In the old days schools and colleges were *in loco parentis*, which meant that those organisations act in the same legal capacity as parents when they are at home, and we have had this conversation for half an hour, which I have found fascinating, without a reference to schools. What sort of structure is it that you have got in mind for a consultation with children? I have not got it.

Ms King: There is no right answer. You should get away from thinking there is one mechanism that is the right mechanism because, obviously, depending on the children that you are consulting with, and children are different, they are not a homogeneous group, it depends, but it is possible to do it through a number of youth organisations working in all kinds of European Union Member States, but there are also national and European NGOs which have good links with children and links to children's services and with schools, so it is possible to set up consultation initiatives with children. Save the Children did quite a big consultation on the Children's Rights Strategy and actually 1,000 children from across Europe took part in it, so it is definitely possible, but it is about having the will to do it. You can do it through questionnaires, but also, which is better, actually getting children together and having participatory workshops and having discussions about policy and feeding back. It might sound quite alien if you have never done it, but it is quite straightforward to do.

Baroness Perry of Southwark: Perhaps we should record that most secondary schools do have a schools council on which students are represented.

Chairman: We are getting short of time. Lady Uddin did want to ask one question.

Q24 ***Baroness Uddin:*** You may have already said this, but what value framework do you place on consulting children? Are there some set standards against which you judge children to be participating in adequate consultation? I particularly want to refer to your comments that we are not very good at consulting children or talking to children. That is not necessarily right across the board, and I think that generalisation is too broad. I think that if you are consulting children, you have also got to take on board cultural issues. I think that consulting children in terms of getting them to participate in sports, or youth clubs, or whatever, it is, of course, paramount for them to be able to contribute to society or their own personal development, but in terms of the value that you place on this, do you also take on the issues

of discrimination, prejudice—that kind of responsibility for citizenship—because it is something that we in Britain are much better at than many parts of Europe? Do you feel that working across Europe that is something that is a positive force, that you can contribute to the other sister countries' discussions?
Ms King: Yes.

Q25 ***Baroness Uddin:*** I am sorry; I have raised a number of different and disparate points.
Ms King: In terms of standards of participation, it is very easy to be tokenistic, and there are standards. My organisation has standards. With the UN Convention on the Rights of the Child, the Committee on the Rights of the Child has actually in one of its general comments outlined what it means by participation rights within the Convention; so there are a lot of good reference points and there is lots of training out there in terms of making sure that it is not tokenistic, what you are doing. In terms of benefits of participation as well as it being a human right, and it is a right to engage in policy-making and active citizenship, it has a lot of advantages for a number of reasons, and one of them is the fact that it is very educational. You get to learn about political institutions, you get to see young people more likely to be engaged in politics, but also to meet people from different backgrounds, different cultures across Europe. It can only do good in terms of getting people to mix with people from different backgrounds and actually having more mutual respect for people. So, it has a number of positive things.

Q26 ***Chairman:*** I think I must stop you there because we have run out of our time allocation for this session, but could I thank you both very much indeed for a most splendid presentation. You have talked to us a great deal about this issue and helped us enormously to come to our conclusions on the impact of the Treaty on these matters. Thank you very much for coming.

Memorandum by Central Council of Physical Recreation (CCPR)

About CCPR

(1) CCPR is the representative body for sport and recreation in the UK, counting over 270 national governing bodies of sport and other national sport and recreation organisations within its membership. CCPR exists to promote, protect and provide for sport and recreation in the UK by demonstrating the benefits that sport and recreation bring to society, working to reduce adverse impacts from legislation or other causes, and providing a range of high quality services to enable its member organisations to operate effectively.

(2) CCPR is also an active member of the European Non-Governmental Sports Organisations (ENGSO) which represents over 40 national (EU and non-EU) umbrella sports organisations across Europe and also a member of the EU Sports Office.

EU Sub-Committee G Questions

Do you have any comments on the factual summary set out in the Annex of the Treaty changes affecting policy areas within the remit EU Sub-Committee G?

(3) Specifically on sport, while it is true that sport is introduced as a new competence it is important to note that it is only a soft competence; ie Article 2E states that the Union shall only have competence to take actions that support, coordinate or complement member states actions.

What are your views about the impact that these Treaty changes might have on the evolution of the policy development process at the EU level for example, the extent to which the roles in the formulation of EU policy—of the EU Institutions, the UK Government and of interested stakeholders within the UK—might be affected by the changes?

(4) CCPR can only comment specifically on sporting changes to the treaty. Sport has been included in the Treaty for the first time (Article 2E) allowing the Union competence to carry out actions to support, coordinate or supplement the actions of the Member states. This addition is in a similar vein to the 1992 Treaty of Maastricht which included culture for the first time. It is hoped that, in a similar way to how the EU's competence in culture has developed, the EU will be able to be more systematic in European rulings without dramatic changes in policy. Sporting policy will still be led by Member States and autonomy given to national governing bodies of sport.

Are there any other ways in which the changes made in the Reform Treaty, specifically relating to the policy areas within the remit of EU Sub-Committee G, might have a significant impact in the EU and in particular in the UK and, if so, what are these?

The Treaty will allow the EU to develop a sports policy

(5) The ratification of the Treaty will allow the Commission to develop a European sports policy as outlined in the EU White Paper on Sport released in July 2007. The Treaty will allow the positive impetus from this initiative to be continued; CCPR in particular will urge the Commission to:

(a) better appreciate the link between professional and grassroots sports.

(b) progress the development of the legal concepts of "autonomy" and "specificity" for governing bodies of sport.

(c) develop funding streams which are clearly relevant for sport.

The Treaty will allow the EU to develop funding streams in sport

(6) The Reform Treaty will allow the Union to provide funding streams for sport alone. Twelve funding streams were considered in the White Paper on Sport, but none are exclusively for sport. In these streams sport can be used to reach the goals of the project but are not the purpose of the stream, meaning sporting projects must be sculpted to meet other aims and not developed for sport's sake. An exclusive sport stream, as supported by the European Commission will allow the expansion of sport throughout Europe. Without ratification of the Reform Treaty, such a stream is impossible to create.

The Treaty will promote sport within the European Institutions

(7) Sport being involved in the Treaty will hopefully promote sport in the European Institutions' agendas and protect against unintended consequences of other policies. The Commission's Sport Unit should be congratulated on setting up a service intergroup for sport that ensures that the 15 DGs involved consider sport in their policy development.

The Treaty takes into account the specific nature of sport

(8) The EU treaty explicitly calls for the Union to take into account "the specific nature of sport" and excludes "any harmonisation of the laws and regulations of the Member States". These are two very important statements for sport. Sport desperately needs to have its status within EU law clarified. While the ECJ ruled in the Meca-Medina case that sporting cases must be ruled on on a case-by-case basis, this does not clarify sports position with respect to EU law. It is clear that areas of sporting law must be different to European law; national teams may discriminate against non-nationals in their selection (Walgrave and Koch C-36/74), transfer windows may prevent free movement of workers as they are intended to prevent competition distortion (Lehtonen C-176/96) and drugs bans do not impinge on freedom to provide a service (Meca-Medina C-519/04). Such exemptions to EU law are generally referred to as the "specificity of sport" and also demonstrate that sports organisations have the autonomy to decide how rules govern their game.

(9) The European Institutions are hesitant about defining sport's specificity or indeed their autonomy. It is very much hoped that giving the EU a soft competence in sport through the Treaty will allow the Union the ability to redefine sports' specificity and autonomy and reverse the uncertainty around sporting governance.

CCPR is happy to expand on all of the above points if we can help further.

12 December 2007

Examination of Witnesses

Witnesses: Mr James MacDougall, European and International Officer, and Mr Andrew Hanson, Head of Policy, Central Council of Physical Recreation (CCPR), examined.

Q27 ***Chairman:*** Good morning to you both. We welcome Mr Anthony Hanson and Mr James MacDougall of the Central Council of Recreative Physical Training. Thank you very much for joining us. We have allocated 30 minutes for this session. I would just like to draw your attention, as I did earlier, to the situation, just to remind you that the session is open to the public and will be recorded for possible webcasting. A verbatim transcript will be taken of your evidence. This will be put on the public record and in printed form on the Parliamentary website. A few days after this session your office will be sent a copy of the transcript to check it for accuracy. Please advise us of any corrections as quickly as possible. You may submit supplementary evidence after the session to clarify or amplify any points made during your evidence or answer any questions which may not be reached today. Could I remind you, as I did earlier, that it would be enormously helpful if you could speak as clearly and positively as possible, so that the record may be as accurate as possible, and, please, would you start by stating for the record your names and official titles. Do you want to make a statement before we ask the first question?
Mr Hanson: Very briefly.

Q28 ***Chairman:*** Then, first, if you would like to state your name and title and then we will proceed with your statement.
Mr Hanson: My name is Andrew Hanson, Head of Policy at the Central Council of Physical Recreation (CCPR), which is the representative body for sport and recreation in the UK. It covers every activity from rugby to rounders and rowing to rambling. We also have in membership people such as the Scouts and Guides, who use sport and recreation to deliver their primary purpose of working with young people. CCPR believes the draft reform treaty is positive for sport. It is the first treaty to include a reference to sport and, thereby, enables the EU to take sport into consideration in the policy-making process and to support sport with funding streams.
Mr MacDougall: My name is James MacDougall. I am the CCPR's European and International Officer. CCPR are very active on the European sporting lobbying front and we are a member of ENGSO (European Non Governmental Sports Organisations), which covers 40 different European countries. I have come yesterday from Brussels where I was with their EU working group discussing the EU Reform Treaty, amongst other things.

Q29 ***Chairman:*** Thank you very much. I will proceed with our first question. Sport policy has been developing at the community level since the Amsterdam Treaty and the Nice Summit in December 1999. Earlier this year, we saw the Commission's White Paper on Sport, and now a legal base is being provided. Could you comment further on the policy development background that has led to sport's inclusion in the Treaty?
Mr MacDougall: As you say, sport was first mentioned in European levels in the Treaty of Amsterdam, and that mentioned really that sport was socially relevant and, indeed, sport is the biggest social movement in Europe; but it did not go on explicitly to say anything a great deal more than that, just a couple of lines. It developed from there through to what we found in the Treaty of Nice, and what was in there was mainly developed by the French Minister of Sport at the time, and he was looking, in particular, for an exemption for sport to EU law, and that is perhaps a reflection of what there is in America in terms of, for example, a national football league. The NFL there is a monopoly, but that is not against American law because sport has an exemption. That, from a European perspective, is almost impossible to do, simply because the things that affect sport are not necessarily always competences at an EU level. For example, tax is still in the domain of the Member States, so there is no way EU law could give sport an overall exemption. So, that developed there. The Minister did not get support from all the EU 15, as it was, and so what happened in the Treaty of Nice was slightly watered down. Cynically, you may argue that the reason why the Minister for Sport in France was particularly interested was because France were perceived to have been unsuccessful in European football, in particular, at the time and he wanted to defend French state aid to football clubs so that they could develop players, and, shortly afterwards, there were, in fact, proceedings from the Commission against France on that. The idea was that there were a lot of things that happened in EU law that actually affected sport, and this is where the idea of specificity comes from; that there are specific natures that are different in sport than they are to EU law. For example, a case before the ECJ was *Koch and Walgrave*, and that was where it was brought against the French National Team, saying for free movement of players you should have not just French people in the team but anyone from the EU, and that was thrown out on the basis that we understand that sport is specific and national teams are national teams and only have national players in them. So, that is where the idea of specificity came from, and the ideas that we see in front of us today in the EU Treaty were also in the previous European Constitution as well. What we have in the Treaty now is actually quite a vague statement from a legal standpoint that could be

interpreted in different ways, but what we are looking for from the sport point of view is a similar aspect to what has happened to culture in the past. That came into the EU treaties for the first time in 1992, and, again, that was also a soft competence, as we call it, so a co-ordinating and supporting role, and you have seen a positive effect on culture, particularly in terms of funding streams. An example of that is that this year is the European Year of Intercultural Dialogue and there have just been 27 projects announced that actually represent the 27 EU Member States, and all of those projects are cultural projects, there is no sporting project in there for any funding. So, that is the sort of impetus and natural progression we would like to see from the Treaty.

Q30 ***Lord Trefgarne:*** You indicated that an increased awareness of sport as a policy issue would be welcome. Can you give us some examples from the past where this lack of awareness has been a difficulty and led to, perhaps, unintended consequences?

Mr Hanson: We had two specific and recent examples. The Temporary Work at Height Directive, designed for scaffolders, steeplejacks, people working on oil rigs, essentially laid out how you should work with ropes to ensure safety. Because the EU is unable to take sport into account, it also applied to people who might be teaching rock climbing or teaching sailing. In effect, the industrial ropes methods proposed within the Directive were more dangerous than the existing methods used within a sporting context, and this had two very bad consequences. One would be that when people went out to climb as an individual, not in a working context, they would have used the normal climbing procedures and been perfectly safe, yet if someone was teaching someone to climb, they would have to teach them according to an industrial process that would not have been relevant. It took about four years of work, I believe, to get this turned around. CCPR is involved in the Adventure Activity Industry's Advisory Committee and worked with the Health and Safety Commission in England and the Health and Safety Executive to eventually get a dispensation that the regulations would be applied in a different way to the recreation activities, but it took a lot of work for British civil servants and a lot of work for British sporting bodies to actually arrive at this. If the EU at policy level had been able to take it into account in the first place, all that work and expense would have been avoided. A similar issue is the Water Bathing Directive. This is about the cleanliness of water for people to bathe. Initially it had been proposed that that should include sailing, rowing, yachting and so forth, and essentially it would have meant that the Thames would not have been clean enough to hold the Oxford and Cambridge Boat Race. Fortunately lobbying at the European level was able to get that changed before it came over to Britain.

Lord Lea of Crondall: Could I ask a supplementary to question one? I did not quite understand something about specificity as far as national teams.

Chairman: Let me remind you, Lady Young has specific questions on specificity, which will be coming next, so it might be better to wait until her questions have been asked first.

Lord Lea of Crondall: I am sorry, it came up. I will leave it.

Q31 ***Baroness Young of Hornsey:*** Specificity—the word of the moment. I work in the cultural sector, so I understand what you are saying with regard to some of the benefits that have accrued from being recognised by the EU. I have got two questions, but I will ask them individually, if I may. Obviously this is a very important issue, and you have already elaborated on some examples that refer to this. Could you tell us in a little bit more detail what you consider would be the implications of not recognising the specificity of sport, given that, even in some of the examples you have given, people have found a way around it. What would be different if we do have this notion of the acceptance of this concept of specificity?

Mr MacDougall: I think the thing that sporting organisations are particularly looking for is two ideas. Specificities, as you say, is the word of the moment and the other one from the sporting area is autonomy, that sporting organisations 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 any guarantees to actually do that. There are some cases, we have shown, where we have managed to get round it, but there are certain things that are still out there. One that is very politically alive at the moment is home-grown players and quotas for different players to develop sport as well. Without the ability to govern your own sport and develop sport for the good of the nation, it will be difficult, and that is the specific nature that we want European law to exempt.

Q32 ***Baroness Young of Hornsey:*** In that particular example that you have given, the arguments that rage about home-grown players in football, what difference would it make having that sort of recognition?

Mr Hanson: Essentially if the EU were to recognise the specificity of sport, it would be able to say, on a carte blanche basis, that having home-grown player quotas is acceptable because we understand that, if you want a vibrant international competition between countries and between clubs, you have to regulate your sport and, therefore, it would disapply, if you like, the freedom of movement for sport.

Q33 ***Baroness Young of Hornsey:*** So that mainly affects sport at an elite level.
Mr Hanson: There would be other benefits of specificity which would not necessarily be at elite level.

Q34 ***Baroness Young of Hornsey:*** Could you give an example?
Mr MacDougall: On exactly the same thing, the Austrian Chess League, obviously not an elite sport category, was actually subject to that same ruling as well. They wanted local people to participate and have Austrians playing, but they were advised that they would have to accept people from Germany, from all around Europe as well, to play in their leagues. They had quotas as well. So it is not just the elite level that it affects and it is not just football as well. Cricket has a very good interest, rugby. For example, there are 190 South African rugby players playing in the French League at the moment, so that is enough for 12, 14 teams, or something like that. It is a huge amount of different people.
Mr Hanson: In terms of grassroots implications, obviously we are all aware of the National Lottery in the UK and how that funds British sport, in other EU countries their national lottery is the prime funder of sport without any other government intervention, and specificity, again, would be able to say that that is allowed to continue and would not be challenged, as it has been in the past, in terms of state aid.

Q35 ***Lord Lea of Crondall:*** Could you clarify if my understanding is correct or not correct that the specificity of the England football team being able to say, "We want home-grown English men"—there being no women in it at the moment—is different from saying Arsenal can have 11 foreign players. Is that correct?
Mr MacDougall: Yes. There was a case, as I mentioned before, that was specifically on national areas in that national teams are allowed to say, "We only have national players", so the English team only says English players, but currently certainly Arsenal, or any team, can have as many EU member players as it wants in its life. It is the autonomy of sports organisations that we are arguing for, that they can choose whether that is the best thing to develop their football, or all sports, at a grassroots level.

Q36 ***Lord Lea of Crondall:*** Is there something new in that regard in this document?
Mr MacDougall: This document asks specifically for the European institutions to look after the specific nature of sport. As I mentioned earlier, that is possibly a vague statement, but what can happen there is that the European Commission can give direction on how they want to approach this. They have mentioned in the White Paper on Sport that came out in the summer that they appreciated the need for national teams and, therefore, the need to develop national players, and they are at the moment doing a study on quotas and this home-grown issue which is obviously very salient at the moment, but because it is actually in here as a soft competence, very much as you heard from the NSPCC and Save the Children, it will have the new opportunity to affect other directives, and that might include employment and free movement of players as well. Sport can be mentioned.

Q37 ***Baroness Young of Hornsey:*** There is a second question, although it is all interrelated. Autonomy, specificity: you said that the EU has been reluctant to define these terms and that, ultimately, you hope to reverse the uncertainty around sporting governance. Could you say something a little bit more about that, please?
Mr Hanson: Yes. I think the key issue is that to date decisions that James has referred to, such as *Walgrave and Koch* and *Meca-Medina*, have all been case by case basis within the EU Court of Justice. We would like to see something that would give more certainty to the governing bodies rather than a case by case basis, something that allows influence on the European Court of Justice from the Commission to make more a consistent judgment on sport rather than the governing body having to wait every time to know whether this time they will take into account the specific nature or whether they are just going to apply competition law, or whatever the law is, in a blanket manner.
Mr MacDougall: I think, certainly, to overrule or succeed anything that the ECJ has already said, you of course need a directive from the European Union. In the current climate that is not likely. In *Meca-Medina*, which was a case of two swimmers who were found to have taken drugs and they complained that being banned from competition was against their free movement and their provision to provide a service, the ECJ said, "No, the specific nature of sport is that you do not cheat, and I am afraid you cannot compete", but they did say specifically in that, "But we want every case to come to the ECJ because every court case is different", and that is the uncertainty that we do not want from a sporting angle. Regardless of whether there will be an EU directive on sport, which there will not be, if there is a soft competence in sport the European Commission can say, "This is what we feel about certain issues", and then the sports governing bodies will be able to understand that that is the likely outcome of anything from the ECJ anyway so they can understand it before the several-year process of going to the ECJ.

17 January 2007 Mr James MacDougall and Mr Andrew Hanson

Q38 ***Chairman:*** What you have said then is that the Lisbon Treaty does not yet make that possible. The Lisbon Treaty does not go as far as you would like it to have done to give you that opportunity. Is that right?
Mr MacDougall: No, I think you will find at the moment the Lisbon Treaty is fine. We would not particularly want any further competences to go to Europe. We are happy with the supporting and the co-ordinating nature that the Lisbon Treaty suggests, but it does allow other directives, for example, to involve sport. One that might come up—

Q39 ***Chairman:*** It gives you an opportunity to now ask for further directives which would strengthen what the Lisbon Treaty makes possible.
Mr MacDougall: Exactly. For example, one that might come up in the next year is an EU directive on gambling. That is very important for the European sporting scene. For example, Finland has over 90% of its sport income coming from its national lottery. So, certainly from a European point of view, there will be a lobby that will say that the gambling directive take into the specific nature of sport, as it says in the Reform Treaty, so that we can fund the sport from this.

Q40 ***Lord Lea of Crondall:*** In your evidence you relate to Article 2E, a new Article 2E which I have not been able to find, but it is relevant to funding streams, I gather. You say that an exclusive sports funding stream will allow an expansion of sports throughout Europe. This would be impossible without ratification of the Treaty. Can you comment on what funding streams we have got now versus what could be and how this new Article 2E changes that?
Mr Hanson: It is very similar to the previous witnesses. The funding streams that are out there are those areas where the EU has competence, for instance, in education, in culture. As the EU has no competence in sport, it cannot create a funding stream for sport. Therefore, sports organisations are having to look at other funding streams. For instance, in Austria and the Czech Republic they managed to pull together a Nordic skiing centre based on a funding stream directed at tourism, but it is quite hard for sports organisations to do that. What this Treaty will enable is the EU to create funding streams specifically for sport.

Q41 ***Lord Lea of Crondall:*** At the moment, in Britain, the National Lottery, your main funding stream, also is helping cultural organisations, heritage organisations, and I declare an interest as one of the Vice Presidents of the All-Party Group on Arts and Heritage, and the Olympic Games, ten billion or whatever it is, each time you open the paper another billion has been taken out of museums and given to sport. If it were the other way round---. You are saying that sport is ring-fenced, but it is not ring-fenced here, is it?
Mr Hanson: There is a lottery fund for sport. There is Sport England and there is UK Sport, and they have a share of the Lottery part of it in the same way as the Heritage Lottery Fund does and the Arts Council of England does.

Q42 ***Lord Lea of Crondall:*** But there are decisions to transfer funds from arts and heritage into sport. Presumably that can go the other way round. Would that be true at European level as well?
Mr Hanson: I think the UK issue is quite different. At the moment what was voted through on Tuesday in the Commons, and has yet to be debated in the Lords, is taking money from all of the lottery distributors, including the home country sports councils, and giving them to the Olympic Lottery Distribution Fund. So, we would also be arguing that grassroots sport is losing out in the same way as the arts and heritage. What we are talking about from a European perspective here is, rather than sports organisations or, similarly, children's organisations, having to look at funding streams designed primarily for something else and putting sport into them, we are suggesting that what the Reform Treaty would allow us to do is give the EU more flexibility in how it prescribes funding streams, so, if it was minded, it could create a fund for sport to deliver other social objectives but which would be easier for sports organisations to apply to.
Mr MacDougall: As an example for that, the White Paper on Sport outlined 12 different funding streams that are applicable to sport. If you examine them in any depth, you realise that they could use sport as a tool but they are not their primary function. One example is the prevention and fight against crime funding stream. The last funding stream that was open there was the for prevention, preparedness and consequence management for terrorism, and I cannot get a sports project, unfortunately, to fit that stream, and it is the same for a lot of the other streams that are out there. I think it is true that you can use sport as a tool to do a lot of very good things, and I think we have seen in great depth the possibilities with health, social cohesion, and so on and so forth, but what we are after is a funding stream that says, "Use sport for these tools", not, "These are the goals along with some other goals and you can pick a project, whether it is cultural or otherwise, to do it."

Q43 ***Chairman:*** To clarify that, you are not saying, or this Treaty does not say, that any directive from the EU can have an impact on the funding stream that Lord Lea is talking about, the UK funding streams?

Mr MacDougall: No, the EU Treaty does not say where it will take money from or what it will do. That is a matter for the European Parliament to decide the project.
Chairman: The impact of the Treaty is not going to be on the funding streams that Lord Lea is talking about within the Union?

Q44 ***Lord Lea of Crondall:*** Chairman, I am sorry, we are talking at cross-purposes. Obviously money does not grow on trees; it is coming from somewhere. It is coming from our national budget. It could be, as it were, part of a funding stream that could have been earmarked nationally. That is logically the corollary, is it not?
Mr Hanson: The Treaty will not give the EU power to amend the UK's National Lottery funding.

Q45 ***Baroness Gale:*** In your evidence, you indicate that you will urge the Commission to appreciate better the link between professional and grassroots sports. Could you explain why you consider it important that this issue be addressed at the EU level and what specific action you would like to see taken by the EU?
Mr MacDougall: Certainly. I think in the White Paper on Sport there is a clear differential between grassroots and professional sport, and that is simply not the case and that is artificial and potentially damaging as well. If you look at the national governing bodies of sport in the UK, they look after the national game and they look after the grassroots game as well. If we take, for example, the sports cricket and rugby, 80% of their income comes through the national game, through television rights and so on, but they put the money into grassroots sport. In fact, in the UK we have a voluntary code of contract which is led by the CCPR, which means 5% of all television rights going to grassroots sport, the money from television rights go into grassroots sports, and what we are looking for is something a little bit closer so they understand the link between professional and grassroots sports. If you ever see the Committee of Region report on the White Paper on Sport, that really does take it down to a grassroots level, which is very good. From our point of view, from a European side, what we are looking for is also then to protect the national game and television rights—examples for this might be the Intellectual Properties Directive—to make sure that things that fund European sport, like television rights, are not stolen in the same way, and the draft legislation, or the draft documents that went through in December, went into great detail about the film industry, and so on and so forth, but did not mention sport once. If sport is specifically mentioned in the EU Reform Treaty, then we have the possibility of including another directive sport being mentioned and protecting sport, and that in particular is why we want to have a look at grassroots sport. I think Andy will now elaborate on further points.
Mr Hanson: The White Paper also discusses licensing the clubs, with the focus particularly on professional clubs and the potential for serious crime, such as people trafficking and money laundering. However, much can be learned about safeguarding, for instance, children from the grassroots club. The FA has its Charter Mark Scheme, there is a Club Mark Scheme across clubs in England and, if you like, the White Paper focuses on the professional end of sport, but actually there is a lot of good practice at the grassroots end that could be learnt from, so it is not a distinction in our mind to separate the two.
Chairman: Thank you very much.

Q46 ***Baroness Perry of Southwark:*** Obviously one of the places where a love of sport is developed is at school, where school sports have a role to play. Unlike Lord Lea, I have not read every detail of the Treaty. Is there not anything in that already, through the education budget in the EU, which stimulates school sport?
Mr Hanson: There was actually in, I think, 2004 the European Year of Education through Sports, which the Youth Sport Trust was the managing partner for in the UK, and that works well, but I suppose it is noticeable that that has been the one significant project involving sport that has been successful. So it can be done, and it was done, but we just believe it would be easier if the EU has this soft competence.
Chairman: Thank you both very much. That concludes this evidence session. We are grateful to you both for joining us and for giving us some very helpful evidence which will enormously help at least our understanding of the Treaty and a lot of these issues and help us in writing our report. Thank you both very much indeed for coming.

Written Evidence

Memorandum by the British Olympic Association

1. The British Olympic Association (BOA) is the National Olympic Committee (NOC) for Great Britain and Northern Ireland. It was formed in 1905 in the House of Commons, and at that time consisted of seven National Governing Body members. The BOA now includes as its members the thirty-five National Governing Bodies of each Olympic sport.

2. Great Britain is one of only five countries which have never failed to be represented at the summer Olympic Games since 1896. Great Britain, France and Switzerland are the only countries to have also been present at all Olympic Winter Games. Great Britain has also played host to two Olympic Games in London: in 1908 and 1948. In 2005, London was selected as the host city for the 2012 Olympic Games.

3. The BOA is one of 205 NOCs currently recognised by the International Olympic Committee (IOC). The IOC's role is to lead the promotion of Olympism in accordance with the Olympic Charter. The Charter details the philosophy, aims and traditions of the Olympic Movement. The IOC co-opts and elects its members from among such persons as it considers qualified. Members of the IOC are its representatives in their respective countries and not delegates of their countries within the IOC.

4. The BOA's role is to prepare and lead Britain's finest athletes at the summer, winter and youth Olympic Games. In Great Britain and Northern Ireland, the BOA is responsible for the development and protection of the Olympic Movement, whose vision is to contribute to building a peaceful and better world by educating youth through sport. In addition, the BOA delivers extensive elite level support services to Britain's Olympic athletes and their National Governing Bodies throughout each Olympic cycle to assist them in their preparations for, and performances at the Games.

5. The BOA does not receive any direct government or public finance and is completely dependent upon commercial sponsorship and fundraising income. The impartiality this grants the BOA means that it can speak freely as a strong independent voice for British Olympic sport. Sport is built on the work of volunteers and those coaches, clubs, governing bodies and international federations who protect and promote their interests. The BOA believes that the autonomy of sport should be protected.

6. Although the European Union has not previously had a specific competence for sport, it has recognised the role of sport on a number of occasions and has exerted an indirect influence over certain aspects of sport through its competence in other areas. Furthermore, the Treaty of Amsterdam (1997), the Helsinki Report (1998) and the Nice Declaration (2000) all gave strong signals of the increasing importance—both social and political—that the European Union now attached to sport.

7. Sports organisations, both in Europe and around the world, welcomed the decision of the European Union summit in Brussels in June 2007 to set up a new inter-governmental conference which has in turn led to the introduction of an Article on Sport in the proposed Reform Treaty of the European Union.

8. The sports movement in Europe has taken a very constructive approach to this work. In a common position on the Commission's White Paper on Sport, the sports movement, including the BOA, restated its unity regarding a legal basis for sport in the European Union.

9. The Reform Treaty now offers the opportunity to strengthen the role of sport in Europe and the structures through which it performs. Sport is the biggest social movement in the European Union and accomplishes important societal tasks in the fields of integration, education and health. The BOA is convinced that the creation of a legal basis for sport in the EU Reform Treaty addresses the needs of sport and provides a sound legal framework for the future.

10. However, the BOA would like to maintain and reinforce the benefits of the declaration of the European Council of Nice in December 2000, most notably relating to the autonomy of sports organisations and the specific characteristics of sport. Reference to the autonomy of sports organisations is missing from the article on sport and this could, potentially, have far reaching implications for sports organisations.

11. The BOA supports the stance taken by the President of the International Olympic Committee, Jacques Rogge, who has stated in September 2007 that, "The responsibility sport has in society and the autonomy with which it regulates itself are central to its credibility and legitimacy. Autonomy thus means preserving the values of sport and the existing structures through which it has developed in Europe and around the world.

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."

12. In conclusion, the BOA welcomes the proposal to adopt an Article on Sport in the new EU Reform Treaty and acknowledges and supports the reference to the specific nature of sport. However, the BOA remains concerned about the potential direction of political involvement of governments and public bodies in the work of sport as a result of the omission of a clear and direct reference to the autonomy of sport on the face of the proposed Treaty. The BOA believes that governing bodies are best placed to run their own sports and will continue to provide services, assist, represent and support them to ensure their autonomy and freedom to deliver is protected.

January 2008

Correspondence between the Chairman of the Select Committee and the Department for Culture, Media and Sport

14248/07: Communication on an Agenda for a sustainable and competitive European Tourism.

Your Explanatory Memorandum dated 6 November, together with Draft Council Conclusions, was considered by Sub-Committee G at their meeting held on 22 November.

We notified your Department by telephone straight away that we had cleared the document from scrutiny, and we trust that this information reached the Minister—representing the UK at the Competitiveness Council meeting of 22 and 23 November—before the item came up for discussion on the agenda of that meeting.

However, while we recognise that EC Treaty Article 3(u) does provide that that the activity of the Community shall include "measures in the spheres of energy, civil protection and tourism", we are most uneasy about the scale of Community engagement which is reflected in the Commission's proposals set out in the Communication.

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 or are constrained by the social and environmental aims of the Member State. We are not convinced that a framework of this kind, covering the European Union as a whole, is desirable.

We would therefore find it helpful to learn of your views about the need for an EU level role in relation to the tourism industry, and we ask you to write to us setting these out.

29 November 2007

14248/07: Communication for a Sustainable and Competitive European Tourism

Thak you for your letter of 29 November seeking my views on the need for a EU role in relation to the tourism industry.

I am grateful to you for notifying my department so promptly of your decision to clear from scrutiny the above Communication. My officials were most grateful for your assistance, especially given the tight deadlines under which they were working. The notified BERR, lead Department for EU Competitiveness issues, straight away and on time for the Competitiveness Council meeting of the 22 and 23 of November.

You might be interested to know that the Council Conclusions on this agenda item were adopted without debate.

In your letter, you express concerns about the Commission's proposals set out in the Communication. I understand these concerns, especially in view of the new Tourism competence that will be introduced in the forthcoming Reform Treaty.

My department has held a longstanding view that there is no need for a competence in the field of tourism. The concern has been that it could lead to more but not necessarily effective activity in this field. However there was no strong reason to object to its inclusion within the context of the wider government negotiating priorities.

With regard to the proposals set out in the Communication and the report to which it refers ("Action for more sustainable European Tourism"), I consider the Communication to be in line with UK sustainable tourism development policies. The UK is a member of the Tourism Sustainability Group (TSG), and we have supported its work and its report in our recently launched tourism strategy: "Winning: A Tourism Strategy for 2012 and beyond".

I agree with your comments on the need for Member States to establish their own policy and regulatory environment to suit and develop their own tourism sector. The Commission, in its Communication, also acknowledges this point and recognises the voluntary nature of stakeholder's engagement with the process: "The tourism sector involves many different private and public stakeholders with decentralised competencies. It is therefore of major importance to respect the principle of subsidiarity and to work with a bottom-up approach, involving those stakeholders who have the competence and power to act and who are voluntarily contributing to the implementation of the Agenda" (Page 6, bullet 3).

We had intitial concerns, echoed by other Member States, about the potential reporting demands that the Commission could impose. The Communication proposes the use of current annual reporting mechanisms through the Tourism Advisory Committee and the revision of the Tourism Statistics Directive. We are engaged in the revision and it is currently making progress. The relevant paragraphs in the Communication are as follows:

"In order to strengthen the collaboration with and among Member States, their current annual reporting through the Tourism Advisory Committee (TAC) will be used to facilitate the exchange and the dissemination of information also about how their policies and actions safeguard the sustainability of tourism" (Page 8, bullet 3.2.1, paragraph 6).

"The need to know better and faster how tourism evolves in Europe can be addressed partly through the collection and provision of statistical and geographic data. For instance through the revision of the Tourism Statistics directive and/or through GMES (Global Monitoring of Environment and Security) delivering Europe-wide uniform geospatial information services, and partly through the activity of existing or new observatories" (Page 9, bullet 3.2.1, paragraph 7).

Having taken further legal advice, we are confident that the new competence within the Reform Treaty excludes any harmonisation of national laws.

If it would be helpful for me to provide further details, do not hesitate to contact my officials.

19 December 2007

Memorandum by the Chartered Institute of Personnel and Development (CIPD)

1. With 130,000 members, CIPD is the largest body in Europe responsible for the management and development of people. This note is submitted on behalf of the Institute and focuses on the impact of the EU reform treaty insofar as it gives the same rights, freedoms and principles of the EU Charter of Fundamental Rights the same legal value as the Treaty. In particular, we are concerned about the possible impact of incorporating into UK law a "right to strike".

2. Individual workers in the UK have never had the "right to strike". By extending the application of the EU Charter of Fundamental Rights, Article 28 of which gives workers the right to take collective action "including strike action", the treaty would overturn a long established principle underlying UK employment law.

3. We recognise that article 1 of the Protocol annexed to the Treaty states that the Solidarity provisions of the Charter do not extend the ability of the ECJ or UK courts to find that UK laws or practices are inconsistent with the rights contained in the Charter, nor do they create justiciable rights unless such rights are provided for in UK legislation. The weight to be attached to the protections for the UK embodied in the Protocol must be judged in the light of the longer-term possibility that they might be "traded" in return for concessions in other areas.

Article 27: employee information and consultation

4. Since 1999 the UK has adopted legislation that brings it more closely into line with the employment provisions, taken as a whole, in chapter IV of the EU Charter. For example the Information and Consultation of Employees Regulations 2004, under which employees can seek the support of the Central Arbitration Committee (CAC) in reaching agreement with their employer on arrangements for information and consultation, should clearly satisfy the requirements of Article 27.

Article 28: collective bargaining and industrial action

5 Article 28 of the EU Charter of Fundamental Rights however contains a Right of collective bargaining and action in the following terms:

"Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

6. The statutory procedures for recognition of trade unions introduced by the Employment Relations Act 1999 mean that unions have the "right to negotiate and conclude collective agreements". Under the Act, if a trade union invokes the statutory recognition procedures, the Central Arbitration Committee can require the employer to recognise a union that gets the necessary level of support from employees. Under the statutory procedures, an employer can be required to negotiate on pay and other conditions of employment. So there is clearly in existing UK law the right for trade unions "to negotiate and conclude collective agreements at the appropriate levels" on behalf of their members.

No individual right to strike

7. Trade unions can also call on their members to take industrial action, without exposing themselves to legal challenge, provided they comply with a number of conditions, including the rules governing the conduct of a ballot.

8. However employees who take part in industrial action will generally be in breach of their employment contract. As the most basic obligation of an employee is to be ready and willing to serve the employer, the action of going on strike is likely to be regarded as constituting a fundamental breach of contract, and the employer will have the right to dismiss summarily. The employer would also probably be entitled to sue the employee for damages: the fact that employers rarely pursue strikers in the courts does not affect the fact that such action is unlawful.

Industrial action and unfair dismissal

9. Under the Employment Relations Act 1999, dismissing a striker is automatically unfair where the striker is dismissed for taking "protected industrial action". However an employment tribunal will normally have no jurisdiction to hear a complaint of unfair dismissal by a striking employee unless the strike is official (ie authorised or endorsed by the union), and has lasted for no more than eight weeks.

10. Taking part in a strike or other industrial action may also affect an employee's other statutory rights, including redundancy or statutory sick pay.

Conclusion

11. The authors of a leading text on employment law (*Smith and Wood's Industrial Law, 7th Edition*) have commented that, although the unfair dismissal provisions of the 1999 Act, discussed above, are "undoubtedly the closest that UK law has ever come" to creating a right to strike, they "cannot be said to guarantee a "right to strike" as such (on account of the qualified nature of the protection against dismissal, and the absence of any protection against victimisation short of dismissal)".

12. To incorporate a right to strike in UK law would disturb the existing balance of the law as between employers and employees on collective issues. It would also risk encouraging a return to industrial action as a means of resolving such issues. In recent years the UK has benefited from historically low levels of days lost due to industrial action. The CIPD would be strongly opposed to any change in the law that might seem to reinstate industrial action as a useful method of resolving workplace issues, which would turn back the clock on many years of progress towards a more consensual style of employee relations. This would put at risk the labour market flexibility on which the UK's competitiveness, ability to attract overseas investment, employment and growth depend. We are unable to judge how effective the protections incorporated in the Protocol may turn out to be in the longer term.

10 December 2007

Memorandum by CBI

1. As the UK's leading business organisation, the CBI speaks for some 240,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size. Member companies, which decide all policy positions, include 80 of the FTSE 100; some 200,000 small and medium-size firms; more than 20,000 manufacturers; and over 150 sectoral associations. The CBI has offices across the UK and in Brussels, Washington and Beijing.

General Comments

2. The CBI welcomes the opportunity to provide written evidence to this wide-ranging Inquiry. The evidence is the result of consultation with members from across the CBI, who have provided a very clear mandate as to the stance the CBI should take on this issue.

3. CBI members have constantly emphasised that any new institutional reform of the EU should be focussed on improving the EU's ability to deliver a more business-friendly environment, and the CBI has worked hard to ensure that any changes do not threaten the UK's business competitiveness.

4. However, it remains clear that there is very little in the Treaty of Lisbon which would actually enhance the business landscape, and to that end we strongly believe that the attention of the EU should now be focussed fully on ensuring it creates and maintains a competitive environment for businesses and citizens alike. In particular we believe its energies should be directed towards full realisation of the Single Market (with proper implementation and enforcement at member state level), getting its derailed Lisbon Strategy back on track, and crucially establishing the EU position on the world stage so as to properly tackle the challenges and opportunities afforded by globalisation. The EU should move away from this period of sustained introspection, to become more outward-facing as it seeks to deal with the challenges of the early 21st century.

Specifics

5. The CBI welcomes the UK Government's success in securing all six of the key "red line" issues within the new Treaty, and during subsequent negotiations.[1] These were the six areas of greatest importance to CBI members, when discussing both the Reform Treaty and its failed predecessor, the European Constitution.

6. During the recent deliberations on the Reform Treaty, CBI members expressed particular concerns regarding two key elements: the Charter of Fundamental Rights, and the principle of free and undistorted competition.

Charter of Fundamental Rights

7. Whilst most of the Charter deals with fundamental human rights, elements within it also deal with key aspects of employment policy. The most notable of these from an industry perspective are the rights it would confer on issues such as collective bargaining and the right to strike—both of which are already covered by the UK's extensive employment legislation. These, if conferred, could have an adverse impact, and threaten the flexibility of the UK's labour market which is crucial to continued economic success.

8. The CBI has analysed the implications of the UK opt-out or protocol on the Charter, and has taken independent legal advice. This has concluded that the risk is relatively low with regard to whether the Charter could be used to broaden the existing UK law, subject to a few caveats. To that end we are less concerned that the Charter could confer additional employment regulations on the UK labour market.

Competition

9. The CBI has expressed continued concern at the significance of the decision not to include "free and undistorted competition" as an objective of the EU, with members extremely worried at the attempted weakening of the commitment to the competition principles.

10. Despite assurances that this will not change the EU's commitment to competition, we remain nervous about the real impact this will have in practice, particularly in the face of increasingly protectionist rhetoric from some member states. CBI members will remain vigilant on this issue moving forward.

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[1] These include: maintenance of the principle of unanimity for tax and social matters; no new powers in the Treaty to extend the competencies of the European Court of Justice in tax matters; preventing the Charter of Fundamental Rights from interfering in national employment and social traditions and practices; blocking the extension of competencies in areas of economic policy co-ordination, financial services and energy; ensuring the UK's international profile would not be damaged; and ensuring national parliaments could still scrutinise Treaty changes.

11. It appears to us that there is now a new legal framework and we are struck by the new objective of a "competitive social market economy". We are still unclear as to how the courts will balance this objective against undistorted competition, when considering the effect on employment in mergers and in state aided companies.

12. Therefore uncertainty remains around the commitment to free and undistorted competition. Uncertainty is never helpful to investment and the CBI still believes more needs to be done in this area to rebuild confidence. One suggestion is for the Commission to issue an explanatory memorandum, interpreting the changes and making clear the commitment to competition.

13. The CBI is developing its own programme of work promoting the values of competition, and we believe it is the UK government's duty, as a strong proponent of free trade and open markets, to do the same.

Conclusion

14. In conclusion, whilst the Reform Treaty has occupied the minds of many of the EU's policy-makers and heads of state in recent times, it is important now that the EU moves on from internal reforms, focussing instead on issues of real substance to its businesses and citizens.

15. CBI members feel strongly that the EU's attention should now turn to proper completion of the Single Market, achievement of the Lisbon goals on jobs and growth, and responding to the challenges and opportunities of globalisation.

16. The EU should also concentrate its efforts on addressing the necessary steps to ensure that there is labour market flexibility within the EU; proper market liberalisation—particularly in the network industries; and that it delivers on its stated goals within areas such as environmental, consumer, financial services and SME policy, so as to create a truly competitive Europe.

21 December 2007

Memorandum by Department for Business Enterprise & Regulatory Reform (BERR)

I am pleased to enclose evidence submission for my Department, in response to your Committee's Call for Evidence on the Impact of the EU Reform Treaty. The submission covers the business aspects of the Charter of Fundamental Rights, and Consumer Protection.

Other aspects of the "employment and social affairs" policy area listed in the inquiry will be provided by the Department for Work and Pensions. My Department has contributed to this particular evidence submission.

I trust that helps the Inquiry, and contributes towards a full debate in Parliament on the Treaty's ratification.

EMPLOYMENT AND SOCIAL AFFAIRS

Charter of Fundamental Rights: Business Issues

1. The business aspects of the Charter of Fundamental rights are addressed.

Will the Charter harm UK business?

2. The Charter will have no impact on UK domestic law and creates no new powers for the EU to legislate. The Charter does not extend the courts' powers to challenge any UK laws, including employment and social legislation.

3. We have made it absolutely clear that nothing will change for the UK as a result of a reference to the Charter of Rights being included in the new Treaty.

Does the Charter create the right to strike and other rights?

4. The Charter makes clear that the rights to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action, are in accordance with national laws and practices. So, no new rights are established and there is no possibility of a return to secondary picketing in the UK.

The Charter gives people no greater social and economic rights than are provided in EU law.

5. We have made it absolutely clear that nothing will change for the UK as a result of a reference to the Charter of Rights being made legally binding across the EU when implementing EU law.

Does the Charter include more laws to stop people getting sacked—will the UK lose flexibility?

6. The Charter simply reflects existing EU and UK law on this subject. We already have UK laws that protect, for example, women from being sacked for being pregnant or taking maternity leave, in accordance with EU law. These are important rights. Charter simply records this.

Will we lose our opt-out under the Working Time Directive?

7. The Working Time Directive gives workers a right not to be forced to work more than 48 hours a week on average, but allows Member States to offer certain workers a choice to work longer than 48 hours if they wish to. The Charter simply records this. The Charter cannot be used to change it.

CONSUMER PROTECTION

8. There are no significant changes to the consumer protection provisions of the Treaty.

Previous article	*New Article*
TEC 153(1)	TFEU 169(1)
TEC 153(2)	TFEU 12
TEC 153(3)	TFEU 169(2)
TEC 153(4)	TFEU 169(3)
TEC 153(5)	TFEU 169(4)

Art 12, TFEU (formerly article 153(2), TEC)

9. Consumer protection requirement shall be taken into account in defining and implementing other Community policies and activities.

Art 169, TFEU (formerly article 153(1), (3), (4), (5), TEC)

10. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

11. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market; and

(b) measures which support, supplement and monitor the policy pursued by the Member States.

12. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

13. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notifed of them.

17 December 2007

Memorandum by the Department for Culture, Media and Sport (DCMS)

1. This evidence is presented after consideration of the questions outlined on page 2 of the House of Lords Call for Evidence, and responds to the Culture, Sport and Tourism policy areas which fall within the remit of the EU Sub-Committee G.

Summary

2. The Reform Treaty addresses three areas of specific DCMS interest: Culture, Sport and Tourism. These areas have all been treated at European level before, albeit slightly differently. However, it is important to emphasise that there is not, and never has been any EU competence to harmonize national laws in any of these areas on the basis of the specific reference to them in the Treaties. Any harmonisation has been, and will remain, on the basis of competencies in other fields, such as the internal market, which may of course touch on culture, sport and tourism. The Reform Treaty does not significantly alter the way the EU will engage with these areas of DCMS interest. However, there are certain slight changes which will have correspondingly slight implications. These are set out below.

Culture

3. On Culture the only change to Article 151 is that cultural issues will now be subject to Qualified Majority Voting, rather than Unanimity. This means that no single Member State can veto European Union initiatives on cultural programmes. The UK was content with this and agreed to this dossier moving to QMV. This will simplify the decision-making process in an area that has consistently proven to be in the UK's interest.

4. Culture remains an issue dealt with in individual Member States. However, the EU can develop programmes which support cooperative cultural initiatives in Member States. These initiatives, such as the Culture 2000 programme and its successor, have all been beneficial to UK cultural organisations.

Sport

5. The expanded Treaty text represents an increased and more formal role for sport within the EU, which is also reflected in the proposals outlined in the recently published EU White Paper on Sport. The Treaty provides a legal base for sport, and will enable the Commission to develop a sports programme and budget. It also provides for cooperation on education and sport programmes outside of the EU. The Treaty should therefore be viewed in accordance with a wider EU policy programme for sport which recognises the positive interrelationship between sport and other activities, such as health and education, and which includes the consideration of sport within the policy development of other Commission services.

6. The text recognises that sport has certain specific or "special" characteristics which should be considered in the application of EU law (although the Commission is clear that where sport constitutes an economic activity it is subject to the application of EU law). The autonomy of sport, also reflected in the White Paper, for which there has been general support from stakeholders, continues to be acknowledged. The Government welcomes this; activity in this area must be underpinned by a clear commitment to the autonomy of sport and can be supported only where clear value is added to existing national policy.

7. The UK supports the broad intention of the Treaty text, although further discussion will be required to determine the detail of how this competence, and the associated White Paper proposals, will operate in practice. We expect the Commission to spend the next year developing an EU Sports Programme, which should provide for greater discussion and exploration of the role of sport within the EU.

Tourism

8. The Reform Treaty expands the role of the EU within the Tourism sector, aiming to encourage a favourable environment and promoting cooperation between the Member States.

9. However, the new text of Article 176b confines the Union role to complementing the actions of Member States and excludes any harmonisation of national laws. The DCMS broadly supports the new provision.

10. Although it is difficult to predict what measures the EU might choose to adopt in practice, a pointer on where the Commission might push for action is the area of Sustainability. An indication of future actions is set in a recent Communication (October 2007) "Agenda for a sustainable and competitive European Tourism", where the Commission announces how the EU will support the Sustainable European Tourism process. The Communcation is in line with UK sustainable tourism development policies. It recognises the

importance of the development of a competitive economic activity and the need to balance this with environmental and social aims.

11. It also acknowledges the decentralised nature of tourism in many countries and the importance to respect the principle of subsidarity and to work with a bottom up approach within the context of supportive national and European policies.

12. This was also the case with the previous Communication (March 2006) "A renewed EU Tourism Policy" which placed tourism firmly within the framework of the Lisbon Agenda for growth and jobs, clearly focussing on the better regulation agenda.

14 December 2007

Memorandum by the Department of Health

The evidence is presented after consideration of the questions outlined on page 2 of the call for evidence (indicated in italics below).

Do you have any comments on the factual summary set out in the Annex of the Treaty changes affecting policy areas within the remit EU Sub-Committee G?

The Department does not have any comments on the factual summary of the changes to the Treaty which relate to public health as set out in the Annex of the call for evidence.

What are your views about the impact that these Treaty changes might have on the evolution of the policy development process at the EU level for example, the extent to which the roles in the formulation of EU policy—of the EU Institutions, the UK Government and of interested stakeholders within the UK—might be affected by the changes?

The changes to Article 152 ("Public Health") of the Treaty clarify, in summary, that:

— Measures may be brought forward, under co-decision procedures, with the aim of setting "high standards of quality and safety for medicinal products and devices for medical use" (Article 152(4)(c)). This will enable the EU to seek to harmonise standards of quality and safety in relation to medicinal products and devices.

— Proposals may be brought forward, under co-decision procedures, in relation to cross-border health threats and the protection of public health regarding tobacco and alcohol. Such proposals would be "incentive measures" to protect and improve human health, but would not involve harmonisation of Member State laws in relation to these areas of public health policy (Article 154(5)).

New proposals in relation to the above areas of public health will therefore be brought forward in accordance with existing EU policy-making procedures. As such, the Department of Health view is that the changes to Article 152 will not change the role of the EU institutions, the UK Government or interested stakeholders in relation to the formation of policy with regard to those areas of public health outlined above.

Article 152(7) notes that it is for Member States to define their health policy and to organise and deliver health services and medical care. It further notes that the responsibilities of Member States shall include the management of health services and the allocation of resources to them. Whilst this statement provides clarity with regard to the role and responsibilities of Member States, harmonised requirements which affect the provision of health services may be generated under other articles of the Treaty. For example, in recent years, the European Court of Justice has been active in relation to patient mobility. In the light of this, the Commission intends to bring forward proposals, under co-decision procedures, which aim to achieve a more general application of the principles developed by the Court with respect to the provision of cross-border health services. These proposals will be subject to scrutiny by the House of Lords European Union Select Committee and the House of Commons European Scrutiny Committee.

Are there any other ways in which the changes made in the Reform Treaty, specifically relating to the policy areas within the remit of EU Sub-Committee G, might have a significant impact in the EU and in particular in the UK and, if so, what are these?

The UK is responsible for covering healthcare costs for UK state pensioners, tourists and "posted" workers living in other EU Member States. The entitlements and rules for access to healthcare in other EU Member States derive from social security legislation (Regulation 1408/71, as amended by Regulation 883/04).

As a result, the changes made to the social security provisions of the Treaty may have implications for the rules of access to healthcare of UK citizens in other EU Member States. These changes, which are discussed in the submission from the Department for Work and Pensions to the House of Lords Select Committee, will provide for Article 42 measures on social security (and associated healthcare provisions) to move from unanimity to qualified majority voting in the Treaty. However, a special mechanism (a strengthened "brake" provision) has

been secured under the Treaty to make sure that the UK can maintain control over any changes which would affect important aspects of our social security system, such as entitlements and rules of access to healthcare in other EU Member States. Experience of the emergency brake will be required to gain a full appreciation of how it will operate in practice.

14 December 2007

Memorandum by the Department of Innovation Universities and Skills (DIUS) and the Department of Children Schools and Families (DCSF)

1. The evidence is presented under the two summary headings in the Annex on page 6 of the call for evidence, and also comments on other relevant changes made in the Reform Treaty, in particular on the European Charter of Human Rights (ECHR).

As regards Youth policy, Community action shall now also be aimed at "encouraging the participation of young people in democratic life in Europe"

2. This reference, stating that Community action shall now also be aimed at "encouraging the participation of young people in democratic life in Europe" is an addition to Article 149(2). The addition builds on activity already underway by mutual agreement under the Open Method of Coordination.

The Council is now permitted to adopt Recommendations in the field of vocational training

3. This amendment is a change of legislative procedure and not substance: Article 150 continues to state that the EU shall fully respect Member States responsibility for content and organisation of vocational training, thus limiting what could be proposed in any Recommendation. The amendment, together with an amendment to Article 149(4) TEC, aligns the procedure for Recommendations (which are not legally binding) in both Articles, so that they can be made by the Council on a recommendation from the Commission. The legislative procedure will therefore be governed by Article 250, rather than Article 251.

Other issues

Article 3 (3) TEU

4. The inclusion of rights of the child is a departure from the current treaties. The UK has ratified the United Nations Convention on the Rights of the Child (UNCRC), with some reservations on migrant children and juvenile justice.

Charter of Fundamental Rights

5. The Articles in the Charter that have potential implications for DCSF and DIUS are noted below:

6. Article 14 (right to education) of the Charter is described in the official explanations as being "based on" Article 2 of Protocol 1 of the ECHR. However, the Charter right is different to the ECHR right in that:

(a) it is a positive, not a negative right (ie expressed as a right to education, rather than a right not to be denied education);

(b) it expressly includes vocational training; and

(c) the UK has a specific reservation on Article 2 of Protocol 1 of the ECHR (intended to ensure that the State respects the right of parents to ensure that education is in conformity with their own religious and philosophical convictions, but not creating an absolute right for someone to be educated wherever and however they want, without regard to public spending constraints).

7. Articles 51 and 52 of the Charter, and the protocol on the UK's and Poland's position on the Charter, provide some useful clarification of the effect of the Charter rights. Nonetheless, the Government will be vigilant in ensuring that Article 14 is not used to expand the EU's activities in the education field (limited by the scope of Articles 149-150 of the EC Treaty) into areas currently outside EC competence.

8. Articles 21 (non-discrimination) and Article 24 (rights of the child) are also areas of relevance to the work of DCSF, and again the Government will be vigilant in ensuring that these Articles are not used to challenge areas of domestic policy which the Charter is not intended to cover.

Inclusion of Sport under Article 149

9. The general area of sport is a DCMS responsibility but DCSF has an interest in the link with education and young people. The Government supports the broad intention of the Treaty text and agrees with the analysis in the recent EU White Paper on the value of voluntary sporting activities in promoting the health and education of young people. It also agrees with the emphasis placed on the protection of young people taking part in sporting activities.

14 December 2007

Memorandum by the Department for Work and Pensions

1. The evidence is presented under the summary headings for Employment and Social Affairs in the Annex on page 5 of the call for evidence. The Government believes these are the main areas within the Employment and Social affairs remit of Sub-Committee G which will have an impact in the EU and particularly in the UK.

Employment and Social Affairs

> *A specific reference to social partners, social dialogue and the Tripartite Social Summit (new Art 136a) is introduced.*

2. This is an EU level action and has limited impact on the UK. It provides a Treaty base for the formal meetings that have taken place on the eve of European Councils since 1997 between the Council Presidency and the two subsequent Presidencies, European Commission, and the European "Social Partners" (European level representatives of employers and workers—including Business Europe and the ETUC).

3. The new Article reflects Council Decision of 6 March 2003 (2003/174/EC) which established this forum to replace the former Standing Committee on Employment. The EU level social dialogue also includes Lisbon Strategy focussed bilateral exchanges and meetings with the officials' level committees for employment and social protection.

> *The Treaty currently provides that management and labour can be entrusted by Member States to implement Directives adopted in the specific areas laid down in Article 137. This possibility is extended to Council Decisions codifying agreements reached between the social partners under Article 139.*

4. This continues the provision whereby Member States may decide to implement EU employment law through Collective Agreements rather than national law. The change is a minor clarification to include not only those Directives that have been negotiated by the Council (and the Parliament) but also those concluded between the Social Partners at European level and then submitted to the Council for their agreement by Council Decision.

> *In the areas referred to in Article 140,*[2] *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."*

5. This is a clarification of the existing provision, reflecting the existing practice of the Open Method of Co-ordination in the field of employment, which is already set out in detail in the Treaty, and of social protection (in particular, in relation to pensions).

> *The provisions to maintain Member States' financial autonomy in relation to social security are strengthened, permitting the normal legislative procedure to be suspended and the issue to be referred to the European Council.*

6. Article 42 of the Treaty deals with the adoption of such measures in the field of social security as are necessary to provide freedom of movement for workers. The EC Treaty provides for these measures to be agreed unanimously by the Council of Ministers. The EU Reform Treaty will provide for Article 42 measures to be agreed by qualified majority voting. Member States' financial autonomy in relation to social security has been maintained by the addition of a "brake" provision negotiated by the UK. This will allow any Member State to declare that proposed legislation would affect important aspects of its social security system and request referral to the European Council. Once a Member State has invoked the brake, if the European Council (which operates by consensus—ie unanimity) takes no action within four months of the brake being triggered, or cannot reach agreement, the original proposal will fall. Alternatively the European Council may request the Commission to submit a new proposal.

[2] 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.

7. Experience of the emergency brake will be required to gain a full appreciation of how it will operate in practice. However, the Government believes that it maintains the UK's ultimate control over any changes to social security measures for migrant workers that may be taken under Article 42 of the Treaty, and which could affect important aspects of the UK's social security system after the EU Reform Treaty takes effect.

The amended Treaty on European Union gives the rights, freedoms and principles of the EU's Charter of Fundamental Rights the same legal value as the Treaties, without extending in any way the competences of the Union as defined in the Treaties. The Charter includes a "Solidarity" section (Title IV) which covers employment rights, amongst others.

8. The Charter does not create any new rights, freedoms or principles. It simply records rights, freedoms and principles that are already recognised in EU and national law, and makes them more visible. This is made clear by the horizontal provisions in Title VII of the Charter, as amended by the 2007 IGC, and by the accompanying explanations. In particular, the horizontal provisions say:

— The Charter applies to Member States "only when they are implementing Union law."

— The Charter does not extend or modify the Union's powers or tasks.

— Rights deriving from EU law or the ECHR are the same (ie the rights in the Charter are not more extensive).

— Rights resulting from the common constitutional traditions of the Member States "shall be interpreted in harmony with those traditions."

— The principles contained in the Charter will guide the EU institutions when legislating but they are only enforceable in limited circumstances.

— "Full account shall be taken of national laws and practices as specified in this Charter."

9. As is well-established in the case law of the ECJ, UK courts already have the power to strike down national legislation that is incompatible with a fundamental right constituting a general principle of EU law, if the legislation implements or derogates from EU law. After the Charter is made legally binding, that will remain the case. The Charter does no more than to restate the fundamental rights to which courts have always had regard, and the circumstances in which they may take those fundamental rights into account.

10. The Charter also includes "principles" that—as the Horizontal Articles explain—do not have legal effect independently of the legislation that gives them effect. Their purpose is to guide the EU legislature, rather than to give justiciable rights to individuals. For instance, the Charter records that when the EU legislates, it should do so in a way that will ensure a high level of human health protection. But that does not create an individual right to health care. And a court may only have regard to such principles when considering whether the EU legislature has taken them sufficiently into account when acting.

A Protocol annexed to the Treaty clarifies that the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

11. The UK has extra guarantees in the Protocol, Article 1(1) of which guarantees that "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".

12. 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.

14 December 2007

Memorandum by Andrew Duff MEP

1. The Sub-Committee may be aware of my recent oral evidence to the European Union Committee, now published in the 35th Report of Session 2006-07. Since then I have also submitted a memorandum of evidence to Sub-Committee E on the UK opt-outs from Schengen, Justice and Home Affairs and the Charter. This memorandum supplements that.

2. To recall my own interest in these matters, I served on both of the European Union's Conventions on the Charter of Fundamental Rights and on the Constitution, and was the Parliament's co-rapporteur on the Charter. Lately, I represented the Parliament in the Intergovernmental Conference (IGC).

3. This memorandum concerns the UK government's particular attitude towards Title IV, headed "Solidarity", of the Charter of Fundamental Rights. My views on the juridical value and political wisdom of the British and Polish opt-out on the Charter as a whole are set out at some length in my previous submission to Sub-Committee E.

4. The UK signed up to making the Charter binding as part of the package deal on the constitutional treaty, signed in October 2004. The UK's subsequent decision to opt out of the justiciable Charter was taken during the "period of reflection", apparently because of a sudden revelation that the mandatory Charter would lead to the demolition of Britain's flexible labour markets. That anxiety needs therefore to be addressed head on.

5. No change was made to the Charter in the course of this year's IGC. Title IV of the Charter, containing the social principles of the Union, is supported by 26 of the 27 member states, as well as by the European Commission and Parliament. The Charter is still wholly consistent with the European Convention on the Protection of Human Rights (ECHR), but superior to it, with a wider scope to address the needs, anxieties and aspirations of contemporary European society. It draws not only on the ECHR but also on the European Social Charter (1961), the Community Charter of the Fundamental Social Rights of Workers (1989), on standard ILO norms reflected by collective bargaining agreements at national and EU level, and on case law of the European Court of Justice.

6. One recalls that the Charter confers no new competences on the Union, and is relevant only within the area of competence as conferred on the Union by the member states and in relation to the explicit powers of the EU institutions. The Treaty of Lisbon, like the 2004 constitutional treaty, makes the Charter binding on member states only in respect of the application of EU law and subject to the principles of subsidiarity and proportionality.

7. The Charter's principles in respect of social policy become significant only if, as and when articulated in terms of EU legislation or executive action. Article 137.5 of the Treaty on the Functioning of the European Union (TFEU) specifically precludes EU interference in matters of pay, the right of association, the right to strike and the right to impose lock-outs. Article 137.4 already lays down that no social policy provision of the EU shall affect the right of a member state to establish its own social welfare system or to affect the financing thereof.

8. The constraints on the scope of the Charter and its field of application are set out very clearly indeed in the horizontal Articles 51-54. In addition, an innovation of the 2004 Constitutional Treaty—now carried over into the Treaty of Lisbon—was to assert that the EU can only be governed in harmony with national practices and constitutional traditions.[3] Under no conceivable circumstances, therefore, 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.

9. Contrary to some scare-mongering, one can safely conclude that UK labour market policy is unlikely to be directly affected by the decision to make the Charter binding. Attempts to approach the European Court of Justice either directly or indirectly by an aggrieved somebody who is unemployed, strike-prone or homeless will certainly fail. The Court of Justice will be assuredly conservative in its treatment of these issues unless a case can be shown to concern directly and individually an employee of one of the EU institutions.

10. One word about Poland. It became clear in the course of the IGC that the then Polish government was concerned to sign up to the UK Protocol for reasons quite distinct, and even opposed, to the purposes of the UK government. The Polish foreign minister, indeed, insisted on the central role that the concept of solidarity had played in recent Polish history. She affirmed her government's strong support for Title IV of the Charter. That Poland joined the Protocol, therefore, seems to have been rather an eccentric move, motivated more by a fear of German litigation on property restitution than by anything else. And as we know, the new Polish government has expressed regret at having to join the UK Protocol.

11. While Poland was at pains to justify to the IGC its attachment to the Protocol, the UK government made no such effort to explain its change of mind since Mr Blair signed the constitutional treaty. I hope your inquiry can shed light on the motivation behind the opt-out, why the Protocol was drafted as it was, and what precisely it is that ministers expect it to achieve.

12. Finally, the Sub-Committee will have noted the recent statement by the re-elected Danish prime minister, Anders Fogh Rasmussen, that his new government wishes to jettison all of Denmark's opt-outs. That, surely, points to the future direction for the Union as a whole. It seems a pity that the UK insists on putting itself on the margins.

26 November 2007

[3] Article 3a(2) TEU.

Memorandum by the European Trade Union Confederation (ETUC)

1. The European Trade Union Confederation exists to speak with a single voice, on behalf of the common interests of workers, at European level. Founded in 1973, it now represents 82 trade union organisations in 36 European countries, plus 12 industry-based federations.

2. For the purpose of this submission, the ETUC will limit its observations to Treaty changes linked to the EU Charter of Fundamental Rights and to the Protocol on its application to Poland and to the United Kingdom.

A legally binding Charter

3. The Charter of Fundamental Rights is not included in the Reform Treaty. However, Article 6 UE, as modified, contains a cross reference to the text of the Charter as proclaimed by the three institutions on 12 December 2007. Article 6 UE states that the Charter has the same legal value as the Treaties. Article 1 paragraph 3 new UE establishes that the Treaty on the European Union and the Treaty on the Functioning of the EU (currently the EC Treaty—which contains inter alia the four fundamental freedoms) have the same legal value. Finally, Article 46 EU—which reduces the powers of the European Court of Justice in relation to the EU Treaty—has been deleted. This means that the jurisdiction of the ECJ over both Treaties will be unified, without prejudice to specific provisos in particular in relation to Common Foreign and Security Policy and Justice and Home Affairs.[4]

4. A combined reading of these new provisions leads the ETUC to believe that the Charter of Fundamental Rights will be legally binding. This is reinforced by Declaration 1 annexed to the Treaties where the Member States confirm that the Charter has legally binding force. For the sake of clarity, and more user-friendly Treaties, the ETUC would have preferred a direct inclusion of the Charter in the text of the Treaties. This would have also secured better visibility of the Union's Fundamental Rights for the citizen.

5. Nonetheless, the ETUC is satisfied that the new institutional arrangements further enhance the legal status of the Charter. The Charter constitutes a cornerstone for social Europe. The ETUC challenges the view that internal market and free competition rules constitute the main thrust of the Treaties. The Union is also obliged to protect and promote fundamental rights. A legally binding Charter confirms this. In particular, Title IV on Solidarity puts on the Union a duty to protect workers where fundamental economic and social rights enshrined in national legal orders may restrict free movement.

6. The Preamble of the Charter reaffirms that it comes from the constitutional traditions and international obligations common to the Member States. The ETUC considers, however, that the Union's Charter of Fundamental Rights has no vocation to replace national human rights instruments. The Charter is to be used at another level, as a "rule of reason" where EU law may impinge on fundamental rights. The Charter is a "shield" (rather than a "sword").

The Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

7. The ETUC understands that the associated Protocol was negotiated amid concerns that the Charter may allow the European Court of Justice to extrapolate from the provisions on social and economic rights to alter UK national legal order. Declaration 61 by the Republic of Poland reflects that Polish concerns cover issues of public morality and family law. In Declaration 62 on the other hand, Poland commits to fully respects Chapter IV of the Charter on Solidarity, which is rather paradoxical considering Article 1.2 of the Protocol.[5]

8. The ETUC regrets that the Protocol was annexed to the Treaties and deplores the political message that it sends to citizens. In particular, the ETUC wishes to stress the indivisibility of the Charter, which is explicitly stated in the second paragraph of the Preamble. The Charter is not—and should not become—an *à la carte* instrument depending on the political considerations of the moment.

9. The Protocol is often referred to as an "opt out" Protocol. This is inaccurate terminology, based on a misunderstanding over the effects the Charter would have upon UK domestic laws. The word "opt out" is currently used in EU law in relation to the Protocol on the application of Justice and Home Affairs provisions to the UK. According to this Protocol, the UK has three months following the notification to the Council of a Commission's proposal based on Title IV of the EC treaty, to notify its intention to opt into the proposal or not. If the UK chooses not to opt in, it will not participate in the negotiations and will not be bound by the instrument once adopted until agreed otherwise by the UK.

[4] See also horizontal amendment b) to the Treaty establishing the European Community which replaces the word "Treaty" by "Treaties", thereby explicitly extending ECJ competence over the Treaty on the European Union.

[5] Protocols form part of the Treaties (see the new Article 49 B UE). On the other hand, it is dubious that unilateral Declarations benefit from a legal status.

The Charter of Fundamental Rights is of a different nature. The provisions contained in the Charter do not confer on the EU any power to enact rules on human rights. It is clearly stated in the new Art.6.2 UE that "the Charter shall not extend in any way the competences of the Union as defined in the Treaties". In other words, there will be no EU instruments from which the UK could pretend to opt out.

10. The ETUC therefore recommends that the term "clarification on the application of the Charter" is used in relation to this Protocol rather than "opt out". A distinction must be established between situations with a Community dimension and purely domestic matters, which the Protocol seeks to clarify.

11. As reaffirmed in its Preamble, the Protocol is without prejudice to other obligations devolving upon the UK under the Treaties and Union law generally. It is well established in the existing case law[6] that fundamental rights constitute principles of Union law. Where the UK is involved in a situation with a cross border dimension—ie where one or several other Members States' interests are at stake or where the situation involves interpretation of an EU instrument applicable to the UK—Union law, including the Charter, obviously applies.

12. On the other hand, the Protocol makes it very clear that the Charter cannot add to UK laws. Domestic situations are governed by UK internal legal order only, in which case no Court will be able to weigh legislation or action of the UK against the provisions of the Charter.

January 2008

Memorandum by the Federation of Small Businesses

Introduction

1. The Federation of Small Businesses is the UK's leading non-party political lobbying group for UK small businesses, existing to promote and protect the interests of all who own and manage their own businesses. With over 211,000 members, the FSB is the largest organisation representing the self-employed and small and medium sized businesses in the UK. FSB members together employ more than 2.5 million people and turn over more than £10 billion a year. About 25% of the membership are self-employed, the others being mainly one or two person companies, which are owner-managed and one third of our members work from home. The FSB welcome the opportunity to respond to the Call for Evidence from the House of Lords Select Committee on the European Union on the EU Reform Treaty.

1.2 This submission is limited to three aspects of the effect of the changes in the proposed Reform Treaty on employment law. The three aspects are:

- The competences of the two legislators, being individual Member States and the European Union.
- The status of the Social Dialogue.
- The elevation of the Charter of Rights.

2. Competences

2.1 The combined effect of the Article 2 TFEU 1, 2 and 3 is that control of employment policy passes to the EU. This includes employment law. Member States can only legislate in this area when the EU has not exercised its competence or has decided to discontinue doing so.

2.2 The FSB regards this with apprehension, in the light of our existing experience because:

- The British labour market has, perhaps only until recently, been the most flexible in Europe. Union legislation in this area has been founded on various articles of the existing treaties for example equal treatment, discrimination and health. These have created regulation and restriction both costly and complex which have reduced flexibility.
- They have also borne disproportionately on small businesses.
- They have ignored the principle of subsidiarity.
- They have proved inflexible, in that a EU Directive is very difficult to amend as experience shows. An instructive example is the Working Time Directive, where the judgements of the ECJ in the Simap and Jaegar cases in 2003, dealing with workers on call but not working were greeted with surprise and dismay in most Member States because of their effect on the medical services sector. Great efforts at all EU levels to rectify the inadvertent error in drafting by simple amendment have failed to secure the required majority.

[6] See for example *European Parliament v Council* C-540/03; Laval C-341/05; Viking C-438/05.

— The proposed ordinary revising procedure will inevitably be complex and protracted.

3. The Social Dialogue

3.1 The new Article 136a recognises and promotes the role of the social partners. For many years, small business organisations in the EU, including the FSB, have pointed to the unfairness and lack of representation caused by their exclusion. The employers in the social dialogue are predominantly very large businesses, frequently international, who have very different ambitions and needs from those in small businesses. The largest EU small business organisation, UEAPME, even took their claim for representation to the ECJ but lost. The employees are represented by trade unions, although the small business sector employs about half of the EU labour force, few of their employees are in a trade union. A majority of those trade union members are employed in the pubic sector.

3.2 It is contrary to democratic principle that the Etuc and Uropmi should be able to reach agreements on legislation and have it passed unquestioningly into law. Naturally, they have a priority interest of their own members.

3.3 No status is given in the Reform Treaty to small businesses even though 99% of EU businesses are SMEs whose needs are crucial, but who are denied a voice.

3.4 Once this has received ratification in all Member States, it will be impracticable to amend. The FSB regards this position with grave concern.

4. The Charter

4.1 The objections to the charter being elevated to supranational legislation are well known and accepted in the UK so are not repeated here. It is subject to a protocol referring to the UK and Poland. The question arises whether that protocol excludes the charter from judicial application in these countries.

4.2 The question has particular importance because the judgments of the ECJ are given premier authority and the ECJ is in practice, supreme, there being no right of appeal and no minority judgments. Further, it is thought by some to lack the will to protect the sovereignty of member states against EU assumptions of power.

4.3 The FSB has the following comments on the proposed text with the reservation that, within the time available, an exhaustive foray into constitutional law has not been practicable. This submission refers only to Chapter 4, "Solidarity".

4.4 The starting point for the application of Protocol Art.1(1) requires the ascertainment of the "present ability of the Court of Justice", since the new Article makes the assumption that there is some ability to "find that laws . . . of . . ..the UK . . ..are inconsistent with the fundamental rights . . . which it reaffirms" The ECJ has already observed that in its case law that EU law has regard to the principles of the European Convention of Human Rights, though it may not have been incorporated into EU law.

4.5 The new test applies to rights which are reaffirmations which it states are not justiciable, but not to new affirmations. Many will consider that it is the new rights in Chapter 1V that give most cause for alarm, but these are not covered by Article 1(1).

4.6 Article 1 (2) appears to accept that the effects of Article 1 (1) are uncertain because it specifically excludes from what is justiciable anything in Chapter IV except insofar as the UK has provided for such rights in its national law. This appears to apply to Articles 27 (information and consultation), 28 (collective bargaining and strikes), 30 (unjustified dismissal), but not 29, 31 to 38 and importantly 31 (working time and paid holidays). There will be plenty of room for argument as to whether rights granted under national law are the same rights as in the Charter.

4.7 Article 2 of the Protocol provides "To the extent that a provision of the Charter refers to national laws or practices, it shall only apply to the UK to the extent that the rights or principles it contains are recognised in the law or practices of the UK". This appears to apply to the rest of the Charter rights similar treatment as is provided for cases under Chapter IV. The same comment applies as under Article 1(2).

4.8 The FSB considers that it is wrong to convert contractual rights in employment contracts into fundamental rights.

13 December 2007

Memorandum by Monika Mura

This is in answer to your invitation to provide an opinion over the changes that the recently signed Lisbon Treaty will bring about to the EU policy-making and, as a consequence, how this will impact on the UK policy-making.

I would like to provide you my comments over the following subjects, which I find more relevant to my research interests:

1. Employment and Social Affairs
2. Education, Vocational Training and Youth
3. Tourism

Employment and Social Affairs

— there are no significant changes in the EU policy-making, as long as the initiative is left to member states. The news with the past is the fact that the European Commission will coordinate the exchange of practice and the monitoring of the progresses.

In my view this represents a form of control, as in order to reach a certain level of employment and reach a fair standard in all the areas indicated in the article 140.

This provision should be regarded in the light of the trends of the economy after the implementation of the Economic and Monetary Union (EMU). All the Euro-countries suffer from high levels of unemployment, and also most of the social welfare institutions and trade unions have been in many cases re-shaped since the Euro was introduced.

From the Amsterdam Treaty onwards the EU intended, and clearly stated so, to fight against unemployment and the provisions under Article 140 represent a further step towards this goal, as the aim is to build the "most competitive economy in the world", that is to say to create a more sustainable Europe.

However, again this ambition should be regarded with relation to the overall performance of the EU economy and in particular the operation of the European Central Bank. Since the primary objective of fighting inflation neglect the impact over the so called real sector, I do not predict any particular achievements from this point of view, as any type of intervention aimed to tackle unemployment or social dialogue is in any case subjected to the working of the EMU, thus the scope and the effectiveness of this action may be limited due to the compliance with the EMU rules and economic model.

It is not clear how binding will be the progress monitoring procedures, in the sense that if progresses are slower than expected, it is not clear how (and if) the EU will take further action to recover from any delay or non compliance by member states.

It is important to note that social partners are this time more involved in the policy making, which means that the Economic and Social Committee and UK trade unions or not-for-profit organisations will be increasingly involved in the making and the implementation of any policy or programme.

The incorporation of the Charter of Fundamental Rights into the Lisbon Treaty and the recognition of the same legal value will probably affect the UK legislation in a top-down way, as any new law that the UK parliament discusses and approves might be influenced by the pre-existence of EU regulations.

However, since the EU Court of Justice will not extend its competence to UK, then any incompatibility with the EU fundamental rights will be excluded. In many respects, these rights are already embedded in the UK society, and mechanisms to assure the respect of them are already in place.

Education, Vocational Training and Youth

This is another key field of the EU action. The basic principle is that the EU is increasingly and dangerously ageing, and the generational turn-over is not fully guaranteed. Beside, at youth level, there is lack of awareness of the EU and scarce participation in the EU affairs.

It seems from the new Treaty that the EU intends to take the initiative to promote young participation and refill the so called democratic deficit. It is not clear how, but a possible way could be the issue of ad-hoc directives, call for proposals and programmes, all specifically turn to young people. If UK has in programme to deal with the same issues, it will probably find an additional source of funding from the above.

Vocational training will certainly provide additional funds to existing provisions in the UK, as it was in the case of the Pan London programme, addressing the unemployment in the London area. As in the past, again the focus will be almost certainly on equal opportunities and social exclusion. However, as said above for

employment and all the welfare and social provisions, all the projects will be subordinated to the EMU. Although UK has formally opted out, the scope and the extent of the EU action need to be considered in the light of it.

Tourism

This is definitely a new priority of the EU. The definition of this policy will not be different from other policies, with the EU setting the general objectives and calling the EU member states to discuss and design the appropriate programmes, either solely devoted to tourism or cross-cutting the other policies, like EU socio-economic cohesion policy and CAP, and any other policy or programme having provisions on tourism.

14 December 2007

Memorandum by Dr Richard Parrish, Centre for Sports Law Research, Edge Hill University

1. Until the Reform Treaty enters into force, sport is not a competence of the European Union (EU). Critics of the EU's approach to sport argue that the lack of a legal base has resulted in general principles of EU law being applied to sport without recognition of the specificities of sport. The European Court of Justice judgment in *Bosman* (1995) is cited as an example of this insensitive application of EU law to sporting contexts. Since that judgment there have been repeated calls from sports bodies for constitutional protection for sport. Following the Amsterdam Treaty deliberations, the Member States attached a non-binding Declaration on Sport to the Treaty which read "*[t]he conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport*" (Declaration 29, Treaty of Amsterdam 1997). At Nice in 2000, the Member States released another political declaration on sport in the form of a Presidency conclusion. Paragraph 1 of The Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies read "*[s]porting organisations and the Member States have a primary responsibility in the conduct of sporting affairs. Even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured*". Neither the Amsterdam Declaration or the Nice Conclusions amount to a Treaty based competence for sport and given the soft nature of the instruments employed, neither have a significant effect on how EU law is applied to sport.

2. Article III-282 of the Constitutional Treaty proposed a change in the legal status of sport by defining it as an area for "supporting, co-ordinating or complimentary action" within the context of education, youth, sport and vocational training policy. This competence survived the ratification problems experienced by the Constitutional Treaty, re-emerging in the 2007 Reform Treaty under the title "Education, Vocational Training, Youth and Sport". Within this context, Article 149(1) is amended to read, "*[t]he Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*". Article 149(2) is amended to include reference to Union action being aimed at "*developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen*". Within areas of "supporting, coordinating or complementary action", the Reform Treaty retains the Constitutional Treaty's prohibition on the harmonisation of the laws and regulations of Member States on that legal basis.

3. Once in force, the EU will for the first time have specific competence in sporting matters. This is of significance for a number of reasons. First, such a competence resolves the consequences of Case C-106/96 *UK v Commission* (1998) on the legality of budgetary appropriations for measures with no legal base, since the promotion of European sporting issues is now an express competence. Aligned to this, the Reform Treaty's provisions establishes 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.

4. In terms of the effect on the application of EU law to sport, and calls for the specificities of sport to be recognised in free movement and competition law, it must be recalled that the Reform Treaty's Article only requires EU bodies to take account of the "specific nature of sport" when considering the Union's supporting action contributing to the promotion of European sporting issues. Consequently, EU institutions are under

no horizontal constitutional obligation to take this into account in the context of legislation under other competences, such as those pertaining the free movement or competition law. Nevertheless, the constitutional recognition of the "specific nature of sport" is of some significance, even though limited to the context of positive action in the field, in that it may act as persuasive authority and inform the legal reasoning of the Court and Commission in instances when they are asked to consider the application of EU law to sporting contexts. In this connection, and whilst not binding, 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, with reference to the pursuit of the objectives of Article 149.

5. Opinion differs on the question of whether the hitherto lack of a sporting competence has had damaging affects on the manner in which the Court and Commission have discharged their constitutional obligations in the field of sport. It is the personal view of this author that it has not. The current framework for applying EU free movement and competition law to sport is sympathetic to the specificities of sport and has been developed without the guidance offered by a Treaty Article. In relation to free movement law, the Court in *Deliège* developed a category of "inherent" rules related to the organisation and proper functioning of sport which fall outside the scope of the Treaty prohibitions. In other instances relating to free movement, the process of objective justification provides opportunity for specificity of sport arguments to be articulated. For example, in *Bosman*, the Court recognised a number of categories relevant to sport including promoting competitive balance and encouraging the education and training of young players. In these circumstances, proportionate rules of sports bodies which restrict an athletes freedom of movement will be accepted as legitimate by the Court.

6. In *Meca-Medina* the Court established a methodology for applying competition law to sport. The Court stated the importance of taking into account the overall context in which the disputed rules were taken or produce their effects, assessing the objectives of the rules, examining whether the restrictive effects are inherent in the pursuit of those objectives, and whether the rules were proportionate in that they did not go beyond what was necessary to achieve the objectives. This framework allows rules inherent to sport to be removed from the scope of EU competition law. Where the Court is unable to make the determination that a rule is inherent in the organisation or proper conduct of sport, it will be defined as a restriction under Article 81(1) and condemned unless the exemption criteria contained in Article 81(3) can be applied. In its decision making practice, the Commission has employed this methodology in such a way so that the specificities of sport have been taken into account.

7. The Committee may also wish to consider the relevance of the Employment and Social Affairs provisions of the Reform Treaty to sporting contexts. These provisions provide a mechanism through which social dialogue in European sport can be conducted and legal conflicts mitigated. In European football for example, the Fédération Internationale des Associations de Footballeurs Professionels (FIFPro) represents the players and the Association of European Professional Football Leagues (EPFL) is the most representative employers grouping and there are attempts to formalise their relations within a social dialogue committee. Within this committee a number of issues pertaining to the employment relationship between both parties could be discussed. The 2007 White Paper on Sport endorses the use of social dialogue within the European professional sports sector and provides official support for such initiatives.

8. In conclusion, the sports competence in the Reform Treaty clarifies the legal status of sport in relation to the assignment of budgetary appropriations and it formalises political engagement with sports policy at supranational level. The impact on the jurisprudence of the Court and the decision making practice of the Commission, particularly in relation to the application of free movement and competition law, is however limited. This need not be of major concern to those stakeholders within the sports movement who wish to see the specificities of sport recognised by the EU. This is because sufficient flexibility exists within the EU's legal framework for such arguments to be successfully articulated. Whilst the debate on sport and the EU has largely taken place within the context of free movement and competition law, the potential for social dialogue within sport as a means through which legal conflicts can be mitigated should not be ignored.

13 December 2007

Memorandum by Dr Eve Sariyiannidou

1. Eve Sariyiannidou is an expert on EU law and policy and works as an independent consultant. Her research on institutional and constitutional developments in the European Union has attracted particular interest from the Council of Europe and Western European Union. She is a member of the Expert Group on Integrated Border Management of the European Commission, an official observer at the WEU Interparliamentary European Security and Defence Assembly and has been on the panel of experts of the European Commission for the Seventh Framework Programme (2007–13).

2. To assess the actual impact of the Reform Treaty provisions on the protection, amongst other, of labour and social rights in the EU and how they will affect the policy evolution in the national political systems, one needs to ask how far these changes impinge on the standard of protection that exists under current EU law and its application to the territory of the Member States.

3. The new Article 1(8) TFEU, the EU Charter and Protocol No 7 on the application of the Charter to the United Kingdom, should be read in conjunction with other treaty articles. Most importantly, any appraisal of constitutional change and its effect on future policy development is not confined to the amended treaty provisions *per se*. The latter need to be considered in tandem with the development of a body of rights protection in the EU (statutory and common law) and in the light of a number of fundamental issues.

4. The first issue is that the European Court of Justice (ECJ) has over the past four decades recognised a variety of labour and social rights in its jurisprudence via a teleological interpretation of internal market rules and fundamental rights protection.

5. The second issue is to enquire whether the EU Charter alters the standard of protection that already exists: a) by adding new rights and b) by acquiring legal base.

6. The third issue is that of the UK opt-out. Does it affect the formal status and scope of application of the EU Charter to its territory? There is also some ambiguity as to how the UK opt-out will work with the European courts.

The Court of Justice and Fundamental Rights Protection

7. Pursuant to its institutional duty to ensure that the law is observed, under Article 220 EC (Article 1(20) TFEU and its reference to Article 9f), the Court created an unwritten catalogue of rights in a substantial body of case law, a kind of negative constraint on EU policy-making. It has recognised a variety of labour and social rights in its jurisprudence—often a balancing act between internal market rules and EU citizenship entitlements—in an incremental expansion of fundamental rights protection. For instance, the right for respect to one's private life (Case C-404/92P *X v Commission*), the right to property and to engage in economic activity (Case C-280/93 *Germany v Council*), as well as some social rights (in Case C-173/99 BECTU, the ECJ classified the right to paid annual leave set out in Directive 93/104 as a "social right"). The Court also declared that the prohibition on discrimination on the grounds of sex is a fundamental human right and recognised the principle of equality—with specific reference to equal pay for equal work—as one of the general principles of Community law, enshrined in the "social objective" of Article 141 TEC (Case C-50/96 *Deutsche Telekom AG*).

8. The question of a possible infringement of fundamental rights can only be judged in the light of Community law itself. On the other hand, the Court has also held that the duty of sincere cooperation, under Article 10 EC (new Article 1(6) TFEU), to ensure *inter alia* an effective judicial protection for individuals, may prevent fundamental principles of national legal orders from "undermining" emergent fundamental principles at EU level (Case C-213/89 *ex parte Factortame*).

The Legal & Political Impact of the EU Charter

9. The Reform Treaty, once ratified, will formally incorporate the EU Charter to the primary law of the EU. The Charter does not create any new competences for the Union and its institutions; nor will the Union's potential accession to the ECHR. Therefore, the EU Charter is not designed to convert the Union into a general human rights organisation. The EU Charter will remain a consolidation of existing law and, thus, authoritative evidence of the law in force. The rights, declared therein, only have legal meaning, if they already existed in the system of protection; for example, in the Court's jurisprudence. This is consistent with the aim of the Convention to make only technical drafting adjustments to the text agreed by the Convention on the EU Charter (CONV 354/02). Consequently, the Charter does not modify the substance of protection, but provides a comprehensive catalogue of rights and principles in a more consistent and transparent manner that renders the existing protection more comprehensible to EU citizens.

10. It could be argued that a legally binding Charter might lead to a change in the direction of protection to a reorientation of human rights protection from economic to social. That is, a shift in balance between fundamental rights and economic freedoms in EU law, as the EU Charter grants *fundamental* status to civic, political and social rights but not to the four economic freedoms (internal market). It is unlikely that it will lead to the establishment of different economic and social policies, as both the current treaties and the Reform Treaty are largely market oriented.

The Protocol on the Application of the EU Charter to the UK

11. The Protocol reaffirms the requirement found in Article 1(8) TFEU that the Charter is to be applied and interpreted by the UK courts strictly in accordance with the explanations referred to in that Article. It does not say that the Charter is not binding in the UK and in this respect it does not amount to an "opt-out" as to the Charter's legal force in the territory of the UK and its legal system. What it does is clarify aspects of the application of the Charter in relation to the laws of the UK and their justiciability, but "without prejudice" to the obligations the UK has under the Treaties and Union law in general (statutory and common law).

12. The Charter adds some social principles under the "solidarity" provisions (Chapter IV), such as the right to strike, right to job training and health care, but also stipulates that these will only have meaning insofar as they are already applied and practised in the individual Member States. It does not create new worker entitlements beyond existing national labour laws. This is analogous to the exemption found in Article 1(2) of the Protocol.

The UK Opt-out and the Future Role of the European Courts

13. Article 1(1) of the Protocol provides that nothing in the Charter would give national or European courts any *new* powers to strike down or reinterpret UK law, including labour and social legislation. This is hardly an exemption, since the EU Charter generally does not create any new institutional powers, including any *new* jurisdiction for the European courts (or even any new courts with jurisdiction to adjudicate on human rights).

14. Equally, it does not affect the *existing* competences of the Court, not even once the Union accedes to the European Convention on Human Rights. A legally binding Charter would mean constitutionalisation of fundamental rights protection brought about by a political process beyond the institutional control of the Court, but it is unlikely that it will deter the Court from its typical systematic interpretation of the Treaties. As aforementioned, the EU Charter remains, irrespective of its status, a consolidation of existing law and authoritative evidence of the law in force; the rights, declared therein, only have legal meaning if they already exist in the system of protection, including the Court's jurisprudence.

15. The Charter specifies in Article 51 (Chapter VII) that it is addressed to the institutions and actors of the Union and to the Member States "only when they are implementing Union law". The Charter can be potentially used to strike down non-compliant EU legislation but not non-compliant national legislation, unless the Member State in question implements EU law. The Protocol states that the Charter does not "extend" the ability of the ECJ to find that UK law is inconsistent with the Charter and, yet, this is expressed to be "without prejudice" to the UK's other obligations under the Treaties and Union law generally. In this regard, the effectiveness of the Protocol is marred by an inconsistency: could the Court strike down a conflicting UK measure intended to implement EU policy on the basis of an interpretation of the application of the Charter to the UK? Or not?

16. The qualification, that any exemption in the Protocol could be provided to the UK *only* without prejudice to its obligation under the body of EU law, leaves only one sustainable interpretation of the inconsistent and ambiguous language of the Protocol. That is, the exemption would infer that indeed the Court's interpretations based on the EU Charter would apply to national measures intended to implement Union law.

17. Article 51 (of the Charter) also specifies that the Charter's applicability to the Member States (when they implement EU law) is to some extent qualified by the subsidiarity principle.

18. The ECJ insists on the uniformity of application of EU law throughout the Union's territory. It has held the requirement, that no EU law can be incompatible to the rights protection, is also binding on the Member States as they implement Community law (Case 5/88 *Wachauf*). As a matter of precedent, the primacy of EU over national law, a cornerstone principle of Community law, holds that provisions of EC law can confer rights on individuals that public authorities must respect and which must be protected by national courts. The Court declared as early as in 1964 (C-6/64 *Costa v ENEL*) that: "It follows . . . that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question." It is, arguably, unlikely that the general obligation to ensure the uniform application of Union law would give way to the Protocol exemption, when UK labour and social policies are set to implement EU rules.

Conclusion

19. The Reform Treaty revision does not constitute a substantial change of direction in institutional and constitutional terms. The Protocol, on the application of the EU Charter to the UK, is rather a matter of presentation than content or substance. The exemption, found therein, will be of little assistance to the UK Government, when it seeks to influence the application of the EU Charter to its territory. Arguably, the UK would be more triumphant, if it relied on the issue of subsidiarity, where applicable.

December 2007

Memorandum by Professor J R Shackleton

1. My primary worry with the EU Reform Treaty is the possible impact of the introduction of the Charter of Fundamental Rights on the legal status of the employment relations framework which has evolved in the UK in the last twenty years. This framework is widely seen as more flexible and business-friendly than its equivalent in most European countries.

2. The areas which are particularly significant are Articles 12, 15, 27 and 28. All seem to have some potential for turning back the clock and restoring—or even extending—trade union powers which were removed by the Thatcher and Major administrations (1).

3. Article 12, *Freedom of assembly and of association*, mentions the "right of everyone to form and to join trade unions". While this right already exists in the UK, it is possible that this wording might be interpreted to imply that such unions, to be effective, should be recognised by employers for collective bargaining and other purposes. At the moment, union recognition is subject to various conditions, including majority support in a secret ballot. One concern for small businesses (which, despite the emphasis on inclusive "social partnership", are largely unrepresented in EU policy-making processes) is the possible threat to the exemption of businesses with less than twenty employees from compulsory recognition procedures.

4. Article 15, *Freedom to choose an occupation and the right to engage in work*, gives non-EU nationals who are authorised to work in the EU entitlement to "working conditions equivalent to those of citizens of the union". This may affect, for instance, the conditions of seamen working in British-registered ships. It could give union agreements a wider coverage and limit firms' ability to substitute cheaper employees. There is currently a case in progress relating to the use of Latvian workers in Sweden where the Charter of Fundamental Rights has been cited.

5. Article 27, *Workers' right to information and consultation within the undertaking*, guarantees "information and consultation in good time"; this is ambiguous over the type of information, the form of consultation, and the definition of "good time". Some fear that it could have the effect of reducing the scope for mergers and acquisitions (the UK has a very active and effective market for corporate control which is anathema to many union activists, particularly in France and Germany) and companies' ability to shed labour in periods of economic downturn.

6. Finally, the article which has most exercised commentators is Article 28, *Right of collective bargaining and action*. This gives the "right to negotiate and conclude collective bargaining" to workers—again raising the possibility of this right being extended to small firms. More significantly, it gives the right, "in cases of conflict of interest, to take collective action . . . including strike action". Since the Thatcher reforms, the right to strike has been considerably reduced in the UK. One fear is that this Article might be used to restore the legality of unofficial, "wild cat" strikes. Another is that the right to strike might be extended to groups which do not currently possess it because of security considerations. One such group is Prison Officers. Their Association has recently announced that it is planning to take a test case to the European Court of Justice. They may be followed by the Police Federation, which is planning a ballot of members on the right to strike.

7. Are the concerns of business critics legitimate? The government's position is that they are not. According to a document on the Foreign and Commonwealth Office's website, "the Charter gives people no greater social and economic rights than are provided in UK laws. The Charter will have no new legal impact on the UK domestic law and creates no new powers for the EU to legislate. The Charter does not extend the powers of any court—domestic or European—to challenge UK employment and social legislation" (2).

8. It is pointed out that a protocol to the Treaty exempts Poland and the UK by asserting that "nothing . . . creates justiciable rights applicable to Poland or the United Kingdom except insofar as Poland or the United Kingdom has provided for such rights in its national law" (3).

9. However there are doubts about the robustness of these exemptions. Members of the European Court of Justice are rarely strict constructionists in the American sense. They have in the past considerably extended the coverage of European Union Law, and as a group tend to be favourable towards extending their remit. They are not answerable in any way to national governments. There must be a possibility that they will

interpret the ambiguities in the wording of the Charter (for instance phrases like "information and consultation in good time" in Article 27) in broader terms than was initially understood, and exploit inevitable loopholes in UK law to introduce compliance with practice in other parts of the EU.

10. Nor should the fact that Poland also stands aside from the Charter be considered to offer much support. Poland's reasons for exemption are very different from the UK: they relate to the implications for the recognition off same-sex marriages, something which was opposed by their previous government. The new Polish Prime Minister, Donald Tusk, has indicated that he will consider accepting the Charter of Fundamental Rights at a later stage. If and when that happens, the UK will be isolated in its rejection of the Charter.

11. Past experience also suggests that in those circumstances the UK government could be tempted, or pressurised, into accepting the Charter as a *quid pro quo* when horse-trading over some other issue.

12. If union power were to be enhanced by the Charter, it is feared that management's ability to manage would be reduced as unions acquired an effective veto over dismissals or major changes of company policy: this could impact on competitiveness and discourage firms from hiring workers. Enhanced powers to strike would discourage managerial risk-taking, add to costs, cause disruption to the public and possibly encourage the re-emergence of an inflationary mindset.

13. But maybe this is just too pessimistic. It can be argued that the other EU member countries are unlikely to gang up on the UK in relation to the issue of unions and strike action. For industrial relations practices across the EU are far from homogenous, as the appended Table indicates, and many countries may wish to preserve their own independence in this area. The Table shows that there are considerable differences between member countries in relation to restrictions on the right to strike, unionisation rates, the use of collective bargaining and so on. It is also worth noting that countries with very different legal frameworks have similar levels of strike activity and other manifestations of union activism.

14. The leaders of some other countries might therefore be uncomfortable with Commission initiatives or judicial activism that enhanced the power of trade unions, in an environment where governments are increasingly aware of the need to free up labour markets. President Sarkozy, for example, is currently trying to reduce the ability of French unions to bring his country to a standstill every time a policy proposal is aired which they don't like.

15. Fair enough: the policy environment may be less straightforward than alarmists allege. But should we have to take the risk that our European colleagues will share the UK's perspective on this issue? This is the question for Parliamentarians.

(1) For a summary, see J R Shackleton (1998) "Industrial relations reform in Britain since 1979" *Journal of Labor* Research 19, 581–605.

(2) Foreign and Commonwealth Office website "The EU Reform Treaty: Ten Myths" http://www.fco.gov.uk/files/kfile/EU_Reform_ Treaty

(3) Protocol No 7 to the Treaty "On the application of the Charter of Fundamental Rights to Poland and the United Kingdom", Article 1.

December 2007

INDUSTRIAL RELATIONS IN THE EUROPEAN UNION'S MEMBER COUNTRIES

Country	*Unionisation Rate % **	*Right to Strike*	*Collective Agreements*	*Other Features of Employment Relations*	*Working Days Lost per 1000 employees***
Austria	47	In practice, not in law	Yes, across the board	Works Councils and employees on Supervisory boards	41
Belgium	60	Yes except ships and police	90% of workers covered	Nationwide bargaining between Belgian Business Fedn and unions	n.a.
Bulgaria	18	Banned in some parts of public sector	Weakly adhered to	"Charter for social cooperation" between unions and employers	n.a.
Cyprus	60–70 in private sector	Yes	Limited		n.a.
Czech Republic	25	Yes, following mediation	Yes	Legal requirement for employers to get names of strikers in advance	n.a.
Denmark	60	Yes, except essential services	Yes—very important	National Conciliation Board if negotiations fail. "Flexicurity" model links generous benefits to rigorous requirements for job search.	172
Estonia	30	Yes	Very limited	Labour Code sets rules	n.a.
Finland	80	Strikes illegal once agreement is in force	Widespread	Incomes policy often used	85

Country	*Unionisation Rate % **	*Right to Strike*	*Collective Agreements*	*Other Features of Employment Relations*	*Working Days Lost per 1000 employees***
France	9	Yes	90% of workforce	Works Councils in businesses with . > 50 employees. Frequent government consultation and highly politicised unions.	n.a.
Germany	27	Yes	Sectoral agreements	"Co-determination" within firms.	3
Greece	26	Courts can ban illegal or abusive strikes	Yes		n.a.
Hungary	16	Yes except military and police	Limited	Tripartite determination of minimum wages.	n.a.
Ireland	50	Yes except military and police	Widespread	Labour Relations Commission provides advice and conciliation	68
Italy	30	Yes, in constitution, except essential services	Widespread	Very difficult to dismiss workers	100
Latvia	17	Yes	Yes		n.a.
Lithuania	10	Yes except essential services	Limited	Works Councils	n.a.
Luxembourg	57	Yes, but after conciliation	Yes	Works Councils and employees on supervisory boards	6
Malta	63	Yes except military and police	Yes	Wage Councils regulating sectors	n.a.
Netherlands	25	Yes except civil servants	Cover 75% of workforce	Strong "social partner" institutions	18
Poland	14	Yes, except essential services, but lengthy procedures	Mainly at company level	Tripartite discussions setting framework for bargaining. Many disputes submitted to labour courts.	n.a.
Portugal	26	Yes. Lockouts illegal.	Widespread	Minimum essential services must be maintained during strikes. % days notice needed in private sector. State mediation in lengthy disputes.	19
Romania	44	Yes	With government	If a court rules a strike illegal, employers may claim damages.	n.a.
Slovakia	30	Yes except armed forces	Widespread sectoral bargaining	Sympathetic strikes allowed.	n.a.
Slovenia	41	Yes but restrictions in public sector	Very extensive. Sectoral agreements across economy.	Tripartite negotiations on public sector wages.	n.a.
Spain	15	Yes. Must give 5 days notice	80% coverage		200
Sweden	80	Yes. Employers can also lock out.	Widespread	National sectoral organisations negotiate framework agreements.	39
UNITED KINGDOM	30	Yes, except armed forces and police	Very few sectoral or national agreements	Little government or "social partner" involvement.	25

* Percentage of workforce, 2004 or nearest year

** Average 1999–2004

Sources: Federation of European Employers, Office of National Statistics

Memorandum by the TUC

Many apologies for the lateness of this response to your request for the TUC's views about the implications for social and employment policy of the Treaty's content relating to the European Charter of Fundamental Rights (ECFR) and the associated clarification protocol which mentions the UK.

The TUC is the national trade union centre for Great Britain. We represent people at work, especially through our 59 affiliated unions and their 6.5 million members.

The TUC strongly supports the European Charter of Fundamental Rights which was originally adopted in Nice in 2000, and to which the UK is a signatory. We believe that the Charter sets out what would be generally regarded as the human rights which people in Europe have a right to expect, and is in accord with the UN Declaration on Human Rights, the European Convention on Human Rights and, with specific reference to workplace rights, the core labour conventions of the International Labour Organisation. We have supported the campaigns of the European Trade Union Confederation, of which the TUC is an affiliate, to have the European Charter included in the EU Reform Treaty with legally binding effect, and we welcome the decision of the Council of Ministers to do so.

Our concerns therefore relate to the associated clarification protocol, which we understand relates specifically only to Chapter 4 of the European Charter of Fundamental Rights. We understand that the purpose of the protocol is to ensure that the inclusion of the Charter in the EU Reform Treaty will not allow the European Court of Justice to add to existing UK laws by extrapolating from the rights set out in Chapter 4 of the European Charter.

The TUC has two principal concerns on how the Protocol will operate, although of course ultimately this will be determined by the Courts. Firstly, the TUC is concerned that the Protocol may hinder the use of the European Court of Justice to ensure access to existing EU based workers' rights. It has been the experience

of unions in the past that many rights which we believe to be set down in legislation can only be obtained in practice through the use of the courts. In recent years, the ECJ has drawn on the existing Charter when interpreting EU employment directives. We would consider it unacceptable for the protocol to restrict that use of the European Court of Justice in the future.

Secondly the TUC are concerned that the protocol could prevent UK citizens from using the European Court of Justice to obtain the same rights at work as citizens in other EU countries, and that the difference in rights thus provided to British workers and other EU workers would inevitably widen over time.

January 2008

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
TUESDAY 20 NOVEMBER 2007

Present	Blackwell, L	Maclennan of Rogart, L
	Cohen of Pimlico, B	Powell of Bayswater, L
	Dykes, L	Roper, L
	Grenfell, L (Chairman)	Symons of Vernham Dean, B
	Harrison, L	Tomlinson, L
	Howarth of Breckland, B	Wade of Chorlton, L
	Kerr of Kinlochard, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr John Palmer, formerly European editor of the *Guardian* and political director of the European Policy Centre and Professor Damian Chalmers, Professor in European Union Law, London School of Economics and Political Science, examined.

Q1 ***Chairman:*** Professor Chalmers, John Palmer, thank you both very much indeed for giving of your valuable time to come to answer some questions and discuss with us one or two matters relating to the Reform Treaty. As you know, we are focusing in the Select Committee at the moment on the impact of the Treaty on the institutions and what that means for the UK. Our report will be a component of a broader report which will focus on the whole array of issues arising in the Treaty on which our sub-committees are currently working. We are on the record. We shall be sending you a full transcript of the proceedings so that you may check to see that what you have said has been properly reflected and the results of the evidence will be printed as part of the composite report. I cannot give you the date yet of when that is going to be published, but we have a commitment to try to get it out in advance of the Ratification Bill coming into this House, so that the report will inform, we hope, members of the House of Lords who will wish to participate in the debate or have a general interest in the topic. Would either or both of you like to make an opening statement before we go to questions? You are welcome to do so. Mr Palmer, would you like to make an opening statement?
Mr Palmer: As I have written in the public press about this Treaty and about the subsequent debate in this country, that it does seem to me really to be much ado about not a great deal. By this I mean that the most striking thing to me is the modesty of the proposals in this Treaty by comparison with nearly all of the preceding treaties. Indeed, I have been a little concerned that the proposals in this Treaty are particularly modest in relation to the problems that the Union faces and which it seeks to address. So by way of introduction, I think that a lot of the judgments that I come to in answering some of the questions that you have asked have, in a sense, been inspired by that sense that it is the modesty and maybe the adequacy in some respects of this Treaty, rather than its ambitions that strike me as important.
Professor Chalmers: I would echo what Mr Palmer has just stated. My view is that it is probably the most limited reform, with the exception of the Treaty of Nice, that we have seen in the last 20 years and some of the debates on the similarity between this Treaty and the Constitutional Treaty have tended to obscure that.

Q2 ***Chairman:*** Okay; thank you very much indeed. Let us go straight to the questions. It would be helpful to the Committee if you would talk to us a little bit about the structure of the two Treaties. What is going to happen? This is basically a treaty containing a lot of amendments to previous treaties. Could you just walk us through the present structure and how it is all going to end up?
Professor Chalmers: My view is that all any treaty reform can do is three things. There is a symbolic dimension which, although it has been rather played down in recent weeks, was significant. The British Government have made a lot about golf clubs having constitutions, so that can be relevant at times. There is a question of competence as to what the EU can or cannot do, and there is how it works. If we looked at the Reform Treaty or Treaty of Lisbon in relation to each of those, taking first of all the symbols, these were largely, not completely, taken out, not just the ones that have caught the public imagination about the hymn and the holiday et cetera, but also those relating to the primacy of Union law and to the Charter. They are not in the main text of the Treaty. Compared to the Constitutional Treaty, there are references or, in the case of primacy, a declaration.

There is still stuff there on representative and participatory democracy that one could say has a certain symbolic input. Turning next to the question of competences—and I will do this by reference to the Constitutional Treaty—my view is that with one small, arguably significant exception, which is the role of the flexibility clause, there was no real extension of Union competences by the Treaty of Lisbon. There is an interesting question about the new status of the flexibility clause, given that it is now meant to overlap the Union rather than the Community and that it is used regularly, that is to say 30 times a year. Beyond that there was no extension of competences. In terms of the collapse of the Pillars, which was the collapse of the third into the first and the extension of supranational disciplines, one could say that what has happened is that we are now in a situation where, instead of agreeing a new IGC at Maastricht, John Major simply said the UK would opt out of justice and home affairs, that from a British perspective we had the right to opt into all these *communautaire* disciplines: migration; asylum; policing cooperation; criminal justice and civil matters. The extension of qualified majority voting, when one looks at it, which does take place, although 50 areas have been mentioned, is largely in single market areas and some trade policy. So if one were looking at questions of what the Union does, there has not been a huge extension of Union competence; in terms of supranationalisation, the UK has largely reserved the right to opt into the bits which are significant, in terms of faster decision making and qualified majority voting. It is in areas that are largely to do with trade liberalization. The third thing it does is to change how the EU works and institutional mechanisms and that is probably the bit that in my view the Reform Treaty is most significant in. If I were to say 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. A lot has been made of the increase in the role of the co-decision procedure; I would agree with that, or the legislative procedure as it will be known. What has been less noted is that in many areas where the European Parliament has merely consultative powers, it now has the power of assent or consent. These are significant areas like the flexibility provision, citizenship, the anti-discrimination provision. In that area, one will see a very significant increase in the European Parliament powers. That is all I would say at the moment but I hope that is clear.

Q3 ***Chairman:*** Thank you very much. That is a good overview. We are focusing very much on the institutional questions, so that is helpful to us. I just wanted to be clear so that we know exactly the framework when we are doing the examination of the Treaty. Could maybe John Palmer explain to us exactly why it was felt that there should be two Treaties? There is the Treaty of the European Union and the Treaty on the Functioning of the European Union. What in fact is the significant difference between those two?

Mr Palmer: This is a question where Professor Chalmers may be in a better position to give you a detailed answer than I am. It is historical. The format is largely derived from past practice. I do not know if I may just add a slight rider to the earlier question and that is that the form of this Treaty is regrettable by comparison with what was on offer before in one important respect. This Treaty defies all but the most dedicated specialists and legal experts to understand and interpret it. The constitutional text, whatever people thought about its content, was a remarkably readable document and one in which the different parts hung together in a more coherent fashion than certainly they do at present. So we have suffered a democratic setback in terms of the form that has now been adopted, a remarkably different form of amendments to the two Treaties. I would invite my colleague, if he has something more concrete, to answer in relation to your first question.

Professor Chalmers: Very briefly, in relation to the legal significance, I would agree with what Mr Palmer said. It is almost an historical consequence of two things. If you look at the existing EC Treaty, there is the bit between the policies and principles and it echoes that. More specifically, it reflects the distinction there was between the part one and the part three of the Constitutional Treaty. I never saw that as particularly significant. It 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.

Q4 ***Chairman:*** May I quote you something one read in *Euro Politics* which is relevant to the structure of the Treaty? It says that by renaming the Treaty establishing the European Community "the Treaty on the Functioning of the European Union", the Lisbon Treaty implicitly subordinates it to the Treaty on the European Union and consequently to the objectives that Treaty sets for Europe. It goes on and says that as a result principles previously considered declaratory—and I will not read out the whole list but some of them—protecting its citizens, economic social and territorial cohesion, cultural and artistic diversity as well as social objectives become fundamental principles guiding European policies and by a simple mechanical effect, they are raised to a higher level and this is a very strong political move. Would you agree with that?

Professor Chalmers: It is an arguable case but I think it is overstated. One has to say that the current relationship between the EC Treaty and the Treaty

on European Union is a mess; this House has been very concerned in relation to Article 47 of the Treaty on the European Union and the expansion of the EC Pillar at the expense of the others. One has to say that problem has been got rid of. It would go to the Court of Justice; the Court of Justice would hear that argument. How much weight would it give to it? I would be surprised if it did what the commentators say, because it would overrule the *acquis* apart from anything else.

Q5 ***Lord Blackwell:*** Professor Chalmers, I was intrigued by your statement that the Treaty did nothing to extend competences. As I understand it, the Treaty defines three types of competence: exclusive competences; shared competences; and coordinating competences. It goes through a long list of what is covered in each of those, including a number of areas which were not in previous Treaties. It goes on to explain that in shared competences, national governments may only legislate in areas where the EU is not legislating. Do those have any impact, in your view, in extending competences?
Professor Chalmers: My view is no. It is true that if you read the text of the existing Treaty, it does not say those things. It reflects the caselaw of the Court of Justice in so far as it interpreted existing Treaties, is the simple answer.

Q6 ***Lord Roper:*** Would you say it is just codification?
Professor Chalmers: A lot of this is codification. How the Court then interprets the codification is another matter, but it is meant to be codification. That is my understanding anyway.

Q7 ***Lord Blackwell:*** I would be interested in Mr Palmer's view on this. To the extent that the Court had made judgment in these areas, but it was not in previous Treaties, is that something we should take interest in, in terms of the way this Treaty is . . .?
Mr Palmer: Yes, certainly. The Court's capacity to make case law is a fact of life and it has played an important part in the definition and evolution of the integration process. There is no doubt about that and there is no reason to think that that will not continue. There is nothing new in this Treaty that creates for the Court a whole new realm of competence that has not already implicitly been there, indeed been exercised in a number of areas that have enlarged our understanding of what European law means for the integration process.

Q8 ***Lord Blackwell:*** Just to be clear then, are you saying that these competences as codified here will be the first time that they have actually been approved by the UK Parliament as competences?
Professor Chalmers: It is a difficult question to answer. It is bit like saying that any judgment of a British court which may be slightly different from how a Member of this Parliament views it should come back to this Parliament. I feel that is the implicit message from the question; maybe I am being unfair to the questioner. It is certainly right to say, and this is one of the reasons why there was so much debate about the Constitutional Treaty, that a lot of the things that were left in case law, the *acquis*, et cetera, were made much more explicit by the Constitutional Treaty and the Reform Treaty. In so far as they are being debated now, the point you make is right, yes.

Q9 ***Lord Kerr of Kinlochard:*** I put it to Professor Chalmers that what is in these three articles is a summation of what was previously scattered throughout the Treaty. Collecting them under a *chapeau* does not change the legal weight of the content of the articles.
Professor Chalmers: I hoped I was saying that; yes, I agree.

Q10 ***Lord Maclennan of Rogart:*** This may be a legal issue. Perhaps, Professor Chalmers, you would be prepared to tell us what effect you think the Treaty's proposed provisions may have. In my recollection, at the time of the Convention leading up to the draft Constitutional Treaty, I was advised that the United Kingdom had been alone at Maastricht in challenging the inclusion of such a provision and that the general legal view was that in international law the Union already had a legal personality and that this was simply a declaratory provision. If that is so, what is the effect, the practical consequence, of declaring that the Union has a legal personality?
Professor Chalmers: I find this question in some ways the hardest to answer of the questions of which I had some notice. I would not agree with the interpretation that was set out to you at the Convention. It is people who do not like the three-pillar structure who make that interpretation. The EC has had that personality and it has been there from the beginning and, in relation to the earlier question, it was there when we joined. That is not just in relation to expressed powers but any internal power by virtue of the doctrine of parallelism. In so far as the Third Pillar has now moved into the EC Pillar, policing, judicial cooperation in criminal justice are now governed by that legal personality and that would have been the case whether this article were there or not. The real issue was personality with regard to the Second Pillar. Now this is where I perhaps cannot be as completely clear with the Committee as I would like, because there is some ambiguity about this. The Union clearly has personality now in all areas including foreign and security policy, but that is not enough: it must be

granted powers there actually to do anything. It is one thing to say there is a power: an international organisation also has to be conferred powers to act. The Treaty makes very clear that the Union has no legislative powers in what we currently know as the Second Pillar, foreign and security policy. To my interpretation that would mean it could not just have a willy-nilly treaty-making power in this field. Where it would come in and where there has been continual concern by those working in the Union about the current nature of Article 24 TEU is in operational matters. There has been continual discussion about things like the Union operations at Mostar, who is responsible for what. It was where Member States could act through Union procedures, but the Union was not formally accountable. There does seem to me a case for the Union having a personality that should be accountable for things like this. My interpretation of that, and it has been set up in a declaration to the Reform Treaty as well, is that as the Union has no legislative powers in foreign and security policy it has no treaty-making powers under the new Treaty. That is my interpretation.

Mr Palmer: I was told there are over 300 instances in which the European Community has acted in the context of its legal personality. Some people think that figure might even be an underestimate. Of course, under formerly Pillar Two matters, if the Union Member States wished the Union to negotiate an international agreement on their behalf, they could indeed give it such a mandate. There are even circumstances where they could be invited to do so by the High Representative. It would require a decision to give that political mandate but it certainly would simplify the process then of achieving that treaty since it would no longer be involving 27 individual negotiations. It is a practical step that facilitates the business of actually concluding treaties once a mandate has been given to the Union so to do.

Q11 ***Chairman:*** Looking at the other side of the coin, states remain free to conclude international agreements, provided that they are compatible with agreements signed by the EU or within the EU's competence. If that were contested, who decides whether it is compatible?

Professor Chalmers: My answer is that it has to be national courts or foreign ministries because the Court of Justice is excluded from the Second Pillar or what is currently the Second Pillar. It cannot be the Court of Justice, so presumably it would come before the national court, which would have to decide whether it based its decision on EU law or national law or it would be a matter of negotiation between the foreign ministries and the various institutions of the EU.

Q12 ***Lord Maclennan of Rogart:*** Do you think that the proposed provision alters the capability of the Union to sue or be sued?

Professor Chalmers: Yes, it probably does.

Q13 ***Lord Maclennan of Rogart:*** In what way?

Professor Chalmers: Crudely, once you have personality on the international legal field, you have the capacity to be sued or to sue.

Q14 ***Lord Maclennan of Rogart:*** Are you denying that it had had that power to sue up to now or that others have had the power up to now?

Professor Chalmers: I go back to what Mr Palmer said. Clearly others have had that power; in the WTO the EU is continually being brought as the largest trading block before the WTO for compliance and non-compliance with it. The issue is not what we currently know as the First and Third Pillar where it has that capacity to sue and be sued because it has legal personality and powers in those areas. The area of change, as I see it, is in what we currently know as the Second Pillar, where it acquires personality. My understanding is that it will have the capacity to sue and be sued in that area of foreign and security policy and for whatever acts it does or others owe to it.

Mr Palmer: I would defer to Professor Chalmers on this but I understand that accession to the European Convention might further enlarge that possibility that you have just described.

Professor Chalmers: That is absolutely right.

Q15 ***Lord Tomlinson:*** As the question of accession to the European Convention has been mentioned, as the European Convention is a convention between sovereign states, do you think there is any basis on which the European Union has the right to try to adhere to the European Convention on Human Rights?

Mr Palmer: One of the advantages seen in this process was precisely to enable it so to do and that in order to improve the cooperation between the two legal jurisdictions so as to avoid any complications. That is, as I have understood it, the central case.

Q16 ***Lord Tomlinson:*** Whereas it might be organically convenient, it strikes some people as being slightly a legal mess.

Professor Chalmers: There is the question of whether it is the most desirable way of going about it and I would defer to you on that. It has to be said that the European Community is a member of a large number of international organisations at the moment, and it always raises questions, from the point of third states, about whether that is accountable times one or accountable times 28. In relation to the European Convention, my understanding was that there was a great deal of sympathy for the EU becoming a

member and a great deal of support from the Council of Europe in some ways. It is legally complicated, particularly when one gets into things like exhaustion of domestic remedies, and what that means in an EU context. No-one denies that.

Q17 ***Lord Tomlinson:*** Can we turn to the main changes relating to the European Council? While not excluding anything else about the European Council, I am particularly interested in what you think the relationship would be between the President of the European Council on the one hand and the team presidencies of the Council of Ministers on the other.
Mr Palmer: There is nobody at the moment that I know of who can give a clear, concrete and precise answer to the question of how these bodies will bed down together in practice and how the liaison will work. As I understand it, the heads of government deliberately did not seek to address some of the mechanics of how the institutions will relate to each other in this series of amendments or indeed in the previous Treaty, because it is always open to an act of the Council to define a clearer functional answer to the question. Politically there are two questions that strike me. One is the relationship of the President of the European Council to the new team presidencies. Related to that is the question of the external representational role of the President of the European Council in relation to the team presidencies. I do not think, vis-à-vis the President of the Commission or the new High Representative that there will be a particular problem but yes, there could be some significant overlapping. I will not say turf wars but there could be some issues there that need bedding down and clarifying before the first team presidencies in particular come into function. I know, for example, that the team presidencies that are in the pipeline after 2009, assuming the treaties are ratified, have already begun to meet each other with a view to centralising, at least at heads of government level, some of their key political decisions over the 18-month period, which is going to make it interesting, to see how they function in relation to the President of the present European Council.

Q18 ***Lord Roper:*** What will be the impact of the Reform Treaty on the functioning of the Council of Ministers? In particular, is the new system of qualified majority voting with the double majority likely to be significant in practice?
Mr Palmer: There will not be a revolutionary change. The most important impact of the practice of qualified majority voting hitherto has been to assist the process of reaching consensus. The actual occasions where people have been voted or out-voted have been precious few, surprisingly few to me. I do not myself see that this is going to change immediately. It is a very important development that adds a significant pressure to achieve a flexible consensus and that will continue to be the case. There is, in the new areas of majority voting, in freedom, security and justice where it applies, a general sense that the unanimity under inter-governmentalism signally failed to achieve the progress that was needed in this area and there has been remarkably little controversy. I am leaving aside the UK position, about its extension among the other Member States, even those with a history of some reservations about majority voting, to it being applied in these new areas.
Professor Chalmers: I would agree with all of that. I would add one further thing, however. Whilst the system between the double majority proposed by the Reform Treaty and that by Nice is often overplayed, the difference is not very significant. What is significant in my view is the timetabling, that essentially the new system does not come in until 2017 and, depending how one calculates it, there has not been such a period of change that one can think of comfortably, if one thinks of enlargements and voting rates.[1] The other thing that is significant, although it is downplayed by most people I know, is the declaration on blocking minorities, where, after 2017, states representing 55% of the blocking number can intervene. Some people say "Oh well, we had that at Ioannina and it was never really applied". This is a much more significant difference. It means the states representing 19.25% 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. Germany has 17%, which means Germany plus three other states in most cases, if one looks at some of the smaller states. It does not actually help the UK. When one looks at the UK which has about 12%, we will still need at least four or five other states when one looks at the statistics.

Q19 ***Chairman:*** Is that something that the Poles overlooked?
Professor Chalmers: I am on the record so I have to be careful what I say. It was an easy thing for the Germans, when they looked at the figures, to agree to the Polish demands. That is how I would put it. It does not help the Poles as much as they want. It brings us down to the Polish position, rather than the Poles up to the British position, is how I would put it.
Mr Palmer: I understand that the new Polish Government may not be minded not to press beyond 2014 in practice for this to be applied, in which case we may not have to wait quite so long.

Q20 ***Lord Roper:*** I wonder whether I could follow up something you said earlier about the fact that there would be no legislation in the Second Pillar. Which council would the foreign affairs matters, where there

[1] See p S17.

is legislation such as development and humanitarian aid, be taken in? Would they be taken in the Foreign Affairs Council chaired by the High Representative or would they be taken somewhere else? In so far as the Foreign Affairs Council is not supposed to be doing any legislation, there seems to be a problem.
Mr Palmer: Certainly it has been my understanding—I stand to be corrected—that they will be taken in the Foreign Affairs Council because, of course, the High Representative will be double-hatted and will, in his capacity as Vice President External Affairs and Commission, have a continuing responsibility for some of those matters directly to the college. My understanding is that it would be taken in the Foreign Affairs Council. How the business would be differentiated to reflect that, I am not sure; I do not know.
Professor Chalmers: I have nothing to add. This would be something of a mystery to me with the reform of the General Affairs Council.

Q21 ***Lord Roper:*** I wonder whether you could say something, any other comments, on the impact of the double-hatting of the High Representative in future and the impact this might have upon the work of the Commission.
Mr Palmer: That is a huge and very important question because arguably in the arrangements to give greater coherence to the common foreign and security policy and to the position of the High Representative, the creation of the external action service is arguably the most important element of this Treaty given the nature of the European agenda today, which is so external, global, et cetera. A great deal depends on the personality of, whoever is appointed, in working through this because there will be a delicacy in the double accounting system. The institutions, the Council, the Secretariat and Commission, have had quite a long time to think through how this will work and what frontiers have to be observed. It would be a little bit surprising, since we have got to 2009 still to prepare, if there were needless confusion or lack of clarity. It is down to what political will the Member States are ready to demonstrate, with this or any other system but certainly with this proposed system, to make common foreign and security policy a reality. All I can say is that I note that across the 27 there is a remarkable degree of consensus about the critical importance of making all of this work; making all of this work in particular by encouraging the formulation of and an understanding of a European-interest-based common foreign and security policy, something that has been difficult to achieve in the past since the preparation of policy has so much depended upon individual Member States. The ultimate answer does not so much lie in the provisions of this Treaty but in the political will which the Member States show to make a reality of it, to make it work.

Q22 ***Chairman:*** We will move on to the European Parliament now. In your opening statement you said that the new powers for the European Parliament are very significant and we recognise that with the extension of co-decision. I should like, if you would, to address two areas. The first one is on the question of the budget. Now the European Parliament is on the same footing with the Council on all budget hearings since the difference between compulsory and non-compulsory disappeared. How significant is this? The second is on agriculture and fisheries. It has been suggested that there is a certain vagueness in how this has been described in the Treaty because there are possibilities that the European Parliament and Member States are going to disagree as to which of the two really have the authority on agriculture and fishery matters, that this could be an area of particular tension. Is that a possibility?
Professor Chalmers: It is tough. In relation to these areas which are redistributive areas in so far as they are not just about classic regulation but largely about redistributing wealth one way or another, it is difficult to know because this is the first time the ordinary legislative procedure or co-decision has been applied in significant ways to these types of policy, where there are clear winners and losers. The experience of the ordinary legislative procedure, co-decision as it still is, is that although Parliament nominally talks about being equal, and, if one looks at it, large numbers of its amendments are accepted, by some accounts 83%, which is very significant; of those 20% are unadulterated, 63% in some compromise form. When one looks at these amendments, a lot of them are those of a review in chamber, that when push comes to shove, my feeling is that Parliament normally backs down. It very rarely exercises its veto; since Amsterdam the statistic that is quoted is two times out of 617. One would expect a lot of influence from Parliament in amending the detail. In terms of joint agenda setting, of joint decision taking, it would be a lot harder. In relation to agriculture, given that is already subject to qualified majority, 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 Agriculture DG who run agriculture. We will presumably have a food committee, 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 rather than the simple question of loss of sovereignty. I see that as what is significant about agriculture.
Mr Palmer: This is an area where the European Parliament is going to become an even more formidable political player. One can expect the

Parliament to perhaps intervene more strongly in some of these new areas than past practice would have suggested. This is not only because of the formal co-decision powers but something else that is more tricky to define is happening which can only be described as the growing politicisation of the European Union decision-making process. By "politicisation" I mean a sense that there are now divisions emerging which are not simply national but are broadly more political and that the Commission has become a more politicised force since the last Commission was appointed. We are seeing the gradual emergence of the European parties and it is very interesting to see how the voting record of MEPs is changing. Professor Chalmer's colleague at LSE, Professor Hix, has done some very interesting work charting the shift in voting patterns to a more political, ideological, set of divisions rather than nationally inspired divisions. That is likely to manifest itself in some of the debates about redistribution policies and indeed the budget as a whole. Just on agriculture, the only thing I would say is that the environment in which the whole CAP has always been debated is now so utterly transformed. The questions suddenly emerging are ones of supply and security, not surplus and subsidies. A whole new debate is beginning as a consequence of climate change and bio-fuels and all the rest of it. That is something which may happen irrespective of the Treaty changes on CAP.

Q23 ***Chairman:*** So you do not think the move to co-decision is going to provoke any real problems over the respective prerogatives of the Parliament and the Council of Ministers.
Mr Palmer: I would not exclude it. I would not exclude the possibility that, on the broad macrobudgetary question, the size of the budget, et cetera, there could be significant conflict. 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 that has already to some extent been demonstrated. That is part of this politicisation process which, over the next decade, may become even more marked.
Professor Chalmers: The only point that I and Mr Palmer possibly see slightly differently is about the vigour and self-confidence of the Parliament and we will have to wait and see on that.

Q24 ***Lord Wade:*** What you have raised is an extremely interesting part of this project of the impact of this Treaty. Is it going to have an effect which you think the people who created the Treaty think it is going to have? Is what you are talking about now, this politicisation of the Parliament, which in fact you are suggesting is that Europe will divide along political lines rather than national lines, what they had in mind or is that going to be a consequence of what they did not realise was going to happen?
Mr Palmer: It is not what all of them had in mind, would be my answer. Some of them would not have done this with that in mind but some of them may have been aware of it, indeed I know some of the negotiators were aware of this tendency, but it is something that is happening independent of the treaty-negotiating process. I agree, we cannot at the moment predict how these new dynamics will work out, but I am certainly struck by the increasing assertiveness of the Parliament in a general sense. If I may add one sentence, it raises very interesting questions as to how the partnership with national legislators should evolve to take account of this. I am struck by the number of national parliaments, scrutiny committees who admit members of the European Parliament as non-voting members in order, where possible, to traction the two parliamentary forces together. This may be something that becomes more relevant with the new powers and co-decision powers of the European Parliament.

Q25 ***Baroness Symons of Vernham Dean:*** It seems to me that what you have been describing is a process that was already under way and that the Treaty, although there are new powers there, actually is not the issue here. The issue is the greater political activity in, possibly for all sorts of external reasons, activities over war in Iraq and everything else which has made people more energetic within the European Parliament. I am just not quite clear whether your assessment is that this is something that has been happening anyway or whether it does turn on the new powers in the Treaty.
Professor Chalmers: My view is that it has been happening anyway but Mr Palmer would know much more about it than I. One can point back to the aftermath of the Single European Act, when one first noticed this huge increase in the number of amendments that were being put forward by the European Parliament and successfully so. It is a process which takes place irrespective of treaty reform. Obviously, the European Parliament is aware treaty reform influences it because it provides new opportunities for that process.

Q26 ***Lord Wade:*** In fact what you are saying is that the Treaty is going to encourage what was going to happen anyway but it has encouraged it more than might otherwise have happened.
Mr Palmer: It will allow new avenues in which this developing tendency can express itself.

Q27 ***Lord Kerr of Kinlochard:*** Back to agriculture for a second. If the abolition of the distinction between *dépenses obligatoires* and *non obligatoires* was not significant, I wonder why the French opposed the abolition so strongly. It seems to me, I wonder whether you agree, that the overweighting of agriculture in the EU budget would not have survived as long as it did had there been no *dépenses obligatoires* rule, and therefore co-decision on agriculture financing 20 years ago. It seems to me that this may be another area where the Treaty is not just catching up with a change that is already happening, but it actually encouraging it, I would have thought.
Mr Palmer: I agree with that entirely. That is happening. The only additional factor I would factor into this equation is the totally new set of problems facing agriculture, none of which could have been predicted from the shape and size and growth of the CAP over the last 30 years.

Q28 ***Lord Tomlinson:*** Earlier we heard from Professor Chalmers that the European Commission had lost power to the European Parliament, also quite a number of people have suggested that there has been enhanced power for national parliaments in the process that we have gone through. Against that background, what do you think is the impact of the Reform Treaty on the role, functioning and membership of the Commission?
Professor Chalmers: I shall try to give a concise answer to that. In relation to the formal powers of the Commission, it is a winner in some areas, a loser in others. It has acquired a monopoly of initiative in new areas, notably what were previously Third Pillar areas. Things like the new consent procedure or the ordinary legislative procedure lead to a diminution of Commission influence. I would raise two other things, if I may. The question of national parliaments perhaps may be one to take separately but I would raise two other things in relation to the Commission that are significant. One is the citizens' initiative, to what extent its power over the agenda is going to be constrained by this, by endless petitions and it is time consuming. The second is that 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. We have a system where the president and the commissioner can co-appoint, admittedly with the Parliament and European Council, reorganise and now fire independently individual commissioners. He or she has a lot of power and this will vest a lot of influence in that personality and that may be for good or for bad. Certainly, it 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.
Mr Palmer: I agree with that. There is one other additional element which some members of the Committee may know I have been excited about for some time, in the Constitution Treaty and in this Treaty, which affects the answer one gives to the position of the Commission.That is the new arrangements for the election of the Commission President, not so much the election by the Parliament but the way this now opens the possibility which the parties are likely to pursue, that they would go to the next European Parliament elections in 2009 not only with lists of candidates and programmes but with their proposed Commission presidency candidates. This is of very considerable importance because in the European Council it will allow presidents of the Commission to point to a direct mandate; we all know even of former prime ministers who have sometimes ended up as Commission presidents and been reminded by their former colleagues that they now have a very different and inferior status. That is going to change. It is going to play into the politicisation process. The Commission has not gained formally from the Treaty to the extent that the European Parliament has, but the point about its weakening can be greatly over-stated. If the presidential commission emerges more strongly, which is the flip side of the politicisation coin, the Commission will play a more important part in the balance of powers in the future than some people right now imagine.

Q29 ***Lord Powell of Bayswater:*** My first question is do you see any major changes affecting the jurisdiction of the European Court of Justice? From your earlier comments, one would deduce not. You said that of course it had capacity to make case law and that much of what happens in the Treaty is codification and therefore not really an extension of its jurisdiction. On the other hand, it does seem to have a more general power now over justice and home affairs, it seems to have some specific powers in relation to intellectual property and, as I understand it, the ability to take proceedings against European institutions including the European Council itself before the Court. Are there other powers? Do you think overall that the Court's power has increased significantly?
Professor Chalmers: You raise a number of questions. Firstly, in relation to powers under what is now the Third Pillar. It is a significant increase in the Court's power, you are right; I did not raise it because of the specific UK position but other than that, in relation to most other Member States, it is very significant. I would make one point in relation to that, that does affect the UK significantly apart from when it opts in and this is that the Court of Justice is currently operating at close to full capacity. It is not like it can do another 200 judgments a year. It is over-stretched

and the docket has gone up significantly and will likely increase as more cases from the new Member States come before it. One change that was made in both the Constitutional Treaty and the Treaty of Lisbon is that cases where someone is in detention will now be expedited. This will presumably be not just questions relating to criminal justice but also asylum. Currently the work of the Court of Justice is actually very narrowly focused because most EU law is not the type of law that gets before the courts. Immigration, asylum, crime are. It could become, if we are not careful, an asylum court where large numbers of cases are sent up to it by NGOs referring, pressurising tribunals to make references and it would only require 70-100 cases a year for that to really change the nature of the docket. In relation to increased powers of judicial review, specifically vis-à-vis the European Council, the European Council does not have many duties or responsibilities, so the general answer to that is yes, formally it does have increased powers of judicial scrutiny but the circumstances where that will happen will be quite narrow. You mentioned intellectual property. 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.

Q30 ***Lord Powell of Bayswater:*** What position do you think it will take on the UK's protocol and the Charter of Fundamental Rights? How do you think it is likely to react to that?
Professor Chalmers: There is first of all the meaning and then there is how the Court will react to it. It is not an "opt out"; even that is admitted by civil servants. What it says is that the existing position on the Charter, as it applies to all Member States, must continue. My understanding of the existing position is that the Charter is a source of law in the same way as the ECHR is in national constitutions. It has been the case since the Family Reunification Directive Judgment in 2006 where the Court refers to it as having equal status with other sources. The protocol does not say the Court cannot apply the Charter to the UK: it just says it cannot extend it. If you look at what happens at the moment when the Court refers to the Charter, it then relies very extensively for its reasoning on the case law of the European Court of Human Rights. People who think we have some sort of opt-out are going to be in for a surprise in that regard because that is what will happen. The temptation for the Court, in so far as it gets cases from the UK or it is worried about UK reception, is quite simply to be profligate about the sources it uses. It will refer extensively to national constitutions or the European Court of Human Rights rather than the Charter as almost all the rights set out in the Charter are found in other constitutions. From my perspective it is very undesirable to give a court an opportunity to be so opportunistic.

Q31 ***Lord Powell of Bayswater:*** So you are saying in effect that the UK protocol is not really worth a great deal?
Professor Chalmers: Crudely, yes. The other thing I would stress before that is that there is an elephant in the room but it is a very small elephant in the room. Fundamental rights have bound Member States as a matter of EU law since 1991. There are only six cases one can point to where it has had any effect, one involving the UK; I have not heard huge outrage in the national press about it. The Court of Justice, has never said social rights are self-standing. Instead, they only have interpretive value. The Protocol is value-less if you think the Court of Justice has no good sense. If you think that in this area, the Court of Justice has been quite timid, I would put it to you that there is less reason to worry.
Mr Palmer: Professor Chalmers is the expert in this area, not I. The only thing I would add is that I would expect British citizens to have recourse to the ECJ on many of these matters but they will be living in other EU Member States and this will create politically quite an interesting situation, if the Court rules in their favour where the Charter is pleaded in support of their cause where they are, as many hundreds of thousands of British citizens currently are, resident in other Member States.

Q32 ***Lord Powell of Bayswater:*** You were implying earlier that the Parliament would feel its oats as a result of the Treaty in a rather general way. Do you think the Court will do the same?
Mr Palmer: The judges, the ones I have ever met or had knowledge of over the years, have not been driven by any great political agenda at all. As Professor Chalmers has referred to, they are hugely preoccupied by the work that they have currently got and, even with the changes to the Court of First Instance and so on, there is a huge problem with processing business which is their main concern. However, they will uphold the ultimate principle that EU law should be non-discriminatory and it would be surprising if they did not.
Professor Chalmers: May I make two points? The first one is in relation to the Court of Justice. It was a great missed opportunity at the Constitutional Treaty and at Nice that more attention was not given to reform of the Court of Justice. What they did was to create more chambers; almost all cases are heard now by chambers of three or five judges. This vests a lot of power in individual judges which gives the possibility of more erratic judgments and more opportunistic judgments, notwithstanding the quality of the individual members of the Court. That is a worry once you start doing that; that it leads to a possibility

of a breakdown of collective discipline. With regard to the Charter, for those who are concerned about it, the main concern in my view is not the Court; it is the new Fundamental Rights Agency. My understanding is that all legislative proposals will be proofed by that agenda which will proof them against the Charter and the Charter therefore will affect the ideological drift of legislation and that is the worry, if there is a concern, not rogue judicial activism.

Q33 ***Lord Blackwell:*** In your earlier answer Professor Chalmers, you suggested that the ECJ had, through its judgment, extended the EU competences in the past which are now being consolidated in the new treaties. Is there anything in this new Treaty that would prevent or limit the ECJ from continuing therefore to extend competences from this current Treaty base?
Professor Chalmers: The simple answer is no. At the end of the day courts have the ultimate authority over interpreting a legal text and it is very difficult for a legal text to tie their hands. This Treaty does not make many efforts to tie their hands it excludes them a bit from foreign and security policy but not from many other areas. One other area it does: internal security.

Q34 ***Lord Harrison:*** Can you help us with an area which has been little commented upon so far and that is the role of the national parliaments in the light of the Reform Treaty? What do you think that role is? Do you believe it to be significant? Given Mr Palmer's comments earlier about some national parliaments having members of the European Parliament join their scrutiny committees, how do you think it will affect this Parliament and the House of Lords in particular? Indeed, have you any advice to give us on how we might reform ourselves to take notice of this greater burden?
Mr Palmer: I am certainly being invited to tread where angels might fear to proceed! You will be aware, Lord Harrison, of the proposals which allow parliaments to flag up concerns at a much earlier stage and, frankly, a great deal will depend on the working relationship between individual national parliaments' scrutiny committees themselves to turn that right into something that is actually useable. The timing is going to be quite constricted, even though there are promises of much more direct advanced information on which to base possible concerns. The whole machinery of inter-parliamentary, national parliament cooperation needs examining urgently to allow national parliaments to be able to canvass and win support, if they so wish, for a sufficient number of national parliaments to send the appropriate signal to the Commission. As always on matters of the role of national parliaments, a great deal frankly is down to the way the national assemblies and national parliaments organise themselves. We have all been impressed with the case of the Danish *Folketing*. This is slightly a special case because until recent years it often had a different political majority than the majority of the parliament itself, which gave it an incredible sharpness of political purpose. There is a strong case for strengthening intra-national parliamentary liaison in order to mobilize the number of national parliamentary objections needed to require the Commission to justify its position or, in extremis, to justify itself to the Council. It may also involve looking again at how you can get the experience of European parliamentarians working as a multiplier in the national scrutiny process. It does, as I say, happen; it happens in the Bundestag, it happens in the Belgian parliament, it happens in one or two other national parliaments and apparently to their advantage.

Q35 ***Baroness Howarth of Breckland:*** I have been wanting to ask this question and it may be outside your remit but it fits in here. It is that communicating organisational complexities to communities is an extraordinarily difficult task. This national parliament, as you know, is in the middle of a debate and some people say there should be referendums and some people there should not be referendums because of the way the detail of the Treaty has or has not been communicated to the general public. That is also trying to get through the medium of those existing newspapers that there are. What role do you think that our parliaments should have in pursuing, helping the communities to gain a grasp of the very complex issues that we have been discussing this afternoon? How do you actually take some lead too from the European Parliament? What is their role in ensuring that national governments are helped with that issue?
Mr Palmer: You raise a question that in my different professional incarnations in the European scene has been a pressing and continuous problem. When you have the responsibility to try to communicate to a mass audience some of these issues—and they get more complex with time and not less complex—one realises what an enormous problem this is. I am struck by the attempts being made—the Commission has given support to this—to encourage citizens' consultative assemblies. This is an experiment which allows randomly selected citizens to come together to discuss big macropolitical and other issues of concern and how and whether the European Union should play a role in helping to resolve the problems. They have advice from experts but it is done in the context of concrete problems and policy issues. Too much of the debate is presented in an abstract fashion and this Treaty, with its mind-boggling cross-references, is incredibly difficult. Professor Chalmers and his colleagues no doubt delight in reading through this

stuff! The only way citizens can be better involved in European Union affairs is when the problems which the EU is designed to help to solve, the real world external problems, are brought into this debate. It helps if we discuss how else we can best deal with some of the issues around management of migration or transnational crime or some of the foreign policy issues or climate change. In this way it may be possible to try to connect again the concrete problems that people do understand with the procedural matters. Once they are separated out, it becomes an almost impossible problem.

Q36 ***Lord Wade:*** Will this Reform Treaty have any impact upon the future enlargement of the EU?
Mr Palmer: Not directly. My judgment is, from what I understand, that decisions about the next major phase of enlargement, which is the western Balkans plus or minus Turkey, will have to be taken somewhere in the middle of the coming decade, between 2012 and 2015. There is one exception to that that could prove to be Croatia which might come through in a slightly earlier timescale. We are in almost a ten-year hiatus in which we have to see to what extent this Treaty, as it comes into force, prepares the Union to be able to handle yet further members and, without extending this discussion wider than your question, what should lie beyond the limits of enlargement, which is a question that our political leaders have to confront very soon. I noticed the Foreign Secretary in a speech in Bruges seemed, according to some reports, to be opening up the possibility of a massive widening to the south as well as to the east. I am unaware of what studies have gone on as to the capacity of the Union in any reasonable timeframe to handle that. This Treaty will not hold up anything that is not anywhere being held up for other reasons. Croatia may come through sooner but we have to decide probably about six years after this Treaty comes into force, if it is approved, what our final decision is on the next Balkan plus Turkey enlargement.
Professor Chalmers: My understanding is exactly the same.

Q37 ***Chairman:*** This Treaty does provide on the other side of the coin the mechanism for getting out of the European Union, which is something new.
Professor Chalmers: Yes, it does.

Q38 ***Lord Roper:*** The question I should like to ask is on the implication of the Treaty for the reduction in the size of the Commission which of course was already in Nice. Do you think very much thought has been given as to how that will be done in practice?
Professor Chalmers: My answer is that I suspect not. The initial proposals in the Convention were for 15 Commissioners. This was seen as the ideal number when they thought about it. There is a little bit of a compromise that they have gone for two thirds of Member States, that is 18. How will it affect the reorganisation of the portfolios and the relevant power of the Commissioners? My personal view is that largely depends on the personality of the President of the Commission. 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.

Q39 ***Lord Roper:*** So there could be circumstances in which there would not be a British Commissioner?
Professor Chalmers: Yes. That also will affect perceptions of the Commission very strongly.

Q40 ***Chairman:*** May I ask you both just to comment briefly on the general bridging clause, that is to say the passage from unanimity decisions to qualified majority, from the special legislative procedure in other words, to the ordinary legislative procedure with no revision of the Treaty necessary. What is going to be the impact of that?
Professor Chalmers: My view is that it is going to be quite minimal. There was provision at Maastricht for moving things from one Pillar to another. My understanding of the provision is that individual national parliaments have a veto, so it will obviously avoid the necessity for a referendum but not much more. It may happen but, and this is looking into the crystal ball a bit, experience suggests that circumstances are likely to be far and few between.

Q41 ***Chairman:*** And the role for national parliaments?
Professor Chalmers: My understanding on looking at the provisions was that there was.
Mr Palmer: Yes, they can object and they can block under certain circumstances. May I say that one of the things I regret, as some people would have wished to happen, did not happen, that we drew some distinction between how we handle institutional change in future. Surely matters of genuine constitutional and major importance have to be handled through unanimity but there are all kinds of procedural matters, which currently fall under the unanimity requirement if not in future actually under an IGC as a result of this Treaty, which represent a needless impediment to the capacity of the Union to adapt sensibly to changed circumstances. I regret the concessions that were made to those who fear any change in this respect.

Q42 ***Chairman:*** In the remaining time would either of you like to make a brief comment on the significance in legal terms of adding a specific section on energy to the Treaty?

Professor Chalmers: My view is that almost everything that is there could currently be done by Article 95, the single market provision, or the environment provisions, and it is even set out that way. The real danger at the moment is the Commission is suggesting things such as the new energy regulator that might be even beyond the competence of the new Article 176(a). There is one issue maybe about security of supply that may not be currently covered by EC competence, but that is the only one.

Q43 ***Baroness Cohen of Pimlico:*** It sounds to me as though there ought to be more than that. This was a specific legal provision added about energy for the first time. I think you are saying that it does not really make a lot of difference.
Professor Chalmers: Yes, I am saying that. The experience of treaty reforms is that they develop new capacities under general headings. This happened, for example, with environment prior to the Single European Act, where most of the environmental legislation we have dates in some ways from that period. Then they codify it at the time. This is what has happened to energy. Just go on to the Commissioner's website or talk to Ofgem. We have had significant European energy legislation really since 1996 and the current raft of measures are very, very significant. They require, among other things, the breaking up of industries.
Mr Palmer: I entirely accept Professor Chalmer's expert legal view on this. Politically it is a signal that energy may well be the next big issue over the horizon. We are going to have to look at whether our government structures are adequate including whether a greater amount of energy policy needs to fall within the legal framework of Community law and Community decision making. After the European Council at Hampton Court, there had been an expectation that EU leaders might be a bit more ambitious in energy policy than turned out to be the case.

Q44 ***Chairman:*** Do you think that the solidarity principle which is enshrined in Article 100 might draw the Council further into the energy question since it presumably would be invoked at times when there are difficulties about energy supply which would bring the Council further into the argument?
Professor Chalmers: I defer to Mr Palmer. The argument is yes, but it is less a question of legal provision than political will. Almost the only thing you could say that was an extension was this reference to climate change in the Reform Treaty that had not been in the Constitutional Treaty and it does seem to be the topic of the moment. If they were not using this, they would probably be making extensive use of the flexibility provision. That is my feeling. I am not well placed to give an answer on how that develops.

Q45 ***Lord Powell of Bayswater:*** How significant do you think removal of free and undistorted competition from the objectives of the European Union in the Treaty is? It is now only in a protocol. In the past, the European Court has referred in its judgments to Article 3 to derive its judgments from the broader objectives of the Union. Do you think this will make a difference in practice, particularly to the European Court?
Professor Chalmers: Very briefly, obviously the protocol would have the same legal force but you have identified the nub of the problem which is that this provision has been used as an interpretive device. What I would say about that is that it has always been used to extend EU regulatory powers. It was used to generate a merger policy, it was used to generate new powers in the field of the single market and new Commission powers over public sector monopolies. How much more mileage that had, I do not know. It has never been used as a basis for a review, so maybe, but it was always a double-edged tool. It could be argued it has been used to suppress competition in some ways, if you wanted to say it that way.

Q46 ***Baroness Symons of Vernham Dean:*** Gentlemen, you have given us a fairly impressive *tour d'horizon* across a whole range of topics which we have raised with you. However, I come back to the point that you, Mr Palmer, made in your opening remarks and with which Professor Chalmers agreed, that the Treaty is much ado about not a great deal, a modest Treaty you said and Professor Chalmers said probably the most limited reform with some of the exceptions in the Treaty of Nice. Which of these institutional changes that we have touched upon do you think is going to impact the UK most?
Mr Palmer: In practical terms, I anticipate the UK will find that in most of the justice-related agenda it will be very strongly minded probably to opt in. Of course, it will be opting in in circumstances where it thereby loses its capacity to change its mind at a later stage in the process. In other words what I am saying is that politically most of the issues that appear to be coming over the horizon for discussion by the Council are issues where the UK Government, with one or two exceptions, is not minded to opt out; it is minded to exercise its right to opt in. That is the first point. There will be some political fallout around the Charter, especially if there is case law made that affects British citizens in other EU Member States. Overall the two big areas we have touched on are the position of the High Representative and to what extent this Treaty provides the muscle, the organisational coherence and will trigger the political will to make a success of common foreign and

security policy. That is one of the litmus tests of this whole Treaty. Finally, there is the European Parliament and the way in which this Treaty is likely to encourage the further politicisation of the European process. We are moving out of decades of something very short of politicization. This may create new problems, certainly it will create new opportunities for relating people to the European issues, if it becomes more a question of political choice, where people can feel they have a way of exercising judgment about all of these issues and not have them handed down from on top.

Professor Chalmers: It is a difficult question. On the first area I would actually agree with Mr Palmer. On the supranationalisation of what we currently know as the Third Pillar, I would imagine the UK will opt into cooperation on policing, judicial cooperation; the main things I suspect it will opt out of are minimum rules and harmonisation of criminal law and we are now opting into a supranational network. The second area that is significant, although I do not feel there has been a huge extension of qualified majority voting, the big challenge for the EU in the next ten years, is not going to be to develop 90,000 pages of more legislation but to manage the existing legislation it has and to get it down. To the extent that qualified majority voting has been extended in the single market, this will be significant. How significant, we do not know because the Commission made this big pledge to get rid of 25% of legislation and this has not worked. That is going to be the big challenge. It is going to affect everything else to the extent that where qualified majority voting has happened it could have possibly gone further and they could have made a distinction between new legislation and amending existing legislation; the two seem fundamentally different to me in terms of state sovereignty. That is where the significance of the Reform Treaty is: it is significant but not as significant as I would have liked it to have been.

Chairman: Thank you both very much indeed for your excellent evidence. This has given us a very good start and a framework for our continuing examination of this Treaty. We will be putting many of the same questions to other witnesses from the European Parliament, our own Parliament and from Government and other experts such as yourselves. Thank you very much both of you and we will send you the transcript as soon as it is prepared. We are very grateful to you.

Supplementary memorandum by Mr John Palmer

1. *What will be the impact of the Reform Treaty on the structure of the Treaties? Is the revision of the content of the TEU significant?*

I regret the form chosen in the Reform Treaty of substituting amendments to existing treaties for a new but integrated text. This does, indeed, make the resulting documents virtually unreadable. I would much have preferred a new comprehensive treaty. Leaving aside issues of content, I found the Constitutional Treaty a more coherent document and accessible to the interested public.

Taken in their totality the contents of the Reform Treaty represent a modest reform of the EU institutions and decision making processes. My reservation is that the preservation of the national veto in critical areas of policy—notably the economy and foreign policy—will not be in the best interests of the Member States in the longer run.

2. *What will be the practical effect of conferring legal personality on the Union?*

A legal personality has been conferred on the European Community since its foundation. This has enabled it to conclude hundreds of agreements with third countries and international organisations. Giving the EU a legal personality will enable the Union to operate more effectively internationally. Giving the EU a legal personality will enable to it to accede to the European Convention on Human Rights.

3. *The Treaties will contain the statement of competences (Arts 3–6 of TOFU). Will this be helpful, and in what contexts? Are there significant extensions of legislative competence?*

The new statement will provide a clearer definition of the competences of the EU without adding any new fields of responsibility. Indeed an additional declaration added to the RT underlines the limitations on the EU's competences. The new language to describe decision making terminology "laws" and "framework laws" is helpful. Of course under the principle of "conferred powers" the Union only has the competencies which have been bestowed on it by the Member States.

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The only significant area for the extension of competencies are Climate Change—something strongly advocated by the UK government—and in immigration, security and cross border crimes—where regrettably—the UK has retreated to a right to "opt in."

4. *What will be the main changes relating to the European Council? What will be the relationship between the President of the European Council and team Presidencies in the Council of Ministers?*

The appointment of the new President of the European Council is not a completely new development. The extension of the period of office of the President from the traditional rotating Presidency term of six months to two possible terms of $2\frac{1}{2}$ years should help with the preparation of the European Council, the identification of its priorities and—critically—with follow up implementation of decisions by Heads of Government.

However, there are no clear answers at present to how this will function in practice. This is something one would expect to be the subject of a subsequent decision by the Council of Ministers. One particularly sensitive questions relates to the international representation of the Union where the new Team Presidencies (responsible for the running of most Councils), the President of the European Council, the President of the Commission and the new High Representative for Foreign and Security Policy have international roles. In my view—in the longer run it may be sensible to create a single President in the same way as the High Representative has been created—that is to say with a "double accountability"—depending on the issue in question—to the Commission or to the Member States for matters of inter-governmental cooperation.

5. *What will be the impact of the Reform Treaty on the role and functioning of the Council of Ministers? Is the new system of qualified majority voting (double majority 55–65%) likely to be significant in practice? How do you see the new "double-hatted" post of High Representative working?*

Within the context of its basically modest provisions the Reform Treaty should help make the work of the European Council more effective. Much depends on what support the new President has at his/her disposal. All forms of QMV have been shown to assist in decision making—even where, formally, unanimous consensus is still the final outcome. The delay in introducing the "double majority" reform to possibly 2017 is greatly to be regretted. In the longer run the Square Root principle might prove be the optimum system for a final resolution of voting weights.

As far as the High Representative is concerned, much depends on the quality of who is appointed but, above all, on the degree of political will among Member States (notably the largest) to make the CFSP objectives a reality. The development of the External Action service should improve the quality of the information and analysis available to the High Representative in preparing CFSP proposals.

6. *What will be the impact of the Reform Treaty on the European Parliament? How extensive are the Parliament's new legislative and other powers? What might the impact of those powers be on the EU and in particular the UK? (with particular reference to (a) the move to co-decision in agriculture and fisheries, and (b) the amendment to the budgetary procedure)*

The European Parliament has emerged with greater powers and potentially greater influence. However there remains a worrying "grey area" in terms of democratic accountability where neither the European Parliament nor national Parliament at present exercise adequate effective control. These areas include CFSP, external security, some important aspects of police and judicial cooperation and defence). This is a consequence of the continued use of "inter-governmental cooperation"—rather than the supra-national "Community method"—in these areas.

The extension of co-decision to agriculture and fisheries should strengthen those working for reform and greater environmental sustainability. The impact of the European Parliament on the wider budget is more difficult to predict. It is likely to support those arguing for substituting a more transparent EU tax for existing Own Resources on the revenue side and for an increase in the current revenue ceiling.

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7. *What will be the impact of the Reform Treaty on the role, functioning and membership of the European Commission?*

The reduction in the size of the Commission will be politically sensitive but it should improve the cohesion of the "College" of Commissioners. However a much bigger issue—the de facto trends "politicising" the Commission is not dealt with in the Reform Treaty. Given the enhanced need for a strong President in these circumstances it is essential that the democratic legitimacy of the Commission President is strengthened. The RT makes it possible for the emerging European political parties to contest the next EP direction election in June 2009 with their own candidates (and programmes) for the Commission Presidency. Of course the successful candidate could not secure office without a consensus commanding an EP majority after the election.

8. *Are there any major changes affecting the jurisdiction of the European Court of Justice? What is the Court likely to make of the UK Protocol on the Charter of Fundamental Rights?*

The abolition of the pillar system and the "communitarisation" of aspects of justice and home affairs will increase the scope of the ECJ's jurisdiction. As far as the Charter of Fundamental Rights is concerned the UK government's stance lacks credible justification. Of course British citizens living in other Member States will be able to make full use of the Charter in recourse to the ECJ. Moreover it seems inevitable that the ECJ will over time develop jurisprudence in the field of fundamental rights by reference to the Charter. In this context the UK protocol may not be as water tight as is suggested.

9. *How significant is the role given by the Reform Treaty to national parliaments, and in particular to this Parliament and this House?*

The provision allowing one third of national Parliaments to force the Commission to reconsider a proposal (and one half of national Parliaments to force the Commission to justify its proposal under "subsidiarity" to the Council of Ministers and the European Parliament) is important and the extra time for consideration of proposals useful.

The capacity of national Parliaments to exploit this opportunity will critically depend on the speed and expertise of their own capacity to hold governments to account and the strength of the network linking national Parliaments where questions of subsidiarity and proportionality may be in question. More worrying is the dubious capacity of all Parliaments to hold the executive to account when Member States act through inter-governmental cooperation. This capacity can only be improved by a greatly enhanced cooperation between the European Parliament and National Parliaments. Both houses of the UK Parliament may wish to consider admitting British MEPs as non voting members of scrutiny committees to strengthen available expertise. This has been successfully implements in some EU Member States (ie Belgium and Germany).

10. *Will the Reform Treaty have any impact on future enlargement of the EU?*

Not directly. I do not anticipate further accession decisions much before the middle of the next decade (with the possible exception of Croatia). That is when decision will have to be taken about the potential applicant states of the western Balkans and Turkey. The big issue is what the eventual limits of accession should be in future. The Foreign Secretary seems to think that eventually the EU might offer membership to counties in the Mediterranean and the Middle East. To the east states still hope for eventual accession as far as the Caucasus. The issue of Russia's final relationship with the EU remains completely uncertain. In my view neither full membership for all these possible candidates nor the relationships envisaged by the current European Neighbourhood policies provide an adequate route map for the future. I have suggested a possible third alternative at a previous hearing of this Committee on the proposed Constitutional Treaty.

11. *How important are the simplified revision procedure, and the other passerelles included in the Reform Treaty, likely to be?*

The simplified revision procedure and the *passerelles* are not very important since they all depend, at some stage, on decisions taken on the basis of unanimity (therefore subject to a national veto). I regret this and would have preferred a simpler process for deciding future institutional reforms which would have left on a limited number of clearly constitutional matters to unanimity.

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12. *In your opinion, which of these institutional changes are most significant for the UK?*

The strengthening of Common Foreign and Security Policy through the new "double hatted" High Representative and the creation of the European External Action Service are significant. But these institutional developments still critically depend on the political will and the political unity of Member States in making the CFSP and the new CSDP are reality. The decision to "communitarise" climate change decisions and some areas of Freedom, Security and Justice is also very important.

13. *Can you explain to us the significance, in legal terms, of adding, for the first time, a specific section on Energy in the Treaty?*

It is recognition of the critical priority which will probably have to be given to this issue in future. My belief is that there will be support to bring at least some key aspects of energy security into the Community legal process in future.

14. *How will the Protocol on Services of General Interest impact on the making of EU policy in this area?*

I have no clear view on this. It may strengthen those who wish to better balance concerns about social and competitiveness issues involved in the regulation and liberalisation of such services.

15. *To what extent is it important that the EU's commitment to "free and undistorted competition" is contained in a protocol rather than as part of the treaty itself?*

I do not see this is significant in any legal sense.

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Supplementary Memorandum by Professor Damian Chalmers

Inquiry into the Impact of the Reform Treaty on the Institutions of the European Union

With your permission, I would like to add two further observations in addition to the oral evidence I presented to the committee.

1. I was asked about the new structure of the Treaties and, in particular, the relationship between the Treaty on European Union and the new Treaty on the Functioning of the European Union. If I understood the questions well, there was a concern that there was a risk of a prioritising of the former and its broader principles over the detail and checks of the latter. In my oral evidence, I thought the risk was very slight indeed. I would re-emphasise that with an observation that I did not make at the time. The 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.

2. We were asked a question about the role of national parliaments post the Reform Treaty. This was one of the few questions I did not address with Mr Palmer providing the oral evidence there. I do have strong views, however, particular about the new eight week period of notice that is to be provided to national parliaments before a matter is placed on the draft Council legislative agenda.

The first observation is that this is very little time indeed. It is the same period as granted by the Commission to private parties to make written observations under its consultation procedures (EC Commission, *General principles and minimum standards for consultation of interested parties by the Commission* COM(2002)704). National parliaments are both more significant than private parties and have greater organisational responsibilities. I am not clear why they are treated as equivalent.

The second observation is that the recent enlargements have fundamentally reshaped the structure of the legislative process under co-decision. The pressures of such a large number of States and parties has led to a priority being given to reaching agreement immediately after the first reading of the European Parliament. The figures are that 170/228 (74.5%) of dossiers have been agreed at first reading since the 2004 enlargement (until July 2007), whilst before it was 146/413 (35.4%). This recharacterises the nature of the eight week period. *In most cases, it is not eight weeks until the Council first considers it, as a formal reading of the Protocol might*

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suggest, but eight weeks until the measure is agreed and the legislation adopted. This makes the period of eight weeks look even more unsustainable in terms of securing effective national parliament involvement.

I would make two possibly presumptuous suggestions as a consequence. The first is national parliaments must insist that they are more actively involved and have more entitlements in the Commission's initial consultations, if necessary before it does its impact assessment and certainly by the time it launches the formal consultations prior to a formal proposal. After this period, the only possibility for effective voice, and this is the second proposal, is through the building of structures between this parliament and the respective European Parliament committee which require the latter to consider this parliament's views and, where they have not been given to the Committee but the matter appears significant, to solicit actively these views.

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Supplementary notes by Professor Damian Chalmers to clarify his response to Q18

The new voting arrangements stipulated in the Treaty of Lisbon do not fully come into effect until 1 April 2017. Assuming entry into force of the Treaty on 1 January 2009, this is a period of over eight years. It is questionable in the light of the history of the EU whether such a period should be labelled transitional as voting weights have changed so regularly because of either enlargements, Treaty reforms or conventions (eg Luxembourg accords). History would suggest that voting weight agreements are more contingent than some argue, and would be affected heavily, in particular, if Turkey were to accede before 2017 or there were to be some political crisis such as that precipitating the Luxembourg Accords. It is therefore perhaps better to see the transitional arrangements as the voting weights for the foreseeable future and the provisions set out in Article 9C(4) TEU as something to which the Union MIGHT eventually move.

Following the Declaration, one will still need a minimum of three states to lead an agreement to continue discussion on my reading as one of the formal requirements. Any combination of three: the top seven States in population terms will meet the blocking requirement (the three least populous (Spain, Poland, Romania) come to a combination of over 20%). The more interesting scenario (and more usual) is when one of these States does not want to do this but wants a blocking minority with other States. The question is how many does it need. Germany needs to get a further 2.15% of the population. To have a coalition involving just three States, it can use any State > or = Hungary (2.1% of the population and 13th place) + any other State. Alternatively, it can use Slovakia and Finland (1.1% of the population and 18th & 19th place). The probability is that Germany will always just need two other States therefore to form a blocking coalition—the population requirement, in most cases, is superfluous.

In the case of the UK, the situation is different. It needs a further 7.05% of the population. If it forms a coalition with one of the other top six states, it will always get this, and will thus need a coalition of it plus two other States. It will get this if it forms a coalition with Romania and Netherlands together as they come to 7.9% of the vote. Otherwise it will need at least three other States and to be part of a coalition of at least four States. Greece is next with 2.3% and it plus Romania (the seventh biggest state and 4.5% of the population) do not reach 7.05%. In fact, if it wants a coalition made up of States that do not come in the top nine largest states, it will need to be a part of a coalition of five States. This will also usually be the case if it wishes to be part of a coalition involving Netherlands or Romania and no State above them in the population league.

February 2008

TUESDAY 27 NOVEMBER 2007

Present	Dykes, L	Roper, L
	Grenfell, L (Chairman)	Sewel, L
	Kerr of Kinlochard, L	Symons of Vernham Dean, B
	Maclennan of Rogart, L	Tomlinson, L
	Mance, L	Wade of Chorlton, L
	Plumb, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr David Heathcoat-Amory, a Member of the House of Commons, Lord Leach of Fairford, a Member of the House, Chairman of Open Europe, and Mr Neil O'Brien, Director of Open Europe, examined.

Q47 ***Chairman:*** Before I formally welcome our witnesses, may I draw your attention to the declaration of Committee Members' interests that you have before you. Having dealt with that formality, may I say how pleased we are to see David Heathcoat-Amory, Lord Leach of Fairford and Mr O'Brien. We are also very happy that sitting behind them is Derek Scott, who is the Deputy Chairman of Open Europe. Mr O'Brien is the Director of course and Lord Leach is the Chairman. I should add that Mr Heathcoat-Amory is a distinguished member of the European Scrutiny Committee in the other place and he will be speaking in a personal capacity here this afternoon. This meeting is on the record. You will be sent a transcript for checking as soon as possible following this session, in the next few days. Thank you all again, for being with us. May I ask if any of you would like to make an opening statement before we go into questions?

Lord Leach of Fairford: I would like to say a word about Open Europe's approach to the Reform Treaty. It is guided by two main principles: that political structures should be built on democratic assent and that free markets are the key to competitiveness. The Laeken Declaration that launched the Constitution suggested addressing the democratic deficit by bring decisions closer to the people. In the event, however, the Constitution and its successor, the Reform Treaty, pursued the centralising course that had caused the democratic deficit in the first place. Additional competences are transferred to the EU; pillar compromise, some would say pillar collapse, puts the Union into policy areas once reserved for the Member States; and the ability of Member States to block legislation, though not to pass legislation, is reduced. The provisions to involve national parliaments are essentially a mere tokenist step towards devolution. The defining ingredient of democracy is reversibility—the right to replace legislators at elections and to repeal laws that prove defective. This ingredient is lacking in the Union's structure and the Treaty does not offer reform. Turning to free markets, the Community's golden economic period was when it was dismantling internal and external trade barriers. Recent times have seen a somewhat less liberal approach, with excessive regulatory harmonisation within the Union, accompanied by increasing protectionism abroad. The Treaty, with its symbolic downgrading of undistorted competition and its opening of new avenues for legislation, sends a regressive message to citizens already overburdened with regulation. The Government claims that our red lines protect us from some elements of the Treaty, but this ignores the lesson of history. From Van Gend en Loos in 1963 onwards, the Court of Justice has consistently taken an activist view of European law, expanding its scope beyond what can be derived directly from the text of the Treaties. Readiness and ability to circumvent our red lines are in the DNA of the Union. Remember the Working Time Directive, brought in through Health and Safety despite our opt-out. This brings me to a final principle, that electoral promises should be honoured. All the main parties promised a referendum on the Constitution. The then Prime Minister said it was unthinkable, if it was defeated, to just change a few things and bring it back, but that is exactly what is now proposed. Research shows a 97-98% identity between the Constitution and the Reform Treaty. The only reason the public is not to be offered a referendum is that the Government expects defeat. Such cynicism may buy a temporary reprieve for the Treaty, but it is another nail in the coffin of public affection for Europe and public confidence in our own political standards.

Q48 ***Chairman:*** Thank you very much. Before calling on Mr Heathcoat-Amory, may I just state that the purpose of our inquiry in this Select Committee is to look at the institutional reforms and what the impact is going to be. It would be fair to you for me to say right away that we are not planning to engage you in a discussion as to whether or not there should be a referendum. It is not in our terms of reference but that is in no way to suggest that you

should not have had your say. I want to make that point clear at the outset.

Mr Heathcoat-Amory: I would like to extend a point made by Lord Leach about the Laeken Declaration because it was that that launched the reform process. The Heads of Government meeting in Laeken in 2001 required that the Convention on the future of Europe designed a Europe that was simpler and more democratic and "closer to the citizen", an accordant phrase. In my judgement, neither the Convention nor the documents subsequent to it discharged that mandate, but at least the Constitutional Treaty did have one simplifying element in it, which was that it merged the two existing Treaties; that is to say the European Community Treaty and the Maastricht Treaty or European Union Treaty, and it merged them into a single text. Although it was fantastically complicated and far too long, at least its structure was an attempt at simplification. The Reform Treaty which we are now considering does not do that. It retains the two-treaty structure. When one hears people saying that the constitutional concept has been abandoned, that is true only in the sense that a single unifying text had been abandoned. So the result is an attempted amendment of the existing Treaties. It is now fantastically complicated, a document that is really only accessible to lawyers and politicians. The instruction to bring in the public and engage them and get them to understand what is happening in Europe in my view has completely failed. Meanwhile, the substance and legal effect of the Reform Treaty is very similar to the Constitutional Treaty, as is easily shown by a comparative table of the Articles in the two Treaties. All the centralisation and the transfer of powers that I have long objected to are still present in the document we are considering. I think one reason for the complexity is actually the process whereby it was adopted this year. Just to remind the Committee, the European Council meeting on 21 June effectively decided the Treaty politically, but the document on which it did that was only available to Member States two days before, when the German Presidency produced the draft mandate on 19 June. Not only the public but all national parliaments were completely cut out of that process. If they had not been, I think there would have been more incentive, more pressure, on the drafters to make it accessible and comprehensible to at least parliamentarians. I think it is a failure of process as well as substance. My last comment, if I may, my Lord Chairman, is over the institutions because your inquiry is specifically about that. All of them gain powers under the Treaty. I saw the process at work myself in the Convention, which very rapidly became a kind of institutional bargaining session whereby well organised Commissioners and Members of the European Parliament tended to see the process in terms of their own institutions. The only group that was disorganised was my own, the national parliamentarians, because we did not know each other; we had no unifying agenda. Perhaps it is national parliaments that are the losers. Certainly all the institutions we will be considering soon I think are gainers, and the losers are national parliaments and, I am afraid, the public. My main point I would want to emphasise is that it is a very serious defect in any treaty that it is not understood by the people who are bound by its provisions. I think we are beginning to slide into a system whereby the very legitimacy of the laws and directives will be under question because people not only do not understand it but they are still baffled by who makes these laws and to whom are they accountable.

Q49 ***Chairman:*** Thank you very much. One of the points that has been made I will just make a very brief comment on, and that is that you were mentioning the very unsatisfactory process that followed the IGC through with the very short timing allowed of 48 hours. I think that we fully agree with you there because we did in our interim report on this note that this should not be repeated in future IGCs, so we are at one on that. Would Mr O'Brien like to make an opening statement? You do not. We can go straight into questions. We leave it to you to decide who will answer the questions; one or all of you may do so, bearing in mind the fact that we have quite a lot of questions to get through and only just under an hour and a quarter in which to do it.

Lord Leach of Fairford: We will probably normally just reply with one of us so as to save time.

Q50 ***Chairman:*** That is very helpful. The first question that we have for you is on the restructuring of the Treaties and whether you think that the division into a Treaty of the European Union and a Treaty on the Functioning of the European Union has clarified or made more difficult our understanding of the Treaty. Secondly, do you feel that there is greater significance in the fact that the objectives are now all in the TEU and the Treaty on the Functioning therefore becomes subordinate to the TEU, and whether you have any comments to make on this structure.

Mr Heathcoat-Amory: I only comment that perhaps the most prominent change to the Treaty on the European Union, the successor to the Maastricht Treaty, will be the collapse of the pillars. The pillared structured that came out of Maastricht will only persist in some form as regards common foreign and security policy. Matters of criminal justice and policing, which are at present in the third pillar, will go formally into the other treaty. This is important

because those policies will therefore be subject to majority voting instead of unanimity at the minute, and also will come under the jurisdiction of the European Court, and the Commission will be able to launch infraction proceedings against Member States. In this very delicate and important area of criminal justice where we are talking about the coercive power of the state in its various forms, the definition of penalties and so on, I think it is a very big change that that should cease to be intergovernmental and should become a mainstream European Union activity.

Mr O'Brien: May I add a little to re-emphasise the practical importance of the collapse of the Third Pillar? It is simply to note that our own Government for a long time were opposed to giving the Court of Justice jurisdiction over the Third Pillar. Back in 2000, the Government argued: "The Government does not accept that we should agree to extend the full ECJ jurisdiction over the very sensitive areas covered by the Third Pillar. These raise sensitive issues relating to national sovereignty . . . ." Even last November, November 2006, Geoff Hoon told the Lords European Union Committee: "There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity for further complicating our existing asylum and immigration processes." So these are not just technical movements between pillars; they have very important practical effects for our criminal justice system and also our asylum and immigration system.

Chairman: Thank you very much. I think we will come back to that. Could we go on then to the question of the conferral of a legal personality on the Union?

Q51 ***Lord Wright of Richmond:*** Mr Heathcoat-Amory, you referred in your introduction to the legal effect of the Reform Treaty, and Mr O'Brien has just talked about practical effects. Would one of you like to give us a view on the practical effect of conferring a legal personality on the Union, particularly in the area of foreign and security policy?

Mr O'Brien: This is something that the UK Government has traditionally always resisted. Back after the signing of the Amsterdam Treaty, Tony Blair made quite a point of having said that we had resisted this attempt to go for the single legal personality. He said: "Others wanted to give the European Union explicit legal personality across all the pillars of the treaty. At our insistence, that was removed." Peter Hain said during the European Convention: "We can only accept a single legal personality for the Union if the special arrangements for CFSP and some aspects of JHA are protected." I think the worry that the Government has had about this is that if the Union gets into the business of signing treaties in both the JHA and the CFSP 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. I suppose it also has practical implications in terms of the long-running debate about single external representations for the Union in various international bodies because if you have mixed competences at the moment, it is very hard to have a single representation, be it in the UN, the IMF or the World Bank. Those are the two main practical effects. You could have, for example, the Union making a treaty to do with justice and home affairs and that having internal implications in the UK.

Q52 ***Lord Wright of Richmond:*** Can I make a comment on the Annapolis conference that is going on at the moment in which both the EU and the United Kingdom are represented? It is an example where both can be properly and fully represented. I just make that point.

Lord Leach of Fairford: Could I just add one word here? This has always been regarded as a matter of immense symbolic importance. I am not sure it does not go back to Spinelli; it certainly goes back a very long way. It has always been resisted by some governments including the British Government and been proposed by the most ardent integrationists. I do not believe one should overlook the symbolic effect, though I realise the question is specifically addressed to the practical effect.

Q53 ***Chairman:*** We are clear, are we not, that in any case where the European Union speaks with one voice in a multilateral institution, it can only do so where there has been a declared consensus amongst the Member States that that policy be enunciated by their representative?

Mr O'Brien: During the negotiations in the Convention, take the vexed issue of the Foreign Minister or High Representative who has the right to speak on the behalf of the UN: first during the Convention the Government tried to have that right to speak on our behalf on issues where the Union has defined a position deleted. Then when it failed to be deleted, the Government tried to get the wording changed so that it would say that the Union Minister for Foreign Affairs could request to speak on behalf of the Member States which had seats on the UN Security Council. That model of requesting to speak strikes me as a better one than that of automatically speaking. I think that is pretty clearly what the UK Government would really have liked. I think there is a difference between having the option of working

together and being forced to have a single position, if you see what I mean.

Q54 ***Lord Roper:*** Would there not have to be unanimity in the Foreign Affairs Council before the European Union could receive a mandate to negotiate a treaty?
Mr O'Brien: One of the interesting questions about the Treaty that follows the Constitution is the whole issue of majority voting on proposals from the High Representative, as he is now known, because the way the process works is that by unanimity the Council asks the High Representative to make a proposal. Then when that proposal comes back, you are into majority voting on it. The problem there is that you as a Member State sign up in principle to something, say a position on Darfur, but then when the proposal comes back, you do not like it but then you are into qualified majority voting and you could be out-voted.

Q55 ***Lord Roper:*** We are talking about the point you are making about the legal personality having the right to negotiate treaties. As far as this is concerned, would there not have to be unanimity in the Foreign Affairs Council before the European Union could start negotiating a treaty?
Mr O'Brien: It is not clear to me from reading the Treaty whether or not international agreements are one of the things you could do using this power of QMV on proposals from the Foreign Minister or not.

Q56 ***Lord Roper:*** The High Representative?
Mr O'Brien: I am sorry, the High Representative.

Q57 ***Lord Roper:*** But he could only bring those proposals forward if he had received a mandate from the Foreign Affairs Council to bring such a proposal forward, I think.
Mr O'Brien: I am not sure that that is true.

Q58 ***Lord Roper:*** I think you should re-read the Treaty.
Mr O'Brien: I am just giving you my honest opinion about this rather than trying to make a point.
Mr Heathcoat-Amory: I do not want to over-state the significance of the EU having a legal personality. After all, the EC has one at the minute. I think it has an important symbolic significance. It will encourage the European Union to be seen and to try and be seen on the international stage as a unit replacing Member States. It is quite interesting that Article 6 says that the European Union shall accede to the European Convention on Human Rights. At the minute, there is no provision for non-states to do that, so it is quite clearly foreseen that the European Union shall accede to a body in that sense like a state. I think what is also significant is Article 3 of TFEU, which gives to the Union, or will give, exclusive competence for the conclusion of an international agreement in a number of eventualities, but including, "in so far as its conclusion may affect common rules or alter their scope". It is not very good language but what this means is that where the Union has internal policies for things, shall we say, like climate change or alternative energy, it gives them not just a right but exclusive competence to decide international agreements on behalf of Member States in that policy area. So we would actually be prevented from signing international agreements on matters on which the European Union has domestic competence. I think that is actually quite a significant extension of its international part for which its legal personality will be more important.

Q59 ***Baroness Symons of Vernham Dean:*** Can I ask about what Lord Wright mentioned a minute or two ago, Annapolis at the moment? Is it in your view detrimental that we operate on the Quartet through the EU? There is currently an arrangement where on this occasion there is some representation of the United Kingdom too but when the Quartet meets over the Middle East Peace Process it meets as the United Nations, the EU, the United States and Russia. Is that arrangement something that you disapprove of or think is an ill-founded arrangement?
Mr Heathcoat-Amory: Speaking for myself, I am an internationalist and I believe that Britain must have a formal position in as many international bodies as we can and try to project ourselves internationally. In many cases it is extremely useful that we have an intense relationship with a number of continental European countries in order to assist this. It may well be that on occasion the European Union should come together and speak with one voice, but what the Treaty does is that it mandates this and it will progressively exclude the possibility of Britain having bilateral agreements over a range of policy matters with other countries. I think this is a denial of choice and it is that choice that I think is very important if we are to have an independent foreign and security policy, which the Government assures us we will have, in parallel with working in the European Union. I think, frankly, the text of the new Treaty puts that in doubt.

Q60 ***Chairman:*** But does not the text make clear that states remain entirely free to conclude international agreements provided they are compatible with the agreements signed by the EU or within the EU's competence? So what you are saying is that if that is the case, then there may be occasions on which Britain may want to sign an agreement which is not compatible with one it has already signed which was

agreed to by unanimity within the EU? It would seem a rather strange case to imagine.
Mr Heathcoat-Amory: Occasionally I want to make agreements which are incompatible with other people's views. I think this is the definition of freedom. Also, I instanced Article 3, which clearly gives the Union exclusive competence in international agreements. That does mean that we can therefore only have agreements if the European Union collectively agrees that we should. I think this is quite a big restriction on what is or should be an independent, free national policy.

Q61 ***Lord Roper:*** With respect, Article 3 is not referring to CFSP matters; it is referring to matters which at the moment are the responsibilities of the Community rather than of the Union. That is therefore presumably only a codification of what is the practice at the moment.
Mr Heathcoat-Amory: Yes. I am using foreign policy in its very general sense to include all international agreements because, after all, it could easily be said that in matters of climate change, it is a feature of our foreign policy that we do or do not sign Kyoto style agreements. I do not wish our policy in that matter to be exclusively conducted through a policy which by definition we do not control.
Chairman: I think that has brought us well into the question of on competences. Maybe we can explore this a bit further.

Q62 ***Lord Kerr of Kinlochard:*** One of the bits that has certainly survived from the Constitutional Treaty, and from the Convention, is the articles making explicit the principle of conferral and classifying into three categories the various forms of competence. This was not particularly popular with all members of the Convention at the time: indeed it was sharply attacked by what we might call the federalist wing of the Convention. Is it one survival from the Constitutional Treaty which you, Mr Heathcoat-Amory, are still happy to see, or have you gone off it?
Mr Heathcoat-Amory: My Lord Chairman, I defer to Lord Kerr's knowledge of a lot of this because he wrote the Constitutional Treaty of course, but on the matter of division of competences, I have never myself asserted that we have a federal system which is comparable or similar to, say, the American system. I always thought it was particularly bizarre when President Giscard likened himself to Thomas Jefferson. The systems are entirely different, except perhaps in this, that there was an attempt in the Constitutional Treaty, which is carried forward into the Reform Treaty, to divide and distinguish competences or, to use an English word, powers. That could be useful, which is why it is in essence constitutional, but in my view it fails because the division is really entirely on the terms of the European Union. To give an example, there is a very long list in the Treaty of shared competences. I did not welcome this because 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.

Q63 ***Lord Kerr of Kinlochard:*** Forgive me, it is not exactly in that area that the position is clarified? To the extent that the Union has legislated, the Member States have agreed that they will on that specific subject and to that specific extent not pass laws in conflict with those of the Union, but in the rest of that area the competence will remain shared.
Mr Heathcoat-Amory: I hope that Lord Kerr is right on that. Referring to the text, it says: the Member States shall exercise their competence to the extent that the Union has not exercised its competence. The definition of "competence" seems to me to be very broad because the list of competences does not refer to individual legislation or directives but to areas as broad as internal market, social policy, economic social and territorial cohesion, environment, transport and energy.

Q64 ***Lord Kerr of Kinlochard:*** With respect, does that not prove my point? Nobody is saying that the United Kingdom cannot pass social policy legislation because the EU has for some time had a competence in social legislation.
Mr O'Brien: One of the practical uses of this division of competence is going to be in court cases, and the problem is it is going to be for the European Court of Justice to decide on these things. I think overall the whole issue of the division of competence is a good example of how good intentions at Laeken went bad. We wanted a division of competences in the UK in order to prevent competence creep but the way in which the sharing of competences has actually worked out was a long way out of line with the UK Government's view of what the existing position is. As you will remember, during the European Convention, the UK Government made 12 separate unsuccessful attempts to change or delete elements of these Articles. For example, it complained that competition law is not an exclusive competence. It asked for various of the other shared competences to become national competences. It also objected to the fundamental structure. The UK tried to delete the whole idea of shared competences because they are potentially in the future more trouble than they are worth in court. If you think about court cases in the

future, like the Environmental Crimes ruling from October 2005, where the scope of the European Union Commission's ability to pass criminal laws is now really only determined by a view of where its competences are, it will be up to the court to decide what its competences are. It now has this whole ream of text, four sides of A4, explaining in very vague terms it will be for it to interpret what these competences are, and also the division of competences is set out in a way with which the UK fundamentally does not agree. Will these Articles have no effect whatsoever? I do not believe that they will not. I believe that these Article will increasingly be used by the Court of Justice in making quite contentious legal rulings. It is certainly clear to me that these Articles have been drawn up in a way in which the UK Government did not like.

Q65 ***Lord Kerr of Kinlochard:*** I was just going to ask Mr O'Brien if he has noticed the principle of conferral, which makes it absolutely explicit that where powers are not conferred on the Union, they remain with the Member States? This of course was always the case, always implicit, but now explicit. That principle will apply in what he is describing as an extremely dangerous grey area. I do not see the danger. And it seems to me the area is less grey because it is clearly defined, in that new classification, as an area where the powers of the Union are applied only to the extent that the Member States decide that they should be, on each of these listed subjects.
Mr O'Brien: All I can really say in answer to that is that you may believe that but the UK Government certainly did not believe that, and it objected and found the idea of these shared competences dangerous.
Chairman: It seems we have a difference of opinion on various shades of grey.

Q66 ***Lord Sewel:*** I am just seeking to clarify Mr Heatcoat-Amory's position on shared competences. Do I take it that what you are saying is that your proposition is that say in social policy, if the EU decided to exercise its competence in the area of social policy on a minor inconsequential matter of policy, then the effect of that would be that Member States would lose all competence to act in the area of social policy?
Mr Heathcoat-Amory: Whether there is all competence in the area remains to be seen but certainly reading the text as it is, it does say that, "Member States shall exercise their competence to the extent that the Union has not exercised its competence".[2] The word "competence" is very general. I would understand if the rules said that in a specific area if the Union had passed a law, you obviously cannot have a Member State passing incompatible laws—that is obviously sensible and longstanding—but I think this goes substantially further by reserving for the Union a wider area, they call it a competence. If you look at the definition of "competence", it is very, very wide, and the list here of 11 policy areas is not exclusive; it only says "in the following principal areas". There may be very wide areas of policy making which could be reserved for the Union if they moved into that area. Of course, we do not know; we are in the hands, as Mr O'Brien has said, of future judicial decision, but I think it is very dangerous in a document that is supposed to bring certainty and clarity. We are saying to the people we represent, "Here is a document that removes the ambiguities. There will be no more mission creep. This will show exactly who does what", but in my view it does not because the ambiguities and the apparently wide areas could be reserved for Union activity in the future, in addition of course to the list of exclusive competences which themselves go rather wider than the status quo. We know, for instance, that the British Government objected to the inclusion of competition rules as an exclusive competence, but it is in the text.

Q67 ***Chairman:*** I notice that you have not referred to Protocol 8 when it was introduced at the insistence of the Czechs, which reads in relation to exercising shared competences: When the EU carries out an action in a certain area, the scope of its competence covers only the elements governed by the Act in question and does not therefore cover the whole domain. That would seem to clarify it.
Mr O'Brien: I think the problem with what the Czechs have got there is really just re-stating the problem because the idea of the area is not defined there in any way. The European Court of Justice has a very clear view on the Council acting within the scope of community law, and that includes things like derogating from Community law. So once again because the idea of area is ill-defined even in the new Czech thing, 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.
Chairman: I take a rather different view, I am afraid. I think the Czech Protocol is very clear, that it makes a clear distinction between the Act in question and not covering the whole domain.
Lord Mance: I am going to ask whether the Lugano opinion in relation to civil jurisdiction and judgements was relevant in this connection. That is where the European Court said that because the Community had reached inside Europe a comprehensive scheme regulating civil jurisdictional judgments that external jurisdiction was a matter for the exclusive competence of the Community because

[2] *Note by the Witness:* Article 2(2) TFEU.

there was an impact, one could argue I think quite a small impact, in a few areas on the internal scheme. So that individual states did not have a right to take part in negotiations. That might be an area where I could see a problem arising, once you got a scheme and then, if there is some small cross-relevance with a proposed external scheme, nonetheless it is exclusively a matter for the Community.

Chairman: Thank you very much. Lord Wade, would you indulge me: I think that we have probably covered competences.

Lord Wade of Chorlton: I was going to suggest exactly the same thing, my Lord Chairman. I think we have taken this matter as far as we can.

Q68 ***Chairman:*** We may proceed to the changes relating to the European Council and the rather problematic relationship between the President of the European Council and the presidency in the Council of Ministers. Would one of you three like to tell us what your thoughts are on that?

Mr Heathcoat-Amory: I will start off on the European Council. It is given an enhanced status. Indeed, it becomes a formal institution of the Union and it is in the Treaty that it will meet four times a year. It does do that already although it is only required to meet twice. It is given particular powers to lay down the general landscape of a Union foreign and security policy, but there has been no change in the Treaty to its working methods. I think this is a problem which goes back to what I said earlier about the opaque nature of European Union decision making. The European Council, the Heads of Government meeting together, publish no minutes. There is no published agenda. There are only conclusions published. It is not certain quite who draws them up. They are certainly not available to outsiders to scrutinise beforehand but they have in many cases a quasi legal status. Also of course the deliberations themselves are largely secretive. So you have the main supreme decision-making body making important decisions in private. I think this operates against transparency. We saw this in the 21 June European Council, which I mentioned, which effectively settled the text of the Reform Treaty only two days after the text was available. I think it really shows the weakness of process. That is all unreformed in the so-called Reform Treaty. As regards the Permanent President, it is often said this will bring continuity and cohesion to decision making but I think myself maybe at the expense again of public involvement. At least when the presidency circulates amongst Member States, it does occasionally come back to home. The decision making is literally brought closer to the citizen and for six months at least it exercises the attention of the national media and public of the country concerned. I think all that will go if the permanent European President becomes yet another full-time official in Brussels, rather remote, bigger and more powerful. In my view that will actually create a bigger gap between the EU and its citizens, in contradiction indeed of the instructions given in the Laeken Declaration.

Q69 ***Chairman:*** You do not think that the fact that the Council Presidency with the exception of foreign affairs issues will be managed by predetermined groups from three Member States for a period of 18 months will not do something to help the public understand what is going on? Presumably within their defined areas they will have something to say?

Mr O'Brien: I think this is yet another example of one of these areas in the Treaty where what exactly is going to happen is not clear, which I think is one of the problems with the Treaty. Many of the new institutions, for example the European External Action Service, are not properly defined in the Treaty. It is not quite clear what their powers or executive responsibilities are going to be. For example, will the new President of the Council be running 3,500 civil servants in the Secretariat of the Council? How is the President of the European Council going to be interacting with all these different team presidencies? I would agree with what Mr Heathcoat-Amory said before about how having an elected President does fundamentally change the nature of the legislative process in Brussels because instead of having a national leader with an obvious vested interest in the rights of Member States, you have yet another independent, free-floating Brussels institution interested in getting things done in Brussels, passing more legislation. The two other open questions I think are: firstly, the failure of the UK Government exclusively to rule out the merger of the Council President with the Commission President in the future. Until very near to the last draft of the Constitution, this was ruled out but at the last minute exclusive separation was dropped. That is something with which the UK Government was not happy but decided to put up with it. The second question I think is the future of this institution, because we are setting up something now which is quite a federalist idea in itself, the idea of having an independent President. But of course it is going to develop in the future. It will gradually increase its powers and responsibilities. Various people, including Nicolas Sarkozy, have suggested that the EU President should eventually be directly elected. So we have to think if we are going to sign up to this Treaty about really where this institution is going to go in the long run.

Q70 ***Chairman:*** Is it usual to insert in a treaty the ruling out of something that does not exist in the first place?
Mr O'Brien: It is certainly something the Government wanted to happen. If it is something that we do not want to happen in the future, then we should explicitly rule it out now.

Q71 ***Lord Sewel:*** Having dealt with the President of the Council, let us move on to the impact of the Treaty and the role and function of the Council of Ministers generally and specifically in terms of the new system of qualified majority voting (double majority). Do you think that is likely really to be of significance in practice and what will the effect of the declaration document be on blocking minorities? Basically: how do you feel the Council and the Council of Ministers has been impacted?
Mr O'Brien: I think that the new voting system is one of the most significant things in the Treaty. When people talk about streamlining the European Union, what they mean is allowing it to pass even more legislation more easily, so that on the one hand you have lots of new moves to qualified majority voting in new areas, between 50 and 60, depending on how you read it, and of course you have the new voting system, which makes it considerably easier to pass legislation and considerably harder to form a blocking minority. I do not think that that point is contentious. Even the Foreign Office has acknowledged that it would be harder to block legislation that we disagree with. Even groups that would not agree with me, like the Centre for European Reform or Business for New Europe, have acknowledged that it will be harder in the future to block legislation that we do not want. A fundamental question is: do we think that the EU needs to pass even more legislation than it does at the present? I personally do not believe for an instant that the European Union is grinding to a halt with the current number of Member States. In fact, there is a very good study from Sciences Po academics which shows that the EU is actually passing legislation about 25% faster since the 2004 Enlargement. I do not think we need more legislation. If you look at the practical consequences, they are very obvious. In areas where the UK Government is currently assembling a blocking minority to block various things it does not like, whether that be the Working Time Directive and moves to restrict the individual opt-out, be it the Agency Workers Directive, or various of the pieces of the Financial Services Action Programme where the UK Government has relied on a small blocking minority to stop things we do not want, our position in all these areas is going to be jeopardised under the new voting system because it will be much harder for us to block legislation. There is a study for example by Felsenthal and Machover on the voting system which suggests that our ability to block legislation will be cut by about 30% compared to the current rules. This is quite a big change and it will have important practical consequences.

Q72 ***Lord Sewel:*** Your emphasis is very much in terms of our ability to stop things. What about our ability to get things that we want?
Mr O'Brien: I completely acknowledge that this means that more things will pass. The question from a business point of view is: do you believe that there should be more regulations being passed or less? If you look at the opinion polls, there is a recent poll of one thousand chief executives in the UK which found that 54% thought that the cost of new regulations from the EU now outweigh the benefits of the Single Market, which is quite a striking and frightening finding. If you want even 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.

Q73 ***Lord Kerr of Kinlochard:*** Do we agree that there should be a correlation between population and voting weight, or do you think that basically we should go back to unanimity and that Luxembourg or Malta should have equal weight with Britain and Germany?
Mr O'Brien: Certainly I am very sceptical about the further extension of qualified majority voting.

Q74 ***Lord Kerr of Kinlochard:*** I am asking about the double majority system in the Treaty, which brings a correlation for the first time between population and voting power. Is that what you object to?
Mr O'Brien: I think what I object to is the overall ease of passing legislation rather than the distribution of power within the different Member States.

Q75 ***Lord Kerr of Kinlochard:*** So your objection is to the threshold numbers. If they were high enough, if one needed to have 100%, you would have no objection; perhaps at 99 you might just about agree, but 65% and 55% are too low? Is that right?
Mr O'Brien: I would not necessarily insist on 100% 100% of the time.
Lord Leach of Fairford: I think it is hard to object to the principle of recognising population in the voting system. Personally, I accept that. I think it is itself a move in the direction of greater democracy. You see in the American system that both concepts are reflected in their structure. I do not think that is at all undesirable. It is a question of where you strike the thresholds and how you deal with this flood of legislation which, as Mr O'Brien has said, is very serious. Gunter Verheugen has estimated the costs of legislation in the European Union are greater than

that of the entire Dutch economy's GDP. That is an awful burden to bear when you are trying to compete with China and India. For example, when you look at the Financial Services Action Programme, that is very expensive.

Q76 ***Lord Kerr of Kinlochard:*** One could argue that the Single Market broadly is a good thing and the Single Market would not have happened but for Mrs Thatcher's decision on the extension of qualified majority voting. There is nothing intrinsically wrong with being in a position where you prefer to get things done. If you want to break down the barriers and make a more open Europe, I would have thought it was quite a good thing to have qualified majority voting.
Lord Leach of Fairford: I think we will be here long after midnight if we were to discuss the Stuttgart Declaration and Mrs Thatcher and how the whole thing arose. I think there were profound misunderstandings about how it would develop between mutual recognition and harmonisation. Unless the Lord Chairman wants us to get into that, I think it would be a very interesting exercise in history.

Q77 ***Lord Kerr of Kinlochard:*** Do I interpret that, Lord Leach, to mean you are actually against the Single Market, you think the Single Market programme has been a mistake?
Lord Leach of Fairford: Of course not. What a question! To be against the Single Market to the extent that it brings greater freedom to trade, I think it would be bizarre to be against that, particularly with our open market philosophy, but there are different ways in which free trade can be consummated. One is by mutual recognition and by all the elements of a free trade area; the other is by harmonisation of a heavily regulated system. I do not think this was foreseen, as I understand it, in 1983 by Mrs Thatcher. That in fact was the way it went. The poll that Mr O'Brien refers to indicates that business is shocked by the degree of legislation which has come about through harmonisation, which is bringing about the Single Market, with its good elements you referred to, through a mechanism that is rather self-defeating because of the very heavy burden of legislation or regulation.
Chairman: I would like to move on to the double-hatted post of High Representative.

Q78 ***Lord Roper:*** I wonder if you would like to comment on to the post referred to sometimes as double hatted but perhaps treble hatted because in fact the High Representative will also chair the Foreign Affairs Council in future. I wonder how you see that working.
Mr Heathcoat-Amory: Perhaps I can start. By any standards, 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. It is not clear exactly what that service will do. It is only sketchily described in the Treaty, but it is clearly intended to be an embryo foreign service for the European Union itself and could become very powerful. I think it is the double hatting that is particular controversial and of course that worried the British Government very much during the Convention which invented the post. I think one has to say that it is bound to undermine to some degree the inter-governmental nature of decision making. The British Government is adamant that they have preserved the inter-governmental system in the new Treaty. I have to say that is difficult, I think, to sustain, when the man/woman conducting the policy is also going to be not just a member but a Vice President of the Commission. The Commission of course has a culture and working methods that are supra-national, and indeed its members are forbidden by Treaty law from taking instruction or being influenced by national governments. Having one foot firmly in that camp I think must mean that the purity of inter-governmentalism will be changed. It will be something of an oddity having a Commissioner permanently chairing the Foreign Affairs Council. We do not know exactly how this will work out. Indeed, a lot of it is in the hands of future personalities and events. So it is very difficult to predict. Certainly it is a compromise. I do not believe that the pillared structure which we have lived with since Maastricht can survive a High Representative who is clearly straddling the two institutions.

Q79 ***Lord Roper:*** Will it not give some greater coherence to the external actions? You were speaking earlier of the external activities on from the policy of the Union does not only comprise those things which are in CFSP but the other areas as well. Will this not ensure that there is greater coherence between those external relations aspects of the Commission's work and the inter-governmental work of the formal CFSP?
Mr Heathcoat-Amory: I think there is incoherence in the Commission itself at the minute between the Commissioners, four of whom have duties that touch on external policy—things like foreign aid and humanitarian relief. I would be more impressed by the reforming nature of the Treaty if informally and without a treaty that had been dealt with more impressively. So I am in favour of the informal working reform as a predecessor to setting up

institutional structures which could become very inflexible and could bind us into a system that we may regret. Coherence is a thing that politicians like, but I think that the public are equally concerned about things like accountability, democracy, transparency. I am not clear that the structure we have invented here by eroding intergovernmentalism will give more comfort to critics of the European Union who believe that it is racing ahead with an institutional structure which is going far beyond the political will for co-operation. I strongly believe in working with other countries to achieve results. I do not believe that setting up powerful institutions is a substitute for the political will and success on the ground. For instance over the Iraq war, there was a terrible disagreement in Europe which would not have been solved, in fact I think could have been worse, if we had pretended that we had a foreign policy and a foreign policy activist and someone conducting it when there was no policy for him to conduct. He would be more like an impresario than a High Representative. Unless we solve those problems of working together in Europe, I do not think the institution is going to solve them; it may even create them.

Q80 ***Lord Roper:*** If we do solve those problems, would this not be a better machinery to ensure that the different parts of the European Union's activities are co-ordinated?
Mr Heathcoat-Amory: In my view not. I think this puts an immense burden on a single individual because we are setting up potential conflicts between this person and the President of the Council, who will be a permanent figure, as we have discussed, the President of the Commission who will still be a powerful figure, and Member States who could find themselves drawn along or unable to change a policy perhaps after a change of government to which they are committed because of course there is a new obligation on Member States to comply with the decisions taken. Of course I readily agree that the initial strategic decision is taken by unanimity and that is a block or a handle that all Member States will have. Can we imagine a change of government in a Member State, really a different government, coming in with a new foreign policy it wishes to implement, bound by decisions taken by the previous government? I think that would start to negate the purpose of foreign policy promises made at general elections.
Chairman: We have 20 minutes left and we still have many questions to go.

Q81 ***Lord Sewel:*** I was really concerned to ask two specific questions on the European Parliament. One is the effect of co-decision making in agriculture and fisheries and also on the amendments to the budgetary procedure. Having drawn attention to those two specific things, could you also give your views on the more general issue of the impact of the Reform Treaty on the European Parliament and how it will affect its legislative and other powers. I would like the answer to the specific points.
Mr O'Brien: In answer to the general point, there are a lot of new powers for the Parliament. One very significant one is the power to elect the Commission President. Again, that is something the UK Government objected to. Jack Straw said that the appointment would be caught up in the politics of the European Parliament. It is certainly likely to mean that in the future Commission Presidents are more likely to have a strongly integrationalist bent in line with the general opinion of the European Parliament. In answer to the specific question about the Parliament's new powers over the budget, I broadly do not see that as a good thing. Over the last couple of years, the Parliament has tended to be a brake on reform of the agricultural policy and the fisheries policy. For example, at the start of the year the Parliament used the powers that it currently has to stop modulation of more direct payments into rural development. The Parliament also resisted the sugar reform and the wine reform and helped to water those things down. Broadly speaking, the Parliament is less reformist, if you will excuse the expression, than the Member States in the Council, and so giving them the final say is not necessarily going to help us get reform of the CAP, which I think most of us in this room would like to see.
Chairman: I call on Lord Tomlinson, a former Member of the European Parliament.

Q82 ***Lord Tomlinson:*** My Lord Chairman, can I just follow up the answer to that question because I think, first of all, the witness slightly ducked the specific about agriculture and fisheries. In a system with qualified majority voting applying in those two areas, will not the process of reform become easier, particularly against the background where the distinction, which almost encouraged irresponsibility in the European Parliament, between compulsory expenditure and non-compulsory expenditure in the budget is now abolished by the proposed new Reform Treaty?
Mr O'Brien: I thought I was replying to that before. I think by abolishing the distinction between compulsory and non-compulsory, effectively you are giving the Parliament the final say over the compulsory elements as well; you are giving the Parliament more power over this.

Q83 ***Lord Tomlinson:*** No, it is not the final say, is it? In the new Treaty it is an equal say between Council and Parliament. There has to be co-decision on the

final say as there has to be on the annual financial perspectives.
Mr O'Brien: You would agree with me that certainly increasing Parliament's power over what it has now would be.

Q84 ***Lord Tomlinson:*** It makes it easier to get a reform agenda through the codifying process.
Mr O'Brien: You answered the question there.

Q85 ***Lord Tomlinson:*** The answer is that I do not agree with you because I think you are asking a different question.
Mr O'Brien: I think broadly speaking giving the Parliament this extra power will effectively give protectionist interests a second line of defence in the negotiations. So as well as being able to block things in Council, you will also be able to kill things off in the Parliament as well. If I felt that the Parliament was a wonderfully reformist institution, full of MEPs that were not on rural seats and not in favour of keeping the CAP, then I might be interested in giving it more power, but, as it is, I am not convinced that it is a good idea for pro-reformists.

Q86 ***Lord Tomlinson:*** Is that your view as well, Mr Heathcoat-Amory?
Mr Heathcoat-Amory: Could I make perhaps a comment on the budgetary procedure, which is also part of the question? I recall when I was a very junior Treasury Minister many years ago going to Brussels in order to negotiate about such matters. It always struck me that the European Parliament was always on the side of expenditure and, unless my memory is doing me tricks, I think Lord Tomlinson might have had a formal duty connected with the European Parliament on the Budgetary Committee.

Q87 ***Lord Tomlinson:*** And always opposing an increase in the maximum rate.
Mr Heathcoat-Amory: If they had all been like Lord Tomlinson, there would not be the problem, but I think he would agree that his colleagues from other Member States, other MEPs, were almost always for bigger expenditure programmes, because, after all, they have the pleasure of spending without the pain of having to raise the taxes. I think giving them any further powers over the budget will probably be treated with considerable alarm in the treasuries of all Member States.
Chairman: I may take a rather naïve view of this but I am always impressed by the fact that the European Union manages to stay well under the cap that they have on expenditures and there is plenty of headroom still there. I do not think that can be entirely contradicted but that is only a personal view.

Q88 ***Lord Wade of Chorlton:*** May I ask very briefly: what will be the impact of the Reform Treaty on the role, functioning and membership of the European Commission and will the President gain power?
Mr Heathcoat-Amory: I can be brief on the European Commission. It will of course expand its role into those aspects which are presently intergovernmental, which will switch to the other Treaty, in the way I described earlier, as affecting criminal justice and policing matters. They will come under the purview of the European Court of Justice and also the Commission will have the right to bring infraction proceedings. To that extent, their role will expand. The President of the Commission will gain the ability to sack individual Commissioners. The Commission itself will get smaller and 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. Every small Member State wants its own Commissioner. That will end in 2014 when there will be a slightly smaller, perhaps more executive body. Indeed, the word "executive" is a new power and a new word that has gone into the Treaty. I think a smaller, more executive body with wider powers is envisaged. Crucially, and I am sure this was fought very vigorously by the Commission representatives on the Convention on the Future of Europe, the monopoly of initiative remains in the Treaty. My own position on this is 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. That is not changed in the Treaty and I think that is a shame.

Q89 ***Lord Wade of Chorlton:*** May I just ask a follow-up? When we took evidence last week, the people who gave evidence indicated that they believed that the new Treaty would encourage more power and influence in the Parliament. They indicated that they believed that Parliament would probably become more politicised as time went on and that therefore slowly they would exert more influence over the Commission. Is that a view that you hold as well?
Mr Heathcoat-Amory: It is true that the Parliament will elect the President of the Commission. I believe that is new. It is stated I think in the Treaty formally for the first time that the Commission is accountable to the Parliament. I may have got the precise wording wrong. As regards which institution will end up ahead of the other, I am not in a position to judge that relatively. All I can say with some assurance is that they all get more powerful, which echoes a point I made earlier. In *Alice in Wonderland* the Dodo was asked at the end of the caucus race who had won and

he said, "All have won and all must have prizes". I think at the end of the Convention on the Future of Europe, they all got prizes except for national parliamentarians and the public.

Q90 ***Chairman:*** I am interested in your argument that a smaller Commission will be more powerful because, if I have got you right, national interests will be less deployed. Is not the corollary of that that you are in favour of a weaker Commission with more national interest influencing its deliberations?
Mr Heathcoat-Amory: My own personal position is that I would make the Commission into a secretariat, possibly based in somewhere like Helsinki, serving the interests of national parliaments and drawing up common rules and proposals where national parliaments agree that common action is required, but this, I am afraid, was never seriously considered.
Mr O'Brien: If I can just follow on from that, in terms of whether national interests are more strongly represented in the Commission where obviously not every country will have a Commissioner, it is pretty clear that the answer is "no", because it will be more difficult for this country in times that it does not have a Commissioner to find out what is going on in the Commission. It is pretty clearly a step further away from the idea of a kind of European nation state towards a more federal Europe. The argument that is advanced for this that it will reduce bureaucracy in the European Union I can't really accept. There 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.

Q91 ***Lord Mance:*** I want to ask you first about the European Commission and the European Court of Justice and the expanded jurisdiction which arises with the collapse of the pillars and the expansion of the Title IV. You have already made some comments on the competences of the approach to the ECJ. Perhaps you could also feed into the answer the Protocol on transitional provisions and the five-year period in that?
Mr O'Brien: I think the whole issue of the Charter is one of the most significant things about the Treaty. The Government in its draft of 2000 promised that it would not be legally binding and never would be. It now clearly will be legally binding.

Q92 ***Lord Mance:*** Is not an answer the Charter?
Mr O'Brien: It is about the Charter.

Q93 ***Lord Mance:*** That was going to be the second limb of my question, but take it first.
Mr O'Brien: On their return from the European Council, the Government initially claimed that they had an opt-out from the Charter. Now they say very explicitly that they have not got an opt-out from the Charter, which is interesting. The Government's current argument seems to be that these are not new rights, either in the UK or in any other Member State. That begs the question to my mind: if these are not new rights, why have we spent the last seven years resisting them? If you look at the sources of these rights, it is pretty clear that they are new rights. For example, if you look at the text of explanations which comes with them, 13 of the Articles are based on the ECJ's own case law; seven are based on the ECHR but their scope has been widened; seven are based on the Articles of the European Social Charter, which the UK has not signed; two of them the Schengen Protocol; and some are very simply new rights and explicitly so in the Charter. Clearly, this will have an important impact. The attention on this in the UK is focused very much on other impact on our economy, on the social rights in Title IV but it has much wider implications because there are lots of new rights which will impact on our asylum and immigration system for example and also on the rights of criminal suspects as well.

Q94 ***Lord Mance:*** Could you just focus the answer a little on the Protocol because the Protocol is clearly designed to address some of the matters which you have been making?
Mr O'Brien: It seems to me that one of the many problems with the Protocol is that Tony Blair when he came back from the summit originally purported to read out the text of the Protocol and omitted the fact that it only says that Title IV of the Charter is supposed not to create any new rights in the UK, and even then, except in so far as those rights are already provided for in national law—and of course it is up to the ECJ to decide whether those rights are provided for in national law or not. So it is a very interesting question, which I would suggest you certainly ask the Government. If, for the avoidance of doubt, we have said that one part of the Charter should not be read as creating new rights, does that not: (a) imply that there is a lot of doubt about whether the rest of the Charter does not create new rights; and (b) why does that piece of text not simply apply to the whole of the Charter? It seems to me that the Government does not have any answers to that.
Mr Heathcoat-Amory: May I comment on one aspect of that? There are new rights. I think it is helpful perhaps to mention just two of them. One is that scientific research should be free of constraint; that is Article 13. I am very interested in animal welfare and I am alarmed that there is an apparent right here to do scientific research which is free of constraint and

may be relied on by scientists doing nasty things to animals in general. The significance of it is that that right does not exist. It is clear from the explanatory notes that it is not derived from existing European Charters of any sort. Also, there is the right of access to a free placement service. That again is an entirely new right. Indeed, Mr O'Brien said that if these rights were not new, nobody would worry about them. It puzzles me that the Government and others persistently say that there are no new rights in the Charter. There clearly are, which is why we have had to have this Protocol. Why I think the Protocol will not work is that it is not an opt-out from the Charter for the United Kingdom; it only tries to ensure that courts do not apply it in this country, but it certainly will be applied indirectly because one can imagine that a Directive applying throughout the European Union may be the subject of an appeal by another Member State to the European Court of Justice. That Court may decide that the Directive in question does not meet the requirements of the Charter and require an amendment or interpret it in a way that is compatible with the Charter. That would become binding on this country under the other provisions in the Treaty whereby we have to obey European Union law and we have a mutual solidarity obligation and so on. So I think the Charter will come into British law not directly but indirectly. If the Government had wanted to prevent that, they would have said that the provisions of the Protocol should apply notwithstanding the other obligations in the Treaty. They have not achieved that, so I think they are extremely vulnerable to the Charter, including its new rights, applying indirectly to this country. I think, frankly, the Protocol is wafer thin. If you add to that a good measure of judicial activism, I think that fact that it will be legally applied renders us widely open.

Q95 ***Chairman:*** What you are saying is that the European Court could say that the Protocol is not effective in certain areas, that it does not apply?
Mr O'Brien: I do not think it is just a matter of the Court saying, "Your Protocol does not apply". I think it is simply a matter for the Court to interpret that Protocol how it likes really.

Q96 ***Lord Mance:*** Really what you are saying is that without an opt-out, a right to opt in, this operates in a different way. Is there anything you want to say on the expanded jurisdiction of the European Court of Justice?
Mr Heathcoat-Amory: It might be appropriate to mention one very curious and new requirement of the Treaty, which is often not commented on, which is that the new Treaty lists the institutions of the Union, which of course include both the Commission, the Council, the European Central Bank, the Auditors and the Court of Justice. It then says that the institutions shall practise, "mutual sincere co-operation".[3] I am not a lawyer but I find it alarming that the Court is mandated to co-operate not with Member States but with the other institutions. If I were a litigant going in front of a court, I would not be happy if the court had to practise mutual sincere co-operation with my legal opponent, but that I think will be the case because very often the Commission takes a Member State to court. The Commission will be an institution and therefore will receive the co-operation of the Court, but the Member State will not. I think 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.
Lord Leach of Fairford: I would be unhappy if any judiciary was obliged to act in sincere mutual co-operation with anybody. It seems to me that if we had here a constitution for Britain and the judiciary was told it had to act in sincere and mutual co-operation with the Government, it would not get very far with some of your learned Lordships. The whole principle is wrong.

Q97 ***Lord Mance:*** Can I just ask one follow-up? Was any consideration given to the extra workload which will fall on the Court and whether its existing working methods and internal structure needed any adaptation to meet that? For example, it is going to require expanding to criminal competence.
Mr O'Brien: I think you have put your finger on a very important point. For example, there are about 80,000 asylum appeals every year in the UK. All of these people will have the right to go to the Court because of the demolition of the limits on the rules on standing. You could find that the Court would suddenly be hearing a lot of very contentious cases, in criminal law and also asylum and immigration cases. There are provisions in the Constitution to allow the Court to set up new specialist tribunals. One of the problems with doing that is that you then get these very small courts with only three judges on and you are more likely to get very controversial rulings, but, yes, that is a clear consequence of the Constitution or the Treaty.
Chairman: I am going to allow this meeting to go on for another seven minutes but then we will really have to finish.

Q98 ***Lord Kerr of Kinlochard:*** Mr Heathcoat-Amory, you have twice said that the big losers were the national parliaments. I remember at the time you and I thought that Mrs Stuart's working group on the role of national parliaments had done rather well, in

[3] *Note by the witness*: Article 9(2) TEU.

particular in injecting national parliaments at a very early stage in the legislative process. They would be the first place where the text of a legislative proposal would go. Now I think in both our Houses we still have to work out just how we can make best use of this, but in what sense were the national parliaments losers? Perhaps you are saying everyone gains and national parliaments do not gain as much as everyone else—but I do not think you are saying that. You are saying that national parliaments are absolute losers. How come?
Mr Heathcoat-Amory: There were valiant efforts made, particularly by my colleague Gisella Stuart, to advance the interests of national parliaments. I think we had a sympathetic hearing from the Secretary-General at the time, but I have to say that the final outcome is rather disappointing. It boils down to the subsidiarity test whereby national parliaments get some additional influence over policing subsidiarity, but it does not add up to very much. It amounts to little more than requiring the Commission to think again. We can do that already. As has already been mentioned, I am a member of the European Scrutiny Committee in the other House. We can require or request that something is looked at again, but the Commission can still go ahead. That remains the case, we never succeeded in replacing it with a red card system whereby there would be a complete block, to my great regret. To be fair, it has been slightly strengthened since then, and there is now a complicated procedure whereby if a large number or national parliaments object, it can go to the European Council. Frankly, the bar is set so high that if it ever reached that, the proposal in question would fall for other reasons. There would not be a majority for it in the European Parliament or the Council. I think this is something of a disappointment. It is no real advance on our existing powers.

Q99 ***Chairman:*** We take note of the fact that there is now an orange card that does have a bigger impact and is more useful to the national parliaments than just the yellow card.
Mr O'Brien: Perhaps you should also note that you still cannot stop the Commission from going ahead with things. Even in the unlikely event that you cobble together a huge number of national parliaments all simultaneously voting against something on subsidiarity grounds within a very short window of time, the Commission is still going ahead with things at the end of the day.

Q100 ***Lord Kerr of Kinlochard:*** Surely it is rather unlikely that they would, because there would hardly be qualified majority voting in the Council if, as you say, an enormous number of national parliaments were against the measure?
Mr O'Brien: This is exactly the problem. Anything where it is likely to be relevant is very unlikely to ever happen, which is exactly the point I am making. If you look at what happened the first time this system was given a trial run, it was put out to national parliaments who did object on subsidiarity grounds and the Commission still went ahead with the proposal at the end of the day. So the trial run of the system does not give me any confidence that it will have a meaningful impact over the long term. If you compare that to what national parliaments are losing at the same time, for example through the new passerelle clauses, through the simplified revision procedures, so that the treaty change in the future does not necessarily involve the consultation of national parliaments, and all the other changes in the Treaty, clearly the net balance of a national parliament is hugely negative. This is clearly a further shift in power away from this place.

Q101 ***Lord Kerr of Kinlochard:*** Chairman, I think we should be clear, and if the orange card system is used by a sufficient number of parliaments, if we are talking about legislation, and the Commission nevertheless goes ahead it is inconceivable that the legislation in question will pass in the Council.
Mr O'Brien: As I understand the orange card, the Commission then has to explain why it has gone ahead. What a terrible thing to have to do?

Q102 ***Lord Kerr of Kinlochard:*** We are talking about legislation. What is your problem? The orange card comes up from the national parliaments: the Council discusses it. You are postulating a situation where the large number of governments necessary in order to get qualified majority voting would vote in Council the other way from the way their national parliaments already had. Is that not a rather unlikely situation?
Mr O'Brien: This is the problem with it. You have to have your national government allow all these national parliaments the parliamentary time to pass resolutions against something which they have just voted for. It is almost infinitely probable that it will never be used.
Chairman: I think this needs further explanation. Do you want to go further on that one or not?
Lord Kerr of Kinlochard: No. I give up.
Chairman: I think we have a difference of opinion as to what in fact the impact of the orange card is. We will explore this further in the course of our inquiry. So far, we have taken rather a different view from yours Mr O'Brien, on the effect of it. I think we should move on very rapidly because I do want to try to touch on some of the other issues.

Q103 ***Lord Roper:*** You have just raised this question of the passerelle. I only make two comments on it, one that there is a loss of power of national parliaments. Do you believe that is the case in the light of the statement made by the Prime Minister when he returned from Lisbon, in which case he made it quite clear that the Government would not allow a passerelle change to be made without parliamentary approval?
Mr O'Brien: When he made a statement to this House it was not clear to me whether he was proposing that it was only the Commons that would have this power, which was in the European Union Bill last time round. It was proposed that only the Commons would get a say, not the Lords as well. I think the fundamental problem with the passerelles—sorry, the simplified provision procedure—is that it is a further move towards incrementalism in the European Union. One of the things identified as a problem by the Laeken Declaration was the step-by-step, salami slicing in incremental integration of the European Union. This clearly makes things worse. Jack Straw and the Government objected to these things and said they should not happen. Jack Straw said it would be awful if you got into a situation where at 3 in the morning we were all discussing that we would trade off further moves to majority voting for someone's increasing quotas in milk or something like that. So there is no doubt in my mind that this allows the treaties to be incrementally changed in the future with much less scrutiny. At the moment at least every five years when there is a new treaty, there is a major row about it; a package deal, it is very visible and there is a public discussion about it, whereas if you are gradually getting rid of all these national vetoes, or if you are gradually changing the text of the Treaties as you are allowed to do under the new Treaty, then all these things can happen with very little public scrutiny and the European Union will be able to advance further ahead in public opinion than it already is. It is something I find very worrying.

Q104 ***Lord Roper:*** If there is an opportunity for national parliaments, if they practise which the British Prime Minister has put forward and followed in other Member States, to take an explicit vote on the particular change, then in that case the national parliament would get rather more power than they do over a treaty, which they cannot amend.
Mr O'Brien: I think that is slightly disingenuous because you can get to a vote on the Treaty and you can say yes or no to it, and ultimately you get to say yes or no to the proposal that is going to come to you under this new mechanism. It is not like you have any more detailed control. What is happening is that these large packages of changes are being broken down into much smaller and less visible streams of small changes.

Q105 ***Lord Roper:*** I am sorry, but do you not have more power if you have power over specific changes rather than over a package?
Mr Heathcoat-Amory: May I make the point that most of the passerelle clauses, and there are several in the Treaty as we know, do require parliamentary approval, but not all of them. There is one that is frequently overlooked regarding foreign policy. Article 17 will allow for additional instances of qualified majority other than those referred to in the Treaty; in other words that new types of decision making in foreign and security policy can be switched from unanimity to qualified majority voting, and there is no reference to parliamentary approval in Article 17. It may be that the British Prime Minister has made a promise that in his case Parliament will be consulted. Whether that will survive his passing from office or in different circumstances, I do not know. Certainly the Treaty does not require a parliamentary input. I think this is damaging because one of the way of people trying to sell this Treaty is that it puts us full stop on the escalator whereby more powers go from national parliaments and electorates to the centre without anyone really noticing. The very existence of passerelle clauses where the whole system becomes self-amending I think is damaging to that perception.

Q106 ***Lord Roper:*** Mr Heathcoat-Amory, just on the point that you have made about an assurance by the Prime Minister, is this not something which will be put explicitly into the legislation, and whereas we cannot amend the Treaty, we can amend the legislation to include an obligation to bring this to Parliament if a passerelle is to be used?
Mr Heathcoat-Amory: I would certainly support that amendment. I think we have a very useful alliance here to amend the Treaty.

Q107 ***Lord Roper:*** Not the Treaty but the Act.
Mr Heathcoat-Amory: I am sorry; I do apologise, the Act.
Mr O'Brien: I would caution, though, in thinking too much in terms of Parliament. The significance of this really is in terms of the public's interest and input into the process. It may well be that there is a vote here on a wet Thursday afternoon to change some particular detail. The problem is that it is no longer going to be visible in the same way that the Treaty is to the public out there, and they will certainly not have their opportunity for example to call for a referendum or complain about it in any other way. I am just thinking in terms of Parliament and also in terms of visibility and accountably to the public as well.

Q108 ***Lord Sewel:*** Very briefly, there was a bit of a hullabaloo about putting the reference to "free and undistorted competition" into a Protocol. Do you think that that move was significant and do you think it will have any practical effects that are removed in that Protocol?

Lord Leach of Fairford: It is hard to judge at this stage whether it goes much beyond symbolism. It may not. Clearly the situation in France was what dictated this. I think if it does go beyond symbolism, which is the second leg of the question, it would be very serious. Free and undistorted competition has been a principle within the European Union, the Community, since I believe the Treaty of Rome. We do live in an increasingly competitive world. My own business life is in the most competitive part of the entire world, trading on the coast of China in Hong Kong which is a very free market. When you see the impact of competition that the whole world has to face from Asia, not just China, not just India but all over, the idea of regressive steps would be very concerning. I have already alluded to the heavy burden of regulation. The Financial Services Action Plan is going to be a £19 billion cost to implement for the City of London. At first it was really hardly noticed in Britain and I think it was taken very lightly by the Government. And of course the City was riding very high at the time. We had not had Northern Rock and the credit crunch and all those problems; £19 billion suddenly looks not a trivial sum but a very large sum. I believe that the downgrading of free competition is potentially very difficult. It is by no means clear, however, how great will be its practical effect. Do you have a different view?

Mr O'Brien: Only in the sense that some people hope it will have a different effect. Sarkozy says: "This may also give a different legal direction to the Commission; that of a competition that is there to support the emergence of European champions, to carry out a true industrial policy". There is certainly hope that this will shift the balance in terms of the less and free market approach. Whether it will, only time will tell.

Lord Leach of Fairford: If it were to do that, then the effects would be really serious. You would see them in external trade with increased protection. We have already had trade wars over textiles and leather and the jeopardising of the Doha Round, and internally you have this wave of legislation and regulation. It is potentially dangerous.

Q109 ***Lord Tomlinson:*** In the meanwhile, would you accept that the Protocol has the same legal forces as the rest of the Treaty?

Mr O'Brien: Yes. The argument, as I understand it, is being downgraded from an objective of the Union to a Protocol.

Q110 ***Lord Tomlinson:*** But it has the same legal force as the Treaty?

Mr O'Brien: That is the argument.

Lord Leach of Fairford: Why move it if it is no change?

Chairman: I think we have belt and braces here anyway. It is in Article 3 of the Treaty of the European Union as well. I want to give Baroness Symons the last word with the last questions.

Q111 ***Baroness Symons of Vernham Dean:*** Thank you, my Lord Chairman. I do not know that there is a great more to be said except that we have run through the litany of the ways you believe that just about every single institution in Europe is getting more power. We have been through the legislative reach, the European Council, the Council of Ministers, CFSP, European Parliament, the Commission and the Court of Justice. Which of these changes do you really think is going to have the most impact on this country? If you had to pick out something that you really do think is the issue that people should be really worried about or really cheerful about because we all know someone is going to be really worried, what would it be?

Mr Heathcoat-Amory: I am very reluctant to pick one because I think the whole Treaty advances on such a broad front that there is a general continuing transfer of powers and decision making from national parliaments and electorates to the centre, which contradicts the aim of bridging the gap between the two, in my view. If I did have to pick out one, I think the advance of the Union into the field of asylum, immigration, criminal justice and policing is what worries me. Of course the British Government has a claimed red line and a separate procedure for covering some of this, which may or may not be watertight. I think it is very dangerous when decisions affecting people's security and rights over them of imprisonment and punishment are transferred from a jurisdiction which they do understand, their own national parliament which can therefore be changed in accordance with their wishes at an election, to another jurisdiction which they not only do not control but they do not understand. I think this is eroding our powers of self-governance to a worrying extent, and I think the public understand this. I know we must not talk about referendums but I think it would be an outrage if they are not consulted on something which is so important that it really goes to the heart of any constitutional system. Indeed, if they are not consulted and the Treaty develops in the way this is clearly intended to, I think that the European Union will face a crisis of legitimacy in a few years time.

27 November 2007 Mr David Heathcoat-Amory, Lord Leach of Fairford and Mr Neil O'Brien

Q112 ***Baroness Symons of Vernham Dean:*** You simply do not believe the statement that the Prime Minister made that the safeguards on those points, which are he says enshrined in legally binding Protocols to the Treaty, are indeed safeguards?

Mr Heathcoat-Amory: They did their best but it is putting sticking plaster over a text which has, lined up on the side of the Treaty, the Commission, the European Court of Justice and almost all other Member States. Against that, we have some very slender and I think legally deficient red lines. It is very unwise to decide and ratify a treaty and then hope that your red lines will protect you in future. I think in this area and others it is very dangerous, and certainly there are massive ambiguities. The final arbiter will be the European Court of Justice, which has a record of judicial activism and from which there is no appeal.

Mr O'Brien: In very short order, I say that the three significant things are: first, to make it easier to pass more legislation through all these moves to QMV and also through the new voting system; second, the new powers of the Court of Justice, and justice is a very serious problem with the UK's red line now in so far that if there are measures which amend currently adopted legislation and we do not want to opt into them, then we are thrown out of the whole thing. So our red line there has been even further undermined, and fundamentally our red line in that area is not strong because the European Court of Justice is getting jurisdiction over this, something the Government always said it should never have. The third—

Q113 ***Chairman:*** We asked for one and you have had two. Lord Leach?

Lord Leach of Fairford: I do not care to choose.

Chairman: We have run far over time, which shows the level of interest that everybody here, both witnesses and members of the Committee, have in this subject. I thank you very much indeed for answering our questions. You will receive the transcript in, I hope, a fairly short period of time. Thank you very much for participating in our inquiry.

THURSDAY 6 DECEMBER 2007

Present	Cohen of Pimlico, B	Maclennan of Rogart, L
	Dykes, L	Mance, L
	Grenfell, L (Chairman)	Powell of Bayswater, L
	Jopling, L	Tomlinson, L

Examination of Witness

Witness: Professor Sir David Edward KCMG QC, Honorary Professor at the School of Law, University of Edinburgh, examined.

Q114 ***Chairman:*** Sir David, thank you very much indeed for giving of your time to come to see us; we really appreciate this. We are a little bit thin on the ground this afternoon because two of our Committee reports are being debated in the Chamber this afternoon, so some of our Members are not here but we have a more than healthy quorum to put questions to you. I will, as is traditional, say that a list of declared interests of the Members has been passed around. As you know, you are on the record and we will be sending you a transcript as quickly as we can after today so that you can check and see your points have been properly reflected. As you know, we are making progress on a fairly profound examination of the Reform Treaty, the purpose being to present, as is our duty, an impact assessment of this Treaty on the European Union and, by extension, the United Kingdom so that our Members will be informed when the ratification of the Treaty comes in the form of a Bill into the House at some future date, maybe late January. Would you like to make an opening statement?
Professor Sir David Edward: No, I do not think so.

Q115 ***Chairman:*** My first question is a rather general one, but there may be some underlying points that you would like to take up. Do you have views on the restructuring of the Treaties, that is to say that we now have a Treaty on European Union and a Treaty on the Functioning of the European Union? There has been some discussion as to whether the subordination of the second to the first has any real impact or whether they are both of entirely equal value. Perhaps you might like to begin by making a comment on that.
Professor Sir David Edward: Very briefly, it seems to me that the advantage of this restructuring is that it brings the two Treaties together in what ought at least to be a more coherent way: the Treaty on European Union, as it were, setting out the objectives and principles, as they used to be and are at present set out at the beginning of the EC Treaty; leaving the Treaty on the Functioning of the European Union for the detail. What is the downside, so it seems to me, is that, whereas the objectives of the EC Treaty were very clear, the objectives in 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. It is, by comparison with the proposed Treaty establishing a Constitution, an advantage that there is really no tinkering with the substantive provisions of the EC Treaty; they remain substantially the same and the structure remains the same. The question, so it seems to me, is the extent to which, and My Lord Chairman has already alluded to this, the new Treaty will downgrade the core value of the internal market. I have always believed that the internal market was the absolute key to the success of the EU. In relation to that, it seems to me to be potentially difficult that the internal market provisions are susceptible, according to this version, to the simplified revision procedure. There could be substantial change in the internal market provisions without the necessity of the full revision procedure as opposed to the simplified revision procedure. That is all I would like to say about that.

Q116 ***Chairman:*** Thank you very much. We may be coming on to the simplified procedure a little bit later. It is something we need to raise because it has implications for parliamentary scrutiny as well.
Professor Sir David Edward: Indeed.

Q117 ***Lord Tomlinson:*** Will there be any and if so what will be the effect of expressly conferring legal personality on the Union?
Professor Sir David Edward: As far as I can see, none, in this respect, that all three Communities, all the original three Communities had legal personality. All three Treaties provided expressly for them to have legal personality and Article 1 of the new Treaty on European Union simply says that the European Union replaces and succeeds the Community, by this time only one. It is valuable to note what the Coal and Steel Treaty said about legal personality because it really explains the logic of it. Article 6 spelled it out in more detail and said that "The Community shall have legal personality" and that "In international

relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives". In other words, it could enter into binding relations in public international law with other states and bodies. Secondly, it said that "In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons constituted in that State; it may in particular acquire or dispose of movable and immovable property and may be a party to legal proceedings". In other words, the Community and now the Union could not enter into contracts without having legal personality within the Member States. Therefore I do not see that the conferring of legal personality on the Union, in so far as it replaces and succeeds the Community, really has any extensive effect at all. However, I may be wrong about that.

Q118 ***Lord Tomlinson:*** I am very grateful Lord Chairman for the clarity of that answer. Can you, in your wildest imagination, hypothesise why so many people are so concerned about this particular issue? I find it impossible, but you might have a more fertile imagination than I.
Professor Sir David Edward: Except in the Coal and Steel Treaty, it was tucked away at the end of the other Treaties and possibly was not noticed. In the Treaty establishing a Constitution, it came up front and it was perceived as part of the "European state" proposal; but, at least understood as a lawyer would understand it, that is a red herring.

Q119 ***Chairman:*** Before I ask you the next question, I should have said earlier that we have found the brief which you provided extremely interesting and very helpful, and I know some of my colleagues will be referring to it in the course of this conversation. May I come on now to the question of the statement of the respective competences that we now have in the new Treaty? Would you say that this is a mere codification of the existing position as reflected in the Court's case law? Will the statement be helpful and, if so, in what context? What difference does it actually make?
Professor Sir David Edward: I would not say that it is *merely* a codification of Court case law. There are certainly reflections of Court case law, particularly in the context of shared competence where it provides that where the Union has legislated then the Member States cannot act on their own; they must respect the legislation which has been taken in fields of shared competence. It also reflects the jurisprudence of the Court of Justice as regards the common commercial policy. I am not conscious that in any other way it can be said to codify the jurisprudence, but I do not find anything particularly surprising or shocking in it, or new.

Q120 ***Lord Tomlinson:*** If I may ask a slightly tangential question, in relation to competences, is there anything in any of the revised Treaty provisions that changes the concept of this being a community of conferred competences, that it has no competence that it is born with, there are only conferred competences that have been willingly, voluntarily given to the Community by the decision of Member States?
Professor Sir David Edward: That seems to me to be expressly provided for. It is very clear that it is based on the principles of conferral, subsidiarity and proportionality.

Q121 ***Chairman:*** I was thinking that the fact that the Czech Government felt it necessary to ask for a specific protocol on this, Protocol 8, to strengthen the concept of the shared competences suggested that in the IGC itself there must have been other countries who took a rather lighter view of this. Does anybody know, do you know, why they felt it necessary?
Professor Sir David Edward: No, I am not conscious of that.

Q122 ***Lord Mance:*** May I ask a supplementary question on different aspects of competences and that is the international agreement competence under Article 188l which now provides, or will provide, that the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or 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 provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope. Two questions. Firstly does that expand international competence compared with the present jurisprudence? The case I think of is the Lugano Convention case, but there may be others.
Professor Sir David Edward: It does not occur to me, but I have to admit it is not a problem to which I have applied my mind.

Q123 ***Lord Mance:*** Second, do you have a view as to how it would work in relation to a matter within Title IV, where the UK had not opted in?
Professor Sir David Edward: Where the UK has not opted in, then it seems to me that in all probability the Union has nevertheless power to conclude such agreements.

Q124 ***Lord Mance:*** Binding the UK in an international level?
Professor Sir David Edward: Not binding the UK in so far as the Union purported to act purely under Title IV and sought to bind the Union in relation to Title IV matters out of which the UK had opted.

Q125 ***Lord Mance:*** So that if we had not opted into the Lugano regulation, for example, then it could not bind us?
Professor Sir David Edward: That is what I understand is the position.

Q126 ***Chairman:*** Are we talking mainly there about immigration, security and cross-border crime? Is that the area?
Professor Sir David Edward: The Lugano example is civil cooperation, recognition and jurisdiction. So it could apply in any field. It could apply certainly in crime and certainly in asylum; any Title IV field.

Q127 ***Lord Mance:*** Are there any major changes affecting the jurisdiction of the European Court of Justice and, in particular, in the area of Freedom, Security and Justice?
Professor Sir David Edward: If I may begin with other aspects, there is a significant extension (or acceleration) of the power to fine in two respects. First of all, in order to invoke the Court's power to fine, the Commission does not first have to repeat the reasoned opinion procedure. So it can come more quickly from the stage of a finding of a breach of an obligation to a request for the Court to fine. More particularly, there is power to fine in respect of failure to implement directives and that can be requested by the Commission, as I understand it, directly in the application to the Court which asks for a finding of a failure to implement a directive. I think that would ensure that the pressure on Member States to implement directives would be strengthened. Secondly, there is an extension of *locus standi* of individuals directly affected by measures which require no national implementation and that could potentially give rise to a significant extension, at least of the workload of the Court to the extent that the legislative and regulatory activity of the Union directly affects individuals. By "individuals" one must bear in mind that the individuals in question may be multinational corporations as well as small persons. There is, in addition, jurisdiction in respect of the acts and failure to act of bodies and agencies, which is new. The action for failure to act is a very little used jurisdiction. It could become significant, if a body or agency failed to take some action which the individual felt should be taken. Then there is the jurisdiction in relation to the situation which arises where the Union wishes to threaten a Member State which is in serious breach of its obligations; the preliminary to suspension or expulsion. One would hope that that simply does not occur. Lastly, but this is not an extension of jurisdiction, there is the question of the obligation to proceed fast in relation to persons in custody. There has been a significant number of cases which do affect persons in custody, leave aside freedom, security and justice.

Q128 ***Lord Mance:*** What does that arise under?
Professor Sir David Edward: Any question under the internal market rules on free movement of persons when a person is in custody. For example, the case of Oteiza Olazabal (Case C-100/01) raised a question about an alleged Basque terrorist who had been in custody in France. This is not new. As regards freedom, security and justice, obviously the effect of bringing freedom, security and justice fully within the Community system, as I have explained in my paper to Sub-Committee E, does have the effect of bringing, in principle, all the acts of the Union under that title within the jurisdiction of the Court of Justice, except in so far as Member States have opted out and subject to the transitional provision.
Chairman: Lord Mance mentioned workload and I know he will probably want to draw you out on that in a little while but first I want to ask Lord Maclennan of Rogart to pose a question.

Q129 ***Lord Maclennan of Rogart:*** Although the Treaty appears specifically to exclude the jurisdiction of the Court in respect of foreign and security policy, concerns have been expressed in certain quarters that there could be some doubt as to whether that would be regarded as excluding from consideration all matters touching foreign and security policy. I wonder whether you could give a view about that.
Professor Sir David Edward: To be fair, I have not really considered this, but at least it must be the case that the Court may be faced, as it is faced at present, with the question of whether a particular issue falls within foreign and security policy or falls within some other competence of the Union. That is a normal part of the Court's jurisdiction. Of course, were the Court to hold that it fell within another competence and therefore was subject to its jurisdiction, it might thereafter be alleged that the Court was "meddling" in a matter from which it was intended to be excluded.

Q130 ***Lord Maclennan of Rogart:*** I wonder whether, from your experience, you would be able to indicate whether the jurisprudence of the Court indicates a propensity to stand back or a propensity to creep forward where there appear to be both considerations or perhaps dual considerations.
Professor Sir David Edward: I was there for 14 years and 12 years in the Court of Justice and I detected no propensity one way or the other for the very simple reason that I signed more than 1,300 judgments and I was rapporteur in more than 300 cases. I did not have time and none of us had time to develop propensities.

Q131 ***Lord Powell of Bayswater:*** With all the diffidence of a non-lawyer, is it not the case that the Court has acquired quite considerable additional

powers of judicial review over the operation of many of the Community's institutions, including the European Council itself? Do you think that is extremely significant or would you say it is going to be very much a rare exception that it uses those powers?
Professor Sir David Edward: That is totally unforeseeable. The European Council, up to now, has not actually had powers of this nature and we must bear in mind the belief—it is not so strong in this country but certainly is in Germany—that it is quite unacceptable that any body should have a power which it can exercise without any possibility of judicial control. In 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.

Q132 ***Lord Mance:*** You were mentioning propensities and I wondered whether you could give us an idea of the general background and areas of expertise of members of the Court. We of course have your CV and I was very pleased to see your appearance in a case which, you will be interested to hear, was being cited to us yesterday where you had a considerable victory, *McKew v Holland & Hannen* in 1965. Leave that aside. Can you give us a view as to the general background and expertise of the Court? What I am going to follow on and ask is how far there are at the moment practitioners in the various fields, which will expand the fields which will apply under Title IV.
Professor Sir David Edward: I do not have the statistics with me, but it would be true to say that when I went there, there was a predominance of public lawyers and professors. Latterly the tendency has been for the Member States to appoint professional judges but also in general to appoint judges from constitutional or public law courts. The difficulty to which I have alluded is that to the extent that you enlarge very extensively the competences of the Court of Justice and in particular require it to give rulings, particularly at high speed, on a range of issues, then it is extremely difficult for that jurisdiction to be exercised, if the Court does not contain people who are accustomed to dealing with that kind of question. The point which I have made in my written evidence to Sub-Committee E is simply that in dealing with references, and I have had experience of this, you may not get any assistance from the referring judge. You may frequently get little assistance or perhaps no appearance from the parties in the national court. You may get no assistance from the government of the state concerned and sometimes the assistance you may get from the Commission is limited for one very simple reason, that the Commission has to plead in the language of the case. Therefore as the legal agent who appears for the Commission, particularly in cases in what are sometimes called the more exotic languages, you have to find a member of the Legal Service who can speak that language and he or she may know nothing about the area concerned. So you may not get a great deal of assistance even from the Commission and this does impose, or will impose, a very significant strain on the Court.

Q133 ***Lord Mance:*** Do you have any proposals or thoughts which, in the longer term, might be considered in this area?
Professor Sir David Edward: Thoughts. Personally I have always wondered whether the Brussels Convention, civil jurisdiction, really is appropriate for the jurisdiction of the Court of Justice and whether it might not have been better to create a tribunal consisting of civil judges of the Member States who would perhaps sit once every three or six months to deal with the relatively small number of cases arising and their expertise would be sufficient to deal with it. They would have a much clearer understanding of the practical problems of jurisdiction. Perhaps that is an idea which might be extended but it is very, very far from what people at the moment are thinking about.

Q134 ***Lord Mance:*** Would that involve ad hoc judges or judges from supreme courts?
Professor Sir David Edward: That is what I envisage. It could be a way of dealing with jurisdictions that require specialist knowledge and require quick answers. There are dangers in that as well, because, of course, as we know, specialist judges tend not to see things in a wider context, so there are dangers both ways. May I just say one thing? It is highly regrettable that more time is not given to thinking how the Court should be structured, how it can work. This is the Cinderella of all inter-governmental conferences.

Q135 ***Lord Mance:*** Can you just help us on the transitional Protocol in regard to the opt-out from non-amended measures and the provision that excludes the application of the Court's jurisdiction over existing Title VI measures for five years unless a measure is amended, giving the UK at the end of the five-year period a right to opt out of all existing non-amended measures but then, as I understand it, a right to opt back into specific ones? Do you see any potential problems here? Will it be clear?
Professor Sir David Edward: I confess I find it extremely difficult to get my head round this. My understanding of some of these provisions is slightly like observing a satellite going round the moon: now you see it, now you don't. That is slightly my understanding of some of these provisions: I understand for a brief period and then I seem not to understand any more. As I understand it, what we are

talking about is a situation where the UK has opted in to a particular provision. That provision is then amended and that creates the jurisdiction of the Court of Justice, even for the UK. The question then arises as to what "amended" means. My answer to that would be that I would be very surprised if the UK were to find itself in a position of discussing a proposal which affected a measure to which it had opted in without taking care to find out whether people regarded this as an amendment or not If it is an amendment and the UK did not like it, then the answer is to opt-out of the amended proposal.

Q136 ***Chairman:*** In the final analysis the Government will find itself having in some instances to make the difficult choice of deciding whether the value of the measure is such that it is important to opt in and whether that outweighs the disadvantages of then being subject to the European Court's jurisdiction. So it's political judgment in the end.
Professor Sir David Edward: This is the nature of opt-outs.

Q137 ***Lord Mance:*** May we just move on then to enhanced cooperation? The Treaty will facilitate closer integration in criminal law by groups of Member States in certain circumstances and where the emergency brake has been applied by one Member State and other groups wish to go ahead, that is Article 69e (3) and 69f (3). Do you see any dangers or difficulties in particular for the Court in promoting different levels of integration in this way?
Professor Sir David Edward: I have to confess that, as the Union has reached 27 and is liable to reach more, variable geometry, if you like so to call it, is almost inevitable. However, there will be the disadvantages of unequal application of the law and unequal application of the Court's jurisdiction. The only point I would make in this connection is that under Article 10(2) of the new Treaty on European Union, a decision authorising enhanced cooperation should be adopted by the Council as a last resort, when it is established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole. Therefore, it seems to me that you have a situation where the enhanced cooperation is not just something lightly adopted or conceded to a group of Member States; there is quite a significant hurdle to be overcome before the enhanced cooperation would be authorised.

Q138 ***Lord Powell of Bayswater:*** I want to come on to the Charter of Fundamental Rights and the question of what, if anything, Article 6 TEU actually adds to the price of bread in this respect? Does it do more than simply confirm a state of affairs?
Professor Sir David Edward: I think it does and, if I may say so, it is of some significance. It is useful to remember what the Charter actually says. In Article 51 it says that "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union"—*addressed* to them. "They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers . . . ", et cetera. One of the institutions to which this document is addressed is the Court of Justice so it imposes a duty on the Court of Justice to apply it and to promote its application. That is there already and so I would agree with you, with respect, that to me Article 6 really adds nothing very much to where we are already.

Q139 ***Lord Mance:*** By parity with the position under the Human Rights Act, is it possible that the effect of this article and the duty on the European Court, which you have just mentioned, will be horizontal? In other words, because the Court will be applying European law as between either Member States or persons and states, when it applies it there will inevitably, as there has been with the European Convention on Human Rights, a tendency for the principles to apply horizontally as well as against institutions.
Professor Sir David Edward: Indeed. My understanding is that, even leaving aside the Protocol in dealing with Poland and the United Kingdom, the Charter does not create by itself justiciable rights in national courts, except possibly in questions relating to the validity of acts of the institutions. In other words you cannot say in a horizontal situation that you demand a remedy because of Article such and such of the Charter any more than you can say it in certain respects in relation to the Human Rights Convention. In my opinion, in horizontal situations, the Charter will only be an aid to interpretation, but I am not sure.

Q140 ***Lord Mance:*** Is there a distinction in that respect possible between what the Charter identifies as rights and what it identifies as principles in Article 52?
Professor Sir David Edward: The language of the so-called explanations is very peculiar in that respect. The explanations do not make it clear what are rights and principles, so I am not sure that that is helpful. What is very clear is the exclusion of Title IV as creating justiciable rights in the United Kingdom.

Q141 ***Lord Mance:*** In the Protocol?
Professor Sir David Edward: In the Protocol. I am sorry, my previous answer was not very clear.

Q142 ***Baroness Cohen of Pimlico:*** Lord Mance has just shot my fox, but I was trying to ask the Clapham omnibus question. What is the effect of the Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom? I suppose the core question in there is whether it works as people expect; that our opt-out will not lead to justiciable rights in the United Kingdom.
Professor Sir David Edward: The justiciable rights point is limited to Title IV and so Article 1, paragraph 2, of the Protocol limits this issue of justiciable rights to Title IV of the Charter. Article 1, paragraph 1, simply says that "The Charter does not *extend* the ability of the Court of Justice . . . to find that the laws, regulations or administrative provisions, practices or actions of the United Kingdom are inconsistent with fundamental rights . . .". It is a very limited Protocol as I see it. It is not a total opt-out of the application of the Charter. On the contrary, it begins in the preamble by reaffirming Article 6 of the Treaty on European Union. As to where that leaves us—

Q143 ***Baroness Cohen of Pimlico:*** I suppose that was my question.
Professor Sir David Edward: —I am not sure that I can either offer elucidation or comfort in that respect.

Q144 ***Lord Powell of Bayswater:*** I would simply point out that in an earlier session we had this discussion and the question was put: are you saying that in effect the UK Protocol is not really worth a great deal? The witness replied "Crudely, yes".
Professor Sir David Edward: I would not say that. The exclusion of the justiciability of Title IV is significant in the sense that you could not rely on Title IV as a ground of action.

Q145 ***Lord Powell of Bayswater:*** Does not the exclusion of Title IV relating to solidarity or employment rights create a problem despite the words "in particular" and "for the avoidance of doubt"? Might reverse inferences be drawn?
Professor Sir David Edward: The inference might be drawn that the avoidance of doubt arises because Title IV is about principles and not about rights. That would seem to me to be a possible inference which could be drawn. Clarity does not characterise this particular area.

Q146 ***Lord Maclennan of Rogart:*** I wonder whether you could indicate to us what, if any, legal effect flows from the translation of the provisions of free and undistorted competition from the body of the Treaty to the Protocol, which it has at the behest of the French president?
Professor Sir David Edward: The first point is that the words "free and" are not in the existing Treaties. The existing Treaties talk about a system ensuring undistorted competition. "Free and" was introduced in Article I-3(2) of the Treaty establishing the Constitution as a specific characteristic of the internal market. It should be noted that the Protocol does not include the words "free and". It only uses the word "undistorted" and I must confess I do not fully understand why it was not possible simply to delete "free and" and leave "undistorted" in the body of the text because that would have been no innovation on the existing Treaty. I would also say that in my opinion "free" competition was never part of the objectives of the Treaty in the sense of unrestricted and unregulated competition; fair competition, fair and undistorted competition, yes, but not necessarily unlimited, unrestricted and unregulated competition which might have been an inference to be drawn from the word "free". The question now is whether, having put it in a Protocol, you have downgraded the significance of the words "undistorted competition" in the context of the internal market. In that connection you have to bear in mind that the Protocols have the same effect as the Treaty and that is expressly provided for in the Treaty on European Union; so that Protocols which declare that undistorted competition is a characteristic of the internal market mean that the words are read back in. The way this was done is regrettable.

Q147 ***Lord Maclennan of Rogart:*** Regrettable does not alter the legal position.
Professor Sir David Edward: No, it does not. As I understand it, it does not because the Protocol has the same effect as the Treaty.

Q148 ***Chairman:*** May I make reference to something that you wrote in your written submission to us involving national parliaments which arouses my curiosity? You note that the proposed Article 63 TFEU would impose a positive obligation on national parliaments to ensure that proposals submitted under chapters four and five, judicial cooperation and criminal matters of police cooperation, comply with the principle of subsidiarity. Elsewhere in the Treaty we had problems with the word "shall" where it originally said "national parliaments shall contribute to the proper functioning of the EU". That word "shall" was eventually taken out because there was strong resistance to any idea that the European Union could prescribe a particular course of action to be taken by a sovereign national parliament and yet here the imposition of a positive obligation seems to be falling into that trap, is it not?
Professor Sir David Edward: The point I was seeking to make was a more limited one, but may I address the general question first. Yes; if you regard the obligation of the member state parliaments in that

context to be an obligation which can be legally enforced, and it does not seem to me in other contexts or even in this context it could be legally enforced. The point I was seeking to make was a different one which was that if you get a measure in the Area of Freedom, Security and Justice and it goes through and then there is a claim that it infringes the principle of subsidiarity, it would be relevant, as I see it, that no Member State parliament had objected to that measure on that ground.
Chairman: I accept entirely that point, which is a very good one. I would venture to say, however, the fact remains that a lot of people who were very worried about "shall" must have missed this reference to a positive obligation.

Q149 ***Lord Mance:*** The draft version I have, has in the margin "'shall' deleted". It now reads, "national parliaments ensure that the proposals and legislative initiatives submitted"—
Professor Sir David Edward: I am obliged. The text I have does not have that but, in that event, the limited point I made remains.

Q150 ***Lord Mance:*** Yes, that if you do not take the point then . . .
Professor Sir David Edward: If you do not take the point at the stage when it is going through, you cannot raise it later.
Chairman: Could I just check with Lord Mance's reading there that the words "a positive obligation" precede the reference to ensuring?

Q151 ***Lord Mance:*** No, it is just "national parliaments ensure" that the initiatives . . .
Professor Sir David Edward: The words "positive obligation" were mine, not from the text.

Q152 ***Chairman:*** Okay, that has clarified that. We have just a few moments left and maybe I could ask you about Article 9(2) of the Treaty on European Union which states "The institutions shall practice mutual sincere cooperation". What might this mean in relation to the Court and to litigation where one or more of the institutions is a party? In a sense we have partly covered this but I wondered whether you had any further comment on this?
Professor Sir David Edward: No. I have not heard of a situation in which anybody has claimed that the Court was in breach of its obligations to the other institutions. 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, the three of them together, the idea that they have an obligation to work together.

Q153 ***Baroness Cohen of Pimlico:*** You cannot impose that kind of obligation on the Court, can you?
Professor Sir David Edward: Nonetheless I suppose in so far as the Court is acting as an institution as opposed to a jurisdiction, if you see what I mean. There are circumstances in which the Court is indirectly involved in treaty negotiations.

Q154 ***Lord Mance:*** I was going to ask one point about national appointments to the Court. Is that still going to be the principle of one judge, one country?
Professor Sir David Edward: Indeed.

Q155 ***Lord Mance:*** But there is the panel to be set up to give an opinion on candidates' suitability.
Professor Sir David Edward: Yes.

Q156 ***Lord Mance:*** Is it easy to think how that will operate if there is, for example, a need for judges in the areas of expanded competence? Is there any way in which national courts will in practice be told that or be able to respond to that? Do you think they will in practice respond to it?
Professor Sir David Edward: It is extremely difficult, just in the same way as there was pressure to increase the number of women in the Court. Had this panel been in existence, it would not have been possible for the panel to say "No, you cannot appoint that person because he is male and we require you to propose somebody who is female". If I take the situation in this country at the moment, if the United Kingdom thinks that the new judge of the Court of Justice ought to come from Scotland, it would be extremely difficult for the panel to say "No, we want an English patents specialist". It is just not a real discussion.

Q157 ***Lord Mance:*** Is it in the long run worth thinking as an ideal of detaching judicial appointments from national prerogative?
Professor Sir David Edward: If we imagine, and I believe this is inevitable, that in the longer term you are going to have to have a "supreme court" of a much more limited composition, then you could detach it from member state choice.

Q158 ***Lord Mance:*** Would you be in favour of that?
Professor Sir David Edward: I believe it is inevitable, given the way that the Court is expanding. If one envisages that there is going to be a court of 30+ judges, it is almost impossible to see how a coherent jurisprudence can be applied. My view therefore is that in the longer term, that has to be thought about. But so long as there is the principle that there will be one judge per Member State and that the judge will

be nominated by that Member State, then it seems to me that the only function of the panel must be to satisfy themselves that the person is a competent lawyer of sufficient quality to do the job.

Q159 ***Chairman:*** I am afraid we will have to leave it there because we are just coming up now to the hour. Talking of competent lawyers of sufficient quality, may I say Sir David that you have certainly fulfilled all our requirements as far as this evidence session has been concerned and we thank you very, very warmly indeed for giving of your valuable time. You have given us a lot to think about and some very useful evidence for our inquiry, so on behalf of the whole Committee, I thank you very much.
Professor Sir David Edward: And thank you, because it has caused me to figure out what on earth this thing means.

Examination of Witness

Witness: Professor Helen Wallace CMG FBA, Centennial Professor, European Institute, London School of Economics and Political Science, examined.

Q160 ***Chairman:*** My first words are always to note that members' interests have been distributed. Professor Wallace, what a pleasure to see you here. Thank you very much indeed for finding the time to come. I am afraid we are a little thin on the ground because, as you will see from the monitor, there is a debate going on in the Chamber on one of our reports which is a highly contentious issue and therefore, I am afraid, some of our Members are in the Chamber rather than here. We are of course on the record and we will send you the transcript. This is part of our ongoing inquiry into the Reform Treaty and we are planning to provide the House with a detailed impact assessment of the impact of this Treaty on the European Union and by extension on the United Kingdom in time for the arrival of the ratification Bill in the House. The timing of that we do not know but it will be some time in the early part of the year. Would you like to make an opening statement? You are welcome to do so.
Professor Wallace: May I make just a few very brief remarks? I thank you for inviting me and I apologise for not being able to send you anything in writing first because I have been away. I just want to make three very quick points. The first is that, as I read the history of the European Union, what happens depends tremendously on evolution and not only on the way the formal rules are stated. Trying to speculate about the outcome of this Treaty, as with previous ones, means guessing about practice as well as about the application of new rules. In my book, and this will no doubt come up later, there are many areas in which the Reform Treaty does not actually dot all the i's and cross all the t's, so there is a great deal of room for practice. The second point to make, as I have just been involved in doing some work on it, is that it is interesting that the Union's institutions have coped much better than many people expected with the arrival of new Member States. If you simply track output productivity, activity and so on from the main institutions, they are pretty much as the institutions were before. Part of that is because, within the institutions, various non-treaty reforms have been introduced to smooth practice. The third point I want to make is that my view of the experience of the past is that the institutional rules which bed down best are the ones which have clear policy drivers behind them. This Treaty is not terribly clear on policy drivers, although I suppose maybe one would expect most impact of policy-shaping institutional practice in the justice and home affairs and the foreign policy provisions.

Q161 ***Chairman:*** Thank you very much; that is very helpful. May we begin by drawing you out a little bit on how the Treaties have been restructured by this new Reform Treaty? Questions have been raised about the relative importance now of the objectives as they appear in TEU and what would appear to be the subjection of TFEU to TEU or do you feel that they both have equal value?
Professor Wallace: You have just been listening to a very distinguished lawyer and I cannot second-guess your previous witness on any of those things. We have ended up with a slightly muddled outcome because of the circumstances in which this Reform Treaty has been born. This is one way of carving up the different items between different branches of the Treaties and a lot will depend on practice and the kinds of cases that are brought, whether legal cases or institutional pressures, to try to figure out how those things work out in practice. I myself was very concerned at the way in which the framing of the words about competition were shifted from the preamble. Lawyers seem to say that probably it does not really make a great deal of difference to the likely substance in that in litigation members of the Court will read across the various provisions. I would have preferred it if, on that particular point, the competition reference had stayed more firmly in the preamble.
Chairman: Thank you. We may come to that again a little bit later.

Q162 ***Lord Tomlinson:*** Professor Wallace, last night I had the benefit of listening in our own House to a debate during which I heard a tremendous diversity of view about what the express conference of legal personality on the Union would actually mean. What practical effect do you think this actually has, if any?
Professor Wallace: Again I am not a lawyer.

Q163 ***Lord Tomlinson:*** That is why I am asking you about the practical effect.
Professor Wallace: I agree with the British Government's view on this, namely that the provision is much more about clarification and simplification than about introducing major new points of principle and I can see there is a welcome point to doing that. If one is thinking about the practical relevance of it, then there are many areas of the world, including many troubled areas of the world, where the Union is working, often with other international agencies, to try to bring remedies to bear in troubled places and where it would be useful not to have to argue about the legal personality of the Union when you are trying to get inter-agency cooperation. For it to be clear that both the Commission and the Member States can directly engage without silliness seems to me a benefit. However, that is a very, very down to earth view of it.

Q164 ***Lord Tomlinson:*** If I may just move on to the next area, the Treaties contain the statement about the respective competences of the Union and the Member States. Are these listings of competence mere codification of the existing position as reflected in the European Court of Justice case law? Do you believe the statements of competences are helpful and, if so, in what particular context?
Professor Wallace: The attempt to try to codify different kinds of competences is an old story, is it not? We know from the history of the Union that whatever kind of categorisation and listing we do, the interesting issues are always about the grey areas. This particular way of doing it in this new Treaty does not remove the potential for grey areas at all. It is probably nonetheless important to have the phrasing that is there because it is a kind of reassurance and it is a particular reassurance for people who have nervousness about subsidiarity and related questions. On the grey areas, my speculation would be that if we were starting to draft this Treaty now and looking at the issues of policy competences, one of the areas many of us would want to look at would be the appropriate policy competences one would want to attribute to the Union for dealing with the climate change related issues. It might be an area in which it would not be too difficult to get agreement for stronger policy competences there. It is just an example of something which comes somewhere around the grey areas and it may be that the Treaty revision procedure that is envisaged in the future might be used or people may try to use it in this context. I suppose the other thing to say, which I actually quite welcome, is that in various places in the new Treaty, there are references to the possibility of proposals to reduce the competences of the Union also being legitimate ideas to put on the table. That used to be regarded as blasphemy. It is not at all a bad thing that one should put into the Treaties that it is a perfectly reasonable thing from time to time to suggest, for X or Y, maybe one wants less at a Union level because there are other, better, different ways of dealing with a particular problem and in this way to see the issues of assignment of competences as a two-way street and not a one-way street.

Q165 ***Lord Tomlinson:*** Just one brief supplementary on that. A significant number of Members of our House seem to be greatly exercised by what they consider to be the fact that the list of shared competences actually makes the interest of the Member State subservient to those of the European institutions. Do you see that? Do you think there is a change caused by the codification of shared competences or do you think it still remains completely a community of conferred competences and they only get the competences that Member States, through the Council, have voted for?
Professor Wallace: The Union has conferred competences and the arrangements for conferring can vary over time. The two-way street point is that they might vary in either direction as more or fewer, in the same way that the competences of the United Kingdom Government have been reduced to the extent that some of those competences have been devolved to other parts of the UK.

Q166 ***Lord Powell of Bayswater:*** I just wanted to interject a thought. I was very interested in what you said that policies ought to be the main drivers of the European Union instead of arcane discussions about competences and shared competences which are meaningless to 99.5% of the population. Do you think this Treaty will actually draw a line under the constant obsession with institutional issues? Or is that a vain hope? Do you think it will go on being the main preoccupation of most European governments forever?
Professor Wallace: I would be very happy if it were, because I have always taken the view that the most appropriate and effective way of trying to reform the Union is in relation to policy things that you either do want it to do or do not want it to do. If the policy objectives—the single market is a very good example—seem to require some different instruments or some different mix of instruments, then put those instruments in place to achieve this; hence my point about climate change. We have had three bad

experiences in a row, have we not, with the Treaty of Nice, the Constitutional Treaty and this one in some sense not doing that? I guess there is a certain amount of fatigue. How long the fatigue lasts into the future, I cannot guess better than you.

Q167 ***Chairman:*** One last quick question on competences. I still do not quite understand why the Czechs insisted on Protocol 8 on defining the scope of competences. It appears that they wanted it there so that it would say the following, that when the EU carries out an action in a certain area, the scope of its competence covers only the elements governed by the Act in question and does not therefore cover the whole domain. I understood that was already within the definition of competences or is this something new? If it is new, what is the significance of it?
Professor Wallace: I do not have a very clear read-out on that. It would not be the first time that a protocol or declaration had made a statement of the obvious. It is frequently the case that Member States wish to be attached to documents of this kind—protocols or declarations—that are there mainly for domestic purposes. It has even been known for the United Kingdom Government so to do.

Q168 ***Chairman:*** In other words, for the Czechs to have something called a Czech Protocol is a score.
Professor Wallace: In the last round of discussions there was rather a queue of governments trying to put their flags on particular things.

Q169 ***Chairman:*** What impact might the extensions of legislative competence have on the institutions of the Union? What about the introduction, for example, of sport as a new competence?
Professor Wallace: The extensions of legislative competence are a very mixed bag of different kinds of issues and I am much more persuaded by some than others. I would broadly welcome those in the field of justice and home affairs in the sense that so much of justice and home affairs is now put into a normal legislative process. There are some areas, such as arrangements to deal with humanitarian aid and so on, aspects of energy policy, where it may also be welcomed for those to be part of a normal legislative process. There is a bunch that I would like to take out and sport would be one, except the trouble is there is Court jurisprudence, so it is quite hard completely to cross sport out. I would cross tourism out as well. It would not be difficult to find a slightly longer list of things that might similarly be removed. Incidentally, I would cross space policy out as well.

Q170 ***Lord Mance:*** May I ask you questions about the European Court of Justice? Do you see any significant changes with regard to its jurisdiction?
Professor Wallace: The fact that the Court is now going to be able to receive litigation in justice and home affairs is hugely important and it is something which I personally welcome. I appreciate there are limitations about which parts of justice and home affairs would and would not be subject to the Court, but there are areas of justice and home affairs where the right of the individual to have access to litigation seems to me critically important. It is not an unreasonable speculation that we can expect the Court to get quite busy in that area over the passage of time.

Q171 ***Lord Mance:*** Do you think any changes might need to be made in respect of the way the Court operates or is constituted for that purpose?
Professor Wallace: I am not an expert on the Court of Justice. What is interesting to note is that the Court of Justice, less so the Court of First Instance, has been through really quite an extensive renovation of its operating procedures and that is one of the better things that came out of the Nice Treaty. They have done that partly to cope with backlogs and the amount of time taken to resolve cases, but also in anticipation of a greater workload with enlargement. I do not know how far the Court would need to do more changes in addition to those that it has recently done which seem to be bearing rather good fruit.

Q172 ***Lord Mance:*** If you are not an expert on it, I will not pursue it very much further but I had in mind also the greatly expanded nature of the jurisdiction. Is there anything you want to say about that? Does the Court need any adaptation of capabilities in that regard?
Professor Wallace: I presume it would be to produce staff support that will enable it better to deal with those areas.

Q173 ***Lord Mance:*** May I just ask then about the UK Protocol on the Charter of Fundamental Rights? What do you make of the position in relation to the Charter and the UK?
Professor Wallace: I gather David Edward has just been talking to you about that and I do not have any more to say than he did on the substance of the law. I personally regret the Protocol, because I regret the complexity that it produces and what may be a lack of clarity as to how the Charter, to the extent that it is justiciable, which is in itself a question, might bear on British citizens. Maybe one other point is that to the extent that the Charter is justiciable and issues are raised, for example, about employment rights in other Member States, then it may well be that companies will start to introduce also in the United Kingdom any consequential changes as a result of litigation elsewhere. This is what happened with the Social Protocol previously.

Q174 ***Chairman:*** May I just follow up on one thing? It would seem that the Court will, over time, develop jurisprudence in the field of fundamental rights by reference to the Charter. Does this not already then undermine the UK Protocol and maybe it is not as watertight as the Government would like it to be?
Professor Wallace: Much remains to be tested here and it may well be that things are not as watertight, just as it may well be that the fact that the Court was already making reference to the Charter, even without it being specified that it would have the force of law, means that there is a certain amount of jurisprudential drift here.

Q175 ***Lord Maclennan of Rogart:*** I wonder whether I could ask you a little about the impact of the Reform Treaty on the Council of Ministers. There have been a number of changes to the presidency and the transparency of its legislative role. There are also the more distant prospects of changes in the qualified majority voting system and the effect of the declaration on blocking minorities. I wonder whether you can see how this may impact upon the effectiveness and accountability of the Council.
Professor Wallace: There are lots of different issues here. First on the voting part, let me just go backwards for a moment, if you will bear with me. We do not have a very good analytical toolkit for telling us how the existing majority voting provisions work in practice. Even in areas where the Council may, and indeed does, take decisions on a qualified majority legal base, mostly governments prefer to take decisions by consensus. Explicit voting occurs on only really quite a small minority of issues and such explicit voting as we have recorded is not very interesting in telling us about the way the voting system operates. To the extent that it really bites, it bites in a much more implicit way, long before decisions are formally adopted. We have to try to figure out what is going on inside the Council, both at ministerial level and in its committees and working groups. It has always been my sense that the numerical notion of voting was really not as important for that as the public debate would suggest and that, in any such negotiations, there is concern to try to assess the weight of the pros and the cons on any given issue and, very importantly, try to take into account reservations that this or that Member State has by incorporating them into the proposed legislation itself by amendment. That is really much more the way it operates. If that is right, then the shift to the different majority voting would probably have a very small impact on the way things happen, although we know it has been extremely important for Germany symbolically for those changes to be made. I do not expect the voting as such to make a terribly big difference. On the revised version of Ioannina, I reread this morning Douglas Hurd's account of the negotiations over the Ioannina decision which troubled him a good deal at the time. What he says in his book and what the experience of practice is, is that the Ioannina decision is useless in practice. In practice it is not very interesting because the cases in which this particular notion of constituting a blocking minority arises turn out not to arise in an important way. Such issues as have arisen and been pleaded on have been pretty trivial issues. I would guess the same is likely to be true with the version that we now have there at the insistence of the Poles. So it has a symbolic importance, but is probably a nuisance in practice and not very important. My starting point on the European Council part of it is that 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 and in this sense for it to be embedded into the institutional system: it recognises practice; it is not a huge innovation given the way the European Council actually operates within the process in a slightly less formal way. As for the election of a full-time President, it is a proposal I have always been against and always thought ill-conceived. Why have I always thought it ill-conceived? For some maybe not entirely glamorous reasons. I have always been more inclined to prefer 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. Actually I thought it was rather a good thing and we were all very lucky that Angela Merkel had that particular period of six months in the Presidency of the European Council and, in my view, did a rather fine job and a better job than most had expected. I rather like the rotation, but rotation has gone out of fashion. In the European Council, with its own elected President, we will be left with a very large number of coordination issues and I am quite bothered about the coordination issues. There is a set of coordination issues between the European Council President and the High Representative. There is another set between the European Council President and the other parts of the Council presidency which will be on a team basis. 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.
Chairman: I am sorry, I left Lord Powell of Bayswater out of this particular part of our discussion. Are there any points you would like to raise in light of what Professor Wallace has now told us?

Lord Powell of Bayswater: Only to comment that I rather agree with her. It seems to me a recipe for confusion with a full-time President of the Council and these team presidencies, apart from the High Representative. I think a great deal of time in the European Union will now be spent on squabbling as to who is supposed to be doing what, everyone trying to do the same thing and causing considerable confusion for the rest of the world when they try to understand who actually speaks for the European Union and under what circumstances. I think it is a pretty disastrous muddle. It has reflected for me the inability of the European Union ever to abolish anything; it creates new things but it never abolishes the old ones and both just go along in harness.

Q176 ***Chairman:*** One of the coordination problems is the fact that you have a permanent President and you will also have a President of a six-monthly presidency at the same time who may be someone of greater stature than the President.
Professor Wallace: One can speculate about lists of stronger and less strong candidates for these posts.

Q177 ***Chairman:*** It is presumably not going to make life very simple for either of them.
Professor Wallace: No.

Q178 ***Chairman:*** Do you think it could undermine the position of the President of the Commission as well?
Professor Wallace: It is a source of confusion. If 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 and in relation to whatever external interlocutors then it might be, then we are not doing better in that direction. One of the tasks of the Commission is also to try to secure some coordination between different policy sectors, so there are some grounds for the confusion which I agree is a problem.

Q179 ***Lord Maclennan of Rogart:*** Could you give us your views about what the importance of the changes is in respect of the European Parliament's new legislative and other powers generally? In particular perhaps tell us whether you think it might have an impact on particular policy areas like agriculture and fisheries and the amendment to the budgetary procedure.
Professor Wallace: It is interesting, is it not, that each successive Treaty reform has produced an expansion of the European Parliament's legislative powers in a very incremental way? Even though in other areas of reform the patterns have been much more zigzag, in relation to the European Parliament they have been pretty linear. It is as true of this Treaty as is it of its predecessors. I always thought it was a pity that in the past agriculture and fisheries were subjected to such weak consultative discussions with the Parliament and I never bought the argument that was made for a long while very fiercely by many Member State governments that the Parliament should be kept completely out of agriculture and fisheries. I would have found it a more plausible argument or a more acceptable argument if I had been happier with the substantive content outcome of policy in the case of the Common Agricultural Policy and the Common Fisheries Policy. I cannot see that the discussion on agriculture and fisheries will be impeded by the Parliament having more say; indeed it might be very healthy for the Parliament to be much more involved, both on the co-decision side for agriculture and fisheries and as regards expenditure. This distinction between obligatory and non-obligatory expenditure was always somewhat curious and was a way of creating protected fiefdoms in the budget. I welcome the changes.

Q180 ***Lord Maclennan of Rogart:*** It has been suggested to us that there might be an upward pressure on the budget as a result of these changes with regard to budgetary procedure. Do you think that is a fair concern?
Professor Wallace: I presume the budget will still be subject to the limits about the margins and manoeuvre and the room for growth, will they not? I see the pressures for growth in the budget in quite other areas. It seems to me that the logical pressures of growth in the budget are much more in the fields, broadly speaking, of those that relate to justice and home affairs and, broadly speaking, those that relate to Common Foreign and Security Policy. Whether or not it is a good thing that there is now a legal base in the new Treaty for some of the budgetary resources which may be allocated for foreign and security policy to be outside the EU budget and subject to a different procedure is not entirely clear to me. I am more concerned about getting to grips with that and less concerned on the agriculture side.

Q181 ***Baroness Cohen of Pimlico:*** I am responsible for the EU Sub-Committee here which deals with finance and we were disposed to see two things as enormously important: first, the distinction between compulsory and non-compulsory expenditure had been abolished; second, agriculture and fisheries now came within the ambit of the European Parliament. We hoped for all sorts of wonderful downward effects on the Common Agricultural Policy. Are we being much too optimistic?
Professor Wallace: I hope you are being realistic.

Q182 ***Baroness Cohen of Pimlico:*** It seemed to us enormously important.

Professor Wallace: I agree with you and I always thought it was perverse and unhelpful that in the past they were protected from it, particularly because what that meant was that 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. The members of the European Parliament need to be encouraged to be vigorous.

Q183 ***Chairman:*** Could you talk to us a little bit about the impact of the Treaty on the functioning and powers of the Commission? In particular, is the Presidency of the Commission moving towards a more presidential style?
Professor Wallace: I find it very hard to read the likely outcomes for the Commission of the new provisions in the Treaty. I say that in a context where, if you are taking a long view, 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. I do not see this Treaty as having lots of obvious prizes for the Commission in the way it operates in the institutional system with perhaps two exceptions. One is that it has a clearer role now in justice and home affairs which it has worked very hard for and, depending on how it develops in the External Action Service and how far the Commission itself is astute in helping to develop that. The general outcomes are quite difficult to read. There is also a kind of fudge in the Treaty about the eventual membership of the College. Although it says that the membership of the College shall be reduced to two thirds of the number of Member States, it is not clear and there is an opportunity to rescind that. We know very well that most Member States are very reluctant to lose the notion of a Commissioner of their nationality. We are not out of the woods on the membership of the College is what I am saying. I would always have preferred a drastically smaller College which was more like the governing body of the European Central Bank, for example. However, I understand that is not a negotiable proposition. On the President of the Commission himself or herself, history tells us that quite a lot depends on the individual. If you look over time, irrespective of the formal powers of the President of the Commission, there have been huge variations in effectiveness and outcomes. People say already in the larger College, where you now have 27 Commissioners, many of whom now have quite small portfolios, that in practice the President is becoming much more important or has the scope for operating in a more presidential way. It seems to be the case already now that fewer things go to the full College for full debate in oral sessions; it is a bit like the Court of Justice in that much more is done in smaller chambers and groupings. Obviously a President who is skilful is in a position to exploit that. There is a lot to be worked out because the relationship between the President and the High Representative is going to be quite testing, just as the relationship of the High Representative with the rest of the Council is going to be difficult. As I mentioned earlier, the relationship with the full-time President of the European Council is also going to be tricky. It could go a number of ways and the bit I find really hard to read is how, under the proposed new arrangements for selecting and electing the President of the Commission, the dynamics of the relationship with the Parliament may also have some impact. It 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.

Q184 ***Chairman:*** I am sure that danger must exist. It is quite likely, during European Parliamentary elections, that the parties will come forward perhaps with their particular standard-bearers for the Presidency and that the one who gets elected will feel beholden to a particular party or group.
Professor Wallace: Yes; absolutely.
Chairman: It sounds to me a very unsatisfactory situation.

Q185 ***Baroness Cohen of Pimlico:*** I want to ask about the High Representative. I wondered how you saw the new double-hatted post of High Representative working. Is his or her status as a member of the Commission going to be problematic? How are they going to get on with the President? Generally it seemed to us a bit unworked out.
Professor Wallace: It is a very experimental proposal. I am not a huge fan of the proposal myself. It is really quite difficult to tell how it will work in practice. I do not think that it is going to be the critical breakthrough in the foreign policy field for achieving more efficiency and more effectiveness. In a way I kind of prefer a situation in which there is a visible and audible ping-pong between the Council and the Commission because they are there to do different things in the system, in this sense, for the Commission to represent what it believes to be a collective interest and the Council, however it reaches its views, to reach its views on the basis of the preferences of Member States. It is hard to see how the different triangles are going to work—High Representative, President of the European Council and President of the Commission—both internally and externally. We talked about this earlier in relation to the President of the European Council. I am quite nervous about how that will work in practice, at the level of individuals and personalities and at the level of secretariat, the different working groups and so on. How the European External Action Service develops is obviously one important element there and we can

see a proliferation of propositions and positioning going on at the moment about how that will develop. If I may add, there is another thing I am also nervous about: the way this is all set out into the new Treaty. It starts by saying external action then it slips straightaway into foreign policy and security policy. A lot of the strengths of the Union lie in other areas of external action, that is to say trade, development policy, humanitarian aid, a whole bundle of things which are quite important. It is not at all obvious either how the FOREIGN POLICY, in capital letters, part is going to be tied in within the Commission or the Council to those other instruments of external policy. I am quite nervous about that.

Q186 ***Lord Powell of Bayswater:*** Would I be right in interpreting you as being rather disappointed that an opportunity has been missed to give greater coherence to the various external aspects of how Europe relates to the rest of the world? It seems to me that you are saying that there is too big a superstructure, there is too much confusion and the various instruments are not pulled together. We may even be worse off than we were before.
Professor Wallace: I do not know whether we will be worse off or better off. My hope is that we would find a way of becoming better off. Since we live in a rather troublesome time in which there is a rather troubled world there is a demand for interventions and actions of various kinds from the European Union, both in the foreign and security policy area, but also in putting together the different dimensions of policy, for example in dealing with Russia, China and so on and so forth. I said right at the beginning, and I believe it to be true, that sometimes things get worked out by practice and if we were going back and now looking at the original Rome Treaty there are many things with which we might be uncomfortable and uncertain about how they would work in practice. We would not speculate correctly about which were going to be the successes and the weaknesses necessarily. Maybe we have to be a bit cautious before leaping to conclusions, but I am concerned that there should be pressure on those who will have to take forward these not entirely coherent arrangements that they will move in a direction of achieving more effectively.

Q187 ***Chairman:*** One of the issues which is exercising us quite a lot is the simplified revision procedure and the other *passerelles* included in the Reform Treaty. Could you tell us how you feel about this? I might just add that last night in the debate on the Treaty in our Chamber the Lord President of the Council confirmed to us—and it was the first time I had heard it—that as far as the *passerelles* were concerned the original idea that only the House of Commons would wield the veto and that the House of Lords would simply have 20 days in which to offer an opinion on it has been abandoned and, in effect, a decision on whether or not to veto is a matter for both Houses. It came as a welcome surprise to me that they had changed their minds on that. That is just an aside. Let us go back, if we may, to the simplified revision procedure and see what you think about it.
Professor Wallace: We seem to be facing two rather extreme variations for changing the Treaties in the future, that is to say either the very elaborate convention mode for macro changes or something much more pragmatic for simplified changes. I am quite attracted to the simplified revision procedure in the sense that recent experience has perhaps said that one can get into very deep water when you go into big Treaty reforming processes. It is quite easy in big Treaty reforming processes for the Christmas tree to be over-decorated, whether in terms of the substantive content or in terms of the protocols and declarations that Member States want to put there. There are areas, and it may be these points we have just been talking about on managing the external relations of the EU, where one could imagine that in five years' time there might emerge a consensus that this or that way of handling the role of the High Representative might make more sense than the one which is currently in the Treaty and that a simplified way of addressing that in a tidying up sense might be quite attractive, just as I would argue, to keep my same case of climate change, that if we decided collectively in the Union that some other way of dealing with carbon emissions required some institutional anchoring—I am not now talking about big competence issues but implementing, management issues—to be able to do that would be quite helpful. I am quite relaxed about that. On the *passerelles* side, which is obviously a very related point, I was a little bit sceptical as to how that would work in relation to justice and home affairs. I am quite relaxed about the outcome in justice and home affairs, not least the fact that the activation of it in the past was done in a rather prudent and thoughtful way. I am open-minded on this.

Q188 ***Chairman:*** Some questions have been raised in some quarters as to whether the Government here would in fact give time for the two Chambers to play their role, that it could be in their interest not to.
Professor Wallace: Absolutely; similarly in other countries as well of course.

Q189 ***Chairman:*** We have mentioned the EU's external action and the contribution to improving coherence of those actions that the Reform Treaty may bring. Unless you have anything further to say on that we can leave that. Could we just hear your views on the role given to national parliaments

generally? Do you feel that this is a step forward or is it all cosmetic?
Professor Wallace: I am not sure whether it is a role being given or, perhaps better, a window of opportunity being opened either by the new yellow card procedure or other ways of engaging with the regular scrutiny of business. It may well be, like the previous point you were making, that a lot depends on what happens country by country and chamber by chamber. I would expect there to be very large variations between countries as to how the yellow card procedure might work. The Dutch, when they talk in their terms about orange cards, seem to be very persuaded that this is going to be a real opportunity that both chambers will seize in The Hague. Maybe, if some chambers in one or other Member State start to be very assiduous, that can create a climate of expectation which has some impact on expectations in other countries. To the extent that there is an opportunity, this House is well placed to exploit it, because this House has such an array of expertise and experience in dealing with both regular policy scrutiny and issues of principle and subsidiarity. Maybe the House of Lords should be aiming to set the benchmark here.

Q190 ***Chairman:*** You are probably familiar with what we sometimes refer to as the Barroso initiative, which was the undertaking that he gave following the June Council 2006 that national parliaments could address the Commission on issues which were not necessarily related to subsidiarity and proportionality to get a reaction and a response. I should like to know whether you feel this would fall into the category of a good window of opportunity. I might add that our experience so far has been rather good. We have written to the Commission on a number of occasions pointing out recommendations made in some of our reports that relate to Commission action and we have indeed received reaction from them not just saying thank you for our letter but going point by point through it and saying that they will be taken into account by the Commission. This seems to us to be very valuable and in a certain sense could be more valuable to national parliaments than what is in the Treaty, which this is not, relating to subsidiarity and proportionality.
Professor Wallace: The point about subsidiarity and proportionality was a very important red line for some Member States, especially the Netherlands, so it is there. I think this President of the Commission, President Barroso, is committed to the kind of approach you have just described and that it is not cosmetic on his side; it is very much to do with his understanding of the relationship that he would prefer between the Commission and parliaments in the Member States. Obviously one cannot guarantee that all such presidents or teams of people in the future will be so sensitive to that, although bedding down the practice now is obviously something which might help to create precedents for the future. Of course this House has a huge advantage because it is the House whose reports on European policy matters have for a very long time actually been read quite carefully.

Q191 ***Chairman:*** Which of the institutional changes in your view are the most significant for the UK? It is a tough question and we put it to all our witnesses. They usually look desperate when we ask it. If you have any off-the-top-of-your-head views or maybe from deep within your head, we should very much like to hear them.
Professor Wallace: It is the exam question you hope not to have to answer. I would give a different answer, if I may, just so that I can say it. I am sorry that the British Government have resiled in this Treaty from things they were in favour of at earlier stages. I am particularly sorry about the extent to which the British Government are now committed to opt-outs, opt-ins and so on and about their greater nervousness than in my view was merited as regards the provisions on the Common Foreign and Security Policy. As a consequence of that they have made the Treaty much more complicated in the foreign policy and security field in ways that will not help British voices to be heard as clearly and loudly as one might want and certainly as I would wish. Similarly in justice and home affairs we risk having a good deal of legal complexity and confusion, which is not necessarily in the interests of British citizens and residents. The way the Treaty has come out in this sense is something I regret.

Q192 ***Lord Powell of Bayswater:*** So you share the Government's view that our red lines have neutered the Treaty in its effect on the UK and therefore it is absurd for anyone to be worried about it because frankly nothing much is going to change as far as the UK is concerned? Or do you think there are still institutional changes which will have a significant, indeed major impact on us?
Professor Wallace: I think it is the case, but we have to see how the jurisprudence works out and how real events occur, that the impact of the Treaty on the UK in justice and home affairs and foreign policy is less extensive than would otherwise have been the case with the version to which the Government also agreed previously in the wording of the Constitutional Treaty. There are costs to this, we pay a price for that and this is a price which I personally regret, because it means the British voice in the foreign policy field will be heard less clearly than might otherwise have been the case. The risk is that when we find ourselves dealing with real issues that will be a handicap to the British. There are other

parts of the Treaties which of course will have probably quite important impacts in the UK.

Chairman: Thank you very, very much indeed for that. We really appreciate your participation and your very clear answers to our questions. As a footnote I should mention that I understand that you were virtually in at the creation of the European Scrutiny Committee and if not its first that you were one of the first ever witnesses. We congratulate you on your long record of cooperation with this Committee and hope we will see you many more times in future. Thank you very, very much indeed.

THURSDAY 13 DECEMBER 2007

Present	Cohen of Pimlico, B	Kerr of Kinlochard, L
	Dykes, L	Plumb, L
	Grenfell, L (Chairman)	Sewel, L
	Harrison, L	Wade of Chorlton, L
	Howarth of Breckland, B	Wright of Richmond, L

Examination of Witness

Witness: Sir Stephen Wall GCMG LVO, Vice-Chair, Business for New Europe, examined.

Q193 ***Chairman:*** One small formality: I announce that you have in front of you a list of the interests that have been declared by members of the Committee. Sir Stephen, may I welcome you very warmly indeed. It is very good of you to find time to come, I know it has not been easy for you to schedule this, but we felt you were very, very important to this inquiry. You know the background to it, that we are carrying out an impact assessment on the Treaty to see what difference this is going to make to the European Union and by extension to the United Kingdom. We are a little more than halfway through the evidence-taking and our intention is to put together a report on which all seven Sub-Committees are working the Select Committee is dealing with the institutional changes, which is what we would like to ask you about. We are hoping that we will be able to present this report to the House two weeks, possibly three—weeks before the ratification bill comes into the House, so that Members will have what we hope will be a thoroughly objective study of the Treaty on which to base their thoughts and their speeches. Would you like to make an opening statement?
Sir Stephen Wall: No, I am very happy to go on to questions. If at the end there are any gaps, maybe I could say something then, but I am very happy to—

Q194 ***Chairman:*** That is fine. We are on the record, and you will, of course, receive a transcript as soon as possible for you to check it out. Good, then maybe we could begin. What I would like to ask you first is whether you think the new structure of the Treaties is important; are there any hidden purposes in the way in which it has been put together, both the TEU and the Treaty on the Functioning of the European Union, and whether you feel that this structure is helpful.
Sir Stephen Wall: Well, I think it is. It is consistent with the direction the European Union has been taking for the last few years. As you know, it is an attempt to go back, in a sense, from where the Constitutional Treaty was, in terms of those bits of what was the Constitutional Treaty that have been removed. I mean, I think that probably, the most significant thing in structural terms is that now, definitively, the justice and home affairs area becomes subject to the traditional Community procedures, so that the pillared structure as created at Maastricht no longer exists in that form, although foreign policy remains, in effect, a separate pillar, largely subject to intergovernmental procedures.

Q195 ***Chairman:*** Thank you. Some of the evidence that we have received has suggested that it is a pity that the Treaty is simply a treaty setting out amendments, and that there should have been an integrated comprehensive text put together. What is your view on this?
Sir Stephen Wall: I think in one sense, that is what was attempted in the Constitutional Treaty, certainly in Part 1, to have something which was a fairly comprehensive, and more importantly comprehensible, text for ordinary mortals to read. I agree with you that in terms of trying to follow the amendments that have been made, not having a consolidated text is of itself a bit problematic in the short term, although I think the Irish government may be first off the blocks in producing one very shortly. I think in all these things, there is an issue of time versus utility, and to do a really comprehensive job on the entire Treaty I think would have kept everybody working for a good deal longer than was thought desirable. There is always a problem with European Union treaties that because they are legal texts, they are texts of internationally binding treaties, they are bound to have complexity, I think that is probably unavoidable.

Q196 ***Lord Kerr of Kinlochard:*** Turning to the question of competence, there are perhaps rather few extensions of competence in this treaty, if you compare it certainly to the Single European Act or Maastricht. How, Sir Stephen, do you assess these extensions: what effect do you think they might have on the workings of the European Union and the workings of the institutions?
Sir Stephen Wall: I think if you take, first of all, the justice and home affairs area, which is the completion of a process, I think it is a reflection of the fact that the vast majority of the Member States felt that the

original third pillar, intergovernmental third pillar largely, was not working effectively. It seems to me in a way that in this Treaty, what we have gone back to in one sense is the kind of rationale that inspired the Single European Act; in other words, you want to achieve certain policy ends, and you can only do it by willing the means. That is what they have done, and Britain has, as you know better than me, the right to participate or not subject to certain conditions. I do not myself see the other areas where, for example, QMV has been extended, as on the whole being very significant. Business for New Europe, of which I am a Vice-Chair, welcomes the provisions that have been made on a number of areas like energy, transport policy, the European research area, provisions affecting the self-employed, a single system for intellectual property rights which may help us finally to get towards a European patent; all those are useful. I do not think they are of themselves vastly significant. I think the increase of the role of the European Parliament, in particular the European Parliament's right to have more of a say over agriculture and fisheries, in other words the abolition of the old distinction between obligatory and non-obligatory expenditure, I think that potentially could be significant, and I think it will take probably a few years to work through exactly how it functions. This has been an old debate, as you know, Lord Kerr, within Whitehall, where I was always among those who thought that actually, it would be beneficial to abolish the distinction, because the net effect of it, it always seemed to me, was to have a situation in which the European Parliament, because of its control of non-obligatory expenditure—non-agricultural expenditure, for the most part—could actually use that leverage to ratchet up agricultural expenditure anyway, plus at the same time the European Parliament was never obliged to make a choice. It could push up the non-agricultural expenditure as far as it wanted, and it had not to choose between that expenditure on the one hand and agricultural expenditure on the other. So it seems to me that the system will take time to kind of work its way through, but potentially, you do now have a system where the European Parliament will have to make those choices in its role in budget making. I think over time that that will contribute to the ongoing shift in the balance of the expenditure between agriculture on the one hand and non-agriculture on the other.

Q197 ***Lord Kerr of Kinlochard:*** Because there is an urban majority in the European Parliament?
Sir Stephen Wall: Yes. Clearly, with all these things, there will be some sort of testing of the parameters, and I do not suppose it will be a smooth process, but as agriculture becomes a diminishing proportion of the European Union's GNP, it seems to me that the trend, which is already there, in terms of wanting to spend more on other things, especially as the overall level of EU resources is not going to rise significantly, that that trend will continue and increase.

Q198 ***Chairman:*** It is rather interesting that the European Parliament seems to be getting into the business of deciding on matters of wealth distribution for the first time, to the extent that they will now have control over all expenditure.
Sir Stephen Wall: Yes, with the Council, obviously, it is a process of negotiation, but what was this rather artificial divide, designed to protect the position of the Member States—it has not always been the case, of course, that the Member States have been as disciplined on agricultural expenditure as they should have been. But as I have tried to say, I do not think that it was ever the case that the two were completely immunised from each other, because the European Parliament could apply its pressure anyway, without having to make a responsible choice. I think what it does now is make the European Parliament make a responsible choice.

Q199 ***Lord Kerr of Kinlochard:*** I was just going to ask whether it is the case that the European Parliament's greater say over the distribution of expenditure is unaccompanied by any increase at all in the Parliament's power, which is zero, over the quantum of expenditure.
Sir Stephen Wall: That is my understanding, you are correct, yes.

Q200 ***Lord Plumb:*** Chairman, Sir Stephen made a very interesting comment. Would you agree that some of that agricultural expenditure might be shifted to rural expenditure rather than just agriculture? That is happening now in pillar one and pillar two.
Sir Stephen Wall: Yes.

Q201 ***Lord Plumb:*** Do you think that is the way it will go for rural development?
Sir Stephen Wall: Yes, I think it is, as you say, largely because that has been the trend for the last several years, I see no reason why that, under this system, would not continue.

Q202 ***Lord Kerr of Kinlochard:*** Sticking with institutions, the European Council. How do you think the relationship between the President of the European Council and the Presidency arrangements for the Council of Ministers will work out?
Sir Stephen Wall: I think this whole area, both that relationship, the relationship between the President of the European Council and the High Representative, and indeed between both those people and the President of the Commission, is

obviously very critical. We do not yet know, at least I do not know how those jobs will be divvied up, although people talk about a grand deal whereby, both in terms of geographical spread and no doubt political spread, they might be decided in some kind of package. I mean, different people have different views about what the role of the European Council President should be. All I can say is that when I was involved in these matters inside 10 Downing Street, and we were thinking about these things, we saw the President of the European Council less in terms of the external role, although clearly there is the external role, in representing the European Union, along with the President of the Commission, at EU summits with third countries, but more the rationale in our minds was here you have a European Union with 25 or 27 now Member States, and the old days in which the European Commission could simply plonk a proposal on the table in the confident knowledge that sooner or later it would find a qualified majority, or occasionally not, that those have gone. Therefore, you do need much more the setting of a strategy, the attempt to build a consensus around what that strategy is, and how it translates into policy, and therefore that you needed somebody, ie the 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; in other words, that the job was more internal than external, in terms of its substance. Because the issue was controversial, it has not been possible to define it quite as closely as, I think, the British Government would have liked, and therefore, it will be much more to be worked out in practice, but if it is that kind of a role, then it obviously does require the President of the European Council to work closely with Team Presidencies under the new system, because obviously it is those governments who will have the responsibility of chairing the individual Councils, with the exception of the General Affairs Council, to try and make sure that that kind of strategy is carried through. At the end of the day, the structures will not deliver the result, the result does depend critically on choosing the right men or women to do those key jobs: President of the European Council, President of the Commission and the High Representative.

Q203 ***Lord Kerr of Kinlochard:*** Some at the federalist wing of opinion argued against the creation of a single Presidency of the European Council, on the grounds that it might provide a dangerous threat to the authority of the President of the Commission. Do you agree with Jacques Delors who said no strong President of the Commission need fear a strong President of the Council?

Sir Stephen Wall: Yes, I do. I think that we have had a variety of Commission Presidents of different kinds. I think the President of the Commission, José Manuel Durão Barroso, has demonstrated that it is possible to be a strong President of the Commission without actually challenging the governments in any kind of systematic way, although he has had to challenge some of them, particularly on issues of the single market and competition policy. It seems to me, and again you cannot make predictions about the future, but if you take somebody of the character of Durão Barroso, someone like him would see the sense of working in close collaboration, simply because I just think within the larger European Union, the job is too big to do. Occasionally, as things happen in Brussels, if you pick the wrong people, you could get squabbles, but I think that in the way I have described the job, hopefully, you would get mutually beneficial co-operation. I mean, this Commission, as you know, is very different from, say, the European Commission under Jacques Delors of the 1980s, insofar as it does not have a driving legislative agenda, not least because that is simply not practical politics. It does have much more of an agenda of implementation and action to see agreed policies put into effect, and that, it seems to me, is where close co-operation between the two people, the President of the Commission and the President of the European Council, could really work well.

Q204 ***Baroness Howarth of Breckland:*** Listening to you, it sounds very much as though it depends more on personality than on structure. What is it in the structure that will ensure that the personalities of these two people will not affect the workings of the structure?

Sir Stephen Wall: I think you cannot guarantee that, except that the role of the President of the European Council as set out in the Treaties is a fairly limited role. That was the view of a large number of Member States, and equally, the role of the European Commission is very clearly set out in the Treaties, and they retain the powers that they have always had, including the power to initiate legislation and the power to ensure implementation, and by and large to be the principal authority taking Member States to the European Court as necessary. None of that disappears. Again, it is not laid down in the Treaties, but there is a change in the political climate, which I think is the one I described, in other words that this European Commission, and it is hard to foresee any very different European Commission in present circumstances, they are not in the business of sitting there thinking, you know, what new legislation do we need. They are in the business of what Durão Barroso calls the Europe of results. I think they will have to be careful not to trample on each other, and it will therefore depend upon their ability to work together.

That seems to me to apply in almost any circumstances. I do not think it would have been feasible to define the roles so clearly that they were *bound* to get on, if you follow me, and bound to work in harmony.

Q205 ***Chairman:*** But on the whole, you are optimistic that this sort of cohabitation will work in a friendly way?
Sir Stephen Wall: Yes, I am. Again, in some ways, this is why the choice of the person to be President of the European Council is critical, because obviously, 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, which would be a mistake, and equally, might mean that they devoted less time to the kind of internal job of managing the business of the European Union, which I think is what we most need.
Chairman: Shall we move on to explore a little further the question of the High Representative; Baroness Cohen?

Q206 ***Baroness Cohen of Pimlico:*** There is this new post of High Representative; will his or her status as a Member of the Commission be difficult, and how do you see the relationship between the High Representative and the President of the European Council?
Sir Stephen Wall: Well, on the second of those things, I think it does very much come back to having two people who do not compete for the same space. The job of the High Representative is both to chair the General Affairs Council and to take instruction from the General Affairs Council. He or she is at the orders of the General Affairs Council, and clearly, therefore ought to be the person who on a day-to-day basis is, on the orders of the Council, conducting the European Union's common policy where there is agreement on a common policy. The role of the President of the European Council is to kind of supplement that, not substitute for it or compete on it. I do not think in practice that the role of the High Representative, answerable to the Council, as well as a member of the Commission, would be a problem. It was quite difficult to draft it in the terms in which it appears in the Treaty, but I do not see it in practice being a difficulty. What might happen, you could in theory get a situation in which the instructions of foreign ministers and the Council differed from where a majority in the Commission thought that policy should go. It seems to me to be not, again, in today's climate, intrinsically very likely; equally, it seems to me if you get somebody, which by definition almost you will, who knows their stuff, it is something that the High Representative ought to be able to manage so you do not get into that kind of situation. What you will avoid is the situation we have had up until now, where the High Representative and the relevant Commission member have kind of rubbed along, but they have, in a sense, been covering the same area of policy while having control over different aspects of it. Having that control vested in one person, I think, should make for greater coherence in the way that we manifest our common policy, and, as you know, by and large, the greatest means by which the European Union exercises influence are through the instruments at our disposal, which include trade and aid matters.

Q207 ***Chairman:*** Is it your understanding that trade and aid would fall within the High Representative's mandate?
Sir Stephen Wall: No, we do not know how the portfolios will divvy up once the Commission moves to a smaller size. My understanding is there would still be Commissioners for those areas, but in terms of having the coherence of policy, so that when you have decided on, let us say, your aid policy to the countries of North Africa, which is an instrument of foreign policy, you then have one person who can deliver the coherent message, and have it at his disposal, as it were, in terms of the case that he makes in those countries, that hopefully united approach.

Q208 ***Chairman:*** That does not devalue the importance of the Trade Commissioner?
Sir Stephen Wall: No, the whole area of trade negotiations as such will continue, and continue, I am sure, under a separate Commissioner.

Q209 ***Lord Wade of Chorlton:*** You have answered it a little bit just at the end, but my comment was going to be really on the answers to the last two questions, which seemed to indicate that your view was, "All being well, it will work", but what is the advantage of doing it then? You seem to be more concerned that there may be disadvantages than explaining what you think are the advantages of these various new offices.
Sir Stephen Wall: If I gave that impression, I did not mean to give that impression. All I was saying is there is no guarantee in the structures that they will work, you have to have the personalities who are willing to make the system work, but that applies to almost everything. I think the advantage, in terms of the President of the European Council, is 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, for the reason I gave really, that you cannot have really coherent legislation unless it is part of a strategy in which the heads of government have agreed what are the things they really want to do. To get that agreement, it does seem to me to require two people, the President of the Commission and the President of

the Council, to put together the policy by intensive consultation with the Member States, which means having somebody who has time to go around the capitals of 27 countries and put it together. That is something that no serving head of government has the time to do. There have been one or two cases, for example the former Prime Minister of Portugal, António Guterres, who suffered domestically, because the people of Portugal said, "You have been spending too much time on the Presidency, how about us?" So it avoids all of that. Similarly, as you know, we have the High Representative post already, and I think Javier Solana has done an exceptional job in bringing coherence to European Union policy, on the back of agreement by Member States. That is a crucial point: that person 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. I think the fact that that person will also be a member of the Commission, where much of the nut and bolts of implementation of policy will have to be put together, will again bring greater coherence.

Q210 ***Lord Wright of Richmond:*** Sir Stephen, you and I have spent about half our lives in the British Diplomatic Service. This is really a follow-on question from the last point: can you speculate a bit on the impact on our unilateral conduct of foreign policy and defence policy? What impact will these changes have on our, as I say, unilateral foreign policy, and particularly on the work of British missions, both in bilateral missions and multilateral missions?
Sir Stephen Wall: I do not see this Treaty as marking a significant change from what has been an evolution. It seems to me that our own attitude in Britain, among successive British Governments, has evolved over the years in terms of on most issues, our seeing the advantage of having a common policy with our partners, and that being expressed primarily through the High Representative. There is nothing in this Treaty which as I read it removes the ability of Member States to make their own foreign policy if they wish to do so. The provision whereby it is governments who have the responsibility, unanimity is required for the strategy in foreign policy that is set by the European Council or by the General Affairs Council, none of that changes. So there will not be a situation, it seems to me, where a British government, if it wanted to take a decision to put its troops somewhere, or indeed to support the United States, even though a majority of its partners did not want to, all of those things a British government or any other government would still be able to do. As regards the kind of role of our own missions overseas, I think when we see the evolution of the European External Action Service, again, there is nothing in that which of itself prevents us—we could have both European missions and bilateral missions in every single country of the world if we wanted to and could afford to do so. I think in fact there will be countries where for the majority of our kind of political representation, that actually, we will probably have more effect operating as the European Union than operating as the UK. There is the whole question of how we manage our trade relations, which obviously will remain competitive in terms of exports and so on as between Member States, but I would guess, for example, plucked out of the air, if you were the Government of Morocco, on most issues that concern you, you would have more interest in talking to a European Union mission than to 27, or however many it is, individual embassies.

Q211 ***Lord Sewel:*** I think we ought to confront head-on the tabloid type challenge, which is basically: do these changes seriously impact upon Britain's ability to develop an independent foreign policy? It is a tabloid type of point, but I think it needs to be answered.
Sir Stephen Wall: My very firm view is that they do not. There is nothing that I read in these Treaty provisions, which as I say affect the ability of a British government to make national policy, indeed it is specifically protected in terms of the Treaty. Quite apart from the declarations and so on that were secured, the actual formulations in the Treaty protect that position. Whether in practice having a national policy as opposed to a common policy on a lot of issues makes sense is another issue. If you get somewhere like Kosovo, to give a current example, the notion that we, Britain, would have a policy on Kosovo separate from the rest of the European Union is not something that we would probably entertain.

Q212 ***Lord Kerr of Kinlochard:*** That is about the making of policies. The other tabloid accusation is that we lose our right to speak in various places; for example, in the United Nations, we lose our seat in the Security Council to the High Representative. Is that the case, is that what the Treaty says?
Sir Stephen Wall: No, and 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. 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. And

when, as you know better than me, the Security Council members meet behind closed doors to actually do much of the negotiation that leads then to the public sessions, that will then be in particular the Permanent Representatives of France and Britain, and not the High Representative.

Q213 ***Baroness Howarth of Breckland:*** Back to these role relationships that we were discussing a little earlier, and the effect the Treaty will have, if you like, on the different power bases which you were describing very clearly; even if you have what sounds like a more rational structure, how you make it really work. I really wanted to ask you about how that will affect the role of the Council of Ministers, and whether or not the new system of qualified majority voting is likely to be significant in practice, and of course what will be the effect of the declaration on blocking minorities?
Sir Stephen Wall: Yes, I think that the system that has been devised in this Treaty is better than the Nice system, which was cobbled together frankly on the basis of every man or woman for themselves, in terms of the Member States. It was all done at 3.00 in the morning on the fourth day, and it was a pretty unseemly process. This is a logical, balanced and fair system. The question is asked: what does this do to British voting weight? I gather that lots of academic research is going into this issue; in other words, what does it do to Britain's power to block? I am one of those who agrees with the argument made by the then Minister of Europe, Malcolm Rifkind, back in the 1980s, that what we need actually to think about is what is the overall advantage to the UK, and the conclusion that was then reached was that actually yes, occasionally you might lose a vote, but actually the British interest was better served by having more majority voting in most of the areas where it applies, and I think that is still the case. It is true that under this Treaty, compared with the Nice Treaty, it requires a minimum of four Member States not three Member States to block. But I think we made a mistake at Nice, and we kind of realised it, I think, when it was almost too late, because we had this magic formula, that three large Member States had to be able to block, but when you actually think about it, it is not very often that we are in league with two other large Member States in wanting to block something. We find our allies in different places on different issues, and the liberalisers, of whom we are one, are not necessarily—with exceptions, obviously—among the other large Member States. So I do not think that that aspect of it is going to be significant in terms of undermining British interest to block. On the other hand, insofar as majority voting is extended, it seems to me it is extended in areas where it is in our interest. On the sort of Polish formula, which is a variant of the Ioannina compromise, again, it is quite difficult to know at this juncture. It is written in a way that leaves it pretty vague, if it is invoked, how much time then has to be allowed to try and reach agreement. My experience with the Ioannina formula itself, when I was in Brussels, it was never, as I recall, formally invoked, but there were occasions when a Member State whose interests were affected would say, "Mr President, we are in Ioannina territory", and then there would be a bit of a huddled consultation, and usually, one Member State would switch sides so that after about three minutes, the measure went through. So insofar as the Ioannina formula applied, it lasted about three minutes. The way this is formulated, it may be more significant, but my sense is it was more—

Q214 ***Baroness Howarth of Breckland:*** You said the way this is formulated, in a sort of what?
Sir Stephen Wall: Because it is rather more precisely set out, it might be more—it has kind of two stages over time, it might potentially have more impact, but I think a bit like Ioannina, it serves a political purpose here and now, and will not actually be invoked very much in practice.

Q215 ***Chairman:*** We have received some rather interesting written evidence from Professor Simon Hix, who I am sure you know well, in particular on QMV. He seems to be very unhappy with what has happened. If I could just quote a couple of sentences that he sent to us, and see what your reaction is. He said: "The population-based part of the new voting formula overrepresents the four largest states relative to the power that they should have in a truly equitable system, while the state-based part of the formula overrepresents the six smallest states. Put another way, citizens in these ten states are far more likely to be on the winning side in the EU than citizens in any of the 18 other states." Does that seem to you to be a problem of equity or not?
Sir Stephen Wall: Well, I would have to kind of wrap a towel round my head, I think, to be able to give a very informed answer, but there has always been a balance in the voting power in the Member States between on the one hand their existence as states and on the other the size of their populations. The fact is that Luxembourg, under the old system, even before Nice, had more votes than a strict population formula would allow, so in other words, that kind of balance is not new. I do not feel, off the top of my head, able to comment on the precise problem which Professor Hix identifies, but my recollection is that when we were looking at these various possible combinations inside Government, that we were satisfied that the formula we now have came as close under a simplified system to preserving the kind of voting weight that we had certainly in Nice, and therefore, that we felt that our interests, both positive

and negative, if you like, were satisfied. But I would, Chairman, need to study Professor Hix a bit more closely, I think.

Q216 ***Lord Kerr of Kinlochard:*** Can I follow up on that question? Professor Hix's views on equity I too read with interest, and it seems to me, I would like to ask Sir Stephen, that he is comparing the new system with an ideal system. If one instead compares with the present system, the Nice system, where it takes only 100,000 Luxembourgers to rate a vote in the Council, and it takes three million Germans to rate a vote in the Council, the inequities surely are far, far greater in the present system than in the proposed system? I would like to ask Sir Stephen if he agrees with that, and if he also agrees that while you can make very complicated constructions depending on plausible alliance-forming situations, what basically matters is national voting weight, and that the Reform Treaty would see the UK's voting weight go up from about 8% in the Council to about 12.5% in the Council.
Sir Stephen Wall: Yes, I think both things are true. Certainly, the first is true, and the second also, that the UK voting weight does increase under this formula.

Q217 ***Lord Wade of Chorlton:*** Mr Chairman, may I just do a bit of a follow-up? It would seem to me that what you are talking about is important if countries' representatives are there as representatives of their country to gain each country as much advantage as possible, but surely to make a success of Europe, people should think in terms of what is right for Europe. Is this Treaty going to help people to think in that way, rather than see it as merely something that they can take advantage of by having a different voting system, or a stronger voice, or a more powerful point of view, or are we actually going to create a Europe where people think, "What is the best in the interests of Europe as a whole?"
Sir Stephen Wall: It seems to me that part of what the Treaty is doing is basically saying, here are certain things where there is a European interest which is kind of greater than the individual interests of the Member States, and in particular, that is true in the area of justice and home affairs, hence the fact that this Treaty completes a process which has taken us quite a long way in institutional terms from where we were at the time of the Maastricht Treaty, when the kind of pillared structure was created. My experience as a negotiator on these things over the years is that you have a situation in which obviously each Member State, each Member Government, is seeking through the European Union to promote national interests. At times, that is very competitive, and at times, it looks pretty selfish. My sense also, certainly as I sat round the table, day after day, in Brussels, is that everybody there does have a sense of something bigger, of the kind that you suggest; in other words, that there is a collective interest, which on the one hand, in a sort of negative way, is about the successful management of relations with countries that could otherwise still be pretty querulous, not in the sense of going to war together, but nonetheless, you can easily get a quarrel breaking out of the protectionist kind; that on the one hand, and on the other that actually yes, we are more effective collectively in very many areas than individually. I think that is why, even though very often these negotiations go to the brink and past the midnight hour and so on, the sense which brings agreement in the end is that sense of, if you like, a European ideal. So I think that is there, and I think this Treaty is, in that sense, consistent with the motivation behind the previous European treaties we have had from the Single European Act onwards.

Q218 ***Lord Dykes:*** Following up very quickly, Sir Stephen, on that, there were expectations by some people that enlargement would mean intrinsic dilution interinstitutional, between the countries as well, and maybe to some extent the institutional modernisation under this Treaty proposal does actually also produce a change in philosophy, makes it more collective. Do you feel that is also possible or is it just happening of its own accord anyway?
Sir Stephen Wall: I think there is a kind of dynamic going on following enlargement which is perhaps in some ways a bit counterintuitive. The research done by Sciences Po in Paris shows that actually there has been quicker decision making since the accession of the Eastern and Central European states than before. Now obviously, at another level, the actual kind of processes in the Council are a bit more ponderous, because there are more people who have to have their say, but it seems to me that the rationale behind this Treaty and the thinking behind this Treaty is actually not to allow the kind of dilution that might otherwise happen, but to create the structures that will enable effective decision-making I come back to justice and home affairs as perhaps the prime example, but also the creation of the long-term President of the European Council, on the kind of basis I have described, and the High Representative; all those things, it seems to me, are about coherence of policy. I think the fact that on JHA, the Member States actually have decided of their own volition to use the traditional Community method, shows that they want effective and rapid decision taking, and as I said before, that is a very similar motivation to the one that prevailed 20 years ago over the Single European Act.
Chairman: Lord Plumb, Sir Stephen has answered a bit of the question about the European Parliament, but . . . .

Q219 ***Lord Plumb:*** I think he has answered quite a bit, but of course the European Parliament is a bigger Parliament than the one you and I remember in the previous decade, so they have got to deal with the legislative powers, some of which you have already dealt with or commented on, and the impact of those powers, but what effect will that have both on the European Union and on the UK, particularly in the context of the codecision procedure which now I hope will be working effectively between the three parties concerned, both on agriculture and fisheries and also on the budgetary procedure? Those two of course are very much connected.

Sir Stephen Wall: Yes, and as I understand it, the changes in terms of the role of the European Parliament on agriculture and on fisheries are about the framing of policy rather than individual decisions on particular regimes at particular times. As I understand it, for example, the setting of total allowable catches will still be one for the Council, and will not be for codecision with the European Parliament. I do think that codecision is, as it were, a work in progress, and it works better in some areas than in others, but I saw an article by David Lascelles in the Financial Times yesterday which suggested that the powers the European Parliament, which already exist, of course, largely in this area, would be kind of detrimental to decision taking in the area of financial services. I think our experience by and large has not borne out that contention; indeed, on one of the financial services directives, the British Government was able to use the European Parliament procedures to kind of regain some ground that it had lost in the Council, in a liberalising sense. So it will vary, to an extent, from committee to committee, and from subject to subject, and there will be some testing of the ground, I think, because obviously the European Parliament is seeking its place in the sun. I think that its power *vis-à-vis* the European Commission has grown *de facto* over the last decade for all the reasons that we know connected with the Santer Commission, but it seems to me that now, there is a more balanced relationship between the Commission on the one hand and the Council and Parliament than perhaps there was before the Durão Barroso Commission came into office. I personally regret that in this country, we treat the European Parliament as a kind of state secret, as it were, because it does seem to me that if we are talking about popular support for the European project, then the more people know about their democratic representation through the European Parliament, the better.

Q220 ***Lord Plumb:*** Do you think by giving the Parliament more responsibility, I am not talking about powers but responsibility, that will not make it more determined to come to decisions which they know are going to be more binding at the end of the day? What I am really saying is you can talk forever and you can come up with conclusions, but perhaps at the end of it know very well those conclusions are not going to function anyway. If what they are coming up with they know is going to actually happen, will they not be more responsible, is really what I am saying?

Sir Stephen Wall: Yes. You get different views on the operation of codecision obviously, and I have not been directly involved in it for three years now, but it seems to me that when codecision was introduced, the fears of people who thought that this would actually lead the European Parliament to have too much power *vis-à-vis* the other institutions, that has not actually happened. There is a tough process of negotiation between Council and Parliament; some deals are done at first reading, more are not done at first reading, and in many cases, there is a difficult conciliation process, but I think the British Government's experience by and large has been that this process has led to, on the whole, acceptable outcomes. Coming back to the issue we talked about earlier, namely the balance of expenditure within the budget, I do believe that over time, the fact that the European Parliament itself will share responsibility for making those choices is likely to get a balance of expenditure which more closely reflects the balance of public interest and political interest across the union.

Q221 ***Lord Sewel:*** Can I briefly put the point to you, and really, it is a point we heard in evidence at an earlier session, I do not think this is being unfair: it was claimed that codecision-making in the areas of agriculture and fisheries would be bad for reform, the prospect of reform in those areas, because it merely strengthens the protectionist forces in Europe.

Sir Stephen Wall: It seems to me that the—I am not saying that this is an area where the victory is won, and if one reads President Sarkozy's speeches on agriculture, you can see them pointing in different directions, but it does seem to me that the trend of policy in the European Union has been away from that. The pressures that are exerted now on the European Union in the trade area, for example, external trade, the stance that we have to take in WTO negotiations is pushing us in a direction away from traditional protectionism. I think 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. Agriculture in France is politically still very significant, but its economic significance has diminished enormously; the same is true of Germany; the same, I think, will be true of those new Member States who at the moment

have very significant agricultural sectors. It just does not seem to me plausible to think that in a system where members of the European Parliament are directly elected, that that will not filter through.

Q222 ***Lord Dykes:*** Sir Stephen, what specific impact would you yourself possibly envisage for the European Commission, in terms of its role, functioning and membership, from these treaty proposals?
Sir Stephen Wall: Well, I think there are two significant issues: one is the new measures on the way that the Commission is actually appointed and approved by the European Parliament, and I think that in particular as regards the President of the Commission, there will be a closer linkage between the outcome of European Parliament elections and the character of the person who is chosen as President of the European Commission. I think the smaller size of the Commission will be a good thing. It is something which successive British governments have argued for, from Margaret Thatcher onwards, and not in her case simply because she did not much like it, but because she actually thought that in terms of their responsibilities, it was more effective to have a smaller European Commission. I do not want to exaggerate the point, but it does seem to me that if you have 27 countries each with a Commissioner, the danger of those commissioners being seen to be the national representative in Brussels—and in my experience, I know of one or two Member States who have been fairly open in saying, "We are a small country, we do not have a big bureaucracy, we rely on our Commissioner to defend the national interest", and that is not what the system is designed to be. So I actually think that a smaller Commission will have greater regard for their duties as Commissioners with responsibility for the interests of the Union as a whole. I am not saying that there is no potential cost from the fact that there may not be a British Commissioner at certain points, but equally, I think successive British Commissioners have actually taken their responsibilities to the Commission, as opposed to the Government from which they came, rather seriously. So 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. I think if you look at recent history, nobody, including me, and I know that I was at odds with Lord Kerr on this point, but he was right and I was wrong, but not many people thought when Pascal Lamy, a Frenchman, was made Commissioner for External Trade, that he would pursue the kind of policies that he did, which were actually ones that we fully supported. If you thought about the idea of an Italian being Competition Commissioner, you might have had the same prejudices, but Mario Monti was an extremely good Competition Commissioner. So I think it is possible to kind of be overinfluenced by our national prejudices on this and actually the reality can be rather different.

Q223 ***Lord Dykes:*** Do you feel that might be—if people were saying, well, eventually the Commission will come to the end of a big phase of single market legislation and so on, and in fact people say that has been reached already, or other people equally say it will go on for much longer than you think, but do you think there might be two phases, the Reform Treaty timing, if it is ratified by the Member States, it would be good from that point of view of having got through the final creation of all the single market aspects, and the Commission goes on to being a much more interesting body?
Sir Stephen Wall: I think there is still some way to go on aspects of financial services, and in particular the general Services Directive that we have is not, I hope, the end of the story. The whole area of energy liberalisation is clearly one where the Commission are taking action, both in terms of legislation on energy unbundling and also in terms of using their powers under the competition rules to enforce opening of the market. I think there are areas of energy policy, both internally, in terms of the creation of a grid, and externally, in terms of the management of our relations with third countries, where there is scope for further development. I think the European Commission themselves are very much focused now not just on—and perhaps rather more than on new legislation, focused on implementation and enforcement, and I think in the single market, including the financial services area, that is absolutely critical, because certainly the faith of the business community in the single market depends upon it being seen to be implemented rigorously. The Commission are very conscious of that, and suffer, because none of the Member States is very willing to give them the wherewithal by which to do it. So insofar as there is a shift away in the single market area from lots of new legislation towards implementation and enforcement, that might be a good thing.

Q224 ***Chairman:*** Is there a likelihood that in future, under this new arrangement, the President of the Commission will in effect always be the candidate of the largest political group in the Parliament?
Sir Stephen Wall: I think that is certainly—given that there has to be agreement between the Council and the Parliament on the candidate, and he has to be approved by the European Parliament, I think there is probably going to be greater regard for political balance as well as geographical balance across these key jobs than perhaps there has been in the past, yes. But I do not think it will just apply to the President of the Commission.

Q225 ***Chairman:*** Thank you. Moving on, could we come to the Court of Justice for a moment? We had Sir David Edward here recently giving evidence, and if my memory serves correctly, he identified at least four areas in which the jurisdiction of the Court would be somewhat extended. I am just wondering whether you have views on whether or not this is desirable; and secondly, maybe you would like to comment on the Charter of Fundamental Rights and what the European Court might make of it.
Sir Stephen Wall: Again, as I understand it, the most significant area in which the European Court will now have an increased role is clearly in the area of justice and home affairs. I think the European Union as a whole has decided that it wants, for reasons of efficiency, to go in the direction of using the traditional Community procedures, including a role for the European Court of Justice. Clearly that presents issues for the British Government, because in terms of decisions which the Government takes to opt in or not, they will have to factor in the possibility of the Court making judgments on issues that affect our national law. I think it is difficult to say at this point whether that will be an inhibition on us in deciding to opt in or not. It is certainly a factor that they will weigh in their minds, because of the particular arrangements we have on justice and home affairs, that will impact on us in a political sense. As regards the Charter of Fundamental Rights, I thought myself, having lived a lot with this, that the safeguards that were secured at the time of the Constitutional Treaty were strong legal safeguards; that was certainly the view of the then Attorney General. It seems to me that what has now been obtained in terms of the protocol makes it absolutely clear. I know there are people who say, "Well, if a case were brought before the UK courts, the UK courts would be almost bound to refer it to the ECJ and then you are off to the races"; I am not a lawyer, but if you look at Articles 1 and 2 of the Protocol, they seem to me to be so starkly and unequivocally worded that the European Court would have to say that black is white to be able to make a determination that actually affected the laws of the UK in the areas which concern us. Certainly, in the organisation which I am involved with, Business for New Europe, our members were concerned to have certainty on that point, but our members, and we have about a third of the FTSE 100 companies as members, are satisfied with the result that has been obtained.

Q226 ***Lord Wade of Chorlton:*** I think you will probably agree with me that one of the concerns in Britain is about the role of the European Court of Justice, and its impact upon what people see as certain issues; do you think as a result of these changes those concerns are likely to be greater or lesser?
Sir Stephen Wall: I do not think they change much. I think there is sort of a view in the UK that the European Court is a kind of constructionist court that wants to advance the frontiers of European competence. I do not think that the history of the Court for the last 10 or 15 years bears that out. It seems to me that the European Court takes a rather rigorous legal view; even in areas where, for example, over healthcare, where it has interpreted single market rules in a way that have extended the scope of healthcare provision across the European Union, I do not think the British Government's lawyers dispute the legal grounds on which the European Court did that. There have been recent cases where the European Court—I mean, for example, on British health and safety legislation, when our rule of "insofar as is reasonably possible", which is a traditional British formula, was challenged by the European Commission, the European Court found in favour of the British Government rather than the European Commission. So I do think this is an area where the reality is a bit different from the perception, and I do not see any reason for this to change, except insofar as if the British Government opts into JHA areas, in doing so, they will have had to assess what they think are the risks if that particular bit of legislation were to find its way before the European Court of Justice in due course.

Q227 ***Chairman:*** Given that Article 51 of the Charter states very clearly that the provisions of this Charter are addressed to the institutions, bodies and agencies and officers of those agencies, do you think that this is not sufficiently understood?
Sir Stephen Wall: Yes. When I was still involved in these things, we had quite a lot of difficulty in getting that point across, because on the one hand, we have those provisions which I think are legally watertight. On the other hand, you have something which started as a political document and has become a legal document, which is why the question is not whether it is a legal document, but in what terms is it a legal document, which is where Article 51 and other articles come into play. As I say, I do think that Articles 1 and 2 of the Protocol, which as you know have equally binding legal force with the substantive articles, if you doubted what is already there, those protections are absolutely explicit.

Q228 ***Lord Harrison:*** Sir Stephen, Eurosceptics suggest that the new powers given to national parliaments by the Reform Treaty are nugatory. Is that your view? If they are substantial, as I believe, how do you think national parliaments should frame their responses to proposed legislation; in particular our Parliament, and in particular, our House? Perhaps I could just tack on to the end, because you are a representative of Business for New Europe, do

you think added confidence will go to the business people of the United Kingdom, who are often poor at communicating to their MEPs or to us, do you think they will be given new confidence, or will it be a delusion, the knowledge that national parliaments may be able to play a more influential role in determining the European decisions?
Sir Stephen Wall: I think it should be a source of confidence. Obviously, it is up to the business community and organisations like Business for New Europe, if there are issues which really affect our members' interests, to get their views and present them coherently and rapidly. Obviously I am not competent to judge what organisational changes would need to be made both here and in the House of Commons, but my perception, when I was a civil servant, and dealing with the scrutiny process, particularly dealing with the scrutiny process when Parliament was in recess, is that it creates a hiatus in the system, and decisions in Brussels cannot always wait on the Parliamentary timetable. So I guess what has to happen is that Parliament has to organise itself to be able to determine significant issues quickly, and then to reach a view quickly. I understand all the problems that that entails, given recesses and other things, because although the timescale is now extended under this Treaty, compared with the Constitutional Treaty, it is still a fairly tight timetable. I guess also, although it is not essential, if you are actually going to get the biggest impact, it requires more coherence and co-ordination between national parliaments, where they may have similar concerns and want to express a similar view. COSAC has been the traditional vehicle for Parliamentary co-ordination, but whether that can be adapted for this particular purpose, I just do not know.

Q229 ***Lord Harrison:*** If I may, I will return to the Eurosceptics who got very excited about the passerelles and the simplified revision procedure. Do you think that leaves the United Kingdom vulnerable to being obliged to do things it does not want to do, or do you think it actually fosters better decision-making procedure?
Sir Stephen Wall: You could demand that we have in every case the whole intergovernmental conference process, or as I saw Lord Owen suggest, I think, in the Sunday Times, we should have primary legislation in each case, but it seems to me, in terms of the preservation of the political interests of the United Kingdom and the power of Parliament, to have both a unanimity provision and, as our Government have said, that there will be no use of the passerelle without the positive approval of Parliament, that seems to me to be a pretty strong democratic safeguard. Nobody can get round that. The argument that somehow you will come under such pressure that you will give ground, does not seem to me to bear much relationship to the practice of successive British governments in their dealings with our partners. None of our partners thinks we are a pushover, as you know.
Chairman: Lord Dykes, did you want to come in?

Q230 ***Lord Dykes:*** Very quickly, Lord Chairman, thank you. On the more human aspects, I remember vividly for two and a half years being a member of the unelected Parliament in the early 1970s, and the antagonism between national parliaments, particularly the British one and the European Parliament, was immense. Do you think that has substantially disappeared and diminished everywhere, including Britain?
Sir Stephen Wall: Yes. I think our own arrangements are less than that of some of our partners. That is obviously a matter for this Parliament to decide whether it wants to do more, particularly in terms of having more interchange and dialogue with the committees of the European Parliament, where they are dealing with issues which are of concern to this Parliament. Others do do it differently; so far as I understand it, there has not been the support for that here.

Q231 ***Lord Wade of Chorlton:*** Under the new arrangements, the proposal is that the EU's commitment to undistorted competition should come to a protocol, and I wonder how significant you think that is, and what practical impact it is likely to have, if any.
Sir Stephen Wall: When the news broke that the provisions that had been in the Constitutional Treaty had been changed, largely at the instigation of President Sarkozy, I think that would have been worrying had the Commission themselves not acted to get the protocol, and although optically obviously when something is there and it is removed it is not great, in substantive terms, that protocol recreates the protections that were there under the previous treaty, so I think the substantive position is no different. I have heard the relevant Director General of the Commission, Philip Lowe, speak on this subject, and he is confident that the powers are fully safeguarded by that protocol; I believe that is the case, and I think there is no doubt about the Commission's determination to use those powers.

Q232 ***Lord Wade of Chorlton:*** Why did Sarkozy want to change it?
Sir Stephen Wall: That is a good question. The benign interpretation is that I think he had a domestic difficulty, and it was easier therefore to kind of slide things through, if he could point in that direction. 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.

Q233 ***Lord Wade of Chorlton:*** Are you confident about that?
Sir Stephen Wall: Yes, I think if he thought he was gaining a point of substance, then I think he did not gain that point of substance.

Q234 ***Lord Kerr of Kinlochard:*** Is it not the case in addition that the words are not there in the Treaty now in force, so he did not secure a deletion from the current Treaty?
Sir Stephen Wall: Exactly.

Q235 ***Lord Kerr of Kinlochard:*** They were in the draft Constitutional Treaty and they were in the draft Reform Treaty and they have disappeared, but they have not disappeared from the current Treaty, so nothing has changed.
Sir Stephen Wall: Yes, exactly.

Q236 ***Lord Dykes:*** Page 6 of the Financial Times yesterday had a very senior official of the Élysée calling for more flexibility and individual policy formation and so on within the Commission framework. Do you think there was any linkage between that utterance and this matter we are discussing here?
Sir Stephen Wall: I do not know. There may have been. My sense at the time was here was a President who was embarking on some very difficult reforms at home, and he wanted a bit of red meat, as it were, to fling to the people who were about to be marching in the streets.

Q237 ***Lord Sewel:*** It is the last question, but in a way, it could have been the first question, it is really: which of the institutional changes we have been discussing today do you think has most significance for the United Kingdom?
Sir Stephen Wall: I do think that the changes on justice and home affairs are the most significant, because I think that those are the ones that will pose for us real policy choices. It is absolutely right that we have not tried to thwart our partners from doing what they feel they need to do for their security, and it remains the case that we will want to, as we have done in the past, opt into the vast majority of those provisions. But the arrangements, as you know, where we do opt out, do involve a rather kind of complicated formula which allows for the possibility that we might be opted out of some of the wider areas in which we have been opted in, because an individual opt-out can affect the operation of those areas, so there can be difficult decisions for Ministers to take. My own feeling on this is that we have to be kind of honest with ourselves and have some means of assessment, fairly consistently, and maybe even with reporting to Parliament on a fairly regular basis. In a way, it is a bit like the argument in the 1950s, where the economic argument pointed in favour of joining the EC, but the sovereignty issues were too difficult, and then the balance changed, because we saw that actually the economic disadvantages of staying out were so great that we had to swallow it, and this could be the same. We need to be rigorous ourselves in assessing, after a certain period: would Britain's national security be better if we were fully in the entire system rather than having the opt-in/opt-out system? You will not be able to properly make that judgment until you see a bit in practice how it operates. I am not saying it will not be a difficult judgment to make, because there are, as I understand it, potential areas of harmonisation which would be easier for our partners than for us. Again, as I understand it, most of our partners have a system whereby the discovery of DNA evidence is not enough to allow a second trial, whereas in our case, we do admit DNA evidence, and indeed there have been recent examples of it. That seems to me to be an area where there is quite a substantive issue involved, which would be very difficult if we were required to change that. So I do not think it is easy, but as I say, I do think it is one that will need to be constantly assessed over the next five years or so.

Q238 ***Chairman:*** Can you envisage a situation in which, for example, one day we may find ourselves having to decide whether to re-opt in to the European arrest warrant, which so far has proved to be very useful to us, but the decision might be taken that we cannot, because then we put ourselves under the jurisdiction of the European Court.
Sir Stephen Wall: I think that is unlikely. Obviously, I imagine there is a whole raft of existing legislation that the Government will be looking at over the next five-year transition period, to see how far our existing enactment of those provisions is ECJ-proof, as it were, and that is a process which obviously we have time to do. My sense of this, as an outsider, but from talking to people, is that both ministers and officials really are determined to operate the system for the best security interests of the UK. As I say, I am not suggesting that the balance between that on the one hand and the political and legal issues on the other is an easy one, to which there is, you know, a simple answer.
Chairman: Thank you. I think we have come to the end of this very interesting session. You have answered all our questions in a very satisfactory and informative manner, Sir Stephen, for which we thank you very much indeed. This will be most useful to our inquiry. Thank you again for giving us your time.

WEDNESDAY 19 DECEMBER 2007

Present	Dykes, L	Maclennan of Rogart, L
	Grenfell, L (Chairman)	Powell of Bayswater, L
	Harrison, L	Plumb, L
	Howarth of Breckland, B	Roper, L
	Jopling, L	Sewel, L
	Kerr of Kinlochard, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr Jim Murphy, a Member of the House of Commons, Minister for Europe, Ms Shan Morgan, Director, EU, Mr Paul Berman, Legal Adviser, and Mr Martin Shearman, Head, Common Foreign Security Policy Group, Foreign and Commonwealth Office, examined.

Q239 ***Chairman:*** Minister, welcome once again to this Committee. We appreciate your giving of your valuable time to meet with us. You have the declaration of interests of Members of the Committee. Firstly, I would like very much indeed to welcome Shan Morgan, Paul Berman and Martin Shearman. Would you like to make an opening statement, Minister?
Mr Murphy: I am just delighted to be here. I have been looking forward to today's evidence session as my last event before I head back north for the festive break, so that is all I would say, that I have been looking forward to it.

Q240 ***Chairman:*** Then, if we could go straight into questions, the first thing we wanted to get your feelings on is the extension of Union competence made by the Reform Treaty, what your feelings are about this, what is the effect on the institutions and who is likely to gain the most from it.
Mr Murphy: There are formally, as I think your Lordships are aware, five extensions, the five Articles which extend competence, and they are on space policy, energy policy, tourism, civil protection and administrative co-operation, so those are the five formal extensions of Union competence. However, Lord Grenfell, within your question of course there is the underlying point about which of the institutions in the complex dynamic of all the different institutions could be perceived or anticipated to gain most and, to some extent, it depends on one's perspective on the impact of the Reform Treaty and one's view of the European Union more generally. In terms of the European Parliament, we strongly welcome the extension of co-decision for the European Parliament, we think it is the right thing, so it is clearly an extension of power and influence for the European Parliament which is the correct balance. There is the introduction of the full-time President of the European Council. Now, ultimately, if one was to take a purely arithmetic measurement of which sort of institution gained most on the basis that that is a new post going from no influence in terms of being a full-time President, then that is of course an extension of influence, but of course, when it is compared against the part-time rotating Presidency situation, maybe that extension of power and influence is less significant. Perhaps then the only other two I would mention would be on the Commission itself and part of the increased influence of the Commission may come from the more effective operation by being smaller and more effective. The truth is, as we all know, the current arrangement in the Commission of having one Commissioner per Member State is not only unwieldy, it is unnecessary. There are not 27 jobs to do and, quite frankly, without being disrespectful to any one individual, the truth is, to some extent, you would be scratching around looking for substantial jobs for 27 people to do, so a smaller Commission which is more effective could have a significantly increased informal influence, but I think the jury would be out on that. Finally, national parliaments, and it is pretty clear in terms of the powers of national parliaments, the yellow and orange cards, and then the arrangement by the Prime Minister this week in the post-European Council statement which of course Baroness Ashton would have repeated, I think, in your Lordships' House about an affirmative vote of both Houses before agreeing to transfer further power. To some extent, my Lord, that is a response to the question because, ultimately, it is a Treaty proposing new interactions and new relationships, and that is my assessment of the expansion of powers and influence of the various institutions.

Q241 ***Chairman:*** There are many who say that there is very little expansion of the power of the European Union institutions compared to where we have been before, that there has been a certain amount of extra power given to them, but not dramatically so. On the other hand, the Campaign against Euro-federalism argues that the Lisbon Treaty gives the EU the constitutional form of a state, and they cite provisions regarding citizenship, legal personality, the formalised European Council and the permanent

President of the European Council. You can probably give us a fairly short answer to that, but do you agree with any of that?
Mr Murphy: Firstly, Lord Grenfell, the final point you made regarding the earlier question, I think by any accurate, objective assessment about a formal extension of European Union competence, it would lead you to the conclusion that, in comparison with other treaties, like Maastricht or the Single European Act, the extended competence within the Lisbon Treaty is considerably less than in any of those previous treaties. In terms of the point about the campaign against a federal Europe, if that was what was on offer, I would be a member of that campaign because I am against a federal Europe, so, if there were some campaign to have a federal Europe, I would be on the opposite side of this debate, but there is not a campaign to have a federal Europe. We have said pretty clearly that it is our belief that a combination of the Lisbon Treaty and the political commitment that goes alongside it means, and I do not wish to be critical of anyone, but for those who believe in a federal Europe, I think that dream is dashed for the foreseeable future. In terms of the point about citizenship and the European Council, EU citizenship has been recognised since the Maastricht Treaty. The European Council has been governed by Treaties since Maastricht, so my sense, and I said this in the Commons on maybe Monday evening, is that the opposition to this Treaty is often driven by opposition to proposals that are not contained within it, and it is about a general feeling rather than specifics about the Treaty. For example, one of the criticisms of the official opposition is that this permanent Presidency of the Council is a power-grab, it is moving away from a system of 26 weeks. As I have reflected before, 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, with no disrespect to bowling clubs, on a rotating presidency of 26 weeks, so I do not see why you should do it in the European Union.
Chairman: Thank you very much indeed.

Q242 ***Lord Dykes:*** The Government, I recollect, were previously very much opposed to the conferral of the legal personality. Why did that position change?
Mr Murphy: Largely because we were able to secure the distinct treaty status for CFSP, foreign and security policy. The concern had been that a combination of the sort of single legal personality to the Union alongside treaty collapse around CFSP would allow the potential for a blurring of responsibility on CFSP. Now that that fantastically phrased Pillar 2 has not collapsed in that sense, that concern has been overcome, as far as the Government is concerned. I think it is also important just to acknowledge that of course, the European Community had its legal personality and the European Union has had in recent years operational legal personality with over 70 or 80 separate agreements, so with the retention in a separate Treaty of CFSP, what this single legal personality does to the Union, the Government feels, is confirm the existing practice as recognised by very many international institutions regarding the European Union.

Q243 ***Lord Dykes:*** So effectively there is very little, or no, change at all, would you say?
Mr Murphy: I think in the operational sense, there is very little change. It confirms what has become an evolving practice for the European Union, having signed these dozens of agreements with other countries and international organisations.

Q244 ***Chairman:*** You are happy that the legal personality will enable the EU to accede to the Convention on Human Rights?
Mr Murphy: Yes, we are content with that.

Q245 ***Lord Powell of Bayswater:*** Minister, you referred just now to the full-time President of the European Council, suggesting that this was a significant step forward, but what is he actually going to do? The original intention, I think, was that it would be a substantial role and might even tilt the balance a bit towards intergovernmental co-operation, but actually his powers seem to be marginal. What power he has, he has to share with the term presidencies and, when it comes to his external role, he is going to be trumped by the High Representative who is going to be present in the Commission and in the Council. So is he really going to be a full-time President or is he just going to be a fifth wheel?
Mr Murphy: Most vehicles need a fifth wheel, if only for a spare, but I accept the point of the President of the Council. The President of the European Council will have, I think, an important role primarily about maintaining continuity. We are in a situation at the moment where of course we are just coming to the end of the Portuguese Presidency and about to start the Slovenian Presidency and there is an enormous amount of work going on to try to ensure a degree of continuity and some of the issues, by their very nature, will be maintained because there is a national dynamic around, for example, Kosovo. However, where there are issues where, if you like, the European Union is responsible for creating and then maintaining the momentum, I think having this full-time Presidency of the European Council is a significant and important step forward not only for

handling those external matters which have their own dynamic, but, more importantly I feel, when it is the energy within the European Union that drives the agenda forward, so whether it is on labour market reform or whether it is on the review of the Lisbon Strategy on jobs, those sorts of things, that full-time Presidency, I think, is the important improvement there.

Q246 ***Lord Powell of Bayswater:*** I can see it brings in an element of continuity in the sense that he/she will physically be there continuously unlike the term presidencies. But you tried to describe the role and I still do not really get it. On Kosovo, the High Representative will be dealing with that and he/she will be dealing with it continuously and will be there throughout. The European Council itself is a pretty intermittent organisation, it sort of pops in and out three times a year or whatever, so how is he really going to exert influence compared to the Commission President with his extensive legal powers, the term presidencies and the High Representative? I feel he is just going to be another panjandrum in the European Union hierarchy.
Mr Murphy: Ultimately, it is a new way of doing things. I could sit here today and say to your Lordship that this will be a panacea, but that would be naïve because it is not going to be. There are other institutional weaknesses in the European Union and, more substantially, there are delivery weaknesses in the European Union which this person in and of himself will not resolve, but I think moving from the position of 26 weeks to two and a half years gives us the potential. Now, as I understand it, in the Treaty I think there are four specific roles about chairing the European Council meetings, co-ordinating the work, providing reports and then seeking consensus within the European Council. I think in that job description, it gives us the opportunity, it does not give us the guarantee, but it gives us the opportunity for such work to have a momentum, for an initiative not to be lost in the passing of this diplomatic baton that currently occurs, and I think that is an important step forward, but the proof of it will be in the actual delivery. Talking to fellow ministers across Europe, there is real determination to make this work because everyone accepts it and almost everyone accepts that the status quo leads to a degree of inefficiency, it just does. The truth is that, in the 26-week period, one can speculate as to how much of that 26 weeks one country actually owns because, for the last three or four weeks, in truth, everyone is looking towards the next Presidency and, for the first three or four weeks, the new Presidency is finding its own feet, so, of that 26 weeks, it is possibly only 16 or 18 weeks when one is actually operating at full speed.

Q247 ***Lord Roper:*** Do you see the President of the Council having a role in terms of bilateral summits with other major partners?
Mr Murphy: I think there is a role there, yes.

Q248 ***Lord Roper:*** He would lead, would he?
Mr Murphy: I do not know if he would lead. He would certainly attend. I think there would be a role for the President of the Commission, depending of course on what the summit would be, but there would be potentially a role for the President of the Commission, there is potentially a role for the High Representative, depending on whether it is an international issue relating to security or foreign policy, and then there is potentially a role for the President of the European Council. I think a relatively small part of the President of the European Council's job will be about foreign and security policy and much of that will be of course with the High Representative's role, but the anticipation is that there certainly is a role for the President of the European Council to attend such gatherings.

Q249 ***Lord Kerr of Kinlochard:*** On the internal role of the President of the European Council, do you think, Minister, that the European Council will be better prepared? I take Lord Powell's point, but, when he was a great panjandrum in the European Union, there only were 12 Member States and there was a tradition, I remember, that the President of the European Council would visit all the other Member State capitals in the two or three weeks before a European Council, preparing the agenda, finding out what they wanted, trying to sell them the possible outcome, but that has lapsed with 27 Member States, and with all the Presidents of the European Council having full-time jobs as the Prime Ministers of their various countries. I wonder if you think it will work better when that sort of tradition can be revived again, when there is a full-time President of the European Council?
Mr Murphy: Over the period of two and a half years, I would say it is unlikely that the full-time President of the European Council would not seek to visit all Member States. I think it would be poor form, bad politics and it would be open to all sorts of accusations and insinuations. However, it is unconditionally unrealistic to expect, as I think has been acknowledged in the question, in this rotating Presidency for the outgoing rotating Presidency to come anywhere close to meeting all 26 other Member States. One could try at international gatherings, but, even there, to have a substantial conversation bilaterally with 26 other Heads of Government would be extraordinarily difficult. It is also worth reflecting that, if we continue with the current system, which we have no intention of doing, of this rotating

Presidency, each Member State would have a turn every $13\frac{1}{2}$ years to offer some sort of direct leadership and momentum. As has been suggested by your Lordship, 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.

Q250 ***Chairman:*** So, in a sense, in the role of the President, he or she is going to be more of the internal fixer rather than the external face of the European Union?
Mr Murphy: I think, my Lord, he would attend external gatherings and would, on occasion, speak on behalf of the European Council, when of course there is agreement and unanimity, but I would anticipate, certainly at the earlier part of this process, for the substantial part of the job to be an internal job. The Treaty has set out, and I have scribbled it here because I knew I would not remember it, but in section 9C(6)(a) are set out four specific roles and it is about chairing, co-ordinating, reporting and endeavouring to create consensus within the European Council, so I think all four of those have a clear internal responsibility and that is important, I think, for us all to acknowledge at the start of this process.

Q251 ***Lord Powell of Bayswater:*** Would you agree that he is likely to have a large additional staff?
Mr Murphy: There would certainly be a need for ministerial support and staff support, but what we have got to get absolutely correct is the relationship between whatever staff would support the full-time President of the European Council and the staff that are going to support the High Representative, which then is about getting absolutely right the External Action Service. For example, there has been no decision taken on the External Action Service, but, for example, it clearly will largely be about supporting the High Representative in the carrying out of his duties, but where the President of the European Council, in his responsibility, takes on any role on security and foreign policy perhaps at a European Council gathering, it is important that there are not two sets of staff, recreating some of the unnecessary silos that have been all too common, not just in the European Union, but common in most major organisations, so yes, there needs a staff level that has its roles and responsibilities with the External Action Service properly worked out.
Chairman: Let us look at some of the influences on the President of the European Council.

Q252 ***Baroness Howarth of Breckland:*** Before I move on to my question, it is a long way from welfare reform which is where we met last, I think one of the issues that we are really trying to tease out is this comparative power role and relationship between the individuals who will be working. Whereas I can see the short-termism of the previous arrangement, which is what you have been referring to very clearly, and in managerial terms it makes more sense in terms of continuity of work, the real difficulty is whether there is clear definition between the High Representative and the President of the European Council, and there are job descriptions, but in terms of clear definition, I am interested in that. I am also interested in whether or not he or she, because the President will not have the same authority as sitting Heads of Government, is likely to be beholden to the larger groupings of governments and how will we ensure that there will be that measure of independence in hearing what needs to be heard through the Council?
Mr Murphy: When I had left welfare reform, I thought I was into a nice, easy job, after taking the Welfare Reform Bill through Parliament, but it was not to be the case! The point is, I think, that the President of the European Council will derive their authority from the Prime Ministers and Presidents of the 27 Member States, so ultimately that will be the source of their authority, elected of course, I am sure I am right in saying, by QMV, so I understand the concern which is a traditional concern in Europe which is that, if one were to get the UK, France and Germany, colloquially put, to one side, then that would create a diplomatic dynamic that would lead to uncertainty, but things are changing. They have not yet changed, but I think we are in the process of changing, and I think that is a good thing, that, with 27 Member States, there is a breakdown of that system whereby one or two States can call all the shots, if you like, in terms of picking someone to perform any of these roles, so I think it is important, and all Member States, quite rightly, wish to become deeply involved in making sure that whoever gets these jobs is the right person for that role. In terms of the managerial point, it is absolutely essential before this starts, after the Treaty is ratified across, if the Treaty is ratified across, all 27 Member States, before this is agreed, the exact roles, responsibilities and relationships have to be ironed out in precise detail. Now, on the President of the European Council, some of these details are still to be worked out by the European Council, but it is important again also to state that that will be by unanimity, but the UK Government is very alive to the issue that 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. It has been agreed that this would happen through unanimity of the European Council and that is the way we are going to progress with it.

Q253 ***Baroness Howarth of Breckland:*** Just to follow up the first bit again, in terms of the institutions, the first part of your answer about the institutions, what in that reassures us that those things will be worked through before there are difficulties in terms of those relationships?
Mr Murphy: We have agreed, as 27 Member States in the European Union, that this has to be worked through before commencement and that we will do it through the European Council through a process of consensus, as we seek to do in all of these things in the European Council of course, although we do not always succeed, but we seek to do it. There is agreement by all governments that this has to be worked through and that the details will be put in place, so there is a pretty clear understanding across Europe that that has to happen.

Q254 ***Baroness Howarth of Breckland:*** I suppose finally, is there a timetable for that?
Mr Murphy: The aim for the Treaty ratification across the 27 Member States, we would like to be, is no sooner than 1 January 2009 with an expectation to have done so in advance of the European elections in 2009 which I believe are in June, so that would be the timescale.
Chairman: Let us move on to the next institutional question.

Q255 ***Lord Roper:*** Another area where things presumably also have to be worked out between now and the time the Treaty comes into force is what is sometimes referred to as a "double-hatted", but is perhaps a treble-hatted, role of the High Representative, not only with his current functions enlarged, but also his role as the Vice President of the Commission and his function as chairing the Foreign Affairs Council. How is that going to be worked out, including the question of how is the current business of the General Affairs and External Relations Council to be disentangled? What will still be done by the High Representative chairing the Foreign Affairs Council and what will be done by the rotating President chairing the General Affairs Council? Will he be taking the business which comes up from COREPER as distinct from FAC?
Mr Murphy: First of all, on the double-hatting or treble-hatting, as you have said, that the High Representative is the Vice President of the Commission and also is the Chair of the Foreign Affairs Council, first of all, the first two posts in terms of the Vice President of the Commission and the High Representative, most people acknowledge that is a sensible reform. It helps align the external priorities of the European Union with the budgeting process and with the right support mechanisms, ie staff, the right support where it has perhaps in the past, without being too critical, been well acknowledged that there has, on occasion, been a divergence of priorities and budgets, so that role being double-hatted, I think, is a sensible and meaningful reform. As to which issues come out of which gathering, I do not know whether Shan Morgan wishes to comment because Shan of course has been one of the sherpas or focal points in the past on the detail of some of this. As for the High Representative, I am reflecting on my experience at the General Affairs Council where we have discussed Pakistan, Iran, Burma, Kosovo and, on the margins, Russia, and I think all of those issues would still be within the locus of the High Representative. In terms of COREPER, I do not know whether, Shan, you wish to say anything.
Ms Morgan: As the Minister said, a lot of this is still to be worked out and we will be doing that over the course of the next year. I would just flag up really, to underline what the Minister has already said, Article 9C, para 6, which sets out the role of the General Affairs Council rather clearly, "ensuring consistency in the work of the different Council configurations, preparing and ensuring the follow-up to meetings of the European Council in liaison with the President of the European Council and the Commission". In fact, if you look at the agendas of what is currently called the "GAERC", there is a general affairs segment followed by a foreign affairs segment, and that description of what the new General Affairs Council will do is very much consistent with what happens at the moment. At the moment, the general affairs segment of the GAERC will look, for example, at preparations for the European Council conclusions that will come through COREPER, so the role of COREPER, as the Minister was suggesting, will not change in that process, but the General Affairs Council will continue its horizontal co-ordination role across all the sectoral councils, as it does at the moment.

Q256 ***Lord Roper:*** Perhaps, in terms of being the Vice President of the Commission, it would be really interesting to know which of the work of the present Commissioners would become subject to the Vice President, for instance, the Development Commissioner, the Enlargement Commissioner, but what other external action would come under the overall supervision of the Vice President?
Mr Murphy: It is primarily the current role of the Commissioner for External Affairs because of course the High Representative is a merger of both of those positions, so certainly that would be the main

Commissioner responsibility that the High Representative would have, in addition to the Vice Presidency.

Q257 ***Lord Roper:*** So other areas of external action which are at present the responsibilities of the Commissioners of, for instance, development, aid, humanitarian aid and enlargement, would not come under his co-ordinating function?
Mr Murphy: Part of this would be resolved, or the frank, direct answer is that part of this is dependent on where we settle as to what the two-thirds of EU membership Commissioners will be. If one looks at it on the basis that we are 27 Member States and we are expecting a Commission of two-thirds the size, so 18 Commissioners, as to exactly which residual functions and job titles are in this streamlined Commission, at that point we would then determine which parts of the formal responsibilities of previous Commissioners, but the one that lends itself immediately, and this is stated very clearly, is the External Affairs Commissioner, but it is reasonable to expect that there would be a role on international development, debt relief and perhaps on issues of expansion and human rights, but part of this will be resolved as a wider reconfiguration of the Commission as well.

Q258 ***Lord Roper:*** But there will of course be a period between the establishment of the double-hatted Commissioner and the Vice President while there still are 27 Commissioners.
Mr Murphy: Yes, that is right, so in that period the major role will be the External Affairs Commissioner.

Q259 ***Chairman:*** But the question of trade negotiations, that remains entirely separate, does it?
Mr Murphy: Yes.

Q260 ***Lord Jopling:*** Minister, under the new rules that we are faced with, if a country wishes to join with others in getting a blocking minority in order to block something, under the new rules on qualified majority voting, is that not going to be a good deal more difficult and is the Government unhappy about the effect of these changed rules on the ability of the UK to block things it does not like?
Mr Murphy: No, that is not the case at all. We are really pretty content with the new system of moving away from qualified majority voting to double majority voting. I have been asked about this before in various gatherings which has led to me having to wade through all the analysis and it is another one of those points where, not your good self, my Lord, of course, but others, they substitute fact for assertion and I have had debates in the Commons about this where it has been suggested that this would be much more difficult and it weakens the UK position. The fact is that, in terms of the UK's share of a blocking minority, it has gone up from the current situation of 32%, so in any blocking minority it wished to be involved in, whereas the UK is currently 32% of that, that would go up to 35% under the new system. It may be helpful for your Lordships if I just reflect on what these changes are about. With the system currently of qualified majority voting, in order for a proposal to gain assent, it requires the agreement of a majority of the Member States, as you know, plus, I think it is, 255 of the 345 votes for a proposal to be agreed to. Under the new system, instead of a majority of Member States, it is 55% of Member States and, instead of 255 of 345, we are moving to a system based on populations where the UK will be one of the main beneficiaries because we are moving towards a system of votes based on population, so I think at the moment we have 29 of the 345 and we are going to a situation where our population of 60.6 million means that, instead of having an 8% share of the vote in the Council, we go to a 12% share. The new system of double majority voting is based on 55% of Member States, instead of a simple majority, and, instead of the figure of 255, it is based on the agreement of the Member States representing 65% of the EU population, so you would have to have both, 55% of the States plus 65% of the population of the EU, being within that 55% of Member States. Therefore, in fact it enhances our share of the vote and it increases our proportion of a blocking minority, so based on all the science, all the facts, all the figures and all the analysis, we are really pretty content with the deal that we have here.

Q261 ***Lord Jopling:*** Can I turn to another side of this and ask you what you think will be the position in the future of a country which very, very strongly objects to what is proposed and what, in the old days, used to be described as a "vital national interest", and that brings me to what used to be called the "Luxembourg compromise". I think that you perhaps agree that there was a lot of misunderstanding about what was meant by the Luxembourg compromise and a lot of people, particularly in this building, thought that a country just had to say, "Veto" and that was that. Of course, it was not like that at all. If you had a vital national interest and you declared it, in order to apply that "veto", one had to get a blocking minority to support you and, forgive me, but you are probably too young to remember that in 1984 Peter Walker used the Luxembourg compromise and was rolled over because he could not get a blocking minority to support him, so the veto in fact never used to work, unless you could get other people to join in with you and sympathise with you. In fact, in my time, a

number of delegations were under a standing instruction that, if any delegation declared a vital national interest, they were, regardless of the facts, to support that delegation to encourage the so-called Luxembourg compromise to work. Now, my question is this: how will it still be possible for a country with a vital national interest which says it is so and it needs to get a blocking minority to support it, which I imagine would still delay agreement if you got the blocking minority? Surely that, as I understand it, will still operate and the so-called veto, which we used to call the "Luxembourg compromise", would still operate if a country declared a vital national interest and could get enough countries to support it. For instance, is the British delegation, at the various facets of the Council, still under a standing instruction, as they were in my time, that, if anybody did declare a vital national interest, they were willy-nilly to support it, and do you know of other delegations which are also under an equal instruction, which I could name, but I will not, which, in my time, were always in that position?

Mr Murphy: You are right, my Lord, that I cannot recall 1984 and the case of Peter Walker. I think at the time I was living in South Africa which is my excuse for not reading the detail at the time. First of all, there are two ways to respond to this. Firstly, on the system of double majority voting, which I accept is not the general point you have made, it is our view that this new system will give us a greater opportunity, where we so wish, to gather a blocking minority, not only because our own share of the vote on a blocking minority is up, but also, in our assessment of the previous occasions on which we have sought to achieve a blocking minority, our retrospective analysis makes us comfortable with this new system in terms of what we wish to achieve. In terms of the Luxembourg compromise, it is my understanding, and your Lordship did not suggest that this was the case, but it has never been a Treaty agreement, it has been a political agreement and that still stands. Now, what we have to do in each instance of course is to ensure that we examine the detail of the suggestion that it is a vital national interest, but, where we are convinced that that is the case, we have still a great deal of sympathy from the United Kingdom and other Member States for the spirit and the logic of the Luxembourg compromise and it is not affected by the Treaty.

Q262 ***Lord Jopling:*** Is the British delegation under an instruction to support a country that declares a vital national interest?

Mr Murphy: Well, under an arrangement, if someone declares it, we examine it to come to a view as to whether it is a legitimate claim and, when it is a legitimate claim, we would work with others to respect that vital national interest, but I am sure your Lordship would accept that we do not, nor should we ever, take as unconditional, superficial and at face value the claim by another about it being a vital national interest, but, where it is proven to be the case, the United Kingdom Government is sympathetic to that political arrangement that has been in place for many years, yes.

Chairman: There is a blocking minority at this end of the table that wants to move on to the next question, but I will take two quick ones on this and then we will move on.

Q263 ***Lord Sewel:*** Why is it that this question on the changes to the rules of qualified majority voting is always sort of discussed and couched in a very sort of defensive, negative way? Surely the real benefit to the United Kingdom Government is that the changes in the rules mean that it will be easier for the UK Government to get its proposals adopted and not be blocked by a totally unrepresentative minority.

Mr Murphy: I think your Lordship is absolutely correct, but unfortunately, and I do not know if I have reflected on this before, the fact is 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". Now that we have the Treaty, we have the formal text and we have achieved our red lines, protocols, opt-ins and opt-outs, there is an opportunity now in the new year, as we seek to ratify the Lisbon Treaty through Parliament, to be positive about the impact of the Treaty and, more widely, positive about the importance of Europe in our foreign policy. I think, without drawing your Lordships into a wider debate, for those who say that the Reform Treaty is not necessary, I am not aware of their considered alternative in terms of how a Europe of 27 countries can change its rules to be effective, and those who oppose our membership of the European Union more generally, I cannot conceive of a coherent British national interest foreign policy assessment which it does not have as an active member of the European Union. A world without the European Union, I think, would be a less prosperous and less fair place and the European Union, as the Foreign Secretary has said recently, has the opportunity to be a model power in the world and that is part of the argument we seek to make as we ratify the Reform Treaty. Unfortunately, and perhaps inevitably, my Lord, I have to set out the statistics and the facts for the record and I think the opportunity for rhetoric and high-minded politics, if I ever reach that, is for another time, perhaps at the second reading of the EU Amendment Bill, but we are certainly determined to make the positive case for

the Treaty and, more widely, the positive case for the European Union.

Q264 ***Lord Kerr of Kinlochard:*** I admire your self-restraint, Minister. Also, in your answer to Lord Jopling's question, I suppose you could have said that the Luxembourg compromise was always opposed as a matter of theology by some Member States, like the Germans, who were under instructions always to vote against a Member State who was invoking the Luxembourg compromise. It mutated in the 1990s into the Ioannina compromise, which became a Union text which everybody accepted, negotiated by Solana and Lord Hurd. Now, thanks to your diplomacy and maybe a little more to Polish diplomacy, it has mutated into the Treaty and there it is now, in the form, as I understand it, of a version which allows for further time for discussion if a Member State is in serious trouble and concerned about a national interest. Is that correct?
Mr Murphy: That is correct. The proposal in the Reform Treaty is to move to this new system by transition from 2007 to 2014. In the interim, a Member State has the opportunity to request a vote by the old system, so we try it on the DMV and, if a Member State still requests it, they can say, "Well, let's try it under the old rules, under QMV", and, if we cannot work it out that way in this transitional period under an Ioannina compromise, the idea would be that there would then be responsibility on, I think it is, the Council to find a commonsense way forward that meets everyone's concerns, but that is a protection that is now in there. It is partly driven by the Poles of course, but that is now in there and I think it is a pretty important kind of staging post to move towards this new system in 2014, and thank you for your comment about my self-restraint. Really what I have decided to do is to take a self-denying ordinance and I would enjoy it if all politicians of other Member State did the same over the next six months. I do not see the attraction for our position by defining us against another Member State and that is my general approach.

Q265 ***Lord Jopling:*** Can I just point out that in my presence, although the Germans opposed the Luxembourg Compromise, Mr Keichle actually used it.
Mr Murphy: Perhaps it would be important also to say, and I am not sure if everyone in the country will be following the detail of this sentence, but the Ioannina arrangements and the Luxembourg Compromise will operate in tandem for this period as well, so that is an important, perhaps double, protection.

Q266 ***Lord Maclennan of Rogart:*** I wonder if we might move on to the authority of the Commission and, in particular, of its President and I wonder if you think that the elevation in, for example, the role of the High Representative and the strengthening of the position of the President of the Council have, together with the provisions for the election of the President of the Commission by the Parliament on the commendation of the Council taking account of the results in an election, affected the role and authority of the President of the Commission.
Mr Murphy: This phrase about taking account of the results of the European elections was another one of those phrases that a number of people have made enquiries about and made all sorts of suggestions about, that it guarantees that the predominant political grouping that wins the elections has greater powers as a consequence. If one reflects on the current situation, it is that a nominee is put to the Parliament and the European Parliament either assents or disagrees to the proposal and that will still be the case under the Lisbon Treaty. What is different is that phrase, "taking account of the election results of the European Parliament". Now, in truth, it is a statement of the political reality because, even though that phrase does not exist at the moment in the Treaty, 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, so, in an operational sense, a practical sense and even a political sense, that changed phraseology has no impact; it simply codifies the Treaty, the current arrangements as they stand. In terms of whether the Commission has more power or less, the powers have not increased for the President of the Commission and those are established in the Treaty of Nice, but my sense, and I tangentially referred to this earlier, of the increased influence of the President of the Commission will come about by the Commission itself being more effective and, therefore, gaining greater respect and consent, and I think that is the prize that would lead to greater influence, but in itself the formal powers have not changed.

Q267 ***Lord Maclennan of Rogart:*** You earlier suggested, Minister, that the reduction in size of the Commission might actually enhance its effectiveness and I suppose it follows from that that you think the President may be more effective as a consequence of that, but why, and I am sorry to revert to this phrase, was this phrase inserted if, as you suggest, it had no meaning in an operative sense?
Mr Murphy: Well, I am happy to seek to find the genesis of the phrase, but the consequence of the phrase simply, in a pretty clear sense, reflects current practice. Your Lordship will be aware that it is about

taking account of the results of the European elections. A nominee to the European Parliament that did not in any way command the support of the Members of the European Parliament, as elected at the European elections, would not be successful in any case, but I will, if your Lordships wish me to, happily seek the origin of the exact phrase.

Q268 ***Lord Maclennan of Rogart:*** I have some recollection of it, as a matter of fact, with respect, but now there is another issue. Supposing a political party or a political family which emerged after the election had announced prior to the election that it would propose to nominate a particular individual as President of the Commission if it were successful in the election, would it not be somewhat strengthened by the formulation that is included now?
Mr Murphy: I am not sure it would, my Lord, on the basis that it is the European Council that considers, and makes, the nomination.

Q269 ***Lord Maclennan of Rogart:*** But, if the European People's Party were the largest party there and had said, "We propose to support so-and-so", would that not be a factor that might be taken into account?
Mr Murphy: It may be, but, without wandering into the internal disagreements and dynamics of the European People's Party, I think it would be an achievement if they were to agree on one nominee in advance of an election. I do not want to get involved in the party politics of it, but the internal dynamic of that grouping, as of any European political family, as you well know, are multi-dimensional and personally I would be surprised if, one, they were able to, two, they chose to and, three, I think it would seem in many capitals to be extraordinarily presumptuous. Ultimately, the relationship and accountability is from the European Council to the European Parliament and, therefore, even if they were to make a declaration, if they were to arrive at a declaration, they would have no formal influence, but of course informally, you are right, it would send a signal to say, "If you don't nominate one of our family, then we're not interested", but there is no sense that that is what is currently being considered at all.

Q270 ***Chairman:*** This is a question which I think we will probably continue to look at very carefully because the fact remains that nobody is going to be elected President of the Commission who does not have the support of the majority in the European Parliament and it is not very hard to identify what that majority is once the elections have taken place. That is not going to change in effect from what we have had before and I would assume that no nominee for the Commission President who does not have the support of the largest political group is likely to be elected, unless it is such an outstanding candidate that the EPP will be happy to vote for somebody who was clearly the standard-bearer of a different group.
Mr Murphy: Of course, that is what already happens in terms of a proposal is made to the Parliament and the Parliament votes for or against that nominee. That will be the situation if indeed the Treaty is ratified across Europe as well.
Chairman: Thank you very much indeed. Let us now move on to the European Parliament.

Q271 ***Lord Sewel:*** This is a question which starts at the general level and then gets particular. Generally, what will be the impact of the Reform Treaty on the European Parliament? How extensive are the Parliament's new legislative and other powers? Then we get more particular and ask you the impact of those powers on the EU and the UK, with particular reference to (a) the move to co-decision making in agriculture and fisheries, and there the lurking question is does it make agricultural reform more or less likely if we move to co-decision making, and (b) the amendment to the budgetary process.
Mr Murphy: You would not thank me, your Lordship, but we could spend the whole of this afternoon just on that one relatively short question. Our response would be the likely impact first of all would be that we will have slower legislation. Inevitably there will be a delay on occasion in the process as others seek to debate, as entirely entitled to do so as part of the agreement. I think I am right in saying there are 40 moves to co-decision envisaged here. In terms of agriculture and fishing, it will probably be slower but it is important to mention that when there is need for urgent action there is still a route to take urgent action where human or animal wellbeing and health is going to be affected. In terms of the budget, it is a pretty technical response. The European Parliament currently has co-decision over the annual budget, not the seven year Financial Perspective of course. The Parliament has co-decision now over the non-compulsory expenditure; everything except Common Agricultural Policy. Under the proposals on co-decision it gets co-decision over compulsory expenditure, including CAP; it does not get co-decision at all over the seven year Financial Perspective, that is still an issue for Member States to be decided by unanimity. Finally, on the wider point about agriculture and fishing, I believe that Sub-Committee D is looking at this in some detail and Defra are in the process of responding.
Chairman: Lord Sewel is the Chairman of that Sub-Committee.

Q272 ***Lord Sewel:*** That is why I am asking the question you see.
Mr Murphy: I need to shoot my researcher! I was not aware of that.

Q273 ***Lord Sewel:*** This is an interesting one, is it not? All UK governments have put a pretty high priority on reform of the CAP, we get co-decision bringing the Parliament in in a much stronger way. Is it your instinctive view that that will help or hinder the process of reform?
Mr Murphy: There is party political leadership at prime ministerial and presidential level. The Foreign Office reading is that there is an emerging consensus that the reform not only should take place but will take place. We are about to enter into the process of just what exactly that means. President Sarkozy has spoken about the need for radical reform of the Common Agricultural Policy. There are different definitions and analyses of what "radical reform" means in practice. Our view is that amongst the Members of the European Parliament there is a real determination in principle amongst the majority to reform the agricultural policy. Not unanimity but the majority. We think that can be a useful lever in the process of change.

Q274 ***Lord Plumb:*** Minister, I am one of Lord Sewel's boys on his Committee and we are about to come to a conclusion on the CAP reform which may interest you. You did not mention agriculture and fisheries or budgetary procedure under the five formal extensions of power and influence, but it does change the power, not so much as budget is concerned although, as you say, the compulsory expenditure is outwith the responsibility of the Parliament, and agriculture, of course, has never been within it in any case. It is sometimes said that the European Parliament does give way on budgets but I can tell you when I was President of the Parliament I refused to accept it twice, so it has had some responsibility and it did hold up the budget for quite a long period of time, quite rightly at that time. On agriculture and fisheries, what effect do you think this is really going to have? You have said already that it may hold up procedure but I would not be too sure about that because I think there is an attitude there which recognises the need for reform and a lot of people are beginning to believe that the sooner we get on with it the better and that goes throughout the whole of Europe from the evidence we have received already in Sub-Committee D.
Mr Murphy: On the specific point about slowing up procedures, I was talking about specific legislative proposals rather than agricultural reform whereby the opportunity for Members of the European Parliament to become involved in the debate and deliberate through the relevant committees and perhaps in plenary session as well will inevitably lead, at least initially, to some delay in the process of specific proposals. I cannot recall whether the REACH Directive was delayed. It was certainly improved but I think it was also delayed as a consequence of deliberation. It is that type of thing, the assessment that would delay but potentially improve. In terms of wider agricultural reform, there is not an assessment that says co-decision of that sort would slow that wider process. There is a growing political consensus left, right and centre amongst Member States and political families in the European Parliament that this should now take place. What I did not mention earlier in answer to the first question from my Lord Chairman on the extensions of the competence, and there were five specifics in these articles and I think there are 12 existing competences that were extended, was the other 12 because the first five I mentioned were extensions of new competences extended through the five articles that I mentioned, starting with space policy.

Q275 ***Lord Plumb:*** Do I take it that you would generally agree with the co-decision procedure?
Mr Murphy: Yes, I think it is an important reform.

Q276 ***Lord Kerr of Kinlochard:*** I am not a member of Lord Sewel's gumboot gang but I was struck by his mention of the changes to the budgetary procedure. As Lord Plumb says, that is quite a big change and perhaps bigger than the co-decision change. As I understand it, up to now the Parliament has been no allowed say on *dépenses obligatoires* which includes two-thirds, three-quarters of the agriculture budget, none at all. As I understand it, there is a large urban majority in the European Parliament, there are many more urban constituencies than rural constituencies, and agriculture provides about four per cent of European GDP. It seems to me unthinkable that, when the Parliament is allowed an equal say on agriculture as on all other bits of the budget, agriculture will go on getting the paramount share of the budget. It seems to me that the Parliament's influence is bound to be to reduce the amount of agricultural support as a proportion of the European budget. Is that wrong?
Mr Murphy: First of all, good luck in your aspirations to join the noble Lord's Committee. I do not know if that was a hustings speech or not! The general analysis is an entirely fair one. I do not want to second-guess it but the general assessment is that involving the politics and the energy of the European Parliament can be an additional driver of this momentum. The rural/urban split is a commonsense analysis of where populations lie and where the parliamentary seats are divided, but primarily in the

European Parliament's set-up and internal relationships it is not that straightforward, and probably nor should it be, because quite fairly there is a good number of urban Members of the European Parliament who emotionally and practically for all sorts of different reasons have a real affection for agriculture, fishing, farming, and that is entirely right and proper. In general terms the co-decision role of the European Parliament on Common Agricultural Policy is a positive and it can help the process.
Chairman: Let us move on to the fourth of the institutions we are discussing, the European Court.

Q277 ***Lord Harrison:*** Minister, do you agree that the most significant change to the jurisdiction of the European Court of Justice is its extension to matters relating to Freedom, Security and Justice? In the light of that, are you confident that the Court will be able to cope with an increased workload following from, first of all, the Commission's power to bring infringement proceedings in relation to criminal law and policing measures and, secondly, the extended preliminary reference jurisdiction in both existing Title IV, referring to visas, asylum and immigration, and Title VI, police and judicial co-operation in criminal matters? Given the importance of the ECJ and the necessity for having it sufficiently staffed but also staffed by those of the highest quality, are you confident that can and should happen?
Mr Murphy: First of all it should happen. We are certain it should happen because the role of the ECJ is absolutely essential, which partly means that it has to have both the quality and quantity of people necessary for it to perform its role. It is also important to acknowledge that we should not overstate the extension of ECJ competence in terms of Justice and Home Affairs. It is not a year one, day one extension on these transitionary measures in particular, there is a five year transitionary period. There will be a gradual build-up which will give the ECJ the opportunity to build capacity as each of these specific defined areas move from Pillar 3 to Pillar 1 over that five year period. So there is an opportunity to participate and learn from the experience of that transition, but it is important that we do get it right. In terms of the second wider point about the infringement and preliminary references, there is a proposal now to put in place fast-track mechanisms which generally are welcomed across the European Union. The analysis at the moment is that the backlog on ECJ referrals is reducing, so there are some positive signs. Also, the expansion of the European Union has brought a new group of judges and expanded the capacity of the judges in terms of numbers and, despite some reports, it has expanded the quality of the judges. There is a supply of good quality, high calibre judges. What I would say is do not overstate the scale of the change. Of course there will be a change but it will be a gradual change and we think mechanisms are being put in place to deal with those changes.

Q278 ***Lord Harrison:*** I very much accept that answer but, given the nature of Freedom, Security and Justice matters, there is the element of a Pandora's Box that in that five year period when those areas are brought into play things could not spin out of control but there could be more references than otherwise might be expected.
Mr Murphy: The number of references has stabilised at about 250 per annum at the moment and that is a relatively stable figure. As I say, there is a period of gradual change. If the transition was over a month or three months then those concerns would have added validity, but that transitionary period of five years does give space to anticipate workload and adjust the transition accordingly.

Q279 ***Lord Wright of Richmond:*** Minister, I think possibly you have just answered my next question. We have had conflicting evidence from witnesses as to whether the Court is likely to become flooded with asylum cases. Do you have a view on that?
Mr Murphy: I do not believe that it will on the basis that, rather than me believing it, the evidence suggests strongly to the contrary, the number of cases having been stabilised. The worry is about delay in processes which comes back to the question posed earlier. We have to continue with the stabilised number of 250 and with the backlog reducing the evidence strongly points to the contrary.

Q280 ***Lord Dykes:*** Following the second part of Lord Harrison's question, are you content with the actual text in the Treaty as laid down about the expansion of the Court's functions or will HMG make further structural suggestions, like sub-panels of judges, court of second instance, which are the examples that have been mooted in other circles in Europe?
Mr Murphy: In general, in the Treaty and the text we are content with the powers, remit and competence of ECJ. The significant areas we were keenest on was the relationship between the ECJ and CFSP and that is clear, and it perhaps could be argued that it just confirms what happens at the moment but it confirms in Treaty text that there is no role for the ECJ in terms of Common Foreign and Security Policy, and that was important for us. The other was on the Charter of Fundamental Rights and ECJ competence. Those were the really significant in principle protections that we were looking for. In terms of further changes to Treaty text or the 52 declarations attached to the

Treaty, we are not looking to change any of those at the moment.

Q281 ***Lord Roper:*** Minister, obviously the number of references have stabilised with the present jurisdiction but clearly the enlargement of the jurisdiction will almost inevitably increase the number of references. One particular group of references is those dealing with people who are in custody, of which there have only been relatively few so far but of whom there might be significantly more with the expansion to what is at present Pillar 3. Is there a problem given the time which the Court tends to take over a case in dealing sufficiently quickly with people who are in custody?

Mr Murphy: As I referred to earlier, there is the combination of the five year transitionary period, the currently stable number of references and the fact that the backlog is being reduced. Without in any way being complacent about it, structurally things are in place that are driving improvements. That five year transition gives an opportunity to look ahead and manage any additional caseload. An additional reform that is being introduced is about specialist tribunals. The impact of specialist tribunals, which we strongly supported and was why we supported the extension of QMV on specialist tribunals, there is one currently on civil service tribunals and the evidence thus far seems to be pretty positive. There is a whole set of important reforms being put in place to ensure that the ECJ is able to deal with the types of concerns that have been raised.

Q282 ***Chairman:*** Thank you very much indeed. Maybe we had better move on to the next issue. I want to raise with you, Minister, a couple of questions relating to the Charter of Fundamental Rights. In particular, what, if anything, does the Protocol add to the horizontal clauses in the Charter? Secondly, would you accept as inevitable the ECJ over the course of time developing jurisprudence in the field of fundamental rights by reference to the Charter and that this might in the long run undermine the Government's "red lines"?

Mr Murphy: My Lord Chairman, this is now an increasingly well-rehearsed argument and is one of the issues that will attract considerable attention as we proceed with the deliberations on the Bill giving effect to the Treaty. We are very clear indeed both politically and legally as to where we are. There is an acknowledgement, or perhaps acceptance may be a fairer way of putting it, across Europe that the Charter in and of itself does not create any additional new rights, it records in one place existing rights, but the important effect is for the first time institutions are bound by the specific rights gathered together within the Charter. There were specific concerns in the UK that also existed in Poland and we sought to address those concerns, with apologies to your Lordships who have asked about the negative language of some of these deliberations in the past, about future competence creep of the ECJ in developing jurisdiction through case law elsewhere relying on the Charter. We wished to put it beyond any doubt whatsoever and that is the purpose of the UK and probably the Polish Protocol on the Charter of Fundamental Rights. Your Lordships have got copies of this. It refers to both the United Kingdom and Poland in Article 1 but it applies to all Titles of the Charter of Fundamental Rights. The horizontal articles do confirm that the Charter cannot expand any of the EU's powers at all. If you like, more colloquially put, it is a belt and braces approach. We are very clear, and all other countries are very clear, that the Charter does not create new rights, that is the belt, and the braces is we have got a Protocol for the avoidance of any doubt.

Chairman: Does anybody want to follow up on that?

Q283 ***Lord Powell of Bayswater:*** I suppose the real point is if it does not create any more rights, with which I agree, it does not diminish them or restrict them or restrain them from the present position in any sense. Given that the Court is a dynamic institution which is constantly fulfilling its mandate, which is advancing the purpose of the Union, then we must look to the fact that it is likely to steadily extend the scope of the rights that are in that Charter, not because they are in the Charter but simply because it decides that in the interests of the Union they should be extended, so we are as undefended as we were in the past, put it like that. There are no extra rights in the Charter, we have no additional blocking power or defences against further extension of the ECJ's judgments on these matters.

Mr Murphy: I will offer a comment and then invite Mr Berman to comment. First of all, I would like to say to your Lordships what I have said in the Commons already, which is that we do not have an opt-out from the Charter. Some of my colleagues, the trade union movement in particular, had a concern that we did and we have made it very clear that we do not have an opt-out but that the Charter does not create rights in the Protocol. The fact is the Protocol, Article 1, is about ensuring that this protection of the Protocol has the full weight of European law because it is contained, as you know, in the way that it is and that is a legally binding Protocol. I will invite Mr Berman to comment more specifically about the legal point.

Mr Berman: My Lord, you are right, the Charter Protocol is concerned with the Charter itself and the concerns that were raised in the Charter. Clearly fundamental rights have been part of Community

law since 1970, so we have lived with them for getting on for 40 years, and there has been an evolution of those rights in accordance with developments in broader case law, the Treaties in which Member States participate and in practices in national constitutions, and that will continue. There has never been an acceleration, the floodgates have not opened, it has been there to protect the individual, particularly in relation to the conduct of institutions, and that will continue to evolve organically as it has done since before we joined the European Community and we have lived through it for nigh on four decades without a problem. What we are concerned to make clear is that the Charter itself does not create a source of new rights, and that is pinned down principally in the Treaty itself to go with the explanations, but guaranteed in the belt and braces way, as the Minister says, by our Protocol.
Lord Powell of Bayswater: I think my point is that the Protocol defends us against a red herring, which is not a very terrifying animal to be defended against.

Q284 ***Chairman:*** I agree with that. Before I ask Lord Kerr, I want to re-emphasise this point. We had a former judge of the European Court before us here giving evidence and he rather charmingly said that they do not do propensity in the European Court, which is to say that there was not a propensity to get more and more proactive, but at the same time we were left with the clear impression that the Court will develop considerable jurisprudence in the years to come and that one of the sources of that jurisprudence will be the Charter. Therefore, even though the Charter itself will not be creating any new rights, the European Court's jurisprudence will in fact be leaning very heavily in some instances on Charter rights.
Mr Murphy: On that basis, of course, my Lord Chairman, the UK Protocol in that scenario, contrary to what has been suggested, would be significant on the basis that the Protocol is clear that no right can be derived from reliance upon a text of the Charter or the rights contained within the Charter, no new EU rights can be extended as a consequence. That is the purpose of the Protocol.
Chairman: We will see if that turns out to be the case and time will tell.
Lord Kerr of Kinlochard: I am sure you are right, my Lord Chairman, that the Court will develop jurisprudence based on its reading of the Charter, but there is a difference. It will now be reading, if this Treaty is ratified, the version of the Charter in the Treaty which contains the horizontal clauses which are not in the Charter which the Court reads now, the one that was promulgated at the Nice European Council. I agree with those who say that the Protocol is completely unnecessary because the horizontal articles at the end do the job. They are very precise and deal with precisely the threat that worries Lord Powell about the existing situation, the potential for constructive interpretation by a dynamic Court. It seems to me that this threat was very well dealt with by Baroness Scotland when she negotiated the horizontal articles into the Charter. I think the belt is very good, therefore I cannot quite understand the need for braces as well. I am sure the belt deals with the problem that Lord Powell raised.
Chairman: Shall we move on.

Q285 ***Lord Dykes:*** This is another area where seemingly a separate stance was going to be maintained by HMG. It was not the only more colourful comics, I suppose, that masquerade as newspapers in Britain, but actually quite serious commentators in the serious newspapers who referred to the concern that the changes brought about the Treaty would affect the basic independent of the UK's foreign and defence policy formation in the future. The Government described this matter as a "red line" issue, I believe. Are these concerns well-founded?
Mr Murphy: No. It may be bad manners to suspect your Lordships will let me leave it at that! The concerns are not well-founded. They are not well-founded on any objective analysis of the text of the Treaty, the text of declarations, the text of Article 11, nor any of the agreements by the heads of government. The fact is that CFSP has been in place since Maastricht. I rightly will be chastised if I even gently tread on the politics of that, but many of those who are now apparently so angry about what we are seeking to achieve here in a Common Foreign and Security Policy were amongst those who voted so enthusiastically and energetically for the Maastricht Treaty. As I say, we have had CFSP since Maastricht, and that was the right thing to have had incidentally, it is not a criticism, just an observation about apparently facing two different ways. The EU's operations in Bosnia and Afghanistan, the common approach on Burma, sanctions on Iran, there is a plethora of important ways in which the European Union's Common Foreign and Security Policy has helped or is helping. There are two new declarations, one about the capacity of those Member States who are members of the United Nations Security Council who continue to operate independently, and secondly about our own foreign policy. In Article 11, I think it is on page 29 of the Treaty, there is a text there which is pretty clear about the Common Foreign and Security Policy. There is much more we could say about this and this debate on foreign and security policy will continue over the months ahead. Foreign policy has been in place since Maastricht and it has not stopped us, on occasion very controversially,

going outside of what would be considered the mainstream of European opinion and, more importantly, outside the consensus in Europe in terms of military action.

Q286 ***Lord Dykes:*** You are thinking of Iraq?
Mr Murphy: I am thinking particularly of Iraq. This approach was in place pre-Iraq, and we will continue to have disagreements within parties and across parties about the merits of the case in terms of Iraq, but the fact is the United Kingdom, working with other allies, was able to embark on its own foreign policy and will continue to be able to do that and it is not affected by the Lisbon Treaty. It is an agreement at a political level in terms of unanimous declarations but also in Treaty text that makes that beyond doubt whatsoever.
Chairman: We will continue on foreign affairs with Lord Roper.

Q287 ***Lord Roper:*** Article 13a of subsection 3 on page 31 talks about the way in which the European External Action Service will be set up. I wonder if we can get some sort of idea as to the timetable as to when there is likely to be the decision of the Council which is going to determine the organisation and functioning of the Council and what sort of role the British Government feels it is going to play in this process? What efforts will the Government make to ensure that the External Action Service is given the resources and political support it needs to be effective? In particular, there is a reference in that Article and subsection to staff seconded from national diplomatic services of Member States. I believe that it would be to the advantage of the United Kingdom to ensure that we are able to second able and competent people and play an important part in developing that External Service in the right direction. Does the Minister agree?
Mr Murphy: I strongly agree. The role of the High Representative is an important one but it is not a job exclusively for one person, that person would need logistically support of the type that we can all envisage. The details of the External Action Service have not been debated yet and certainly have not been agreed yet. When ultimately it is decided upon, it will be decided upon by unanimity, which is important. There are some quite fair concerns about how we come to the decisions on the External Action Service and it will be by unanimity. It will be our intention to play our part in terms of UK secondees to that service. We currently have secondees to a variety of European institutions and bodies and it would be the correct and proper thing to do for the United Kingdom, along with others, to play our part and provide secondees to that service.

Q288 ***Lord Roper:*** Perhaps I can pursue one point which goes back to something we were discussing earlier. Obviously bringing together what you referred to as the two silos of the work done in the Council Secretariat and the work done in the external relations part of the Commission, also presumably the present representations of the Commission in the field which will, of course, become Union representations in future, they will presumably be double-hatted to that extent. On the other hand, in the external representations of the Commission at the moment there are quite a lot of people dealing with things like development aid who are coming from parts of the Commission which are not going to be under the direct responsibility of a High Representative. Do you think that they will become part of the External Action Service or will they continue to be directly coming from their own Directorate-General?
Mr Murphy: We have not considered the detail of how this will operate and I think it would be inappropriate for me this evening to make it up on the hoof, colloquially speaking. These are things that within the UK Government we will come to a settled position on as to what we think will be the most effective way for this to operate, and then by unanimity of the other 26 to come to what will be operationally sensible, what does not repeat some of the mistakes of the past.

Q289 ***Lord Roper:*** The decision on the functioning and operation of the External Action Service which is referred to will presumably not have to be made before the Treaty is ratified but some time after, so it could come in 2009 once the High Representative is appointed, so it will be possible for this Committee or one of the Sub-Committees to return to that question during that period.
Mr Murphy: It will be for your Lordships to make that decision. It is not for me to dictate the work of this Committee or to anticipate an opportunity to appear before you again, but the timescale for any decision on this is such that there will be ample opportunity for your Lordships to consider the detail of this. In fact the truth, as I have said already, is that the UK Government has not worked through the detail of our position so there will be limited validity in questioning us about a position we do not yet have. Perhaps it will be sensible as we develop our view and thinking on the External Action Service for me to notify the Committee and then for the Committee at a time of its choosing to perhaps seek the appropriate minister to provide evidence to you.
Chairman: That is fine. We might raise this with you when we meet you again. We have a date fixed for you to come and talk to us about the European Council, so we could raise it on that occasion.

Q290 ***Lord Wright of Richmond:*** Minister, I think you have told us that you are not really in a position yet to talk about things like secondments to the External Action Service, but to what extent does the Diplomatic Service already second people to the Commission representation abroad?
Mr Murphy: We do second people to the Commission. I do not have the figures with me today but it may be helpful if I provide those figures to your Lordships.

Q291 ***Lord Wright of Richmond:*** I would be very interested.
Mr Murphy: I will happily do that.

Q292 ***Lord Roper:*** If they could show both the numbers seconded to work in the Commission in Brussels and those seconded to work in Commission representations outside Brussels.
Mr Murphy: I will happily provide the details to you, of course.
Chairman: That is an interesting point. We recall the interesting article in *The Economist* quite recently about the number of UK nationals working in positions in the Commission and elsewhere which seemed at least to alarm *The Economist* and I must say it somewhat alarmed me too. I think we have an interest in this.
Baroness Howarth of Breckland: I do not know whether I am permitted this question really. At the beginning you talked about the need for reform because you would not run a bowls club with the present structures, with which I agree with you. One of the issues that we have not talked to you about, and one that we may want to ask about later, is how you explain this complexity to the ordinary consumer, the ordinary bowls club member. I was interested listening as you went through and you talked about the ambiguities that still exist in the detail and, of course, the general population find ambiguity very difficult to deal with. Some of the issues about quality, quantity and speed that you have talked about, people might understand better if they thought it was a speedier reaction they were going to get but the multiple voting means it may be slower, how does the general population understand that? I just wondered what you would say in a sentence if you were going to say three things about this debate to your bowls club to really win them over, because this is the real crunch about the complexities of these issues. I am Sub-Committee G and we deal with consumers and those sorts of affairs. How do you get ordinary consumers to really grasp those sorts of issues, quality, quantity, ambiguity and change, when you do not have the kind of detail people do understand?

Q293 ***Chairman:*** You get equal time with the Baroness if you wish to.
Mr Murphy: I was only given three sentences. First of all, I think there are some excellent bowling clubs throughout the United Kingdom.

Q294 ***Lord Wright of Richmond:*** Some of your best friends.
Mr Murphy: Some of my voters, which are of course the same thing.

Q295 ***Baroness Howarth of Breckland:*** It is rather better than the Clapham omnibus, is it not?
Mr Murphy: The Clapham omnibus you have to spend less time on than you do in a bowling club. How would I describe it? That Europe has been a great force for change in the past. Its rules are outdated. There were six countries in membership—I do not know how many sentences this is now—when we joined and we should celebrate there are now 27. Those countries freed from Communism are now full members of our club. Like every organisation, the rules have to take account of those changes. If we do not change and improve the way we work the great things that we all believe in will not be achieved through Europe. That would be my approach in trying to justify and argue the general thrust of the Treaty.
Baroness Howarth of Breckland: You have got a lot of work to do.
Chairman: I think that was a pretty good stab at it, if I may say so, Minister.
Baroness Howarth of Breckland: It was a good stab.
Chairman: This leads us on to what Lord Sewel and Lord Maclennan may wish to put to you in the final moments of our meeting.

Q296 ***Lord Maclennan of Rogart:*** We have heard statements, not only from our Prime Minister but also from other heads of government, that these constitutional reforms embodied in the Treaty of Lisbon mark the end of the road for institutional reform. Are we expected to believe that if in practice they turn out to be less than optimal the Union is setting its face against any more IGCs to improve the situation, or is it anticipated that any necessary changes would be achieved by evolution of the constitutional developments comparable to those in Britain or, per contra, is it lack of imagination that suggests there cannot be any improvements made?
Mr Murphy: The pure structural organisational answer first and, if you will permit me, a political comment. The conclusions of the European Council are pretty clear, no more change in the foreseeable future. The quote is that, “In the foreseeable future we should concentrate on concrete challenges including globalisation and climate change”.

Domestically our own Prime Minister has ruled out any future Treaties for this or the next Parliament. On the basis that these Treaty changes are by unanimity there is just no appetite any longer for another IGC process and further Treaty change. This process has been going on now for seven or eight years. That is the straight structural response. My more political response would be that if Europe was to go through another period of near a decade of having a conversation with itself, the detail of which only a thousand people across the continent have followed the precise twists and turns of every move from QMV to DMV, to Protocols, Charters, "red lines", opt-ins, opt-outs and legally binding protocols, we risk our collective ability to do the things that we wish to do because we erode contemporary political consent for Europe, the European project and what we believe it can achieve. My sense about this disconnection between European populations and Europe as an institution and as a force for good is driven by the fact that a Treaty in itself will not change that and a clever speech by a politician or business leader will not change that. Until such time as people's lives reflect the reality of our argument they are right to feel sceptical that Europe has yet to deliver the improvements that we all believe it should, can and has done in the past. It is about delivery. The importance of the Treaty for me is that it gives us an opportunity to help deliver much of that. If I could finally sum it up. Many more people, myself included, are much more interested in the Lisbon Agenda and changes and growth than in the important detail of the Lisbon Treaty. Once we have come to the conclusion of the deliberations of ratification of the Lisbon Treaty we should put as much energy into the Lisbon Agenda when there are 92 million people across the European Union economically inactive. That is a massive challenge for us and the test will be will we collectively put as much energy into that as we have into this. If we do not then I think we run the risk of just talking to ourselves and undermining future consent.

Lord Sewel: I cannot add anything to Lord Maclennan's question and I am totally content with the Minister's answer. I think we are all a little bit exhausted. Thank you.

Chairman: That is the Chairman of Sub-Committee D. I think the long inquiry into the wine regime has got him down.

Lord Plumb: It has not, my Lord Chairman, it has built him up, I think!

Chairman: Minister, thank you very, very much indeed for giving very generously of your time and answering all of our questions in your customary very precise and informative way. We look forward to seeing you on 15 January when we will have a chance to discuss the outcome of the recent European Council. Thank you very much to Shan Morgan, Paul Berman and Martin Shearman. Thank you.

Letter and supplementary memorandum from the Minister for Europe

I am replying to Susannah Street's letter of 4 January requesting additional evidence on the impact of the Lisbon Treaty on EU Institutions, following my appearance before the Committee in December. Please find attached the replies, which I hope you will find helpful.

During the evidence session I promised to provide you with information on the number of FCO staff seconded to Commission. There are currently five FCO Seconded National Experts to EU Institutions, only one of whom is seconded to the Commission. There are 112 Seconded National Experts in total in all EU Institutions from all Whitehall Departments.

Finally, the Government will publish a consolidated version of the EU Treaties as amended by the Lisbon Treaty later this week, following your request. I hope this will help the Committee's inquiry into the impact of the Lisbon Treaty on the EU Institutions.

Jim Murphy MP
Minister for Europe

17 January 2008

Replies to the Lords EU Select Committee on the Inquiry into the impact of the Lisbon Treaty on the EU Institutions

QUESTION 1

How comprehensive are the lists of competences provided by the Lisbon Treaty amendments? Are the lists a matter of codification?

19 December 2007

The Lisbon Treaty for the first time provides a clear and explicit classification and list of the EU's competence. The categorisation of competences reflects the rules and practices under the current Treaties and provide helpful clarification—for example, by making clear that the EU may cease to exercise shared competence, and setting out as a distinct category competence areas where EU action is limited to supporting, co-ordinating and supplementing the action of Member States.

The lists of competences are comprehensive. They reflect the current position under the Treaties together with the limited extensions provided for in the Lisbon Treaty. In almost all of these areas, the EU already takes action under other legal bases.

A list of the extended competences is set out below.

New competences or extensions to competence established by a new Treaty Article

Energy

The Article creates a distinct legal basis for shared competence on energy policy although measures in the sphere of energy is already listed as part of the Community's activities and the EU has already agreed a number of pieces of legislation in this field (from energy efficiency and renewables to market liberalisation)

Member States retain the right to determine the conditions for exploiting its energy resources, its choice between different energy sources, the general structure of its energy supply and all measures of a fiscal nature.

Tourism

Tourism is already listed as an area of Community activity under the current Treaties, and existing EC action has taken the form of encouraging training for staff working in the tourism sector and Communications, studies and publications highlighting, for example, national good practice on sustainable tourism.

This Article creates a specific legal base for EU support for Member States action to promote competitiveness and best practice in the tourism sector. 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.

Civil Protection

This creates a specific legal base for EU action to encourage co-operation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural and man-made disasters. The EU's competence is limited to supporting, coordinating or supplementing the action of Member States.

The existing Treaties already list civil protection as an area of EU activity. EU action to date in this area has primarily involved measures to enhance EU disaster response by facilitating information sharing and financial support within the EU.

Space policy

This Article creates a new shared competence to draw up a European space policy and—potentially—a European space programme. It would promote joint initiatives, support research and technological development, and co-ordinate the efforts needed for the exploration and exploitation of space. The treaty also explicitly states that the exercise of EU competence does not prevent Member States from exercising their own powers in this area.

Administrative Co-operation

This Article creates a new competence to introduce measures to improve the administrative capacity of Member States to implement EU legislation—it is implicitly aimed at the newer Member States. This competence is again limited to supporting, co-ordinating or complementary action to Member States' activities. There is no obligation on Member States to make use of EU support, and any harmonisation of laws and regulations is explicitly excluded. Action envisaged would include information and staff exchanges, and training schemes.

European Research Area

The Treaty includes in the existing provisions of the EC Treaty dealing with activities in the area of research and technological development, the objective of achieving a "European research area". The treaty also explicitly states that the exercise of EU competence in the area of research and technological development does not prevent Member States exercising their own powers in this area.

Sport

The Lisbon Treaty includes the promotion of European sporting issues in the existing provisions on education, vocational training and youth. The EU's competence in these areas is limited to supporting, coordinating or supplementing the action of Member States.

Travel and residence documents

The Lisbon Treaty extends the current provision for the adoption of legislation necessary to facilitate the exercise of the rights of free movement and residence to cover provisions on travel and residence documents and social security and social protection.

Common safety concerns in health

Article 152 TEC provides for the adoption of measures in certain areas of health policy. The Lisbon Treaty adds that such measures must be adopted "in order to meet common safety concerns". The changes to Article 152 ("Public Health") of the Treaty clarify, in summary, that:

— Measures may be brought forward, under co-decision procedures, which will enable the EU to seek to harmonise standards of quality and safety in relation to medicinal products and devices.

— Proposals may be brought forward, under co-decision procedures, in relation to cross-border health threats and the protection of public health regarding tobacco and alcohol. Such proposals would be "incentive measures" to protect and improve human health, but would not involve harmonisation of Member State laws in relation to these areas of public health policy.

New proposals in relation to the above areas of public health will therefore be brought forward in accordance with existing QMV procedures.

Intellectual property

The EC has already adopted a range of measures on legislation on intellectual property using existing powers. The Lisbon Treaty provides a specific legal basis for measures in relation to European intellectual property rights.

Crime Prevention

The Lisbon Treaty provides for EU measures to promote and support Member State activity on crime prevention.

SGEIs (Services of General Economic Interest)

This Treaty provides a specific legal base for legislation defining the general EU-level principles and conditions, which apply to the provision of services of general economic interest. This can already be done on a sectoral basis under the existing Treaty.

Diplomatic and Consular Protection

The current Treaties provides for Member States' missions in third countries to assist each others' national on the same conditions as they would their own nationals and to establish necessary measures amongst themselves. The Lisbon Treaty enables the EU to adopt coordination and cooperation arrangements to facilitate such measures.

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Solidarity Clause

The Lisbon Treaty includes a "solidarity clause" providing for action by Member States and the Union in the event of a terrorist attack or natural or man-made disaster. Provision is made for the Council to adopt a decision defining the implementation arrangements by the Union.

Humanitarian Aid

The EC can already adopt measures relating to humanitarian aid under existing development cooperation and other powers. The Lisbon Treaty introduces a specific legal base for humanitarian aid. The treaty also explicitly states that the exercise of EU competence in this field does not prevent the Member States exercising their own powers in this area.

Common Commercial Policy

The Lisbon Treaty amends the existing provisions on the common commercial policy to refer to foreign direct investment.

QUESTION 2

Why does the Treaty apply the yellow and orange card procedures to subsidiarity but not to proportionality?

Subsidiarity involves the assessment of whether the objectives of a particular measure 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 given a direct role in relation to this assessment.

Compliance with the principle of proportionality is assessed and enforced on the same basis of other general principles of EU law.

QUESTION 3

Will any decision by the EU to sign an international agreement or treaty have to be taken by unanimity under the amended Treaties, or will Qualified Majority Voting apply in policy areas other than the CFSP?

As at present, the voting rules for the negotiation and conclusion of international agreements will be determined by the subject-matter of the agreement concerned.

Unanimity will apply where the agreement covers a field for which unanimity is required for the adoption of EU measures as well as in certain other cases such as Association Agreements. Unanimity is not therefore limited to agreements relating to the Common Foreign Security Policy.

In other cases, qualified majority voting applies. For example, as now, agreements relating to international trade in goods under the common commercial agreement will continue to be concluded by QMV.

QUESTION 4

Do the new arrangements on Permanent Structured Cooperation in defence mean that the UK will be faced with the prospect of either being outvoted under Qualified Majority Voting if it did join a group of countries making use of this facility, or be left on the sidelines of EU defence if it did not decide to join such a group?

The Permanent Structured Co-operation (PSC) is a new provision that only addresses capability development as set out in the Protocol on PSC which is an integral part of the Treaty on European Union as amended by the Lisbon Treaty. It provides a mechanism to help develop more effective military capabilities amongst EU Member States and is in line with UK objectives for improving the capabilities available for EU-led operations.

Article 28E of the Lisbon Treaty sets out when the Council would adopt a decision by QMV:

- — establishing PSC and determining the list of participating Member States (QMV amongst the whole of the Council);

— confirming participation of a Member State that subsequently wishes to participate (QMV amongst those members of Council already participating in PSC); and
— suspending participation of a Member State should it no longer fulfil the criteria or its commitments (QMV amongst those members of Council already participating in PSC excluding the Member State in question).

The use of QMV is therefore in UK interests since it prevents an individual Member State from blocking PSC establishment, from blocking another Member State from subsequently joining or from blocking the suspension of a non-performing Member State.

Since improved capability development amongst Member States is a key UK objective, and because the UK already provides a significant proportion of European capability, it is likely that we would hope to launch PSC as soon as practicable after the entry into force of the Reform Treaty, in co-operation with other like-minded Member States. If the UK were to decide not to be in the first wave of PSC members, QMV would help to ensure that any another Member State could not block any subsequent UK application. Any decisions regarding the substantive implementation of PSC would be by unanimity of those Member States participating in PSC.

Question 5

Do you expect that under the new Treaty arrangements, the Political and Security Committee will prepare for meetings of the Foreign Affairs Committee, and COREPER will prepare for meetings of the General Affairs Council?

Once the Lisbon Treaty comes into legal force, the revised Article 16(7) of the Treaty on European Union and Article 240 of the Treaty on the Functioning of the European Union will set out that COREPER shall be responsible for preparing the work of the Council in its various formations. This includes the General Affairs Council and the Foreign Affairs Council.

Article 38 of the Treaty on European Union states that the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of crisis management operations.

We therefore expect the Political and Security Committee's role to remain broadly the same as it is now. COREPER will have overall responsibility for preparing the work of all Council formations, but where the dossiers have a European Security and Defence Policy focus, the Political and Security Committee will do the bulk of the detailed preparation.

Question 6

Does the article on mutual assistance in case of armed attack imply that the EU is becoming a military alliance? What is the exact difference between the mutual defence obligations introduced by the Lisbon Treaty and those contained in the North Atlantic Treaty and the Brussels Treaty (art 5)? Will this clause reduce the relevance of NATO in the long term?

The mutual defence provision is in accordance with Article 51 of the UN Charter, which recognises the inherent right to individual and collective self-defence. The provision reflects the reality that EU Member States would come to the aid 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 defence of their fellow Member States, to the potential benefit of the UK.

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 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. It provides furthermore that commitments and co-operation under this provision shall be consistent with NATO commitments and that the provision does not prejudice the specific character of the security and defence policy of Member States, which are also NATO members.

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It should be recalled that the parties to the Brussels Treaty decided, shortly after the creation of NATO, that NATO would be responsible for the implementation, in military terms, of the mutual defence commitment of the Brussels Treaty.

The Lisbon Treaty clause only refers to armed aggression on the territory of a Member State, i.e a limited and relatively unlikely scenario. NATO's Article 5 commitment (". . . an attack against one or more . . . shall be considered an attack against them all . . .") is more extensive in its applicability, as demonstrated by its invocation following the 9/11 attack.

Question 7

What is the rationale for the creation of a European External Action Service, and how will the Service be structured? Will it work closely with the diplomatic services of the Member States?

The External Action Service (EAS) will support the new High Representative for Foreign Affairs and Security Policy. So the rationale is the same as for the High Representative—the change will mean better, more coherent policy implementation and delivery of all of the EU's external policies.

As set out in the Lisbon Treaty, the EAS will bring together staff currently working on external issues in the Council Secretariat and the Commission—it is therefore a sensible rationalisation of existing machinery. The Lisbon Treaty also sets out that the EAS will benefit from some additional expertise from Member States' secondees. It also states quite categorically that the EAS will work in "cooperation with the Diplomatic Services of the Member States", and it is in everyone's interests that this is a close cooperation.

The Treaty leaves all further details on the organisation and functioning of the EAS to a decision of the Council, after the Treaty comes into force. And there have not yet been any detailed discussions on the EAS in preparation for that decision. We anticipate that these discussions will take place under both the Slovenian and French Presidencies of the European Union. We will keep Parliament informed of their progress. The council decision will be subject to Parliamentary scrutiny in the usual way.

Question 8

Can you explain to us the significance, in legal terms, of adding, for the first time, a specific section on Energy in the Treaty?

The EU already has an energy policy, but a specific energy article removes the need to make use of other articles such as 95 (approximation of laws for the internal market) and 175 (environment) to achieve that policy. Differences between the new energy article and the articles that have previously been used for energy related matters mean that the new energy article is likely to have resulted in some small and technical extensions of EU competence and qualified majority voting. For example, some measures in relation to security of energy supply have been based on article 100(1) which is limited to measures appropriate to the economic situation, in particular if severe difficulties arise in supply. There is no such limitation in the new energy article, thereby potentially lowering the threshold for EU action.

The inclusion of a new Title on energy in the Treaty will help to ensure that policies on energy markets, energy security and energy efficiency are coherent and mutually reinforcing. It also makes clear that measures adopted shall not affect a Member State's right to determine the conditions for exploiting its own energy resources. The UK Government welcomes the inclusion of the provision, which reflects 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.

Question 9

How will the Protocol on Services of General Interest impact on the making of EU policy in this area?

The Protocol on Services of General Interest (SGI) confirms the existing position in relation to services of general interest.

The first article confirms the (existing) principles applicable to services of general economic interest.

The second article confirms that the Treaties do not effect in any way the competence of Member States in relation to non-economic services of general interest.

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Question 10

To what extent is it important that the EU's commitment to "undistorted competition" is contained in a Protocol rather than as part of the Treaty itself?

There is no change to the legal position under the existing Treaty. The substantive Treaty provisions setting out the powers and rules governing regulation of competition in the EU remain the same.

The words used in that Protocol are substantively the same as the words used in the current EC Treaty. Paragraph 1(g) of Article 3 of the current EC Treaty lists one of the Community's activities as "a system ensuring that competition in the internal market is not distorted". Article 3 is not retained in the amended Treaties. Instead, Article 2 (renumbered 3) of the amended Treaty on European Union provides for the establishment of an internal market. The Protocol states that this reference to the internal market "includes a system ensuring that competition is not distorted." The Protocol is legally binding and an integral part of the Treaty.

In addition, the new list of EU competences in Article 2B (renumbered 3) of the Treaty on the Functioning of the European Union includes "the establishing of the competition rules necessary of the internal market". The substantive Treaty provisions setting out the powers and rules governing regulation of competition in the EU remain the same.

The Commission, as the guardians of the Treaty, have explicitly confirmed that the position remains unchanged.

> "To avoid any risk of uncertainty as to settled law and to make fully clear that competition will continue to be one of the main policies aiming at the good functioning of the internal market, the European Council decided to provide for the protocol . . . which paraphrases the current EC Treaty provisions . . . a protocol forms an integral part of the Treaty to which it is annexed and has the same legal value as Treaty provisions."

Question 11

What view does the Government have of the implications of the Treaty for the UK labour market if the Protocol on the application of the Charter of fundamental rights of the European Union to the UK (and Poland) had not been included?

The Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom is annexed to the Treaty of Lisbon.

The Charter simply reaffirms the rights and principles, which apply to the EU institutions and to Member States when implementing EU law. The Charter creates no new enforceable rights and provides no new basis for challenging UK legislation including that relating to the UK labour market.

The UK Protocol puts that matter beyond doubt for the UK guaranteeing, in particular, that the Charter does not extend the powers of any court—European or domestic—to strike down UK law.

Question 12

In written evidence submitted to our inquiry, the Scottish Parliament European and External Relations Committee expressed concern that in the Government's White Paper and July Explanatory Memorandum (11625/07) there was no reference to discussions of the UK Government with the devolved administrations, or reference to a separate Scottish legal system or to the fact that aspects of justice and home affairs are devolved. The Scottish Government was unable to explain why the UK Government did not make explicit reference to the representations that it had made or the interests of the devolved administrations. What is the Government's response?

The Devolved Administrations were involved in discussions on the preparation of the UK position for the IGC legal group, as the Scottish First Minister recognised in a letter to the Foreign Secretary of 23 July. The Scottish Executive were also consulted on the Government's 23 July White Paper on the IGC, along with Whitehall Departments.

Agreement on extending the UK's Justice and Home Affairs Protocol (the opt-in) takes into account Scotland's distinctive legal system. The Treaty will also recognise the role of regional and local self-government in Member States for the first time. On both these issues, the Government has supported—and secured—the concerns of Devolved Administrations.

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The issue of fisheries has also been raised by the Scottish First Minister. The Treaty of Lisbon makes no substantive changes to the allocation of competence for the Common Fisheries Policy or the conservation of marine biological resources under it. Community competence over fisheries is shared with Member States, except for conservation measures, where it has been exclusive since the UK's Treaty of Accession to the EC. The Treaty of Lisbon does not change that.

Europe Directorate
Foreign and Commonwealth Office

January 2008

Further supplementary written evidence from the Minister for Europe

Thank you for your letter of 8 February asking about the Lisbon Treaty and the possible impact in terms of responsibility of UK Diplomatic and Consular Services for providing assistance and protection to Commonwealth and Dependent Territory Citizens.

Although the United Kingdom is under no general legal obligation to provide consular assistance to unrepresented Commonwealth nationals, British Missions have by tradition been responsible for the protection of the interests of all Commonwealth countries that do not have a mission in a third country. Assistance is discretionary and subject to resources.

British Overseas Territories Citizens (formerly British Dependent Territories Citizens) living or travelling outside the Overseas Territories are given the same assistance as any other British national in difficulty.

The provisions of the Lisbon Treaty have no impact on the basis on which we provide consular assistance to either British Overseas Territories Citizens or unrepresented Commonwealth nationals.

18 February 2008

TUESDAY 8 JANUARY 2008

Present	Blackwell, L	Mance, L
	Dykes, L	Plumb, L
	Grenfell, L (Chairman)	Powell of Bayswater, L
	Harrison, L	Roper, L
	Kerr of Kinlochard, L	Wade of Chorlton, L
	Maclennan of Rogart, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr Jens Nymand Christensen, Director of the Secretariat General for Directorate E, and Mr Pascal Lefevre, Secretariat General, examined.

Q297 ***Chairman:*** May I thank you very much indeed, Mr Nymand Christensen, and also your colleague, Pascal Lefevre, for being with us. You have stepped into the breach very nobly to take the place of Christian Leffler, and we understand exactly why he could not be here. We are delighted to have you with us. I think you have been able to see some of the questions that we would like to put to you. I should start by saying I think this is a record number of the members of the Select Committee who have ever come together in this room, which demonstrates the deep interest we have in the topic of the Lisbon Treaty. We are on the record, if that is all right with you, but if there is anything you want to say where you want to go off the record if you will just indicate that, but we hope that you will not need to resort to that. I would just like to ask you whether or not you would like to make an opening statement of any sort or go straight into the questions, I leave it entirely to you.

Mr Nymand Christensen: My Lord Chairman, my Lords, thank you very much for inviting Mr Lefevre and myself to come here today. We send apologies to you from Mr Leffler again, who is in Slovenia with Margot Wallström who has stepped in and replaced the President leading the Commission's delegation to the new Presidency country. We have had to do a lot of shuffling around. I am delighted to be here today. We are in a very interesting period because we see a lot of opportunity from where we are now. Let us face it, after the successful ending of the IGC and the signing of the new Treaty here in December, we hope the Union can very shortly move into concentrating fully on the issues at stake for the citizens of the countries. It is, of course, an exaggeration to say that we have not been able to deal with a lot of matters of substance in the meantime, but it is clear, and you have all seen it from the press coverage and the minutes of the European Council and things like that, that institutional matters and Treaty matters have been occupying the Heads of Government and State for a number of years now, starting with the Laeken Declaration over the Convention, the IGC and the ratification process which was ultimately aborted. We see that we have reached a very important stage where we hope that the 27 Member States within a short period of time will be able to successfully complete the ratification of what their prime ministers have signed up to so that all the energies and forces in Europe can start to concentrate singularly on the issues of globalisation, environmental challenges, security, safety for our citizens and things like that. We think that 2008 is the beginning of that but it is clear, however, that the year will be marked by the fact that we are in a process of ratification in 27 countries and each Member State pursues this process under its own constitutional national procedures and it is not for us in Brussels and the European institutions to interfere in any way whatsoever in that process. We wish to be helpful in explaining, as we see it, how the new provisions in the Treaty may be helpful for a future Union, how it may turn out to be a better Union, but we also recognise that the Treaty, and treaties per se, is the product of agreement between governments and we are living with what governments have agreed. The Commission has embraced the result and thinks that it will lead to a better Union but, first and foremost, it is an agreement between the 27. I just wanted to say that as an opening. We are very happy to try to answer some of your questions.

Q298 ***Chairman:*** Thank you very much indeed. As you will clearly understand, having you here with us is an occasion for us to probe a little bit more about the Commission and what the impact of the Treaty will be on the Commission. Maybe you would like to answer that focusing a bit on whether or not you feel that the Commission has come out of this with enhanced powers or the opposite.

Mr Nymand Christensen: I do not think that is the case either way. The Commission's powers are not fundamentally changed. The Commission note that

the Treaty preserves the right of initiative on most areas of policy in the EU within itself. The main change which we see in the Treaty concerning the Commission is, of course, the provision that from 2014 there will be fewer Commissioners than the number of Member States, which unavoidably will change the nature of the body. For those of us who were party to the lengthy discussions between the government representatives at the IGC before the Constitution was drafted, and even at the Convention, we know that it was a subject of great discussion between governments whether there should be one per Member State, and the compromise which is maintained in the Lisbon Treaty was that out of respect for the 12 new Member States, who it was largely agreed should be entitled to have a member of the College for a full period up to 2014, it was decided to delay the introduction of the, so to speak, reduced Commission until then. The main change is in that area. The number of Commissioners will be two-thirds of the number of Member States and if it was today it would be 18. Another change which one should not overlook is the High Representative. It is clear the fact that the Member States have agreed to unite three key roles in one single person, the Foreign Policy Commissioner, the High Representative and the President of the Council of Foreign Ministers, who is also the Vice-President of the Commission, is a significant institutional development which will also impact on the Commission. These are the main large institutional reforms. The fact is that the new Treaty moving to co-decision in some policy areas where that has not been experienced earlier, such as in agriculture, will impact on the Commission because our way of operating between Council and Parliament is significantly impacted by the fact that we have co-legislators on all internal market legislation and the fact that the European Parliament now becomes a player on a par with the Council in deciding agricultural policy is a significant innovation which we will adjust to and work with and it will have an impact on how we work with our agricultural legislation.

Q299 ***Chairman:*** We may explore that a little bit more in a while. Do you feel, given the fact that the President of the European Council is accountable to the national governments and that the President of the Commission is accountable to the Parliament, that this creates tensions or difficulties? You will have a permanent President of the Council who may feel that there is a difficulty in fulfilling his function with the President of the Commission being a very distinguished operator as well. Are there going to be problems there?

Mr Nymand Christensen: I think one can say that the texts have been drafted in such a manner to make it as clear as possible how each of those people will function. First of all, the future President of the European Council will not set up his own big, independent apparatus, he will rely on the Council of Ministers. That is the first point I want to make. The second is 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. I think you all know, it works amazingly well. We have a very good co-operative spirit between the European Commission, the President of the Commission, and the various Presidencies, including their prime ministers or presidents. The texts have clearly been drafted with a view to limit any kind of confusion or turf battle. In particular, of course, the President of the European Council prepares the meeting for the European Council. It is perceived, and I have seen it myself and I know a number of you around the table have as well, that it is such a workload to prepare a European 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. One should not underestimate the workload that comes with the role. He or she will be responsible for preparing it, setting the agenda and monitoring the follow-up so far as it is within the remit of what the governments would do. The real area where one must reflect on the work is in the field of international co-operation and there 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. 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 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. We have the expectation, and experience shows, that there will develop a spirit of mutual interest and common understanding and preparations when you go to G8 meetings and things like that to make sure that we are all pulling in the same direction, that what the 27 Member States and the European Parliament have agreed as the outline of the EU strategy is pursued by all players, whoever they are and in whatever role they play. The risk is always there that senior politicians try to mark their territories slightly more sharply, but experience shows that we should be rather optimistic about how those two players will be

able to work together in the external global field to the benefit of the EU.

Q300 ***Lord Roper:*** Perhaps I can pursue that with the question of the treble-hatted post of the High Representative. As you have said, he will have the current role of the High Representative, status as a member of the Commission and head of the external relations department. What do you see will be the relationship between the High Representative and the three Union Presidents?
Mr Nymand Christensen: He is a member of the College of Commissioners and will participate in all Commission decisions. He is a normal Commissioner in that sense. In the Treaty he has been given a specific role identified in the field of foreign policy and security where he can take initiatives and advance EU positions. The first thing one must realise is vis-à-vis the President of the Commission and the rest of the College, on an ongoing basis, a weekly basis, he will be involved in the management of EU policy. It is important to stress that the role that Mrs Ferrero-Waldner exercises today is also a role of co-ordinating what various Commissioners and their departments are pursuing as policies in the external field. That is why it is very important to have this treble-hatted man or woman, in the College because the Commissioners still maintain their prerogatives and their responsibilities of negotiating agreements with third countries in their policy areas. He or she will have a key role within the College of ensuring coherence and co-ordination together with the President, who of course does it for all policy areas. Vis-à-vis the President of the European Council, we know that the European Council returns to a number of foreign policy issues each time and discusses them and I would expect the preparation of the Conclusions of the European Council will very much rely on his input and his draft texts rather than on the situation today where the rotating Presidency chair, plus Council Secretariat, works and tries to put together the pieces. We expect it to lead to a much greater degree of continuity and even higher quality, not that there is any reason to criticise now, but the fact it is the same man or woman with the same kind of common service under them to underpin these kinds of texts will be very helpful.

Q301 ***Lord Roper:*** For example, in terms of bilateral summits with strategic partners, such as the United States and Russia, say, would you expect you would have the three Presidents plus the High Representative representing the European Union?
Mr Nymand Christensen: The High Representative is at ministerial level, so it is a different level. He or she will not represent the EU at the level of Heads of State and Government. The question is how to represent the EU at that level and, as I have described, it is clearly laid down in the new Treaty text how that will be done. It works very well already with the rotating Presidency, so once you are at these meetings with Mr Putin or Mr Bush it works very well as to how they share the roles and who advances the EU's positions on various points.

Q302 ***Lord Roper:*** You referred earlier on to his chairing the Council of Foreign Ministers. Do you see the existing General Affairs and External Relations Council being divided with a Foreign Affairs Council being chaired by the High Representative and the General Affairs Council made up of the same foreign ministers but chaired by the rotating Presidency?
Mr Nymand Christensen: I do not think I would like to speculate on how the Council will organise its work to create a separate General Affairs Council. I see there is merit in that insofar as it has often been the same person, the same minister chairing it, but under the rotating system it is clear what we in the old jargon called Pillar II files will now be chaired by the High Representative and, therefore, there is a lot of merit in saying if there were to be issues outside that remit of a general nature they would be chaired by the Presidency Member State.

Q303 ***Lord Roper:*** But, for example, on development co-operation affairs, which would presumably be prepared in the Commission and then go through a Council working party to COREPER, they would presumably go to a Council which would be chaired by a rotating President rather than by the High Representative. Is that an assumption we are entitled to make?
Mr Nymand Christensen: I am not the expert on it but it reflects the logic of the role of the High Representative.

Q304 ***Lord Wright of Richmond:*** My Lord Chairman, can I ask a particular question about the Middle East Quartet. Could you just describe to us how the representation exists now and how far, if at all, it will change under the Reform Treaty?
Mr Nymand Christensen: I am sorry, I cannot. I do not know that. If you ask me I will get you the answer.

Q305 ***Lord Wright of Richmond:*** That would be helpful.
Mr Nymand Christensen: I would like to consult with the experts in DG RELEX:
Chairman: Thank you very much, Mr Nymand Christensen. I have three colleagues, Lord Powell, Lord Blackwell and Lord Maclennan, who want to come in on this rather complex question of the relationships.

Q306 ***Lord Powell of Bayswater:*** You gave a description at the beginning of a clear division of labour, but actually the more you talk it through the more crowded. It sounds as though the leadership of the European Union is going to become confused with many of these people having overlapping responsibilities. Is it not the fact that these issues have not yet been determined and probably will not be determined until the Treaty comes into effect, if it does, and all of this has to be tried out in practice because so much of it will depend on personalities or the nature of the people chosen for particular jobs? At the moment it does seem you have got really quite a crowd up at the top there, particularly in the foreign affairs area. The Commission obviously has a role, the President of the Council will have a role and the High Representative will have a role, but trying to separate those roles and grade them as only one does Heads of Government, one handles governments at a lower level, I do not believe that is going to work in practice. Mr Solana has been dealing with Heads of Government for the last ten years or so and I do not think he is suddenly going to stop. Surely the case is that it will be something which will just work itself out in practice over quite a protracted period.
Mr Nymand Christensen: The first thing one should note to give a very simple answer, we are not creating a new element which will crowd the top. There is already a President of the European Council, he is only there for six months. The issue that you are talking about today, it is not that under the new Treaty we have created a supplementary President which did not exist before and who will suddenly be shuffling around trying to get his or her space, that is not the case. For many, many years the President of the European Council has played a very high profile role in the EU, in international fora and bilateral meetings with international leaders.

Q307 ***Lord Powell of Bayswater:*** You are not getting rid of the national Presidency though, that will continue.
Mr Nymand Christensen: No, but it is clear that the national Head of Government will no longer play that role. It means that Mrs Merkel would not have played that role in last spring's Brussels machinery and in the various bilateral meetings because the European Council and, therefore, the Heads of Government and State would have been represented at these meetings by their chosen chair. If it is an overcrowding, it is an overcrowding we know of today. We read that the Treaty, for legitimate reasons, has identified the roles of the players and also made sure that what you call the overlapping—you can never draw a complete line in a very few lines when you talk about drafting a Treaty—the authors of the Treaty have successfully tried to describe very simply the roles of at least the two players you are thinking of. You are codifying how the President of the European Council and the President of the Commission are playing out their roles today and the only really innovative element is that the chair of the European Council is elected for two and a half years and, therefore, replaces a rotating chair. I do not subscribe to the idea that the new Treaty in any way leads to further overcrowding or overlapping compared with what we know today; on the contrary, I think the roles have now been clearly defined.

Q308 ***Lord Powell of Bayswater:*** One very brief supplementary. Supposing a large country, let us take the example of France, held the rotating Presidency, would the President of France simply stand aside and think he had no role at some international meeting which was very important to the European Union where the President of the Council and the President of the Commission were present?
Mr Nymand Christensen: I have to answer yes. I cannot imagine he would be invited, it is as simple as that. Mr Putin has a meeting with the leadership in Europe once a year, the invitations are not scattered, they go to individual people, and if the EU Treaty foresees that the EU will be represented in foreign and security matters by a permanent chair of the European Council then that is the person who will be invited. (The answer was continued off the record)
Chairman: Thank you very much indeed. That is a very important point you have made. (The remark was continued off the record)

Q309 ***Lord Blackwell:*** Two quick questions. On the overcrowding, has there been any discussion about whether at some stage the President of the Council and the President of the Commission might be combined? I understand the text originally specified that they should be separate posts and it now does not have that specification.
Mr Nymand Christensen: As Lord Kerr knows, it was discussed at the Convention by a few members of the Convention but was never subsequently pursued and at least among the government representatives there was a feeling that they should be two separate posts and they are defined as such.

Q310 ***Lord Blackwell:*** So it is not a current issue?
Mr Nymand Christensen: It is not a current issue. From memory, but Pascal Lefevre, who was in the Secretariat of the Commission following the IGC and the Convention, will know more, I believe it was an idea by Benelux countries to have that discussed.

Q311 ***Lord Blackwell:*** So it is an issue that could return at some point?
Mr Nymand Christensen: Yes, it could return. It was discussed, at least amongst some government representatives, but not considered to be opportune.

As I say, one should not underestimate what it involves to chair the European Council. It is not something where the President of the Commission just walks across rue de la Loi and meets 27 Heads of State and Government and starts chairing a meeting and has an agenda. One of the reasons behind the reform is a number of prime ministers have said that it is such an enormous workload to prepare these meetings and to try to get the 27 before the meeting to have largely agreed positions so they do not spend days and nights discussing the Conclusions, as you know. At this stage, at least, I think it is not on.

Q312 ***Lord Blackwell:*** Secondly, could you say a word about what you see as the significance of the European Council becoming an institution of the European Union, what the benefit of that is and what the implications are in terms of these relationships?
Mr Nymand Christensen: I would say very small, legally speaking it becomes an institution. If you read the existing Treaty, the European Council is weirdly floating in the air, so to speak, it is very difficult to see what it is. It has worked quite well in that way for many years but there was a feeling it had reached maturity in recognising it was a body in its own right rather than just a super Council of Ministers kind of thing. They do play a very particular role in setting the strategic objectives and settling some of the most thorny issues of conflict and disagreement between Member States. The time was right to recognise it by giving it that full status as an institution. The implications are not very important in the sense that it will still be relying on the institution of the Council of Ministers for its functioning and I do not see it having a major practical implication.

Q313 ***Chairman:*** It is quite clear that the role of the European Court of Justice vis-à-vis the European Council would be very limited indeed then.
Mr Nymand Christensen: When you read the Conclusions of the European Council it is very difficult to see how the European Court can come in on them. A few of the cases I have in mind, and perhaps Pascal can remind me of them, is when the Heads of State want to take very specific decisions they switch out of their role as the European Council and into the format of the Council of Ministers to be able to execute the practical role. You are right, there is that institutional role vis-à-vis the Court but in general it is not a substantial change.

Q314 ***Lord Maclennan of Rogart:*** The mode of appointment of the President of the Commission is changed by the Treaty and is different from that of the mode of appointment of the President of the Council and the High Representative. Do you think that will have any political significance for the role of the President of the Commission vis-à-vis the other two? Secondly, do you anticipate that there might be greater continuity of initiative, if you like, or less jerky initiatives flowing from the change to a two and a half year Presidency of the Council with the possibility that there might be a greater identity of view between the President of the Council and the President of the Commission about carrying initiatives forward?
Mr Nymand Christensen: On the second question, the Member States already work in a rolling three Presidency mould, so we already see an 18 month programme together to ensure that one Presidency takes over as in a relay from the previous one that leads to a successful outcome, if possible, of the discussion. The European Council as such shows a high degree of continuity in its work. For instance the Spring Council, came back to the Lisbon Strategy, they were continously pursuing key files. Today there is a high degree of continuity which to a large extent is influenced by the policy agenda of the European Commission which takes the legislative initiatives and institutes the general debates which we have in the European institutions. I hope we can say the continuity is going to be at least as great as it was. It is an issue for the President of the Council, together with the President of the Commission, ensuring that the European Council contributes to the realisation of the agenda agreed by all, often on the basis of initiatives from the European Commission. In answer to your first question about the election of the President of the European Commission, it is true that the procedure is new. We believe it gives the President of the European Commission 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. It is clear through that procedure the President of the European Commission has a specific position and we welcome that very much. We think that links very well with the role that the Commission has vis-à-vis the European Parliament generally. Generally, they are there in the Treaty to control the Commission and to monitor what we do and discuss with us on a continue basis in relation to all the policy areas.

Q315 ***Lord Maclennan of Rogart:*** Part of the requirement is that the Council pays attention to the results of the election to the European Parliament in making its nomination. How significant is that requirement?
Mr Nymand Christensen: It is quite significant. I remember last time when President Barroso was nominated that there was a debate, at least among a number of players, about what the outcome of the European elections was and how that should be interpreted in the sense of who should then be the

European Commission President. That is a completely legitimate debate to be had. It is clear that the President sets the programming and is responsible overall for the policy priorities of the European Commission and, therefore, it is correct that there is a debate about who should lead the Commission following direct elections to the European Parliament. (The answer was continued off the record)

Q316 ***Lord Kerr of Kinlochard:*** I wanted to ask a question about the working of the Commission post-2014, when it will come down in size. Many people think not as far as it should come down in size, for efficiency. Efficiency is a function of the number of people in the room and also the calibre of the people. A second concern some people have is that when the nationals of only two-thirds of the Member States are there they will be chosen in *rotation égale*, equal rotation. In other words, if you think the Commission should consist of the best people for the jobs, you have to assume that a Luxembourger or a Maltese is 250 times as likely to be the right person for the job as a German because their *rotation* will be *égale*, there will be a German in the Commission as often as a Maltese and as rarely as a Maltese. Thirdly, given that some would say that this is a little unfair, or possibly even a little undemocratic, it might create a certain sensitivity, say, when the Germans, the British or the French are not in the Commission. How do you envisage arrangements will be made for dealing with the Member States in the one-third not present in the Commission?
Mr Nymand Christensen: To be totally honest, it will not come as a surprise to you that the Commission have hardly begun that discussion. We have noticed that the Treaty now foresees that there will be two-thirds the number of Commissioners there are today from 2014. How we organise our contacts with the one-third which are not in the College—I do not want to use the word "represented" because that is misleading, the Commissioners do not represent Malta or Germany, they are representing European common interests but have been chosen from that Member State—leads to 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, if it was today, nine Member States that would not be in the College. We have no answer to that question today but it is clear that from this Treaty hopefully coming into force up until 2014 we need to answer that in a satisfactory manner.

Q317 ***Lord Dykes:*** Of course, the wider public have always found these internal structures and arrangements quite complicated and difficult to follow and there is no criticism in the various Member States for that because it is complex for the practitioners outside and sometimes even those who are inside.
Mr Nymand Christensen: I can assure you that is the case.

Q318 ***Lord Dykes:*** In Directorate E you have seen some of the changes in habits over the years and that kind of thing. Subject to that, would there be a tendency of the one-third to just cluster them round in terms of human as well as country relationships with the two-thirds who are Commissioners functioning so they keep in touch with them so that there would not be much aggro about it and difficulty, it would just be a practical matter of keeping in touch with the ones who are there for that period?
Mr Nymand Christensen: I hesitate to speculate about it because I have had some discussions with wise old men in the Commission who have been dealing with these responsibilities much longer and there are many ideas about it. It is important to ensure that the Commission can execute and play its role fully towards all Member States irrespective of whether there is a member of the College from that Member State or not, and that the role and the initiatives and decisions of the College are equally respected whether one has that position or not. How we organise that is important. In a way you are describing what we must avoid, that the focus is on the 18 who are to be in and not the nine. The task is to ensure that the nine Member States where there are no Commissioners in the College must feel completely comfortable with the situation and we must have some mechanisms in place and some degree of transparency about it, but today I do not wish to comment on it, it would not be appropriate for me, it is a political decision. The Commission is fully aware of it.

Q319 ***Lord Dykes:*** Coming back to the one area where transcending the national frontiers is easier psychologically, and that is the European Parliament, presumably that will accelerate to some extent because the powers of the Parliament are being increased and so on. If you had to talk to an audience of highly educated people in the Member States, how would you postulate very briefly how a higher degree of politicisation might occur with the new Commission President, with MEPs being involved, and how that would pan out? Would it increase public interest do you think? Is it possible that would be a sharp focus, even getting into the newspapers occasionally, maybe not too often?
Mr Nymand Christensen: You come from a country where the EU does appear in the media quite often I have noted.

Q320 ***Lord Dykes:*** For different reasons!
Mr Nymand Christensen: I think that legitimate political debate and disagreement and conflict is a prerequisite for a well-functioning democracy and the European Parliament is one of the best guarantees of that because you go into the body and you have MEPs, as you know in the House of Lords and House of Commons, with very different views arguing them out and trying to win over some people to the positions they hold. If you follow the European Parliament, as I have, for 27–28 years, it has been a remarkable journey that I do not believe any parliament has gone on in such a short time, from in 1979 being the first directly elected but very different political body to what it is today, a very serious player. You probably remember that when the Maastricht Treaty introduced genuine co-legislation there was a lot of doubt about whether the Parliament could discipline itself and play it out, but look at how frequently we have first reading agreements between the two bodies, how to what extent a body with 785 members manages to deliver and play a key role to the benefit of the EU and where the political groups across party lines manage to find the necessary compromises to significantly influence EU legislation. As you saw, it played an absolutely essential role in settling the debates about the Service Directive. The political role and prerogatives and powers of the Parliament should be seen as something positive for European democracy. How it will ultimately be reflected in the media is much more difficult to predict because, as you know, the EU legislative process is very slow and it is very difficult to say when you will report something. Is it when the Parliament voted and made its position or is it when they meet at three o'clock in the morning for conciliation-negotiations or is it when the Commission announces its proposal? I find even the serious media is still searching around for how it legitimately reports and reflects on those debates and when the case should be given the space it merits. That is still something where the jury is out. As we saw with the Service Directive, and we have seen it with major debates such as on the REACH Directive, the Parliament can also set a political agenda which sends waves of media coverage through all the Member States.

Q321 ***Chairman:*** The increase in the number of first reading agreements makes the role of national parliaments in scrutiny quite an interesting one. This brings us on to the next question. We have only got just over ten minutes left and about six questions.
Mr Nymand Christensen: Sorry, I am too long.
Chairman: Not at all. What I suggest is, if possible, we now eliminate supplementaries so we can try and get through them. Perhaps in answering a question that Lord Wade is going to put to you about national parliaments you could also include some brief comments on the impact of the yellow and orange cards.

Q322 ***Lord Wade of Chorlton:*** How significant do you think is the role that is given by the Lisbon Treaty to national parliaments and how should national parliaments position themselves to fulfil that role? I can personalise it by saying we are all parliamentarians, what further responsibility and opportunity will we have that we have not got now?
Mr Nymand Christensen: The new Treaty takes a major step forward in recognising for the first time a role for national parliaments. If you step back a little bit, the EU has always been, and quite legitimately so, built on 27 national governments. It is a union of sovereign states and the sovereign states are represented by governments and, therefore, that is why the institutions meet in the Council of Ministers and the UK is represented by the UK Government and the German Government is represented by its ministers. It is a significant recognition of an institutional development where national parliaments can play a very positive role in the advancement of EU solutions. The fact there is a provision in the Treaty now recognising this is important. As you said, my Lord Chairman, the role specifically attributed in a number of areas in the new Treaty to national parliaments is significant, and there we are talking about substance. On the yellow and orange cards mechanism, we are talking about the future and how you will play it out, so I cannot say how you will do that. Being a Dane, and knowing how the Danish Parliament works, and as you know the Danish Parliament is one of the parliaments which has worked most systematically since 1973 with EU matters, I expect that the yellow card, orange card subsidiarity mechanism is very important. Subsidiarity is an important principle for the Union and should be brought to the fore, to ensure that we do not slide beyond and out into areas where we do not need to go, that we should leave with Member States a degree of regulation or to raise the question if the EU should regulate at all. I hope that national parliaments will wake up to that role, but it is not for me to say that they should. The instrument has been put at the disposal of national parliaments now for them to assume that role should they wish to and also to have a debate in the national context with their governments about it. Based on both this particular initiative in the Treaty but also on what we call the Barroso initiative, where the President of the Commission on his own initiative started to send proposals to national parliaments, we believe it advances the democratic quality of the EU if national parliaments are better informed and more actively debating the proposals that are coming out of Brussels. In the particular legal area of whether

subsidiarity has been respected, national parliaments are foreseen to have a formal role to play and it is a very significant step forward.

Q323 ***Chairman:*** Thank you. You were formerly the Commission's Director of Relations with Civil Society.
Mr Nymand Christensen: That is right.

Q324 ***Chairman:*** So I am sure you will want to say something about what you expect the citizen's initiative is going to do for the Commission. Are you a little scared of being overwhelmed by citizen's initiatives?
Mr Nymand Christensen: I am not scared. We think that it reflects well on a democratic practice which is already widely used in quite a large number of Member States. We welcome it because it can motivate a debate about what Europe should be doing. We, as the Commission with the right of initiative, but also national governments, can benefit from getting this electric shock of having one million signatures coming in suggesting that the EU should take a step in a certain area. We will not always necessarily follow that but it will be a legitimate and positive issue to have debated, that a million citizens in Europe want Europe to act on this. It is a very positive article and I hope it can only lead to a stronger, more participatory democracy in Europe. We are at the very early days but after the coming into force of the new Treaty we will present the proposal from the Commission on how this citizen's initiative should legally be organised.

Q325 ***Chairman:*** Let us just see if we can get through two other questions quite quickly before we have to stop, I am afraid. The first of the two is the simplified revision procedure and the other *passerelle* provisions. Could you give us a little bit of your thinking on how they are going to be used and what their impact is going to be?
Mr Nymand Christensen: In the short-term, my personal view, and I have to say it is personal because the College has not discussed them, is they will not have a major impact insofar as now the 27 governments have just agreed unanimously what should be by unanimity and what should be by Qualified Majority Voting, so I do not expect in the near future anybody will wish to revisit these issues again because why would they agree in six, 12 or 24 months to look again at what they have spent a number of years discussing? Your own government was one of those that repeatedly stated where the red lines were, where one could have Qualified Majority Voting, and other Member States had similar positions. If I look at it in calendar terms, and it is always difficult to predict the future, I would not expect it to have any immediate effect. It is more an issue of establishing flexibility so when the time is ripe, when all the Member States do agree that there is merit in going from one procedure to another, they can do so without going through all the formal procedures which are otherwise necessary. It simply establishes a degree of flexibility in technical terms which we welcome very much. The simplified revision mechanism is the same. There was, and has been for a long period of time, a debate about whether one could have simplified revision mechanisms for certain parts of the Treaty. You will probably have read the proposals inspired by some countries' constitutional issues that when a certain number of Member States had ratified it could come into force. This has never led to any Conclusions. It cannot find unanimity among the Member States, far from it, and therefore cannot become part of the legal basis of the EU. In policy areas, if you look at some of the Treaty policy articles, they are extremely detailed and static. When you look at some of the articles drafted 10, 20, 30 years ago, would we really need an Intergovernmental Conference to sit and discuss this or can we agree time has moved on and we would like to review this particular policy article through a simplified mechanism? This is really what is behind it. As I say, I do not expect this is something that will be at the front of the minds of any of our Heads of State or Government in the near future.

Q326 ***Chairman:*** Thank you. I am sorry that this has been a bit rushed but I would like to get your opinion on the amendment to Article 308. What would you have to say about that? How significant is this?
Mr Nymand Christensen: As some of you know, I and my colleague from the Legal Service, Mr Hartvig, had the pleasure of meeting with some of your colleagues, a few months ago. The new Article 308 is largely the article we know today. The innovative element is the fact that in the future the European Parliament will have to give its consent, so if anything it is going to be used less than it was before because there is now another player, not only do the 27 need to agree but you need to get the European Parliament on board as well and still keep the unanimous 27 on board. That being said, the Commission is of the view that 308 should be used with caution only when it is necessary to implement the objectives which are identified in the Treaty and to the benefit of the EU. Under any circumstances, we would not wish the article to be used in a manner which would be seen to extend the role and responsibility and competences of the EU. It cannot legally be done and we would not wish it to be so.

8 January 2008 Mr Jens Nymand Christensen and Mr Pascal Lefevre

Q327 ***Chairman:*** In other words, if it is in the wind that the European Parliament is not likely to agree you will not start the initiative anyway.
Mr Nymand Christensen: As Lord Plumb will know, we try it once in a while with a view to winning the argument in the Parliament, and we do win the argument, so it is very difficult to say. Normally you would have a procedure where if you needed to use Article 308 you would have informal discussions between the Member States at senior level at Coreper or at ministerial level, and then you would have informal soundings with the European Parliament, and in the future I expect with the chairs of the political groups. You would have to argue the case for why 308 is the legal base. One of the facts is the European Parliament has been using Article 308 because previously it has only been given the role of being consulted and in a way that problem has been solved now. If 308 is the correct basis for an initiative by legal basis that argument from the European Parliament would not be advanced, I expect. I want to stress that the innovative element is the European Parliament's strengthened role.
Chairman: Jens Nymand Christensen, we thank you very, very warmly indeed for having given of your time in answering our questions so clearly and very informatively. We thank Pascal Lefevre for being with us today as well. We will send you a transcript of this and we will make sure that those parts that were off the record are off the record. Thank you very, very much indeed, it has been a great pleasure to meet with you and your contribution to our inquiry has been extremely useful. We wish you well in the Commission.

TUESDAY 8 JANUARY 2008

Present	Blackwell, L	Mance, L
	Dykes, L	Plumb, L
	Grenfell, L (Chairman)	Powell of Bayswater, L
	Harrison, L	Roper, L
	Kerr of Kinlochard, L	Wade of Chorlton, L
	Maclennan of Rogart, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr Jo Leinen, a Member of the European Parliament, Chairman, European Parliament Committee on Constitutional Affairs; Mr Timothy Kirkhope, a Member of the European Parliament, Vice-Chairman, European Parliament Committee on Constitutional Affairs; Mr Richard Corbett, a Member of the European Parliament, Lisbon Treaty *Rapporteur,* European Parliament Committee on Constitutional Affairs; Mr Elmar Brok, a Member of the European Parliament, IGC Representative, European Parliament Committee on Constitutional Affairs examined.

Q328 ***Chairman:*** I know that two of your colleagues are delayed. We hope we will see them in due course. May I begin by saying how very happy we are that we can meet with you. It is very kind of you to take time. This is probably the largest gathering of this Committee we have actually had outside Westminster for a very long time which demonstrates the importance we attach to the Lisbon Treaty which, as you know, is the subject of an in-depth inquiry by this Committee and its seven Sub-Committees. We shall present to our Parliament a reasoned analysis and impact assessment to assist Parliament when the ratification Bill comes into Parliament. We now have Elmar Brok and Timothy Kirkhope, thank you very much.
Mr Kirkhope: Sorry we are late.

Q329 ***Chairman:*** You are almost on time, do not worry. The members of the Select Committee who you see around the table are engaged with me in an inquiry into the institutional aspects of the Treaty and the seven Sub-Committees are dealing with the specific issues for which their Sub-Committees have a mandate. It is quite a big exercise. We felt it extremely important that we should come and talk with senior Members of the European Parliament. Colleagues from the European Parliament, we are happy to see you here. Mr Leinen, would you like to say a few words to start?
Mr Leinen: Yes. Thank you. My Lord Chairman, you know us from the many meetings of COSAC. My Lords it is a real pleasure to have you here and, since it is the start of 2008, I wish all of you a successful 2008. For the European Union, this new year will be a success if the Treaty we are talking about is ratified in 27 Member States. It is a big effort to explain what the Lisbon Treaty is about, what the goals and objectives are. I am happy that we are able to have this exchange of views tonight. You have invited eminent persons from our Constitutional Committee, Timothy Kirkhope, my Vice-President, Elmar Brok, the representative in this IGC, as he has been in the last four, so he has some experience of IGCs, and Richard Corbett, who has written lots of books and articles and is our *rapporteur*. We are drafting a report and in two weeks we are voting on it in committee. In February we will be voting on it in plenary. This time, we were not the first Parliament to have an opinion because, as you know, after five days the Hungarians ratified it. This is a record, five days after signing. I do not know how they conducted their debates! They were second on the Constitutional Treaty after Lithuania, which was quite quick. This year, 2008, is the year of different cultures and in ratifying you could say you have different cultures from country to country. I will be short. The basic goal of these procedures in the six years—after the Treaty of Nice looking at this big enlargement that never happened and then at the end 12 new Member States—was to make the EU function. Function means make it effective so that they can made decisions with 27, make it transparent that this animal in Brussels that nobody understands is a bit more understandable, make it more democratic and look for elements of participation directly or indirectly. In my Committee we have had lots of debate even in the last weeks. We have to compare the Treaty of Lisbon with what exists, not with what did not come but what exists. The last Treaty was the Treaty of Nice and we have to compare the new Treaty with the existing Treaty. Our analysis has been that there is no one single step backwards behind the *acquis communitaire*. There are different steps forward, some bigger, some smaller, some middle class and this was compromised among the 27 twice. Knowing that you are experts, I am looking forward to a very interesting exchange of views. You are the master of this meeting. We have not had a pre-meeting amongst ourselves, so those who want to answer will answer and you will see whether we agree

or diversity in unity is a character in the European Parliament. Thank you for coming and a successful 2008 for all of you.

Q330 ***Chairman:*** Thank you very much, Mr Chairman. That is a very nice introduction. It might be a good idea that if your *rapporteur*, Richard Corbett, has anything he would like to say to start with, he should do that now, bearing in mind we around the table are pretty familiar with the content of the Treaty, we have looked at it very closely. As you will understand, we are very anxious to focus a bit on the European Parliament itself and what the impact of the Lisbon Treaty is on the European Parliament, on the national parliaments and our relationship with the European Parliament, and other issues. As you indeed suggest, it would be a very good idea if you or your three colleagues feel like jumping in at any point with comments, or even questions, about where we stand. I wonder whether you want to say anything to start with, Mr Corbett?
Mr Corbett: I will accept your invitation to focus on the specific point of what it changes in terms of parliamentary scrutiny, perhaps starting with the European Parliament. As I am sure you know, what we now call the co-decision procedure will become the normal legislative procedure and apply to virtually all European legislation. In the few cases where it does not apply, in many of those there will still be the consent or assent of the Parliament to an act of the Council or, indeed, the other way around. We think this is a very important step forward from the point of view of the European Parliament. It is not actually the only one. The Parliament will also gain additional powers, as will the Council, over the Commission when we delegate powers to the Commission. As you do in your domestic Parliament, when you confer power on the Executive to adopt Statutory Instruments, Parliament and Council confer implementing powers occasionally on the Commission. Where they are of a quasi-legislative nature, from now on both the Parliament and the Council will be able to object to a measure which the Commission wishes to adopt, in which case the Commission will not be able to enact it, they will have to come up with a new proposal. Furthermore, under the Treaty the Parliament and the Council both have the right to revoke the delegation of powers to the Commission at any time. That is something that has not been commented on much in the debates so far in the United Kingdom on this Treaty. It is an extra safeguard, if you like. It is not that either Parliament or Council would wish to use this every week but it is a safeguard where if we think the Commission is doing something really silly we can blow the whistle. When it comes to the ordinary legislative procedure, which people have commented on, I think this is very important. It shows that we have two quality controls before any European legislation is adopted: acceptability to the Council—ministers who are accountable to their national parliaments—and acceptability to those directly elected by the electorates to act at the European level on European issues. These two institutions do not duplicate each other, they bring different perspectives to bear. The Council sits in national delegations and focuses on looking and defending the national interest, rightly so. We sit in political groups and we have the full diversity of political opinion in the European Parliament from, shall we say, the far left to the far right. We have members not just from capital cities but from regions. We bring pluralism to the European process. Our members are not just from parties that are in government in each Member State but those that are in opposition in each Member State. The European Parliament brings something extra to the scrutiny of European legislation and perhaps we bring a more political perspective. When we divide in Europe and have differences of view the media tend to focus on especially the European Council and portray it as if it is a sort of gladiatorial combat between countries: did Britain win today or were we outmanoeuvred by the French getting together with the Germans or the Dutch and the Italians, or whatever, as if it is all a zero sum game. But when those same subjects, come before the European Parliament, it is unusual to see all the members of one country voting one way and all the members from another country voting another way because we divide politically and, if you think about it, in many cases that is a more realistic way of looking at it. In the choices we face, do you want higher environmental standards but at greater cost to industry, for instance, there will be people on both sides of that argument in every Member State, it is not that everyone in one country thinks one thing and everyone in another country thinks another. To take a topical example, the revision of the Working Time Directive, we have trade unions from every country coming and saying, "We need this tightened up" and representatives from small and medium-sized enterprises from every Member State saying, "No, we want a more flexible labour market". Those are policy choices, political choices, which will have people on all sides of the argument in every country. That is reflected in the Parliament, it is hidden away in the Council. That is why I think enhancing the role of the Parliament is something that brings added value to the scrutiny of European legislation. It is an extra safeguard. It does not take away the fact that European legislation must have the approval of the Council of Ministers but it adds on this extra dimension of more pluralism, different perspectives being brought to bear, more scrutiny and extra

scrutiny, and that ties in nicely with the extra possibilities given to national parliaments by the Treaty. I am speaking personally here. I do not think the orange card and yellow card in practice will be the most important breakthrough, they will rather be safeguards which you can use where necessary. The Finnish Parliament has had a subsidiarity control mechanism since they joined and I think they have only found one case where they felt that a Commission proposal violated the principle of subsidiarity. In practice, you will not need to use that very often but it is there, it is an important safeguard. Where I think the Treaty will change things for national parliaments is that this eight week period and whole process is a real encouragement to national parliaments to help shape the position taken by the minister representing their country before he or she goes off to Brussels and not just hear about it afterwards. If you are to seize that opportunity, perhaps looking at what the Nordic parliaments do in this respect, you will have a powerful new instrument for national parliaments to get involved in the shaping of European legislation via helping to shape the position that the minister representing their country will take. Globally that gives us a system which, frankly, is something we should be proud of. Our European Union will be more democratic than any other international structure in the world: the World Trade Organisation, the IMF, the World Bank, NATO, OECD, you name it. Nothing has that level of parliamentary scrutiny from national parliaments and the purpose-built European Parliament at that level. It is not a perfect system, nothing ever is when you get that distant from people, and we are distant, we recognise that, that is one reason why we do not want to do things at European level that can be done perfectly well at national or local level. But we do do some things jointly in Europe, let us get it right and democratic, and this Treaty will help us do that. I will not address any other aspect of the Treaty, I will just leave it at that. Thank you.

Q331 ***Chairman:*** Thank you very much indeed. In a moment the Committee would very much like to hear from you what your views are about the UK Government red lines. Just before we leave the question of the orange and yellow cards, there is a suggestion that they are pointing at the wrong target because it has been suggested that subsidiarity is more often violated not by EU primary legislation but in the comitology process. I wonder whether you agree that, in fact, we are looking at the wrong target when we are looking at the primary legislation?
Mr Corbett: I would not say that comitology is necessarily the culprit because the Commission's powers under comitology should be laid down clearly in the initial legislation, though the new procedures that I just mentioned whereby both Parliament and Council can block an implementing measure would bring an extra safeguard. When you said "wrong target" I initially thought you were going to say because the target is the proposal of the Commission and the violation of subsidiarity is often in the knobs that are added as you go through the Parliament and Council, and one might even say especially the Council. That perhaps is something where you might want to say the procedures need continuous following by national parliaments of proposals as they go right the way through the legislative procedure.

Q332 ***Lord Wade of Chorlton:*** My Lord Chairman, may I just follow up on something you said earlier. I was very interested in your explanation of the extra powers of the Parliament which you now think it has because one of the reasons why I feel you get so much criticism in the UK is the lack of understanding of what their parliamentarians do. It is all right saying now that the Lisbon Treaty enables extra involvement from the Parliament, but it will be up to the parliamentarians to make it clear to their electorate that they are actually making use of it. You are parliamentarians, how much do you discuss this? How much do you appreciate that the role you need to play in order to get a proper representative relationship with your constituents is going to be the key in making a long-term success in Europe if you are going to get the support for both the changes in the Union, the Treaties and everything else? Personally, I do not feel that message has got across certainly to our UK parliamentarians because we hear very little of the arguments that they take, the positions they take on these various issues, and that comes through to us, but maybe it is the messenger rather than what they are doing. I would like your opinion on that and how what you are now saying is an opportunity is going to be fully utilised in practice.
Mr Leinen: That question is asked very often and whenever I have a group of visitors that question is asked by citizens. It looks very difficult from a distance but it is very simple in practice. We are a Parliament elected in direct universal elections, like any national parliament, and we have the same tasks, which have been developed treaty-by-treaty and step-by-step. Like any parliament we control the Executive, participate in a double chamber system in legislation and decide on the budget, being understood that the European level decides only on expenses and not on income, which is a reserve for the Member States by unanimity. It was originally for the Parliament to control the budget of the Executive and we welcome very much that we have now overcome the distinction between obligatory and

non-obligatory budget lines in the EU. For us in the agricultural field a lot will change in the direction that Britain has been campaigning for for many years and in my opinion this subventionism will not survive with co-decision in the Parliament.
Mr Kirkhope: At this early stage of our discussions I do not want to put too much dissension into the situation but I would like to touch on the general point about democracy. It is one thing to argue, or to suggest that we afford greater opportunities for democracy but at the same time not look at the quality of the democracy. I am only too aware of the charge of the Laeken Declaration, which was a charge that others in this room are well aware of, that we had to take on board in the Convention, which was really to make Europe more understandable to the citizens and, indeed, in the British context that was an extremely desirable thing for us to be charged with. I do not know whether anyone would disagree that perhaps we did not quite achieve that. Certainly that was an important prerequisite, as far as I was concerned, and everything else then followed. That is why I am concerned. 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. As my Lord Chairman knows very well, I have congratulated him and all those members of the House of Lords on their interest in European affairs, which is at a higher level and higher quality I have to say than in that of the "other place". I do think that scrutiny, therefore, is something which needs to be dealt with very strongly and I do not think whatever happens in this Treaty ultimately is going to be able to affect that. It is also a big mistake for us to assume that the rights which we are giving to our national parliaments, or endorsing, will necessarily be understood or utilised properly. I will not go back through the yellow card procedure or the subsidiarity issues, all I would say is that at the moment we do have a very loose connection or alliance with other national parliaments. Of course, there is COSAC and other ways in which parliaments talk to each other, but trying to get some kind of clear similarity of approach or understanding of difficulties coming from the European legislative process, it is not going to be easy for parliaments to be able to make use of those particular opportunities and, therefore, that is very difficult. In relation to the government in the UK in particular, one of the things we called for was that meetings of Council should be far more transparent, far more open to public scrutiny and the mandate which it would be necessary for the Council to obtain from national parliaments is something which seems to have gone by the board. We have had promises from various foreign secretaries in the present government that there would indeed be greater transparency in Council meetings and, indeed, greater discussion before those meetings, if you like, a form of mandate from Parliament to the decisions that were going to be taken or pursued on behalf of the UK. I do not think that has taken effect although I am sure the Government would argue the other way and say at least they now have debates. As far as obtaining any kind of mandate is concerned, that is a long way off. Therefore, there is a great gap in democracy, a great gap in accountability. We, as MEPs, as you will know, are elected in the UK, albeit democratically elected but under a process which is enormously remote to most people. I represent five million people in Yorkshire and what are my chances of communicating anything very much to them unless with the goodwill of the regional newspapers? It is very, very difficult indeed. In other countries the list system is on a national basis and even more remote from the people. We must see this in terms of linking to the citizens and getting understanding, particularly in the UK where we have a real problem over this, that I am pro-EU but am also sceptical about many of the things that occur and obviously I am not in favour of this particular constitutional process at this time. You have to understand, and I am sure everybody does, that we do have that particular problem and we have failed to address it. That is something we ought to do together but it is also part of having some kind of clearer approach to European affairs than we have at the present time.

Q333 ***Chairman:*** Before going to Lord Maclennan I have the feeling that Elmar Brok would like to intervene at this point.
Mr Brok: Thank you very much. I will do a favour to Timothy Kirkhope and not attack him!
Mr Kirkhope: The usual arrangement!
Mr Brok: First of all, the election law for the European Parliament is done by Member States, every Member State can do it as it likes, they have different systems. We might have different opinions about the proportional system or the British directly elected system of first past the post is the winner, but you cannot say if other countries have other systems it is less democratic. There are different traditions and it has nothing to do with the rights of the European Parliament. First of all, if we consider the Treaty of Lisbon we have to consider whether it is better or worse than the present situation. I have not heard any argument when it comes to the democratic accountability questions that the Treaty of Lisbon is worse than the Treaty of Nice, it is better in every respect. The Treaty of Lisbon could be better but it is better than the Treaty of Nice, and this is important. First of all, there are the rights of the European Parliament. Our former President battled for more rights for the European Parliament and we have

more or less done the job now with this Treaty. At a European level we have more or less all that we wanted to have. Secondly, I agree with my Lord Chairman that a subsidiarity check is perhaps not the most important question but it is a safeguard, as Richard talked about. Because the Commission in the future has to give all the proposals to national parliaments eight weeks before the legislators, the Council and the European Parliament starts to work, that gives a stronger position to national parliaments to check with their national governments as members of the Council. We cannot solve more by this Treaty. How this is used is the question and how the national parliaments want to work and we have nothing to say on the constitutional powers of national parliaments on this question because they are national rights. The working conditions become better for national parliaments by that and that is very important progress. On the question of the relationship between the European Parliament and national parliaments, I believe we have to do more. When I was Chairman of Foreign Affairs we invited national committees to certain deliberations three or four times a year, and here we have to develop this. This is also a question for national parliaments. I am a member of the European Affairs Committee of my national parliament with all the rights but without a voting right because I am not elected to the national parliament and it would be unconstitutional. Therefore, if we have a debate in this committee in the national parliament which I think will help in the argumentation, my national parliament becomes stronger towards Brussels and especially its own government to control it. This is also a question we cannot solve in the Treaty of Lisbon. This is a sovereign decision for the national parliaments as to how they want to deal with that. Having a closer relationship with your MEPs within the British national parliament and both the House of Lords and the House of Commons might be a way to do that. As a Member of the European Parliament I have a right to go to every working group in my national parliament and get invitations to the group meetings of the national parliament and ask for the floor and I get the floor like a member of the national parliament. I even have an office in my national parliament in order to make it possible to develop such a relationship which makes us both stronger. That is the point of modern democracy. It is not a question of whether it is the national parliament or European Parliament. We have to become stronger through co-operation to do our job and control our bureaucracies, both the national and European ones. We can only win this battle if we co-operate and the Treaty of Lisbon gives us a better possibility of doing that if we want to do so. Before we start on the details can I make one more point I would like to mention. I believe that, including the Single European Act, there is no Treaty where we have less transfer of competences. In the Single Act, in Maastricht, Amsterdam and Nice we had more transfer of competences to the European Union. The change is the stronger roles of national parliaments and the European Parliament. This is major progress. When we come to Home and Legal Affairs, where we have majority voting now, this was already a competence of the European Union. There has been no change in competence since Amsterdam and Nice but the rights of the European Parliament because it is co-decision of the European Parliament now, not the transfer of competences and also it is a question where Britain got an opt-out, so it is both more democratic and there is less British involvement!

Q334 ***Chairman:*** Could I put this to you, and let me be blunt: at least three of you, and I probably exclude Timothy Kirkhope in this, think that over this Lisbon Treaty the British are an absolute pain in the neck because we have asked for too many opt-ins, too many opt-outs, too many red lines. What is the feeling in the Parliament about this? Give us a really, really frank answer.

Mr Leinen: This is a weakness of the Treaty of Lisbon, that it is a treaty of footnotes, opt-outs and declarations. Those who oppose this Treaty in any way refer to the bulk of paper that accompanies the Treaty but because we are now 27 Member States we are no longer 12 or 15, we have more diversity. The success of the EU is to be flexible and adjust itself to certain necessities and problems that Member States have. That is the positive side of declarations, footnotes and opt-outs. The negative side is that we are a community of law, we are not a usual international organisation but a community of law, and opt-outs create incoherence in this Union. Especially painful for the vast majority in the Parliament is the opt-out from the Charter of Fundamental Rights. I think that this will be a boomerang in a few years and now there is already a boomerang. If you debate it without emotions people would understand that the Charter strengthens the rights and freedoms of the European citizens whereas it is pretty clear that there is no extra competence at a European level via the Charter. I was a member of the Convention on the Charter of Fundamental Rights and I know Britain got full success in what it wanted and their representative, Lord Goldsmith, at the end had the full support of that Convention. The task was to make visible what rights and freedoms we have either from our constitutions, from the European Treaties or from international conventions that all Member States have ratified. The Charter is the result of it with maybe one, two or three innovations. When we talked about genetic

engineering, and Article II on the health of human beings where there was something about cloning, reproductive cloning, we excluded that in Europe and that was acceptable. Then we had data protection, which is a more modern right. It is what we have, it is *acquis communitaire* in all our Member states. I call it "opt-out", Richard Corbett tells me it is only clarification. In Poland, but not for Great Britain, this is a deficit in the image as well as the capacity of the Union to act inside and outside.

Mr Corbett: We are where we are and you asked what reactions there are among our colleagues from across the Parliament. Of course there are aspects of this Treaty that a majority in the Parliament regret, I would say, including the loss of the notion of a constitution, that had very strong support in the European Parliament but, on the other hand, there is a recognition that there would be no new treaty at all if it were not acceptable to all 27 Member States. The process of making it acceptable to all 27 Member States was a complicated negotiation where every government had positions, whether they were called red lines or not, that they wished to defend, marks that they did not wish to be stepped over. That has been the case in the whole history of the successive Treaties that have gradually built up our Union. For instance Denmark still has a number of opt-outs, as it were, which is technically not the right word but for shorthand we will call it an opt-out, from the time of the Maastricht Treaty, and they are now considering whether they want to change their position on that, which is interesting. On the Lisbon Treaty there are not just the questions of the extension of the British and Irish opt-in situation and the Protocol on the Charter but also the extra seat for Italy in the European Parliament, in derogation of the principle in the Treaty of degressive proportionality, which as a Parliament we thought was pretty outrageous but, there we are, that was the price needed to get the unanimous agreement of every Member State. Rather than going back over that you will see in the draft report of our Committee that, as a Parliament, we note there are concerns and regrets but the bulk of our report is doing what Elmar Brok and Jo Leinen said just now, comparing what we have got now with what we will have with this new Treaty if it is ratified and seeing whether it is an improvement or not and our conclusion was clear: it is an improvement.

Chairman: You mentioned the size of the Parliament, I am wondering whether Lord Kerr would like to come in on that one.

Q335 ***Lord Kerr of Kinlochard:*** I am struck by your reference to the wickedness of the extra Italian seat being a breach of the principle of "degressive proportionality". Could you define the principle of degressive proportionality, please?

Mr Leinen: In fact, we have no mathematic formula for it. I am sure in the next legislature we will have to come back to this question if Croatia becomes the next Member State and they will get 13 Members of the European Parliament, so if we have to stick to 751 as the maximum number of seats this redistribution procedure will get us back to the debate of what is the formula for degressive proportionality. Our *rapporteurs* and then the plenary had formulated a few criteria and one decisive criterion—

Mr Corbett: Shall I say it? We laid down first the obvious one, that the bigger a country's population in general the more seats it should have, but at least one fundamental principle we defined was the ratio of seats to population should decline as you go up the scale of the size of population.

Q336 ***Lord Kerr of Kinlochard:*** Could you say why?

Mr Corbett: That will no longer be the case for Italy.

Q337 ***Lord Kerr of Kinlochard:*** Could you say why?

Mr Corbett: How else would you define "degressive". If it is strictly proportional to population—

Q338 ***Lord Kerr of Kinlochard:*** I would like to know why this is democratic. A democratic principle is that a voter, wherever he lives, has the same degree of rights in respect of representation in the European Parliament, but this principle appears to fly in the face of that.

Mr Corbett: The principle of degressive proportionality was laid down in the Treaty. We came up with figures that respected that principle, which is to say that the bigger a country, instead of a linear graph it is a tapering graph, and that is not unknown in national situations, in the United Kingdom Scotland has a slightly higher proportion of members to population in the UK Parliament than does England, for instance. That has always been the case in the European Parliament to a slightly greater degree as a recognition of the fact that we are a Union of 27 different nations.

Lord Kerr of Kinlochard: I admit to having some memory of the inclusion of the principle of degressive proportionality in the text that I was associated with. What I had hoped was that the Parliament would produce a definition of the principle, and, to be honest, I had hoped that the Parliament when it made its proposal would come up with a number rather lower than 751, and I do not mean 750. It does seem to me to be a pity that it is so big. I also hoped that the Parliament would define the principle so that there was a formula which would apply automatically in the case of a future enlargement and it seems to me we have not quite got there.

Chairman: That appears to be the case.

Q339 ***Lord Powell of Bayswater:*** My Lord Chairman, I wanted to get away from this three decimal point subject of degressive proportionality and go back to the very interesting comments that were being made about the British attitude. I think opinion in Britain is very confused: on the one hand it has the government which tells it, "This is not a constitution, this is just a technical amending treaty, nothing to worry about, go to sleep again and forget about it", and you have got an official opposition that says, "On the contrary, this is actually pretty well the full original constitution and you should worry", and then they hear several Heads of Government and State in Europe, including former President Giscard, saying, "It is really 95% of the original constitution". What do you, as a Constitutional Committee, think? Is this basically the constitution with a few very minor amendments? I see your draft report refers to "abandonment of several features of the constitution". What do you think are the important differences?

Mr Leinen: It was never a constitution before, it was always a treaty. It was called a Constitutional Treaty because we had the Single Treaty with Part I where the fundamentals were laid down in some 50 Articles and Part II where the Charter of Fundamental Rights has been integrated, so Part I and Part II gave the character of a fundamental treaty and at the end they called it a Constitutional Treaty agreed by all 27 Member States in the IGC. It is not useful to continue on this play of words. We have followed the Laeken Declaration which wants to make the EU in view of this huge enlargement of 12 or more Member States more effective, more transparent and more democratic, and let us focus on these goals and objectives. I would say we have done a good job there. This is going in the right direction and it fulfils sometimes more and sometimes less the objectives laid down in the Laeken Declaration. You can call it what you want. I was joking that in Portugal they call it the Reform Treaty, in Germany the Fundamental Treaty, in France the Mini Treaty or the Simplified Treaty, so they followed the words of Sarkozy, the whole of the media from left to right, and in Britain you still call it the Constitutional Treaty because parts of the substance have been saved. It is useless to continue this debate. One should look at what is achieved according to the objectives in the Laeken Declaration and how we compare it with the existing Treaty of Nice: is it better or is it worse? Our judgment is clear that it is coming nearer the objectives of Laeken and it is better than Nice.

Mr Brok: I am a moderate Christian Democrat so I do not have the strength to ask for the floor very often! I have a few remarks first of all. It was the European Parliament in the Convention which was asking for a lower figure, but it was the governments, and especially the IGC governments, which put it at the higher level. We made a proposal for 750 because three figures were set by the Heads of State and Government: 750 was set both in the IGC for the Constitutional Treaty and the mandate in June; 96 and six for the smaller countries. Because of that we only had to find a solution in-between the three figures. I preferred a lower figure, the original one was 732, for example. We have to pursue the question between the effectiveness of the work of the European Parliament and at the same time the representation of the people. The more people you have to represent the more difficult it is to represent them and, therefore, we have to find this balance. To have the solution that we have no more is a problem. The Italian problem with the one seat was a lesser problem than the British problem with the Charter of Fundamental Rights. I would like to agree with you that the British policy was very painful to me because in the Charter of Fundamental Rights, the possibilities and declarations that it only applies to European legislation and its implementation to European institutions was negotiated five times by Britain, once in the Charter of Fundamental Rights Convention, twice in the Constitutional Convention, the fourth time in the IGC for the Conventional Treaty and the fifth time in the mandate. The result was the opt-out. We got the British negotiation result but Britain did not join it and we considered that unfair. If you did not want to join why negotiate with the others, that was our feeling. The same was partly the case with Home and Legal Affairs, you got your red lines and we accepted that because we wanted to go forward but it was a problem for us because after you got an agreement this agreement was negotiated because of the will of a country which got this agreement. It might be said that this is a very clever method of negotiation, but we did not feel very happy about that. To see the debate after you got all these red lines in such a country where the debate is going much too far creates problems for understanding in other countries. On this question Britain was a winner in the negotiations, it was not amended in the IGC. It was a winner as no other country. In a certain way this has to be accepted if we want to talk in a constructive way with each other. On the question of is it a constitution or not, the Constitutional Treaty was not a constitution, it was a treaty written partly in the form of a constitution. In legal terms it was never a constitution because there was no statehood. Now it has taken out all the wording which might give the impression that Europe was looking for statehood. Even the word "law" has been taken out and we are back to words like "directive" which nobody understands. The result of that is people understand less about Europe. The explanation was everything that could give the impression that

Europe was looking for statehood has been taken out and we can see it is clearly defined 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 the Member States and can be taken away by the Member States. This second explanation was put into the Lisbon Treaty at the last moment. Member States are more clearly defined than before as the masters of the situation. This is an important question that we have to look at. In the future it is very clearly defined for the first time. In a legal sense it was always there but it was not in the wording there. It states that every competence not mentioned as an EU competence stays automatically as a national competence. This clarification is now part of the Treaty and it was not there before. I cannot understand the problem if you look into such cases because when people say it is a super state, they have got more assurances than they have ever had.

Chairman: That has opened up the debate very nicely. I know Lord Maclennan has been waiting.

Q340 ***Lord Maclennan of Rogart:*** It is partly referring back to the issue of comprehension of the public and is the Laeken Declaration about strengthening that. I wondered if you felt that the public's understanding of the political issue within Europe would be helped in this age of political celebrities by that provision regarding the election of the President of the Commission. It does seem to me that opens up the possibility of the public understanding a great deal more about what the Union is doing if candidates are offered in the parliamentary election which have to be taken into account by the Council after the event before nominating someone for that role. It would be very interesting to hear whether you think that is strengthening the Parliament, strengthening comprehension and strengthening the President of the Commission.

Mr Leinen: As standing *rapporteur* for the European political parties in the Parliament I very much welcome this question because, for me, it is a key question for linking the institutions to the citizens, communicating Brussels to our citizens and, in a way, being more transparent and more democratic. From 2009 onwards the President of the European Commission should not be designated behind closed doors in the European Council, after the elections it should be an open process before the elections. We have a plurality of ten political families a wide spectrum, much wider than we know it at national level, of political ideals and political concepts that exist. I would like to see those European parties taking their responsibility and have the courage to nominate a top personality who runs in the election campaign for the position of the Commission President. I might remind you that in the elections of 2004 it was clearly stated by one political party, "If we win these elections, if we are the biggest group in the Parliament, we want to have the President of the European Commission" and in the days after the elections in the European Council there was a candidate from another political family and he had no chance because that bigger political family was saying, "You are not the winning team, we are the winning team and as it is at a national level so it should be at a European level" and we had the first priority and they found Mr Barroso to do the job. I hope that in 2009 this method will be more general and this game that the citizens understand and the media like to communicate and see the difference, "What is the difference in the choice we get if we vote for this party, this party, this candidate or that candidate?" is facilitated by the new Treaty. The President of the European Commission will be elected by the European Parliament on the basis of the results of the European elections. This phrase in the Treaty is very helpful to promote this mechanism.

Q341 ***Lord Blackwell:*** Can I just go back to the red line on the area between justice and security. I think this is an area where there is a fundamental debate between many in the UK and in Europe on whether this is an area where legislation should be at the European level or the national level. The UK Government says that we have an opt-out or an opt-in so we do not have to accept any legislation in this area unless we decide to, but if you take that body of European law which is going to develop alongside the fact that the European Court will have jurisdiction in this area and will be trying to apply principles that say laws should apply across the European Union and the Charter should apply across the European Union, is it realistic that in five or ten years' time there could be a substantially different body of UK law from European law in these areas or is this, in effect, just temporary window dressing and sooner or later the UK will have to be drawn into the mainstream of the area of freedom, security and justice?

Mr Brok: There will not be the possibility that via the Court of Justice what the other countries have decided will become British law in practice. It will be the case that Britain will consider in certain cases, because of the fight against terrorism and organised crime, whether it is appropriate not to join certain mechanisms or not and in the system it is the right of the British Government or British Parliament to do so or not. In the long run, because here we are in a common fight, I believe that Britain will join in on a lot of these questions because it will see the need for that, but I can understand the political sensitivity

where at the moment in Britain this is not politically possible and, therefore, we agreed to the possibility of the opt-ins and opt-outs which gave a lot of possibility for flexibility to Britain in this case. For example, in the Schengen Agreement we see that a lot of cases do not apply to Britain and Ireland. I believe Ireland is more and more unhappy about this situation, that because of their relationship on this question with Britain they have to follow Britain but they still have controls at British harbours and airports. At the end of the day Britain is one of the countries, and Ireland, where I have to show my passport. The British citizens have to show their passports in 25 countries. I do not know who is in a better or worse situation.

Mr Kirkhope: I was not going to answer the specific question raised by Lord Blackwell, someone else perhaps will do so. I would just like to go back to remarks passed on the question of this constitution or "non-constitution". In a way it is to do with the aspirations of the people who are involved in it and projecting it. Unfortunately, from the point of view of the British public, had we started out and stayed with a clear treaty dealing, as Laeken suggested really, with the relationships between European institutions and protection of national parliaments, and we had gone down that route very strongly then that might have been a clearer message rather than the message which came across. My colleagues say this was never a constitution, this was always a Constitutional Treaty, but we all know all Treaties are constitutional. I was a whip at Maastricht and I know very well the constitutional nature of these sort of rather heavy Treaties. I think it is being unfair to suggest that this was not intended by the vast majority of people involved to be a constitution for Europe. That, of course, sent warning bells immediately ringing in the UK, it did not matter which government was in power, the point is it was something in the British public's perspective which anyone could have seen coming really because it was something which was anathema to them having no single written constitution of our own. Once our media, which is well-known for its lack of objectivity, got hold of this lot it was almost inevitable that there would be a mass reaction which would make it even more difficult for politicians who were taking a sensible approach, a realistic or pragmatic approach, to come out of this with anything that would satisfy the British people. That is where we are. On this business about opt-outs, yes, I think opt-outs are not honest, I do not like opt-outs. I want us to be protected, of course, but having opt-outs is a little bit unrealistic in the sense that most of the opt-outs that we are talking about, and Richard does not use the term "opt-out", in my view are challengeable in a number of ways legally, and particularly in relation to the Charter. Speaking as a lawyer as well, but only a rather simple lawyer, nevertheless it seems to me the chances of the Charter of Fundamental Rights not being utilised in terms of the UK position is very small indeed, I think we will see that. The final thing I will say is when you look at other areas, such as defence, for instance, what I regret very much is although one can argue separately about the need for a European Defence Policy and the High Representative position, or whatever the term will be in due course, it does seem to me that with other organisations which are established and well-established historically, such as NATO, there is going to have to be a lot of thinking in terms of our relationships on a wider scale and this is probably going to cause some harm in relation to a purposeful approach to defence, particularly in a very dangerous world as we all know.

Q342 ***Chairman:*** I want to bring Lord Mance into this but I noticed Mr Corbett wanted to comment on what had been said before. If you could do that fairly briefly because I think we all want to hear from Lord Mance on this.

Mr Corbett: Following what Tim said, I think it is all a question of definition, what is a constitution and what is not. You can define these things in different ways, and they are defined in different ways. The Canadian constitution until recently was an Act of the British Parliament; part of the British constitution is the Act of Union with Scotland, which was an international treaty. Let us not get into definitions. We are talking, nonetheless, about the basic rulebook of the European Union, what it can do, what it cannot do and how it functions, whatever you want to call it. Just leave it at that. That being said, the use of the term "constitution" was one of the problems in the Netherlands when they rejected it, the fear of statehood that Elmar Brok talked about. In the UK it was the term "constitution" that gave rise to demands for a referendum saying, "This is not like any other international treaty, we have never ratified international treaties by means of a referendum, this is different because it is called constitution". That has now gone, all that aspect of it has gone, it is now a normal international treaty which some say is 98% identical in its content but human beings and chimpanzees, I gather, are 99.2% identical in their DNA and the 0.8% is rather important I would suggest. That is the same here, it is the difference which is rather important. The bit that gave rise to concern, calling it a constitution, has gone. The price we pay is that it is a less readable text and I would suggest that the British constitution is not very readable, it is not codified and it is not a very readable text either, and we are going to have to live with the fact that our rulebook is a set of treaties.

Mr Brok: If it became more unreadable it would become more British!
Chairman: I will call on Lord Mance and after there have been reactions to what Lord Mance says I will call on Lord Dykes, but I very much want to keep on the institutional aspects because we have got a number of them still to deal with.

Q343 ***Lord Mance:*** I hope I am not going to deviate too much. I just wanted to follow up one or two points about the opt-out. I fully appreciate the point about exceptionalism and the complication and fragmentation, so it was not really that. I also do not want to go into the Charter, if you call the Declaration or the Protocol an opt-out or an opt-in or, indeed, go into the question of what the Protocol means. I really want to look at the freedom, security and justice area, Title IV, which will certainly lead to more situations where the UK will have to consider whether to opt-in, and criminal law especially, I suspect, is the area. I just wanted to ask whether you could help as to whether you see negative implications, apart from the point about exceptionalism, if the UK does exercise its right not to opt-in. There has been one template example, it seems to me, recently, the Rome I negotiations on proper law where the UK did not opt-in, but has then taken part in negotiations which have led to a result. We have not obviously decided whether to opt-in at this stage but one can see it might be embarrassing and very irritating if we did not. On the other hand, assuming we do, will the process have suggested that in future there will be any real difficulties if the UK in more frequent situations does not initially opt-in? Do you see any practical difficulties about the operation of the Title IV right not to opt-in in future?
Mr Corbett: This has to be looked at case-by-case and we will see. In practice, in most cases I think the UK will want to opt-in, and it will want to do so because the nature of European legislation in this area is not to create a single penal code or a single criminal law, it is to deal with those aspects where there is a trans-national dimension, international criminality or where there is a problem in civil law in terms of divergent, national legislations where people have families in two countries or businesses in two countries, those aspects of it. The type of legislation that will be adopted will not be harmonising everything, it will be dealing with those trans-national aspects where Britain will often have a shared interest in trying to deal with the problem in question. Remember, irrespective of the opt-in or opt-out, to adopt anything at the European level you need the approval of a very large majority, if not unanimity in some cases, in the Council of Ministers, a Council composed of national ministers, members of national governments accountable to national parliaments, not people predisposed to harmonising everything at a European level if there is no case for it, their job is rather the contrary, to keep national margins of manoeuvre wherever possible but, where necessary, to agree common rules. Given that, in most cases I think in practice the British will usually want to opt-in and not out.

Q344 ***Lord Mance:*** Are you saying initially because I was really directing my attention to the possibility that—
Mr Corbett: Yes, initially.

Q345 ***Lord Mance:*** Would it create problems or irritation, or anything more than irritation if, in fact, the UK on a number of occasions did not opt-in initially but asked to take part in the negotiations as it did in relation to Rome I and ultimately hope to reach an agreement?
Mr Corbett: Elmar is itching to answer that one.
Mr Brok: It is not an answer to all the questions on home and legal affairs, but in practical terms there would be much more pressure on certain European countries to join in than on Britain or Ireland. For example, the Czech Republic could have this opt-out and with all the borders with other Member States around it that would create a much bigger problem than Britain would create for others on this question. Because it does not have such an impact on the other countries because of this situation there will be less pressure on Britain to join in as there would be for a central European country.
Mr Kirkhope: Schengen is a good example. Talking about being outside Schengen, of course we are inside an awful lot of Schengen. We have been opting in or signing up to a considerable number of provisions of Schengen, particularly on the co-operation front, for some years now. We all agree that co-operation is a very important thing.
Mr Leinen: Richard was mentioning when we talk about criminal law, which is sensitive, but when it comes to civil law and Rome I, and you mentioned it, if you have opt-outs then contracts and commercial trades and exchange could be harmed in a common market.
Lord Mance: I am sure that is why the UK has taken a vigorous part in the negotiations.
Lord Dykes: We have to finish at eight o'clock so I will make this as a quick comment, but if people want to regard it as a question as well I am happy with that. Just to remind Timothy Kirkhope in the most polite form, of course, that the problem really started on his analysis when Tony Blair changed his mind from saying it was not only an indispensable Constitutional Treaty for Britain—"indispensable" is a very strong word—and did not need a referendum, and there was just a very short moment,

of course, one recalls when Chirac was thinking, as they are doing now, of having a congress of both houses rather than anything to do with the referendum but then he saw the pressure and the Murdoch press reaction and all that, that was the tragedy. It was a failure of national leadership as big as not joining the euro or the other previous examples of hesitation on Britain's part. I think you saw it in a particular light afterwards and welcomed what had happened whereas most people looking back on it in history will find it was a serious mistake. I hope that is the case anyway. Presumably Elmar Brok and others on your committee would hope in practical terms as politicians you are going to have pretty famous people as candidates for this particular process of the election of the Commission President. It is only a draft report I know, but it is an excellent report, and I congratulate you. In nine and ten of the conclusions, and that must be a task that even Timothy Kirkhope would agree with, there is the difficult task of getting these things over to the public in the Member States. It is much easier with these six core countries for obvious historical reasons: Germany a spectacular example of leadership in Europe on many occasions, not least giving up the only successful currency and joining the euro. Gosh, if Britain was able to do some of these things and not just the Single Market, I would be very pleased looking back on European history. Can I just comment, I hope very much that the press in Brussels, and therefore the national press liaising with their colleagues in Brussels, when the Treaty is ratified, we hope, and I agree it is a long process, it takes time, will take an interest in these matters so that extremely famous people are on the television in the national Member States. There are only a small number of politicians in the Member States now, and Elmar Brok is one of them. I pay tribute, by the way, to Elmar Brok and his work as *ein erstkassiger kämpfer der europäischen geschichte,* and in Britain as well. I remember him vividly in the early 1990s very elegantly and politely giving some important advice to some of our colleagues on the Commons' European Scrutiny Committee about some of the realities of these things. The more that is done the better. If you can combine that with the public's growing interest, including in Britain, by the way, becoming very European minded as a national constitution, on the practical stuff of Europe like the mobile phones and reducing charges here and there, all the things they hear about of the Commission's good works in those matters, and the Single Market and all the rest of it, and if only they would take an interest in the euro if the British press would talk about that as well, that will all come. If you can combine those two things as well as the institutional explanations that the new candidates and the winning candidate who becomes the President eventually can do, it is a long process but do you feel the press in Brussels are beginning even to think about it, or is it too early?

Chairman: We are short of time and I do want to ask Lord Plumb to come in. I would like to hear from the four of our colleagues from the European Parliament how they think the relationship between the four important officials in the European Union will work. How will they work together? This is a very critical constitutional issue for us. That will be our last question but, before we do that, let us get Lord Plumb in.

Lord Plumb: Thank you, my Lord Chairman. I know just how difficult it is to get a word in with the colleagues who are sitting in front of us, I have had a bit of experience of that in the past! We are a scrutiny committee, and as a scrutiny committee our Chairman will have the responsibility of going back to the House of Lords and in 17 or 20 minutes, at maximum, he will have the opportunity of saying to the House of Lords what we have scrutinised. I hope we can report scrutinising the facts rather than the fiction or some of the perception that so many people in our country have of what this is all about. What you have said has been helpful but, at the same time, it wants a lot of scrutinising. The question I want to pose is on co-decision. It is exactly 20 years since the co-decision procedure started, and I remember it extremely well and the concern we had at what it was going to do. How has it worked so far? How is it going to work in the future, because now you are bringing in budgetary affairs and agriculture and all that implies because of the reformed Agricultural Policy? I am going to leave it there because time is pressing. There are a lot of things we could follow-up on and a lot of things we ought to follow-up on because I do not think we are in a position at the moment, in spite of the things you have been saying and interesting though they are, to be able to put together a paper based on those facts which would satisfy our own people and then, of course, satisfy those who are in the other place and from there on, of course, satisfy the 40 or 50 million people who might have a say on this once it gets out into the country.

Q346 ***Chairman:*** Thank you very much indeed. In the last minutes we have, could we ask our colleagues how they think this sort of minuet is going to be danced by the various high officials? Is anybody going to come out as top dog? Is the permanent President going to be calling the shots? What is the relationship going to be with the High Representative? Will the President of the Commission feel that he or she is losing a little authority because of the new Council President, and

where does the rotating Presidency come in? If you can address some of those issues for us it would be very helpful to us for our inquiry.
Mr Brok: This question that Lord Dykes and others have raised about the candidates for the Commission Presidency is an important question, not perhaps in 2009, that might be too early, but in the 2014 European elections. If the political families come out with their nominations for Commission President then the job is done with legitimacy because the vote of the citizens is for the President of the Commission because he is part of an election campaign. We have to be careful in 2009 in which order these positions are nominated before we come to a situation where public control is there. We have to clarify, and Lord Kerr knows this better than all of us, the President of the European Council is only responsible for preparing meetings of the European Council, he is not responsible for the legislative Councils or the General Affairs Council or the Foreign Affairs Council. It is very important that we require these three positions. The High Representative: is he a High Representative for his own service or in the legal sense is he also the Vice-President of the Commission in a practical term, not just a legal term. It will be very important in 2009 in which order and what type of people are nominated at the beginning for that because the type of people set realities, and here I am a little bit concerned about that and we have to be careful in the course of the coming year how this is done. The last thing I would say is in answer to what Lord Plumb said about the co-decision procedure. The European Parliament acts in a very responsible way where it has competences. It is the same everywhere in the world, if people get responsibility they will act responsibly. We have seen this change in the working method and behaviour of the European Parliament. The European Parliament is flexible in getting agreements in negotiation with the Council when it comes to conciliation. Here we have a problem with the Council because not all 27 ministers take part, it is mostly the ambassadors who have no political legitimacy, who are not ready and able and have no right from home to make compromises, and it is a practical problem. That is a decision for national governments, not on our side at the European level. COREPER in the future should have ministers from national governments who are in the cabinet and have political legitimacy. In the long run we must come to that point because we cannot leave legislation to ambassadors for a lot of reasons. This has to be considered by national governments in the future. Sorry, but you know better than me what I mean.
Mr Kirkhope: I think the biggest clash is going to be that between the new so-called EU President and the High Representative because here we have a very clear conflict, particularly in relation to future foreign policy areas. Undoubtedly, the President is going to have rights to take a lead on foreign policy but immediately there is going to be a difficulty with the High Representative in my view and the status of the High Representative, particularly in relation to the meetings of the EU General Affairs and External Relations Council. I think that is going to be a real problem and no-one has a complete answer as to how that is going to work. For all its deficiencies, personally I think we have one of the best Commissions that we have ever had, it is a very good Commission and a very good President. I am very worried about the aspirations and ambitions of some people. Some of the personalities and names who have been attached to these positions also worry me very much. Undoubtedly, democracy will help, but in that particular field I think there will inevitably be quite a clash regardless of the UK's interests in relation to foreign policy.

Q347 ***Chairman:*** Thank you very much. The last words from Richard Corbett and Jo Leinen.
Mr Corbett: It has been said.
Mr Leinen: I will just comment on the last words from Lord Plumb saying this is not yet satisfactory for a report in the House of Lords, for the other House or maybe for the 60 million citizens of Britain, and I ask myself what would be satisfactory for the House of Lords, the other House and the country. I have to take part in lots of meetings and I think the citizens are the winners in this Treaty because Europe is able to solve the big problems we have defined as being better dealt with at the European level. This is internal security, external security, the fight against criminality, especially terrorism, the fight against climate change, energy safety and so on. We have to translate the Treaty in relation to issues and policies that serve the people. The difficulty is as long as we only talk about institutions and procedures it will be very far away from the comprehension as well as the needs of the citizens. The political class, and that is all of us, has a duty to translate the Treaty into the practical consequences it will have for the citizens in Europe as well as for Europe itself looking at the 21st century in relation to globalisation and what we are facing in the next decades. This has been a very good exchange of ideas, a lot of questions, and I thank you very much again for coming to the European Parliament.
Chairman: Thank you very much indeed to all four of you. Let me just emphasise, and this may come as a disappointment to some of you, that the report we are going to put in is not going to make a recommendation to the House as to whether or not they should ratify the Treaty; that is for the House to decide. What we are trying to do, and I think you got

close to saying this yourself a moment ago, is to provide a good analysis of the Treaty so that it is understood what the implications of it are for those who will have to vote on the ratification and, therefore, we are in the process of conducting an analysis and an impact assessment of the Treaty. It will not be focused solely on the institutional questions, it will go right through the Treaty and the different Sub-Committees will have their comments to make on all other parts of it. It is meant to be a thoroughly objective report that will assist the House to make up its mind as to what it wants to do with the Bill when it comes to the House some time in March very likely. Let me close by saying that we may have strayed rather wide in our conversation this afternoon, but it has been very useful to us and I thank you all sincerely for your contributions to it because the institutional part may bore the public to tears but it is, nonetheless, a very important part of the Treaty because from the institutional arrangements flow so many other things. Therefore, we felt it was very important that the Select Committee should take the responsibility to look at the institutional aspects of the Treaty which will form an important part, of our report. Thank you very much indeed for giving us of your time, it has been very helpful indeed. We will send you a transcript of the discussion that you can check through. We will certainly send you copies of the report as soon as it is published. We wish you well, the Members of the European Parliament and your Parliament, with the new dispensations given to you by the Treaty if the Treaty finally comes into force. Personally, I look forward to seeing all of you at various other meetings, where I am sure we will meet in the not too distant future. On behalf of the whole Committee, thank you for being with us for so long today and giving us such an interesting chance to talk.

THURSDAY 10 JANUARY 2008

Present	Cohen of Pimlico, B	Maclennan of Rogart, L
	Dykes, L	Powell of Bayswater, L
	Grenfell, L (Chairman)	Roper, L
	Harrison, L	Symons of Vernham Dean, B
	Jopling, L	Wade of Chorlton, L
	Kerr of Kinlochard, L	Wright of Richmond, L

Examination of Witness

Witness: LORD BRITTAN OF SPENNITHORNE, QC, DL, examined.

Q348 ***Chairman:*** Lord Brittan, we are very delighted to see you here. It is kind of you to give us of your valuable time. We felt that our inquiry would not complete without hearing from you. You have in front of you a list of the relevant interests of the Members for the record. We will send you the transcript after the event and we are on the record. I believe you would like to make an opening statement. Please go ahead.

Lord Brittan of Spennithorne: I am delighted to be here. I just wanted to indicate at the outset my basic position on the Treaty. I regard it as being modest in scope but both necessary and useful. I think it will lead to greater efficiency, increase the chances of reaching agreements in the European Union and will make the European Union where agreement is reached—for example in the area of foreign policy—more effective in the implementation of its policies. 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. Of course it introduces a new element for the benefit of the Member States in the greatly enhanced role of national parliaments with the yellow card and orange card system and, from the point of view of this country, the reweighting of votes gives Britain more influence in the Council of Ministers than it otherwise would have. I think the mistake was to call the old Treaty a constitution in the first place. Neither it nor the present Treaty justifies that description.

Q349 ***Chairman:*** You wrote a very informative and, if I may say so, a very entertaining book called *A Diet of Brussels* some years back on your experiences in the Commission and, although in a slightly different context, you wrote there that the concept of what is the touchstone of sovereignty changes quite radically over the years. I think that was in the course of a chapter about economic policy. Do you feel that the statement about the concept of the touchstone of sovereignty changing radically is reflected in any way in this Treaty?

Lord Brittan of Spennithorne: On any view of sovereignty this Treaty does not involve a substantial transfer of sovereignty or indeed any significant transfer of sovereignty. What I meant when I wrote that book was that, whereas a century ago, the great debates in British politics were over free trade and trade policy, I found that conferring upon the European Union and the Commission in particular the competence on trade was something that was not challenged much even by the most extreme Euro-sceptics. A century ago we did not have control over monetary policy because we were on the gold standard. Now, the big debate about the euro is related in part to sovereignty so that shows how the concept of sovereignty does change. On any view, this Treaty, whatever view you take of sovereignty, old or new, I do not think amounts to a fresh transfer of sovereignty to any significant extent.

Q350 ***Chairman:*** Could we move to the institution which you served with great distinction as a Commissioner? Do you think that as a result of this Treaty it will be able to conduct its business more effectively and will the President gain or lose authority?

Lord Brittan of Spennithorne: In principle and in theory the President gains authority because of having the right to in effect sack members of the Commission. The present President demanded of incoming members of the Commission that they hand an undated resignation chit to him in any event, so I am not sure that that is going to make a great deal of practical difference. The Commission as a whole will become more efficient simply because it will be smaller in size, which I think means a greater degree of efficiency. For example, when I was there—and it had been increasing in size while I was there—increasingly if any subject was thought to be of any real importance there was felt to be an obligation to have a *tour de table* in which every member of the Commission felt he had to express a view. That of course took an enormous amount of time, reduced the possibility of real debate and made the whole thing less efficient. Also, 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. As to the balance between the institutions, I do think that the creation of the High Representative presents a complication as far as the Commission is concerned. I do not think there is any doubt about that. If you want to talk about the distribution of powers between the different institutions as opposed to between the Member States and institutions, I think there is no doubt at all that this re-ordering of affairs leads to more power for the Member States as expressed in the European Council, if you like at the expense of the Commission.

Q351 ***Chairman:*** Does the fact that the election of the President of the Commission by the European Parliament will have to take into account the composition of the Parliament mean that in future all presidents of the Commission will in fact reflect or be drawn from the ranks of supporters of the majority party?
Lord Brittan of Spennithorne: I hope not. As we all know from experience in other spheres, "taking into account" does not mean the same as "following". In practice, 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. Granted, the European Parliament does not often have a single party with an overall majority, I do not think it is going to make as much difference as all that and, if we talk about institutions, once he is elected he is elected. He remains *primus inter pares* and not a dictator. The fact is that there is this provision with regard to the president and not with regard to the other members, who have to be supported by the Parliament as a block and not individually I do not think the new provision will make that much difference.

Q352 ***Lord Wade of Chorlton:*** Do you welcome the creation of a more permanent President of the Council and, if so, why?
Lord Brittan of Spennithorne: I do welcome the creation of a permanent President of the Council. I think it provides greater continuity and that is itself a strength. What people often do not really fully appreciate about the European institutions is that they really gain their strength by the process of working together over a period of time, whether it is the Commission, the Council of Ministers or whatever it is. Having a president who is there for two and a half years and possibly for five obviously means that he is going to be working together with his colleagues and building up relationships and he will know what can and cannot be done. I think it will make it more effective. It is important to stress what I said very shortly in the opening statement, that he is not going to have any more power than the existing president. He is not going to be able to make things happen, to tell people what to do, to take decisions which the existing president in office cannot do. He is going to have the same powers as the existing president but he is going to have them for longer. Although he will inevitably come from a particular nationality, particularly as time goes on, he will not be the spokesman of a particular nationality. Although very often presidents try to take on a role different from the country from which they come and go beyond that, even doing things which they would not have done had they just been ordinary members of the European Council, nonetheless they are from a particular country operating and trying to achieve results that will redound to the credit of that country; whereas a more permanent president will not do that. For all those reasons I do welcome this proposal which I think was first put forward by Britain.

Q353 ***Lord Wade of Chorlton:*** On our recent visit to Brussels there were a number of things we learned but particularly was the fact that there is still a great deal of work to do to make this Treaty practically work effectively. Second was the issue of the role of the Council. When we asked, "Is it going to work properly?" the answers were that it would depend upon the personalities and the attitudes of those who got these various roles. In looking further at the Treaty, would you think there are ways that you could make it so that it is likely to work a little more effectively than it might work as it is left at present?
Lord Brittan of Spennithorne: 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.

Q354 ***Lord Jopling:*** You say you do not think the Council presidency will have more power but I am talking of a peripheral matter really. The Council presidency will have more power by virtue of the fact that it is going to be there longer. I can remember years ago, in preparing for the British presidency, discussion revolving around, "Can we get that done in the six months?" and of course if the new Council presidency has a longer view of the matter that will bring with it a certain amount of extra power. I think you might agree about that?
Lord Brittan of Spennithorne: I do agree with the substance of it. It is just a question of the words used. It will be more effective but what I meant was it is not giving him any formal powers that the existing President does not have. Hopefully, in the way that you have such personal experience of, it will lead to that. I remember it was sometimes said to an incoming president that what you have to realise is

that you can only start things off or finish them off. You can start the ball rolling and you can finish things off that are close to the boil but you cannot do the whole thing with any particular subject.

Q355 ***Lord Roper:*** I wonder whether that you would like to say anything more about the relationship of the Commission's President with this new European Council President and indeed with the High Representative who will both be chosen by the Council but will also be a member of the Commission?
Lord Brittan of Spennithorne: As far as the relationship between the Commission President and the 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. No new powers are conferred. As Lord Jopling says, in practice he will become more effective. People who are more effective are in a sense more powerful, not in the sense that they have been given more power but because they have achieved more power. To that extent there is a change. I do not mind admitting though that as far as the Higher Representative is concerned, that is the part of the Treaty that troubles me most in the sense that he is a very curious, hybrid creature. He is in the Commission but he is also a creature of the European Council and the Council of Ministers. I note from what is said in the new Article 9E that he shall ensure the consistency of the Union's external action. "He or she shall be responsible within the Commission for responsibilities incumbent on it in its external relations and for coordinating other aspects of the Union's external action." All that is fine. It is just what a present member of the Commission with those responsibilities does. It goes on to say, "In exercising these responsibilities within the Commission and only for these responsibilities the Higher Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3", which say that he is a creature of the European Council. Who is to decide when those responsibilities end and when it is consistent with paragraph 2 and paragraph 3 or not? I do see fruit for problems arising there but again, as has already been said in answer to the previous question, everything depends on the personalities. It can be made to work. When the Solana appointment was first made, it was thought that there would be great conflict with the Commission and there were people in the Commission who wanted to spend all their time arguing about whether he was taking power away from them and trying to fight turf battles. Fortunately, Chris Patten and Solana were absolutely determined not to play that game. I am not saying that their staff in particular did not have spats and turf battles but they realised that there was an overriding interest in not doing that. Let us hope that that applies to the new High Representative. It is made more difficult by the fact that he is actually in the Commission as well as being an emanation of the Council. To deny that that is a complex and potentially problematic procedure would be to blind oneself to reality but I cannot pretend that I have thought of anything better.

Q356 ***Lord Roper:*** The section you quoted does show one other potential problem because he has a double function in the Commission. He fulfils the present function of the Commission who is responsible for external relations and then it goes on: "He coordinates the external actions", and therefore he is as it were *primus interpares* among all of those, presumably the Commissioner for Trade, the Commissioner for Development and perhaps the Commissioner for Enlargement, because those are the other external actions of the Union as distinct from the external relations which are at present the function of one. Do you see that as a potential problem?
Lord Brittan of Spennithorne: Possibly, yes. What does "coordinate" mean? "Coordinate" does not mean "dictate". Is he chairing it? What is he doing? Yes, 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. That something like it needed to be done I would affirm and assert.

Q357 ***Lord Wright of Richmond:*** In your introductory remarks you said that you thought the Reform Treaty would make the European Union more effective in foreign policy. We have tried with other witnesses to get some view on first of all how the Middle East Quartet representation is working and, secondly, the extent to which the Reform Treaty will change that representation. I know this all post-dates your time as a Commissioner but do you have any thoughts on that?
Lord Brittan of Spennithorne: Yes, I do. I think it will be more effective in the sense that I do not think it will increase the likelihood of there being an agreement within the Member States such as to create a European policy on a particular subject, except insofar as the continuity point arises and, by working together with people over a period of time and seeing what is possible and what is not possible, it may increase the chances of reaching agreement. On that we cannot be sure. On the other hand, when it is a question of implementing an agreement that has already been achieved—for example, to do something in a particular area—then I think the new arrangements will mean that there is a single voice which speaks for the EU and organises and

implements it. In a sense, there is a takeover of the Commission delegations which will be enhanced also and they will be made more fully diplomatic missions. They have been the tools of the EU. I think there is reason to hope that it will increase the chances of reaching more agreements on European Union policies and I feel confident that where such agreements are reached it will lead to a more effective implementation of those policies.

Q358 ***Lord Wright of Richmond:*** Is it your understanding that the personalities will change?
Lord Brittan of Spennithorne: What do you mean by that?

Q359 ***Lord Wright of Richmond:*** Representing the European Union at the Middle East Quartet.
Lord Brittan of Spennithorne: This is not on any view going to come into force for a year or more.

Q360 ***Lord Wright of Richmond:*** I am sorry. "Personalities" is the wrong word.
Lord Brittan of Spennithorne: Where the Quartet will be then and whether that is an instrument which will continue to be the most useful one and how the European Union's role in it will be is speculative.

Q361 ***Lord Dykes:*** I was very struck by your words in the June all-day debate last year when you said in your speech when you were Commissioner, "I saw that it was getting more difficult to reach agreement even with the mini-enlargement that took place at that time. The deliberations were steadily getting more cumbersome and will get worse." Indeed, no doubt you keep in touch with former colleagues and friends in the Commission and so on and you hear people saying that kind of thing. Very much too one hears that said in the Council of Ministers by various officials. In a way we could say that the situation might be worse in the Council than in the Commission. They are a small addition in terms of economic power, as we know, the ten new members and the two as well but nonetheless important and significant each individually and collectively. Do you see that becoming easier now for them joining in at this stage to row with the collectivity with these new arrangements in the Treaty or do you see some awkward customers there, or do you feel that, if you take the pervasive disease of too much national chancery politics in the Member States, holding back the development of the Community and collective decision making, do you see the troublemakers being more in the existing, original countries before enlargement?
Lord Brittan of Spennithorne: As far as the Commission is concerned, the point that you quote me on is the one I was talking about in saying that the reduction in the numbers will reduce the problem of the endless *tour de table* and hopefully increase the actual working time for reaching agreement and deciding things. As far as the Council of Ministers is concerned, that is not true because everybody is in the Council of Ministers. On the other hand, 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 them to be trouble makers, as you put it, in the sense that the chances of them being outvoted—which is the ultimate sanction—are greater. I think it will have that effect.

Q362 ***Lord Harrison:*** You have already indicated that you do not think it is necessarily desirable that the elected Commission President should reflect the majority grouping within the European Parliament presumably because you think the best person for the job is the person who should be alighted upon. Do you think the Treaty will change the relationship between the Parliament and the Commission in other ways, especially as the Parliament now has greater and extended powers?
Lord Brittan of Spennithorne: From the point of view of the Parliament wanting to increase its role, most of the job has already been done with the greatly enhanced role of the Parliament in the legislative process and the fact that already it is involved in the choice of members of the Commission and the President and its capacity to sack the Commission and so on. The balance as compared for example with when I first went to Brussels has already shifted radically. I do not think the Treaty will make a very big, further difference as far as that is concerned. Obviously with more qualified majority voting there is a slightly greater role in the legislative process but I think most of that change has already been effected.

Q363 ***Lord Wade of Chorlton:*** Some of the evidence we have received has suggested that the Treaty might create a situation in the Parliament where the Parliament becomes more politicised and there is more development of political views within Europe which are represented within the Parliament. Do you believe that is a likelihood?
Lord Brittan of Spennithorne: I thought it was pretty politicised already so I cannot see how it can become more politicised. I do not think so. On this question of the appointment of the president, "take account of" is not just a compromise formula but a quite reasonable thing to say. For example, if you have a candidate who is outstanding but is not attached to any political grouping, an outstanding European figure, it would be ridiculous to say that he must not be chosen as the President because he does not reflect the majority in the Parliament or the leading party in the Parliament. Again, you might have somebody who has a mild, non-extreme past in a particular political party but who is acceptable to the other

parties. I think "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.

Q364 ***Lord Harrison:*** The evidence that Lord Wade and the rest of us heard in terms of the Parliament becoming more politicised was that at the moment perhaps the view is that Parliament still retains national interests as expressed through the Parliament, but that that itself would change. The particular political groupings stretching across national boundaries would come to the fore and that in turn might make the change in the dealings with the Commission.
Lord Brittan of Spennithorne: I am not sure whether such a change would be a good one or a bad one. That change has been expected for decades and it has been incredibly slow in coming. I used to attend the EPP in the good old days when there was no question of the Conservative Party pulling out of the EPP. There we saw quite openly in the discussions in Strasbourg divisions between particular national groupings which often burst out from the EPP framework. 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.

Q365 ***Lord Maclennan of Rogart:*** Would you anticipate that the extension of the budgetary responsibilities of Parliament, obligatory and non-obligatory expenditure, could result in any development of their influence over priorities of expenditure for the Union?
Lord Brittan of Spennithorne: Yes, I think that is possible but again it is an evolving trend from a position in which the Parliament really had no say to one in which it has had more say and now perhaps a little bit more. The essence of the whole thing is that in all of these areas this Treaty is pretty incremental with a pretty small increment too, compared with the Maastricht Treaty or the Single European Act. We are really talking about very small changes indeed. The most important changes are in the numbers, in the area of foreign policy and things like that which do reflect the necessities brought about by two factors. One, the greatly increased size caused by the addition of the Central and Eastern European countries and, secondly, the desire that the European Union should be able to play a more effective role in the world where its Member States do reach agreement than it has done up to now. You should maximise the chances of the Member States reaching such agreement. Those are the changes and they are changes which I regard as wholly to the good. I do not think that they in any sense amount to the creation of a constitution, nor the deprivation of Member States of their sovereignty, quite apart from the fact that Britain has the special position through all the opt ins and the opt outs, the arrangements, protocols and so on with which you are so familiar.

Q366 ***Chairman:*** Could I come back for a moment to the Commission? Was it your experience when you were a Commissioner that individuals were leaning over backwards not to give the impression that they were there as national representatives? One has the impression nowadays, particularly after the 2004 enlargement with the ten coming in, that some of the smaller countries amongst the new members do regard their Commissioners as being their national representatives. I wonder whether this trend is becoming bedded down now, where it is almost accepted, which leads me on to the second part of this question. When the time arrives when the United Kingdom does not have a member on the Commission, as will happen eventually, will we take this with good grace or are we likely to go the way of many of the other Commissioners and decide that we no longer have a proper national representation and have to find other ways of getting our views across in the Commission?
Lord Brittan of Spennithorne: On the first point, I hope I am not telling tales out of school but to look back to the halcyon days when everybody perfectly reflected what was in the Treaty and had some kind of platonic, objective view of life is a little unrealistic. It varied. Some people really did think what was best for the European Union. It was their duty to listen to what distinguished Permanent Representatives like Lord Kerr said but to make their own minds up at the end of the day. Others were to a greater or lesser extent influenced by what national governments asked them to do and of course in many cases they were appointed by a national government and then there was a change of national government. There was that complication as well. I do not think it was all completely cool and objective as it theoretically should have been. Whether it has got worse I am not really in a position to say. I cannot see anything in the Treaty that will make it worse than it is currently. On the question which is perhaps even more important of what we will feel like if we do not have a Commissioner, I think there will be a loss. Although in principle the job of a Commissioner is to exercise his own judgment for the benefit of the European Union as a whole, he is expected to be able to say that this, that or the other provision may be wonderful for everybody else but, for the following, specific reasons, it would be disastrous in my country; or to say, "You may think this is utterly trivial but it is hugely beneficial for my country." That has happened as far as Britain is concerned with time sharing, of all things, where we were the keenest to

push the legislation on the subject and others really could not understand what it was all about. Similarly, it is the job of the Commissioner to go back home to listen but also to say in his own country what the Commission is up to and what the European Union is up to and to expound it. I used to do that a lot and, my goodness, with the media as they are, it was jolly necessary to do that. If there is not a Commissioner, there will not be a single figure of the same authority to do that in that way, so there is a loss. That is why in the book that you kindly referred to which I wrote I did not come up with the solution which is reflected in the Treaty of just saying, "In some countries in an arbitrary or systematic way we will no longer have a Commissioner at any given time." I came up with a different scheme of having senior and junior Commissioners so that the Commission would not continually grow in size but there would always be somebody who was a Commissioner, like a junior minister. I worked out a particular way of handling that which may have been right or wrong, but that is all theoretical because that is not what happened. I think 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.

Q367 ***Lord Jopling:*** Do you not think that when countries know that they are not going to have a Commissioner for a period of time what will happen is what often happens in negotiations in both the Council and the Commission, that countries gang up together? Do you not think there will be a likelihood that if, say, the United Kingdom does not have a Commissioner for a period, people will come to a friendly arrangement with other countries where they will tend to scratch each other's backs when they go through the period when they do not have a Commissioner?
Lord Brittan of Spennithorne: I think that will happen and it will be a good thing. It is the only thing that should happen. I do not want to exaggerate this because I was asked the question and I am answering it. I am not saying it is going to be the end of the world. Supposing for example we say, "Okay, the Danish Commissioner. Let us hope that he will represent British interests." That may work very well in the Commission itself but if you are talking about coming to Britain and what the Commission does and why, listening to British industry and so on, if only in terms of sheer time, you cannot expect him to do the same job as a British Commissioner would do.

Q368 ***Baroness Symons of Vernham Dean:*** I think you have brought out a very important point. You talked earlier about the smaller Commission being more effective and therefore having support. That was a very compelling argument. What we have now is the *real politique,* not what goes on in Brussels but what goes on in London and importantly what goes on in the British press. I do not know enough about the foreign press to know the ins and outs of how they report on everything to do in Europe but I certainly get the impression that our press are peculiarly Eurosceptic. It seems to me that what you are suggesting—and there is a real possibility of this—is growing Euroscepticism, not within necessarily the informed part of the body politic but amongst the press and the British public. It would be disastrous if we had a Danish Commissioner coming here. In and of itself my instinct would be to say, "No. Keep away and we will try and deal with it." I wonder whether you feel that in the longer term the gains that you described about a smaller Commission will not be completely undermined by not having our own Commissioner. There is one other point which may seem trivial but it seems to me to have some impact. If we are the first of the big countries not to have our own Commissioner, it would be a much worse position than if the French and the Germans had already done it. I wonder if you agree with that?
Lord Brittan of Spennithorne: I do agree with the last point and I hope good sense will ensure that that does not happen. That is not asking too much. On the broader point, I do not think the advantages would be outweighed by the disadvantage, although obviously from my own experience I am bound if anything to exaggerate the importance of the relevance of a British Commissioner in Britain. Let us not get carried away with it. This raises a much wider point which I hope to have the opportunity to talk about in a lecture I am giving to the LSE on 7 February. It means that if there is not a Commissioner doing it there is a heavier responsibility on the Government itself to do it. Without wishing to get too controversial or partisan, that is a responsibility that has not always been fully discharged.

Q369 ***Lord Dykes:*** I will not refer to who it was but there was one national leader who said that the Commissioner would be an excellent representative of their own country, coming back to the previous theme. We are all nowadays beset by the increasing complexity of the national political economies in Europe and elsewhere in the whole world but particularly in Europe where one often gets a sense that even a well intentioned, efficient and intelligent government is just beset by the difficulties of solving problems and so on and the tussle between the parties gets more and more artificial because of that. Do you think there is a secular sense in which these great, leading matters like environmental policy, economic policy and currency policy and all that need more and more to be decided within the European Union by friendly sovereign governments working reasonably happily together and making collective decisions?

Will that be helped by this Treaty or will the situation remain the same and there is no secular sense and it is not affected by the Treaty?
Lord Brittan of Spennithorne: One of the most important things about the passage of this Treaty which I strongly favour is that it will put an end to constitutional and institutional debate for several years. All are agreed on that. (I see not everybody is agreed!) It will put an end to serious proposals and serious intentions of anything happening. I cannot stop people in an academic or even in a political context giving their views but in practice it is not going to happen. That really means that the decks will be cleared. Let us remember for how long the decks have not been cleared and for how long we have been bogged down in discussions which are important and necessary even but nonetheless mean that the main thrust of Europe's attention has been diverted or channelled in this direction. Hopefully when the decks are cleared we will have a greater focus on things like energy supply, climate change, the environment, things which everybody knows cannot be done effectively on an individual, national basis and have to be done together. If that happens and it is seen that the European Union is able to make progress in that area and to do so in the international domain, that would be generally good for the country, for people, for Europe but also seeing that that is happening will play a part in reversing the tide of Euroscepticism because people will see that there are things that they regard as important which can only be done and are being done through European cooperation. Frankly, just to show that I am not too tainted by the theology of the Commission, I would just add that it does not matter whether what is done is done through a European Union instrument, directive or recommendation or something or whether it is done through consensus emerging as a result of discussions within Europe and then implemented in each country in a slightly different way through national action. What matters is that it should be done and I believe whether it is done through a formal, European process or through consensus leading to national action it is more likely to be done if we get this out of the way and get on with the next vital business that faces Europe and the world.

Q370 ***Lord Roper:*** You answered in the final sentence to Baroness Symons on the question of the situation in the absence of the Commissioner about the increased responsibility of the government. I was going to ask you whether you thought it would not mean increasing the size and perhaps some of the responsibilities of the Permanent Representation so that they would have the capacity to do some of this communication and reporting back work to people in the UK and perhaps a different kind of representation.
Lord Brittan of Spennithorne: I think that would be difficult although there is at least one person here who will have a more informed view on that. First of all, it is very easy to underestimate the sheer grind of detailed legislative work that takes place in COREPER and the heavy concentration that that requires; and the fact that that representation has to deal with people coming to Brussels, wanting to talk about what might happen, what should happen and what they do or do not want to happen. To ask COREPER and the Permanent Representative most particularly to play a significantly enhanced role in the presentation of European issues back home is not realistic.

Q371 ***Lord Roper:*** We have to think of some different machinery?
Lord Brittan of Spennithorne: Yes. I thought what you were going to say was that the role of the Europe Minister should be enhanced. That I think is a much more fruitful avenue. It is not so much a question of institutions but of political will because it is very easy for governments—and I deliberately put it in the plural to avoid party controversy—which are faced with what they know is necessary and desirable but may be unpopular to prefer for the brunt of the argument to be borne by somebody who is not a member of the government but is a recognisable British face.

Q372 ***Lord Roper:*** On the other hand, it was easier in the time when you were a Commissioner, when there were two British Commissioners coming from two major political parties, for them to come back and communicate effectively both with the people in and around the major government party and the major opposition party. The shrinkage to one Commissioner has already made that part more difficult.
Lord Brittan of Spennithorne: I have not personally experienced that shrinkage. What was useful was that two Commissioners coming from different political families, to use the European phraseology, would nearly always be saying the same thing and that was quite effective if, coming from those different backgrounds, you were saying the same thing back home. I agree with that.

Q373 ***Lord Kerr of Kinlochard:*** I share your view that the Permanent Representative cannot be given a role in explaining the Commission's proposal. The role of Permanent Representation is to encourage Commission proposals of the kind which the national authorities would wish and negotiate on them when they appear and, if they are not optimised, to optimise them for the national interest. You cannot

do both jobs. You cannot sell the national policy to the Commission and sell Commission policy to the nation as an official. I would like to know whether you agree that another way of tackling the problem perhaps more successfully than by beefing up the role of the Minister for Europe would be to think about politicising the Commission office in the Member States and giving its occupant a higher profile, an observer a seat in the Commission, and a role in explaining the Commission proposal in the national capital. I feel you are quite right: there will be a problem for the Member States from whom no Commissioner comes, but I think it has to be solved by some change to the Commission's own machinery for explaining what it believes, not to the national machinery for influencing the Commission.
Lord Brittan of Spennithorne: That would only work politically if it is done in a completely overt way during the periods where there is no Commissioner and to say, "There is no Commissioner. We are the voice of the Commission and therefore we have the right and the obligation to do what the Commission would otherwise do" and to have a nationally known and recognised political figure doing it at that time. It is important that that should not happen when we do have a Commissioner because, as it is, there is political objection from Eurosceptic quarters if the European Commission representation in London suggests anything or gives money to people for a conference or something of this kind. We have all experienced that. I do not think you would want me to give ammunition in that direction. There would be a wholly new situation where there is no British Commissioner and we would be justified in saying quite openly, "The voice of the Commission needs to be heard and here is a British person who is not a Commissioner but is a political figure doing that job in London and in the rest of the UK."

Q374 ***Baroness Cohen of Pimlico:*** I would like to turn our attention to the impact of the Reform Treaty on the Council of Ministers. Do you think that the new system of qualified majority voting is likely to be significant in practice and will it be to the UK's advantage?
Lord Brittan of Spennithorne: It will not have a big difference but it will have some difference. The difference it will have will be of course wholly to Britain's advantage because we will have a higher proportion of the votes. I do not expect a big thing from it. One of the benefits is that it will be more transparent, more explicable, more rational in appearance but in terms of the actual difference in the decisions it will be beneficial but slight.

Q375 ***Baroness Cohen of Pimlico:*** What do you feel about the effects of the declaration on blocking minorities? I cannot help feeling we are going to find ourselves as a blocking minority some of the time.
Lord Brittan of Spennithorne: I hope that that will not be a customary position for Britain to find itself in. To be fair, you would think from the discussion in the British press that this happens all the time. If we look at an unblocking minority, at the number of occasions on which qualified majority voting has been exercised and we have been overruled, we have been overruled less than most of the other Member States under the present arrangements. Although this looks good, I do not think in practice it is going to make a huge difference.

Q376 ***Lord Maclennan of Rogart:*** We have heard it said in evidence that the Council proceeds by consensus rather than by voting normally. Do you think the transparency of the Council's procedures, when it is sitting in a legislative capacity, might force or induce or encourage members to vote where before they have not voted and have arrived at a consensus?
Lord Brittan of Spennithorne: I am inclined to agree with you and I have never been an enthusiast for the transparency of voting for exactly that reason. I know it is politically incorrect to say that and we all should believe that everything should be transparent but I think the Council of Ministers is in some ways more like a Cabinet than a legislature, even though formally it has legislative powers, and 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.

Q377 ***Lord Jopling:*** Going back to blocking minorities, whilst I suppose it is politically incorrect to talk about Luxembourg compromises, do you envisage that some delegations will have, as the UK delegation has had in the past, a standing instruction that where a delegation claims to abide by the national interest other delegations will join in with that and support it and therefore create the block? That is the way the classic compromise works. Do you see that continuing so that an individual delegation of vital national instruments can be protected? I know we have been rolled over on that.
Lord Brittan of Spennithorne: I think that will happen so long as it is not abused. If countries do it in a very restrained, limited way, that system could continue and it will. If on the other hand, particularly if it is the same country doing it all the time, they frequently have recourse to something which even to somebody from different countries is manifestly not of supreme national interest, that system will not continue to operate and the more formal arrangements will apply.

Q378 ***Chairman:*** If I may come back to QMV, Professor Simon Hix, whom you know I think, has written to us expressing some quite grave concerns about the new voting formula. He says, that as to the population based part, it over-represents the four largest states relative to the power that they should have in a truly equitable system while the state based part of the formula over-represents the six smallest states. He says, "Put another way, citizens in these ten states"—those that benefit most from the population and state based parts—"are far more likely to be on the winning side in the EU than citizens in any of the 18 other states and this could have considerable long term consequences for the legitimacy of the EU in a large number of states." What is your reaction to that?

Lord Brittan of Spennithorne: I cannot pretend to have done the statistical analysis that the Professor doubtless has done before coming up with that conclusion. I would be surprised if I came to the same conclusion but I cannot convincingly refute it in the absence of joining in the statistical game.

Q379 ***Lord Kerr of Kinlochard:*** Would you not agree that in any case the present voting system gives a considerable under-weighting to the population base?

Lord Brittan of Spennithorne: Absolutely.

Q380 ***Lord Kerr of Kinlochard:*** Which is perhaps dangerous for the long term acceptability of qualified majority voting in a country like Germany, so palpably under-represented in the voting system?

Lord Brittan of Spennithorne: I do agree with that. My instinct is wholly to say that the change in the arrangements is a beneficial one. Having been told about a contrary view put forward from a respectable academic source, I cannot just say that that is rubbish. My inclination is to hope and believe that it probably is.

Q381 ***Lord Powell of Bayswater:*** Coming to a subject which you were particularly concerned with, that of competition, the draft Constitutional Treaty had the reference to "undistorted competition" which is dropped from the Treaty on the Functioning of the European Union, relegated to a protocol or a declaration. I cannot remember which. We have been assured in Brussels and elsewhere that this has no practical significance. Does it worry you that it is an undesirable political signal and it may be used as an excuse for trying to undermine European competition policy or to encourage protection of national champions?

Lord Brittan of Spennithorne: The important thing to remember is that nothing has been changed leading to the weakening of competition policy compared with the existing law. What we saw was an attempt to include the concept of competition, free and undistorted, in the formal objectives. That attempt was politically seen off but there was then a fight back led from this country which led to the protocol saying that the internal market includes a system ensuring that competition is not distorted, which is legally binding, so it is a sort of score draw really as far as that political game is concerned. Granted, nothing was actually changed. Granted, the competition Directorate General will be as vigorous and active as ever on the state aid side and on the cartel side. Granted, this political foreplay if one can so call it just falls by the way once the Treaty comes into existence. I do not myself believe that it will have a harmful effect. Whether it was really meant to have a harmful effect in the sense of leading to a change in the way competition policy is implemented or whether it was merely meant to give a political signal in a particular country that we are standing up and fighting for our particular concept I do not know. Either way, I do not believe—granted, both the legal situation and the undoubted continued intention of the Commission to continue with the competition policy exactly as it has been in the past—it will make any difference. What is important and interesting is that there have been a succession of Commissioners from different countries with different political backgrounds who have followed precisely the same line. People were very worried when Karl van Miert took over as a Belgian socialist about what was going to happen and when there might be a French Commissioner and so on, but in fact it has carried on. The strength of the tradition is enduring and in the absence of absolutely constraining words which will change that—which is not so; quite the reverse—I do not think that is going to change.

Q382 ***Lord Powell of Bayswater:*** That is very reassuring and I hope very much you are right. It is just that the political orientation behind the attempt to remove it and the fact that it was successfully removed from the draft Treaty does suggest that maybe the battle is not over.

Lord Brittan of Spennithorne: Battles are never "over" in the European Union. They are very often won and this one has been won for about 40 years. I can quite understand why you are expressing concerns. If you were from the other side of the Channel you might say, "This is a pyrrhic victory; we got this knocked out but we got the protocol put in instead and there seemed to be sufficient political support to put that back in." I would be more persuaded by the worriers if the worriers spoke also about the victories as well as the so-called political defeats. I do not think either of them will make a scrap of difference.

Q383 ***Chairman:*** At the time this happened, we know what President Sarkozy's initiative was all about and there was some initial concern that this might weaken the resolve of the European Court of Justice in dealing with competition cases because they might sense that there was a weakening of resolve within the EU generally on this. I think all the evidence we have heard since then, including from a former judge of the European Court, is that they would not be influenced in this way.
Lord Brittan of Spennithorne: Frankly, I think sufficient time has passed for it not to be necessary for me to conceal this. I was approached by the Commission and they said, "Look, this has happened; something needs to be done." I got on to the British Government and action was taken which led to the protocol. If the protocol had not been introduced, perhaps it would have had the effect but the fact that there was sufficient support to get the protocol approved produced what I call a score draw, which meant that you were back to where you were before, which was an effective competition policy.

Q384 ***Lord Dykes:*** Coming back to the problems of scale, including the economic policy, the corporate policy and all that, do you foresee the Council of Ministers being keen on seeing European champions emerging rather than national champions or is it just pie in the sky?
Lord Brittan of Spennithorne: That is a complicated and different issue. It depends what you mean by "European champions". I think everybody would like to see strong European companies but there is a recognition, certainly within the Commission—and that is what I fought for very hard with a measure of success—of the view that a company which only derives its strength from having a domestic monopoly—domestic in this context means a European monopoly—is not going to be a world beater because it will have a soft home market which will make it more likely to be uncompetitive abroad. That is the dominant vision certainly in the Commission today and I think it will continue.

Q385 ***Lord Jopling:*** So far as the UK is concerned, which do you think are the most significant institutional changes which we are going to face? We have talked about the lack of a Commissioner but what are the others?
Lord Brittan of Spennithorne: The increase in the number of votes that we will have is important but probably the one that will be most interesting perhaps in this room is the enhanced role of national parliaments, which I think is something of quite considerable importance. If you are talking about specific things, that is what I would say. I hope as a Member State that will play, I hope, an increasingly active and positive role in Europe, we will benefit from the general strengthening of the European Union that the Treaty will produce. The specifics are those. I am not talking about the defensive ones about red lines and that kind of stuff. I regard those as being political necessary but not necessarily hugely beneficial.

Q386 ***Lord Jopling:*** As you know, I am no Eurosceptic but what would you think were the two or three most difficult points to answer which Eurosceptics are likely to use in the months ahead?
Lord Brittan of Spennithorne: That is asking for an effort of the imagination which I am not sure that I am capable of. I do not think Eurosceptics will get on to this point because it is not the kind of thing they would do. I do think that the business of the High Representative's relationship with the Commission and Member States is the most serious, real point but we all know that Eurosceptics do not necessarily go for the most serious, real points. They will simply go for the increase in the number of issues with qualified majority voting. That is the only real thing they have got to go on. We all know what the Government has said about that and I agree with it, about the subjects being ones which we will benefit from rather than lose from. I basically agree with Margaret Thatcher's view when she supported and invited us on a three line whip to support the single European Act with its much more substantial increase in qualified majority voting than anything that this Treaty presents. I think she was right then.

Q387 ***Lord Harrison:*** Given your view that perhaps the most important change is the role of the national parliaments and perhaps this Chamber in respect of the United Kingdom, do you think and believe that we have to reform ourselves and our practices so that we can perform well, better than we do at the moment, the job of responding to the Commission in a quick, athletic and positive way which I think is implied by this new role?
Lord Brittan of Spennithorne: I suspect the answer is yes but I have not been sufficiently quick and athletic to be able to say how that should be done.

Q388 ***Chairman:*** Could I raise one other problem that we have been wrestling with? This has come up in evidence that has been given to us. Much has been made of the fact that the national parliaments now have eight weeks in which to make their reasoned considerations of draft legislation. The problem is that an awful lot of the codecisions are taken at first

reading now which means that it is all practically wrapped up right at the very beginning of the eight week period. Therefore, there is an argument for saying that the role of national parliaments is much diminished by the fact that, by the time they have geared up to use their eight weeks, things have pretty well been wrapped up in the European Parliament.

Lord Brittan of Spennithorne: I cannot pretend that I have given this adequate thought to feel comfortable with the answer but I suspect that what is really necessary is for national parliaments to exert their influence and indeed their power, which in a democracy is ultimately supreme, in discussing with governments of individual countries the way in which European issues are presented to Parliament at an early enough time for Parliament to exercise the role granted it by the Treaty. I do not have specifics in mind but I suspect that that is what it will come to.

Lord Kerr of Kinlochard: I had the impression that the text prohibited the Council and Parliament from proceeding before the expiry of the period. It is certainly the case—and it is a good thing—that as the Parliament and the Council engage less in institutional battles and address the substance of the proposal more readily the negotiation between the two institutions can be very rapid indeed, but I think the period in question for national parliamentary scrutiny in advance has to be in advance of that period of negotiation between the Council and the Parliament.

Chairman: I hope that is right. I am sure you are right but nonetheless this has been raised several times by people as being not clear. Let us check it and see.

Q389 ***Lord Roper:*** In order to have effective parliamentary scrutiny and control, there are some people in this country who are suggesting that we should perhaps follow the approach which was adopted initially by Denmark and is now being followed by Finland. I wonder whether you could give us from your own experience what you see as the advantages and disadvantages of moving in that direction?

Lord Brittan of Spennithorne: From my experience the balance is wholly negative. I would strongly counsel against such a procedure. If you have a country saying, "I am sorry, I cannot say what I think because I have not consulted Parliament yet" it may sound wonderfully democratic but it reduces the influence of such a country in the deliberations because they just become a bore and a nuisance. That is my frank view.

Chairman: If there are no further questions, thank you very much indeed, Lord Brittan. That was extremely enlightening and very interesting. Thank you for dealing with all of our questions. We will send you the transcript and you will see our report which we hope to have out some time in advance of the ratification Bill coming into the House. Thank you very much indeed.

Written Evidence

Letter from D Adams

RE: PROPOSED E.U. REFORM TREATY (ALSO KNOWN AS THE "LISBON TREATY")

Your Lordships,

Ever since Edward Heath took Britain into the E.E.C. in 1973, politicians of all parties have consistently deceived the British electorate about the true purpose of the European Union, ie: to create a United States of Europe, where the ordinary citizens of Europe will be nothing more than slaves of a system they cannot vote out of office.

The new E.U. Reform Treaty is basically the same as the old E.U. Constitution. Mr Giscard d'Estaing, who chaired the drafting of the original E.U. Constitution, has said that "the institutional proposals of the original constitutional treaty are to be found complete in the new treaty and, that the revived version was deliberately drafted in such a manner as to try to avoid the people of Europe having their say on it".

Part of the British democratic constitution of self government is the hard won right of the indigenous British people to elect and dismiss those who make their laws. The British people have given to Parliament the power to make all their laws for them, but they have never given Parliament permission to give that power away. Parliament has usurped the power of the people by giving E.U. Commission the right to make our laws. The E.U. Commission has the monopoly to propose all new laws in the E.U., but is undemocratic, unelected and corrupt.

1) The Treaty will have primacy over the laws of all member states.
2) The Treaty creates a European criminal justice system, with a European Public Prosecutor and an E.U. legal code. This runs directly counter to our own common law traditions and will require Britain to give up its' Habeas Corpus, the presumption of innocence and right to trial by jury.
3) 40 plus, national vetoes will be abolished as a result of adopting the Treaty.
4) Brussels jurisdiction is specified in almost every area of government policy; transport, energy, public health, trade, employment, social policy, competition, foreign affairs, defence, agriculture, fisheries, asylum and immigration and of course, justice.
5) The Treaty will become self-amending, meaning that any future transfers of power to the E.U. will not require new treaties.
6) The day the treaty enters into force, all previous E.U. treaties will be dissolved; the E.U. will cease to be an association of states bound by international treaties, and will become a State in its own right—the United States of Europe.
7) The new Treaty will also require that any of the "Red Line" areas Gordon Brown currently talks about, will disappear when qualified majority voting starts in a few years time.

The British people **must** be allowed a binding referendum on the subject of the new E.U. Reform Treaty.

November 2007

Email from Nicholas Atkinson

I am opposed to the new Constitutional Treaty (Reform Treaty).

1) The so called red lines are not set in the main part of the treaty. The ECJ will steadily erode these.
2) There will be an increased compliance cost that will adversely affect the competitiveness of the UK economy.
3) The ratchet clause will enable further erosion of those areas of national remaining subject to UK legislation.
4) The commission will now be able to force the EURO without UK parliamentary intervention.
5) All immigration will be subject to EU rather than British Parliamentary control.
6) Border control will be under Brussels.
7) Loss of over 80 areas now subject to Veto are lost.

8) Banking and Capital movements under Brussels.
9) Erosion of national competance under so many areas will make Westminster redundant.
10) Loss of competance will result in public apathy to elections.
11) Feelings of powerlessness risks far right and far left exploiting public anger and possibility of BNP gaining power.

These are just some.

6 November 2007

Letter from Mrs M Boardman

This is a personal and individual contribution to the call for evidence by Sub Committee E (Law and Institutions): Area of Freedon, Security and Justice and the impact of the Reform Treaty on the UK. I am Mrs Margaret Boardman, an ordinary member of the public. I am not a member of any political Party.

1. With the exception of the Labour Government the Reform Treaty is generally thought and said to be the old rejected EU Constitution repackaged and renamed. We, the British people, already have our own Constitution under which **NO** Parliament can bind its successors. That is exactly what has happened and continues to happen. To ratify this treaty would be a total betrayal of the British people. At no time have the British people been consulted on the transfer of power to run our great country to the emerging superstate, the European Union. I question the legality of any of the EU treaties, starting with the Treaty of Rome in 1973 to this present day. All were signed by treasonous politicians without any democratic vote by the people. Sadly there is no political will or anyone with enough backbone to demand that Article 49 of the 1969 Vienna Convention on Treaties be invoked.

2. Any erosion of the principal of Habeas Corpus in favour of Corpus Juris and the European Napoleonic Code is of very great concern to me. The reversal of the burden of proof changes that relationship between the State and the people. The Napoleonic Code is specifically designed to ensure supremacy of the State. In the UK historically the State is the servant of the people.

3. A treaty with a self amending article is unthinkable. It would allow future changes to be made without having to refer back to member states. This would give the EU bureaucrats the power to do anything they wish. It would destroy everything our fathers and forefathers fought to protect. Many gave their lives to protect our democratic way of life and our independence. Make no mistake; the EU is not a democracy.

4. The loss of veto in many areas means that the UK will be powerless to veto EU laws. Eg ***Freedom to control our own borders***. Without the power to control our own borders and limit immigration to our small island, the UK would soon be swamped by economic migrants we cannot integrate and criminals that we cannot deport. Our society and social structure is already feeling the strain. Hundreds of thousands of foreigners settled here last year and as more countries join the EU, the problem will keep increasing. It is quite clear that this is affecting our way of life and is one of the reasons so many British people are leaving the UK. It is not only retired people moving to a warmer climate. Many young couples concerned about the democratic deficit and the futures of their children are leaving our shores. So great is the pressure of this influx of immigrants on our society that it is likely to completely destroy the very thing that made them want to move to the UK in the first place. By that time the damage will be irreparable.

With the move to Qualified Majority Voting there is more chance of EU laws being imposed on Britiain regardless of whether our Government, Parliament and the people all oppose them. This would be completely unacceptable.

22 November 2007

Memorandum by Business for New Europe (BNE)

1. Introduction

1.1 *About Business for New Europe (BNE)*

BNE is an independent coalition of UK business leaders. Our aim is to support the UK's active engagement in Europe, and to promote a reformed, enlarged and free-market EU. We recognise the benefits that cooperation with our European partners brings. Since our launch in March 2006, we have become a leading pro-Europe organisation in the UK, gaining a good deal of press coverage for our views. We have a number of leading business figures serving on our Advisory Council (for more information, see www.bnegroup.org).

1.2 *BNE principles are as follows*

- We support the UK's membership of the EU and oppose withdrawal to the margins; we support positive and constructive engagement with the EU as the only sensible approach and as vital to our national interests.
- We support a vision of a prosperous free-market Europe able to compete in a globalised world.
- We support economic liberalisation and oppose excessive EU regulation, centralisation and red tape.
- We support institutional reform, further cooperation between EU member states where it is in Britain's interests and oppose old-fashioned federalism.
- We support the enlargement of the EU including Turkey, and recognise the benefits that the recent waves of enlargement have brought.

Business for New Europe (BNE) welcomes the opportunity to respond to the House of Lords European Union Select Committee inquiry on the impact of the Reform Treaty on the institutions of the EU. This response has been prepared by the BNE Executive.

2. General Arguments in Favour of the Reform Treaty

2.1 BNE supports the Reform Treaty because it will help make the EU's institutions more efficient and effective. As a business-based organisation we welcome the fact that, as a result of the Reform Treaty, the EU is adapting it institutions to its enlarged membership. A similar process of internal reform would be undertaken by any large organisation or business after a merger which had doubled its size (after all, the EU has increased its membership from 15 countries in 2004 to 27 countries today).

2.2 EU enlargement has been championed by both the present Labour government and the previous Conservative one. For the long-term functioning of the EU, enlargement necessitates institutional reform. It is also imperative if future enlargement is to take place.

2.3 EU institutions are needed to deliver and implement EU policies in the domain of trade, the environment and energy, all of which have a positive influence on European business and citizens. If we want to fulfil the reality of a fully functioning single market, we need an effective European Commission and European Court of Justice to enforce the EU's regulations.

2.4 The Reform Treaty is mostly institutional in nature, which does not directly affect economic policy. Notwithstanding this, some of its provisions could have positive effects on business. The fact that the Treaty includes a legal base for EU energy policy should help the single market work better in this area of strategic importance. We also welcome the provision about the European Research Area (ERA) which could foster further cross border cooperation among business and universities. Finally, the provision on EU-wide intellectual property rights may boost Europe knowledge economy by facilitating the use of the single application system.

2.5 Since the French and Dutch referenda on the Constitutional Treaty in 2005, the EU's policy agenda has been distracted by the institutional impasse. BNE believes that, once ratified in all member states, the Reform Treaty will allow the European Union to focus on its policy delivery agenda. Central to this agenda will be issues of interest to the British business community such as strengthening the single market, Europe's global competitiveness, trade liberalisation and climate change.

2.6 Many people in Britain have been frustrated at the lack of reform in the EU institutions over recent years. However when a Treaty is put forward addressing these reforms, it is apparent that many of the same people who would be complaining about the lack of institutional reform persist in their attacks on the EU. Therefore opponents of the Treaty often want a do-nothing EU, and in extreme circumstances, support withdrawal from the EU.

2.7 We believe that the UK debate on the Treaty in recent months has been pointing in a negative direction. We would like to see a more positive case advanced by the government. Many of the changes made in the Treaty should be welcomed, and we would support political leaders accentuating the positive innovations brought about by the Treaty.

3. Specific Issues in the Treaty

3.1 *President of the European Council*

- The Presidency of the Council that rotates every six months may have worked well in an EU of 6 or even 12 member states. In a Union of 27 member states this modus operandi is not so practicable. It means that smaller member states are left with the onerous task of managing the Presidency for which they can be ill-equipped.
- The current system also lacks continuity. Presidency policy agendas become obsolete in six months. The proposal to create a permanent non-executive Presidency is sensible, as it gives the EU better coordination and continuity.
- The new Council President, whose duties include chairing meetings of the European Council, will be able to devote his/her full energies to the job, which will lead to efficiency gains much welcomed by the business community.
- We welcome the fact that national governments will elect the Council President for a term of 30 months (renewable once). This means that the President is accountable to leaders of national governments. This innovation makes sense as the EU's two other EU institutions, namely the European Commission and the European Parliament also have stable and continuous presidencies.

3.2 *Double majority voting in the Council of Ministers*

- The Treaty introduces some much needed reform to the Council voting system to make it proportionate with population. The introduction of "double majority" will mean that a measure can only be passed with 55% of member states representing 65% of the EU's population.
- This system is much more fair and representative of each member state's population than the one currently in place under the Treaty of Nice. For example the UK is set to increase its overall voting weight from 8.4% to 12.2%, an increase in its share of 45%. In addition, the change in the voting system is set to increase the UK's share of a blocking minority from 32% to 35%.
- The "double majority" system also allows the EU to further enlarge (to Croatia soon and we hope eventually to the Balkans and to Turkey) without a further Treaty and institutional horse-trading on the weight each new member will have in the Council of Ministers.
- In the UK, majority voting is sometimes perceived as something to be feared, yet it will enable the UK to overcome obstruction from other countries and to push its political agenda. This highlights the importance of the UK building up fruitful alliances at EU level, and the recent enlargements have provided the UK with a larger pool of potential allies.

3.3 *High Representative on Foreign Affairs*

- The proposal to merge the positions of EU High Representative for Common Foreign and Security Policy (CFSP) and the Commissioner for External Relations into one role, the High Representative, is a logical improvement and should make the EU more efficient.
- A strong EU foreign policy voice when all member states decide to act in common is in the UK's interest, particularly on external-facing issues with a business dimension such as energy security.

3.4 *The European Commission*

- In a European Union of 27 or more members, it is important to review the number of Commissioners. Like the European Parliament, the college of Commissioners needs to be a reasonable size to function. The moves to reduce the number of Commissioners to two thirds that of the number of member states is welcome. Concretely it means the College will have 18 members from 2014 (assuming no further enlargement).
- In addition, we applaud the Treaty's strengthening of the European Parliament's role in electing the President of the Commission, thereby making the European Commission more accountable (beforehand the Parliament merely approved the candidate chosen by national governments).

3.5 *Simplified revision procedure*

— One of the areas in the Treaty that has aroused great concern in Britain is the simplified revision procedure or Passerelle Clause. This Clause states that member states can decide by unanimity to move a policy area to majority voting. We are reassured that the Treaty ensures every member state can veto such an initiative, and yet understand this clause brings flexibility and may prove useful when using EU policy to respond to crisis situations.

4. CONCLUDING COMMENTS

4.1 BNE supports the Reform Treaty as we believe it will equip the EU with better policy-making tools which are necessary for creating an even better business environment in Europe.

4.2 We believe that the EU's ability to deliver on its future agenda, notably the completion of the Single Market, will be helped by the provisions of the Reform Treaty.

4.3 We are also pleased that with the Reform Treaty, the European Union brings two years of legal uncertainty about the future of EU institutions to a close. Both European and other businesses need this certainty to grow and invest long-term in the EU.

Leah Charpentier
Public Affairs Executive
Business for New Europe

December 2007

Memorandum by the Campaign against Euro-federalism

THE LISBON TREATY AS GIVING THE EU A FEDERAL STATE CONSTITUTION

1. *Preamble*

We submit that the "Treaty of Lisbon" or European Reform Treaty aims to achieve the same result as the 2004 "Treaty Establishing a Constitution for Europe" which was rejected by the French and Netherlands electorates in referendums in 2005. Both Treaties would establish what would be constitutionally, legally and politically quite a new European Union with the constitutional form of a supranational Federal State and would make us real citizens of that State, with real citizens' duties of obedience to its laws and loyalty to its authority, instead of our being nominal or notional EU "citizens" as at present.

For ease of reference we refer to the two treaties that have aimed or are aiming to establish an EU Constitution as the 2004 Treaty and the 2007 Treaty.

2. *The 2004 and 2007 EU Constitutional Treaties*

The 2004 Treaty was both a Constitutional Treaty and a Constitution, as indicated by its title: "Treaty Establishing a Constitution for Europe".

The 2007 Treaty, while being an EU Constitutional Treaty in that it amends the two existing European Treaties, namely the "Treaty on European Union" (TEU) and the "Treaty Establishing the European Community" (TEC), and thereby turns these two treaties together into the Constitution of the legally new European Union they would establish, it is not in itself that Constitution. The two amended treaties, the second of them renamed "Treaty on the Functioning of the Union", would be that. Together these two amended treaties would have exactly the same legal effect as the 2004 "Treaty Establishing a Constitution for Europe" in that they would establish what would be constitutionally, legally and politically a wholly new European Union which would be fundamentally different from the EU we have at present. They would give this new EU the constitutional form of a State for the first time, a supranational European Federation, and would make us all real citizens of this State instead of our being merely notional or honorary "EU citizens" as at present.

The amended "Treaty on European Union" (TEU) would become the constitutional part of the new EU Constitution, the part which would establish a new European Union quite different from the present EU. The "Treaty on the Functioning of the Union" (currently the TEC) would become the Constitution's "implementational" part, which would set out how the new Union would work and its main policies. The effect of this amending and renaming process would be that the Constitution of the new Union would be set out in

two treaties instead of one, both having equal legal value. Thus the 2007 Lisbon Treaty would constitute a new European Union and give it a Constitution indirectly rather than directly, in contrast to the 2004 Constitutional Treaty.

3. *The "constitutional concept" in the two Treaties*

When the IGC Mandate for the Lisbon Treaty stated that "the constitutional concept is abandoned" and "the TEU and the Treaty on the Functioning of the Union will not have a constitutional character", or when Foreign Secretary David Miliband states that the 2007 Treaty differs "in absolute essence" from the 2004 Treaty, we submit they are seeking to distract attention from the new method of giving the EU the Constitution of a supranational EU Federation, without actually calling it a Constitution or without admitting that they are engaged in a Constitution-making process.

The 2004 and 2007 Treaties are both international treaties which would hand over national State powers to a supranational Federal-type entity. The content of the handover and the extent of the diminution of national sovereignty involved are to all intents and purposes identical in each Treaty. It has been estimated by the London-based Open Europe organisation that all except 10 of the 250 or so Articles of the new Treaty would be the same in legal substance as its predecessor. They would be mostly identical in wording also, except that the word "Constitution" would be omitted throughout. In other words, 96% of the new text would be the same as the EU Constitution which was rejected by the peoples of France and the Netherlands in their 2005 referendums.

We submit that what makes the Lisbon Treaty a Constitutional Treaty is that it would constitute a new European Union in the constitutional form of a State, not that it uses the word "constitution" in its title or text. We submit that the peoples of Britain and the other Member States are entitled to be made aware of the fundamental political character of the European Federation which the new Treaty would have the effect of establishing. They are entitled to know that the abandonment of the word "Constitution" the second time around has no practical significance.

4. *The existing and proposed new European Union*

What we call the European Union today—a name which derives from the Maastricht "Treaty on European Union"—is merely a general descriptive term for the various areas of cooperation between its 27 Member States: the so-called "Community" area of supranational European law deriving from our continuing membership of the European Community, and the "intergovernmental" areas of foreign policy and justice and home affairs, in which Member States still interact on the basis of retained sovereignty (v.TEU, Article 1). The present EU does not have legal personality or distinct corporate existence in its own right. It is clearly not a State, so that citizenship of it is purely notional or honorary, for one can only be a citizen of a State. That is why Maastricht was a "Treaty ON European Union", not "OF" Union. The proposed EU Constitution which would be brought into being by the Lisbon Treaty amending the two existing basic Treaties would in effect be the "Treaty OF European Union".

5. *The three legal steps which the 2007 Treaty would take to turn the EU into a supranational European Federal State are, we submit*

(i) Giving the EU legal personality

The first legal step would be for the 2007 Treaty to give the new European Union which it would establish its own legal personality and 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, just as the USA is separate from and superior to California or Maine, or, the Federal Republic of Germany is separate from and superior to Bavaria or Brandenburg. Giving legal personality to this newly constituted Federal EU would enable it to sign treaties with other States in all the areas of its competence and conduct itself as a State in the international community of States. It would speak at the United Nations on agreed foreign policy positions of its Member States, just as in the days of the Soviet Union the USSR had a UN seat while Russia, Ukraine and Byelorussia had UN seats too. It would have have its own permanent political President, Foreign Minister—to be called a High Representative—diplomatic corps and Public Prosecutor, and take to itself all the powers and institutions of the existing European Community, as well as the many new powers set out in the new Treaty.

The first sentence of the first Article of the 2004 Treaty stated: "This Constitution establishes the European Union". Clearly this would have been quite a new Union in constitutional terms compared with the EU which currently exists. The 2004 Treaty-cum-Constitution would have created a Federal European Union distinct from and superior to its Member States, with its own legal personality and distinct corporate existence in its own right, empowered to interact with the other sovereign States that make up the international community. The proposed 2007 Lisbon Treaty would achieve exactly the same constitutional result by inserting the following amendment in Article 1 of the "Treaty on European Union": "The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union. It shall replace and succeed the European Community". The 2004 Treaty said "this Constitution establishes" a new Union; the 2007 Treaty says the new Union, now endowed with legal personality, "shall be founded on" the two amended constituent treaties. The 2004 and 2007 treaties do exactly the same thing.

(ii) Merging the supranational "Community" and "intergovernmental" areas

The second legal step in giving the constitutional status of statehood to the new EU Federation would be to abolish the distinction between the supranational "Community" and the "intergovernmental" areas of the two existing European Treaties (TEU and TEC). This would be done by replacing the word "Community" by the word "Union" throughout the Treaties, thereby bringing the previously intergovernmental areas, where Member States retained their sovereignty, within the scope of the supranational law of the new Union and giving the latter a unified constitutional structure. All spheres of public policy would thus come within the scope of supranational EU law-making either actually or potentially, as in any constitutionally unified State. One says "potentially" because further inter-State treaties would still be required to transfer the minority of law-making powers still remaining with the Member States to the new Union in the future, or to shift powers from the Union to its Member States.

An important "federalising" aspect of the new Union's constitutional structure would be the Treaty provision which would for the first time turn the European Council, the quarterly meetings of Member State Heads of State and Government, into one of the institutions of the new Union. This 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 Treaty lays down that the European Council shall define the general political directions and priorities of the new Union and that as one of the new Union's institutions it "shall aim to promote its values, advance its objectives, serve its interests" and "ensure the consistency, effectiveness and continuity of its policies and actions". The European Council would thus become in effect the Cabinet Government of the new Federal European Union. Its individual members would be expected to represent the Union to their Member States rather than their Member States to the Union—at least if they take their EU constitutional obligations seriously.

Furthermore, like all the Union's institutions, acts of the European Council, or if it "fails to act", would be subject to review by the European Court of Justice (Article 230 ff TEC as applied in the TEU). All spheres of public policy, supranational and national, would thus in principle come within the purview of the EU Heads of State or Government in the European Council as they exercise the political government of the new Union.

Another feature showing the state-like character of the new constitutional structure is the Treaty provision that the President of the European Council would preside over the summit meetings of Prime Ministers and Presidents for up to five years (two and half years renewable once). This further emphasises the new federalist nature of the European Council. There 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.

We submit that the Treaty underlines the subordinate role of National Parliaments in the constitutional structure of the new Union by stating that "National Parliaments will contribute actively to the good functioning of the Union" by various methods set out in Article 8c. At present, National Parliaments have in any case already lost most of their law-making powers to the EC/EU. The citizens who elect them have lost their powers to decide these laws too. The provision of the Treaty that if one-third of the National Parliaments object to a Commission proposal, the Commission will have to reconsider it, but not necessarily abandon it, is small compensation for the loss of democracy involved. It is hard to think of a major function of a State which the new European Union would not have if the Lisbon Treaty were to be ratified. The main one would seem to be the power to make its Member States go to war against their will, although the Treaty provides that the EU may go to war while individual Member States may opt out. The obligation on the Union to raise

its "own resources" in order to finance the attainment of its objectives confers on it taxation powers, although these would require unanimity to exercise. The new Union would have its own government, with a legislative, executive and judicial arm, its own political President, its own citizenry and citizenship, its own human and civil rights code, its own currency, economic policy and revenue, its own international treaty-making powers, foreign policy, foreign minister, diplomatic corps and United Nations voice, its own crime and justice code and Public Prosecutor. It already has its own flag, anthem, motto and annual official holiday *de facto*.

All the classical Federal States which have been formed on the basis of power being gradually surrendered by lower constituent states to a higher Federal authority have developed in this way, sometimes over quite a long period of time. Nineteenth century Germany, the USA, Canada, Australia and Switzerland are the principal examples. Indeed the EU has accumulated its powers much more rapidly than some of these classical Federations, in the short historical time-span of some sixty years. The key difference between these classical Federal States and the new European Union, however, is that the former were established by distinct national communities with their own languages, histories, cultures and communal solidarities, which gave them a democratic basis. There is no European people or "demos" except statistically. In our submission the Lisbon Treaty is an attempt to construct a highly centralised European Federation artificially, from the top down, out of Europe's many nations, peoples and States, without their free consent and knowledge.

(iii) Transforming the peoples of the Member State from notional EU citizens into real ones

The third legal step would be to make us all real citizens of this new EU State entity, with the normal citizens' duties of obedience to its laws and loyalty to its authority and institutions. A State must have citizens, who are its members and inhabitants, and it cannot exist without them. One can only be a citizen of a State. If the 2007 Treaty is ratified, the new European Union which it would establish would thereafter have prime call on its citizens' allegiances as the constitutionally, legally and politically superior entity, over and above their obligations to their national constitutions and laws, with all the implications of that.

At present EU "citizenship" is an entirely notional status attaching to membership of one of the 27 Nation States that make up the current EU/EC. Citizens of the Member States have certain European Community rights attaching to their national citizenship, but they are not citizens of a supranational entity, for one can only be a citizen of a State and neither the Union nor Community is yet that. The 2007 Treaty would radically alter this position by establishing a real supranational EU Federation which people would be made real and not just notional or honorary citizens of. One illustration of 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 is that the European Parliament, which at present consists of "representatives of the peoples" of the Member States, would under the Lisbon Treaty consist of "representatives of the Union's citizens".

All States have codes setting out the rights of their citizens. The EU Charter of Fundamental Rights would be that. It would be made legally binding by the Treaty and would become an essential part of the new Union's constitutional structure. The Charter, which constituted Part 2 of the 2004 "Treaty Establishing a Constitution for Europe", is no longer set out in full in the 2007 Treaty although it is made legally binding by it. It would be binding on the Union's own institutions and on Member States in implementing European laws, which nowadays make up well over half of all new laws we must obey each year. This would give a new and extensive human and civil rights jurisdiction to the EU Court of Justice and would make that Court the final body to decide what people's rights are in the vast area covered by European law, as against national Supreme Courts and the Court of Human Rights in Strasbourg, which are our final fundamental rights courts today. Henceforth EU citizenship would entail real and not just notional rights and duties *vis-à-vis* the new Union, over and above the rights and duties entailed by national citizenship. In any case of conflict between the two the rights and duties attaching to the Union level would be primary because of the legal superiority of European over national law. The final decision on any boundary issues would be made by the EU Court of Justice as the new Union's Supreme Court. The federalizing influence of a Supreme Court as it exercises a rights jurisdiction is well illustrated by the role of the US Supreme Court in the constitutional evolution of that country.

6. *Conclusion*

Our submission is that the central constitutional purpose of the Lisbon Treaty is to turn the citizens of the 27 EU Members States into citizens of a supranational European Federation, with all the implications of that, if possible without their realising it and without permitting them any say in the matter.

Because the terms European Union and EU "citizen" and "citizenship" have been in use since the 1992 Maastricht Treaty, those pushing the EU State-building project hope that the peoples of the Member States will not notice the enormity of the constitutional change proposed. These already familiar terms would continue to be used as if nothing had changed, although their legal substance would be transformed fundamentally by the new Treaty and the EU Constitution which it would establish. This is central to the strategy of deception being employed by those who deny that Lisbon is a Constitutional Treaty which would fundamentally affect our democracy, national institutions—including parliament, independence and civil rights and those of our children, grandchildren and future generations.

John Boyd
Secretary

26 November 2007

Memorandum by the Coalition for the Reform Treaty (CRT)

1. Introduction

1.1 The Coalition for the Reform Treaty (CRT) is a network of organisations and individuals advancing a positive view on the proposed EU Reform Treaty.

1.2 The principles of the CRT are as follows:

- The UK and its citizens derive significant benefit from membership of the EU.
- The EU's successful enlargements, which have increased membership from 15 in 2004 to 27 members today, necessitate reform of its institutions.
- The Reform Treaty is in Britain's interests as well as the European Union's because it will lead to more efficient, effective and democratic decision-making.
- Agreement and ratification of the Treaty by all 27 EU Member States will help the Union to focus on the issues that really matter: competitiveness, social and consumer policy, and the EU's role in tackling global challenges such as trade liberalisation and climate change.

1.3 The CRT has both individual supporters and member organisations. The member organisations of the CRT are as follows:

- All-party Group on Europe.
- Business for New Europe.
- Demos.
- European League of Economic Cooperation.
- European Movement.
- Federal Union.
- Foreign Policy Centre.
- Global Policy Institute.
- Jean Monnet Circle.
- Jean Monnet Association.
- Labour Movement for Europe.
- Liberal Democrat European Group.
- Policy Network.
- Progress.
- Weidenfeld Institute for Strategic Dialogue.

2. General Arguments for the Reform Treaty

2.1 The CRT supports the Reform Treaty because we believe that its provisions will result in the EU's institutions becoming more efficient, effective and democratic.

2.2 Though we do not view the Reform Treaty as a panacea for the EU, we do see it as a positive step in the right direction. The origins of the changes encapsulated in the Reform Treaty lie in the policy of enlargement. The enlargements of 2004 and 2007, allowing the EU to take in a total of 12 new member countries, have dramatically changed not only the size but also the challenges it faces. The majority of new members are former communist countries from central and eastern Europe who are often reform-minded, often share the British government's economic reform instincts. All three major UK political parties were rightly supportive of EU enlargement and we should bear in mind that this Treaty is addressing the consequences of such enlargement. The debates about the similarities and differences between the Constitutional Treaty and the Reform Treaty often overlook the essential point that both Treaties are seeking to address the same problem, namely providing the EU with suitable tools to function with an enlarged membership.

2.3 The EU's institutions are much maligned and misunderstood in the UK. Many people think of the European Commission as a large unwieldy bureaucracy, and are surprised to hear that it is transparent and accessible organisation, with a total staff numbering less than a large city council in Britain. The most important point is that the EU institutions do not exist for their own sake, but are needed to deliver and implement the EU's policy remit. For instance, if we want to see a fully functioning single market, this must be underpinned by an effective European Commission and European Court of Justice to enforce the EU's regulations.

2.4 The Treaty is designed to help the EU work better. While it is hyberbolic to claim that enlargement has made the EU decision-making machinery unworkable, there has been evidence of some slow-down in decision-making in the policy areas of JHA and foreign affairs (Centre for European Reform policy brief "Why Treaty change matters for business and for Britain", May 2007). Furthermore, even though there has not been a profound short-term impact, there is a danger of the EU's creaky institutions rusting in the long-term unless these reforms are adopted. It is untenable for the rules of the Union which were designed for 6 or 12 member states to apply to a much larger EU of 27 members (and possibly more in the future).

2.5 The ratification of the Treaty by the UK and the other member states will enable the EU to shift from its internal debate about institutions to an outwards-facing one about policy delivery. The EU needs to focus on competitiveness, social, environmental and consumer policy, and its role in tackling global challenges such as trade liberalisation and climate change. There is a cross-party consensus in the UK that the EU has an important policy agenda, encompassing globalisation, advancing international development and combating climate change. In order to meet these massive policy challenges, the EU needs to draw a line under the institutional debate as soon as possible.

2.6 We believe that the UK debate on the Treaty in recent months has been pointing in a negative direction. We would like to see the government advance more positive arguments for the Treaty, using it as an opportunity to make the wider case for Europe in the UK. Many of the changes made in the Treaty should be welcomed, and we would support political leaders accentuating some of the positive changes precipitated by the Treaty.

3. Specific Issues in the Treaty

3.1 *European Council President*

- The Presidency of the Council that rotates every six months may have worked well in an EU of 12 or 15 member states. However, in a Union of 27 member states this modus operandi is impractical. It means that smaller member states are left with the onerous task of managing the Presidency for which they are often ill-equipped.
- Also the current system lacks continuity, with Presidency programmes or policy agendas becoming obsolete in six months. The proposal to create a permanent non-executive Presidency, therefore will give the EU better coordination and continuity.
- The new Council President, whose duties include chairing meetings of the European Council, will be able to devote his/her full energies to the job. This contrasts with the current set-up, whereby a national politician chairs the council for six months at a time.
- The proposal of a permanent Presidency has caused some consternation in parts of the British media (with some stories even suggesting that the position will supplant the Queen as Head of State), and has been wrongly interpreted as a move towards a super-state. Yet the fact is 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.

— We welcome the fact that national governments will elect the Council President for a term of 30 months (renewable once). This means that the President is accountable to leaders of national governments. Besides there are already Presidents in the other two EU institutions, namely the European Commission and the European Parliament.

3.2 *Team Presidencies*

— The permanent Presidency will be supported by team presidencies of 3 member for a period of 18 months, which again should provide more continuity than is the case at the moment, with the Presidency switching every six months.

— The Permanent President, along with team Presidencies, is something that could have salutary effects. One of the features of the present system is that national governments may work in a silo while carrying out their Presidency. But under the proposed new arrangements of team Presidencies, there will be greater collaboration and cooperation between member state governments, which will improve not only a set of bilateral relationship but the quality of working relationships at EU level.

3.3 *Voting system in the Council of Ministers*

— The Treaty introduces some much needed reform to the Council voting system to make it proportionate with population. The introduction of "double majority" will mean that a measure can only be passed with 55% of member states representing 65% of the EU's population.

— Furthermore since the Treaty of Nice, voting weights in the Council have been lop-sided, with the largest member states not receiving their fair share of the vote. The UK is set to increase its overall voting weight from 8.4% to 12.2%, an increase in its share of 45%. In addition, the change in the voting system is set to increase the UK's share of a blocking minority from 32% to 35%.

— Majority voting is sometimes perceived in the UK as something to be feared, but it offers the possibility for the UK to overcome obstruction from other countries. This highlights the importance of the UK building up fruitful alliances at EU level, and the recent enlargements have provided the UK with a larger pool of potential allies.

3.4 *High Representative on Foreign Affairs*

— The proposal to merge the positions of EU High Representative for CFSP and the Commissioner for External Relations into one role, the High Representative, is a logical step and should make the EU more efficient.

— A single figure head will make consensual EU foreign policy more efficient and effective. This increase in efficiency has been highlighted by some of our EU partners.

— However, the decision-making method for policies in the area of foreign affairs will remain as it is under the current treaties, namely unanimity. This means that the UK will act together with other EU member states only when it decides it wants to.

— Rumours that the amalgamation of the two posts into the High Representative would result in the UK losing its seat on the UN Security Council are without foundation, and an instructive example of the hyperbolic European debate in the UK slipping into distortion and inaccuracy.

3.5 *The European Parliament*

— The expansion of the EU has had a significant impact on the nature of the European Parliament. Obviously there are sensible limits to the size of membership of any legislature before it becomes unwieldy and unworkable. We therefore welcome capping the size of the European Parliament at 750 members. We note that this will affect the total number of British MEPs, but understand that this is an important step if the European Parliament is to remain a central, efficient actor in the EU system.

— In addition, the extension of the co-decision procedure should strengthen the role of the European Parliament, which is something we welcome.

3.6 *Number of European Commissioners*

- With the enlargement of the EU, it is important to review the number of European Commissioners. Like the European Parliament, the college of Commissioners has to be a reasonable size to function. The moves to reduce the number of European Commissioners to two thirds that of the number of member states is welcome. Concretely it means that, as of 2014, the EU will have 18 Commissioners (assuming no further enlargement).
- In addition, we applaud the measure in the Treaty strengthening the role of the European elections in the choice of the President of the Commission, which has the potential to increase the democratic accountability of the Commission as a whole.

3.7 *Role of national parliaments*

- We welcome the greater role of the national parliaments as envisaged in the Treaty. If one-third of national parliaments think that a Commission measure violates subsidiarity, then the Commission must either explain why it is needed or redraft it ("yellow card"). If a majority of national parliaments express concern about a proposal, a majority of national governments or MEPs can force the Commission to withdraw it ("orange card").

3.8 *Simplified revision procedure*

- One of the areas in the Treaty that has aroused great concern in Britain is the simplified revision procedure or Passerelle Clause. This Clause states that member states can decide by unanimity to move a policy area to majority voting. We are reassured that the Treaty ensures every member state has a right to veto such an initiative, and yet understand this clause brings flexibility and may prove useful when using EU policy to respond to crisis situations.

4. Concluding Comments

4.1 The CRT supports the Reform Treaty as we believe it will equip the EU with better tools for efficient and effective policy-making.

4.2 Many people in Britain have been frustrated at the lack of reform in the EU institutions over recent years. The Reform Treaty addresses these challenges head-on. Some opponents of the Treaty seem to want a do-nothing EU, and in extreme circumstances, even support withdrawal from the EU.

4.3 We believe that the EU's ability to deliver on its future agenda will be helped by the provisions of the Reform Treaty.

Zaki Cooper
Director of Business for New Europe

December 2007

Memorandum by Ms Sally DeBono

1. The creation of a full-time, unelected EU President, who will negotiate directly with the European Commission on new EU laws, further removes elected national governments from EU decision-making and erodes their ability to stop legislation that voters do not want.

2. The creation of an EU Foreign Minister with supporting diplomatic service, will extend the EU's control over foreign policy. Article III-300 states that the EU Foreign Minister will be able to initiate common positions that can be imposed on individual member countries by a majority vote. Once agreed, the Foreign Minister will present the common EU position on the United Nations Security Council (Article lll-305). The EU diplomatic service aims to make national embassies redundant, leaving Britain un-represented across the world.

3. The Treaty will extend majority voting in EU decision-making and cut our voting strength by 30%, so greatly reducing Britain's influence over new EU laws. 69 national vetoes will be scrapped, meaning our government can be increasingly out-voted by other countries and EU laws in more policy areas imposed on Britain regardless. For example, Article 111-147 of the original Constitution said that the EU can impose privatisation in any area of service provision, without the consent of elected national parliaments.

4. The Treaty will give the Union a legal personality to make legal agreements in its own right and represent its members on international bodies, cutting Britain's influence in the world. Brussels would be able to agree international treaties with external countries that would be legally binding on Britain and other EU member states.

5. The Treaty will extend the EU's powers over criminal justice, through the power to set common definitions of criminal offences (Article 111-271) and harmonise national laws through the mutual recognition of judicial decisions (Article I-42). The establishment of an EU Public Prosecutor will be made possible (Article III-274). Eurojust will be given new powers including the "initiation of criminal investigations" (Article III-273) and the EU's embryonic police force Europol will be expanded. Its officers will retain their immunity from criminal prosecution if they break national laws (Article III-276).

6. Article IV-444 will allow the EU to remove national vetoes in almost all remaining policy areas, and Article IV-445 will allow sections of the treaty relating to the "internal policies and action of the Union" to be re-written. This will allow the EU to self-amend the treaty in future, preventing major British scrutiny and debate about the EU's powers and direction.

7. **The application of the Charter of Fundamental Rights to FSJ measures**: My opinion is that the Government's Redlines and opt-in/out will not hold. While Art 4 of the Reform Treaty, paragraph 2, states that "national security remains the sole responsibility of each Member State", through the Elf's Protection of Critical Infrastructure, the EU, using Article 308 may for the very first time in the history of this Country, allow others—the EU—to involve itself in the very sensitive issue of National Security, again, allegedly because this is yet another matter that transcends National Borders. If our National Security is transferred to the EU, it is one of the greatest betrayals of all, because, in war time, any information given to the "enemy", is a matter of treason.

In conclusion, I do not see how any Government, whose first loyalty and solemn Oath of Allegiance is to the Crown and this Country, could "ask" (which they are not doing) the people to destroy their own Constitution. Furthermore, I cannot understand how any Government could accept and ratify such a constitutional treaty, which, when fully implemented with the inclusion and use of a self amending Article, would destroy everything that the people (including my father, who was a World War 2 Bomber pilot) fought for. (Freedom and Liberty)

I submit this to the House of Lords, who is the only remaining democratic hope that we, the people of Britain, have.

Memorandum by Brendan Donnelly, Director, Federal Trust (evidence submitted in a personal capacity)

The Reform Treaty and its Impact on the EU Institutions

Introductory Comment

1. Many institutional provisions of the Reform Treaty are framed, perhaps deliberately, in general, permissive or tentative terms. The real impact of these provisions will therefore only emerge in the course of their implementation. This implementation will be influenced by the personalities involved in the workings of the new structures and the general political background against which implementation takes place. As a result, some uncertainty must still attach to many answers offered to the Committee's questions.

Reform Treaty Structure and Legal Personality

2. If the European Constitutional Treaty had been adopted in its original form, it would have constituted a clearer and more accessible document than the structure arising from the Reform Treaty and its interaction with the existing European Treaties. This is a definite drawback of the abandonment of the "constitutional concept" by the European Council in June 2007. The often confused controversy caused over the past three years by the use of the phrase "European constitution," however, was such that the abandonment of the "constitutional concept" was probably the only politically acceptable option open to the European Council.

3. The question of the legal personality of the European Union has both a practical and a symbolic aspect. Practically, the recognition of the Union's legal personality puts an end to an existing controversy about whether the Union may not already have this legal personality. The Union's recognition by third parties as having treaty-signing power would strongly suggest that it does already have this personality and that the Reform Treaty simply recognises an existing reality. Symbolically, legal personality for the European Union is seen by some of the Treaty's critics as creating a new (or consolidating an existing) state-like characteristic of the European Union. It should be pointed out that a number of organisations, such as the UN, already

enjoy legal personality without being states. More generally, a distinction should be drawn between "state-like" characteristics for the European Union and its potential development towards becoming a state or "superstate". The European Union already enjoys and will continue to enjoy a number of state-like characteristics, such as a common currency, a directly-elected parliament, an independent court and an (admittedly small) central budget. It lacks many others, such as an army, a large central budget, direct powers of taxation and welfare policy. To recognise that the Union already has, and should continue to have certain "state-like characteristics" is not the same as asserting it is, will or should become a "superstate".

European Council and Council of Ministers

4. When the concept of a semi-permanent President of the European Council was first mooted in the European Constitutional Convention, it was the hope of some advocates of the creation of this post that he or she would be endowed with a range of substantial powers to co-ordinate the work of the sectoral Councils and thereby possibly to modify the existing institutional balance of the European Union. Typically, 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 the event, the powers of the new Presidency seem in the Reform Treaty to be limited to the point of marginality. It must be more than questionable just how substantial an impact the new President will be able to make on the day to day workings of the Union. Even 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.

5. It is true that the Reform Treaty gives to the European Council the right to define the "general political priorities and directions" of the Union. Few would anyway have disagreed before the Reform Treaty that this was the case. The President of the European Council is also enjoined to promote the cohesion and effectiveness of the European Council's work. A quasi-permanent Presidency may well be better able to do this than a rotating Presidency, where priorities and preoccupations tend to shift every six months. But 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, where national ministers are by no means always simply the creatures of their national Presidents or Prime Ministers. The new 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.

6. One of the few specific powers given to the new President, that of external representation, is subject to an unhelpful sharing of responsibility with the High Representative. If, as is widely expected, the new President is a former head of a national government, it may be that he or she initially enjoys greater personal prestige than does the High Representative. It does not follow, however, that he or she will exercise over time more real influence than will the High Representative, whose integration into the European Union's decision-making structures will be much greater than that of the President. (The High Representative's chairmanship of the Foreign Affairs Council and ability to call on the resources of the External Action Service are particularly relevant in this regard.)

Qualified Majority Voting

7. Both because of the increase of the number of areas in which Qualified Majority Voting can be used and because of the re-weighting of votes within the Council, 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. It should 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; and that the United Kingdom is more likely to be the beneficiary of streamlined decision-making over time than its victim. The re-weighted voting system of the Constitutional Treaty, now taken over by the Reform Treaty, is an improvement on that contained in the Nice Treaty, in that it replaces the laborious system of the "triple majority" with a somewhat more comprehensible "double majority". This improvement in comprehensibility, however, is likely to be more apparent to specialists and scholars than to the general public.

European Parliament

8. The 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. In 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. This is certainly a development to be welcomed. Some commentators attach in this connection particular importance to the extension by the Reform Treaty of the European Parliament's powers over the European budget. It should not, however, be assumed that the European Parliament, representing as it does the widest range of political and national positions, will necessarily be an ally of the British government on such questions as the reform of the Common Agricultural Policy and the British budgetary abatement.

9. Indeed, the general implications for the democratic life of the European Union of the extension of co-decision should not be overstated. The co-decision procedure is already well established in many areas of the Parliament's work and the Parliament is entirely used to regarding itself as a co-legislator with the Council. This sense of its own identity will be reinforced by the Reform Treaty, but it is not the Reform Treaty which has created it. The Reform Treaty is best regarded as a further step along a road which the Union has followed over the past three decades of integrating the European Parliament more fully into the Union's decision-making. A powerful argument in the deliberations of the European Constitutional Convention was that there seemed little rationality in the only partial application of the co-decision procedure. The generalisation of the procedure appeared the appropriate and logical next step in the interests of consistency and simplicity.

10. Members of the European Parliament are themselves uncomfortably aware of a striking paradox, namely that their increasing powers over the past three decades have not led to generally greater public prestige for or greater public interest in their institution. This is seen by many of them as detracting from the political legitimacy and democratic representativity of their institution, a concern accentuated by the traditionally low turnout for European Elections. It may be doubted whether the extension of the co-decision procedure will of itself reverse this phenomenon. Many factors certainly contribute to the lack of public salience of the debates and decisions of the European Parliament, such as the consensual nature of much of its work, the complex nature of the European Union's decision-making system and the Parliament's role in it and perhaps above all the absence of an identifiable European executive arising directly from the European Parliament. The Reform Treaty offers the possibility of at least a partial solution to the last problem. (Please see following paragraph.)

European Commission

11. How the new Commission envisaged by the Reform Treaty will function is largely subject to the caveats of this submission's introductory comment. The European Parliament already regards itself as exercising a large measure of supervision over the European Commission, and this self-assessment will no doubt be enhanced by the extension of co-decision. More important potentially for the relationship between Parliament and Commission are the provisions of the Reform Treaty on the election of the European Commission's President in the light of the European 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. This in its turn might well enhance the democratically legitimising capacity of the European Parliament. The apparent absence of political consequences following from European Elections is certainly one reason why many electors doubt the European Parliament's capacity to make the European Union more democratic in its structures.

Charter of Fundamental Rights

12. Serious technical and legal questions surround the application in the United Kingdom of the Charter of Fundamental Rights and the UK Protocol on the Charter. These technical and legal issues should not be confused with the separate question of whether the Charter could represent in any genuinely foreseeable circumstances a significant threat to the United Kingdom's economic well-being. If it does not represent any such threat, then the interesting technical and legal questions about the Charter and the British Protocol logically deserve less political salience than they have enjoyed until now in the discussion of the Reform Treaty.

National Parliaments

13. The provisions of the Reform Treaty represent a clear compromise between those who wished to create for national parliaments a central and specific role within the European Union's legislative process and those who, for practical or philosophical reasons, did not favour such a role. Practical arguments cited by the latter included the difficulty of establishing any common view between 40 different elected national parliaments and the new complication which would have been introduced into an already complex legislative system by anything approaching a veto for these national parliaments on European legislation. Philosophically determining for many was the belief that the main contribution of national parliaments to the Union's legislative procedure should be their control of their national executives and what they do in the Council of Ministers rather than any attempt directly to shape European legislation in competition with the European Parliament. The compromise attained by the Reform Treaty arguably gives to national parliaments no powers that they do not already enjoy. If a large number of national parliaments today protested to the European Commission about the supposed infraction by a new legislative proposal of the principles of subsidiarity or proportionality, it would be surprising indeed if the Commission took no notice. It also has to be asked how often the Commission would anyway put forward proposals which a large number of national parliaments would find unacceptable specifically on grounds of subsidiarity or proportionality.

14. Many of those eager to involve national parliaments more directly in the Union's decision-making did so in the certainly justified belief that national parliaments represent an important source of legitimacy and national political discourse for the European Union, its institutions and workings. It may well be that the Reform Treaty is an occasion for national parliaments to review more carefully than hitherto the specific role they can play in the future evolution of the European Union. Better methods, consonant with differing national parliamentary systems, for scrutinising the role of national ministers in the Council would be one obvious starting-point. National parliamentary reports, such as those regularly produced by the House of Lords, on matters of current European controversy, would be another, compelling attention by the force of their arguments rather than by formal institutional structures to support these arguments.

Enlargement

15. Please refer to introductory comment. If there are public and political reservations surrounding any particular proposed new member of the European Union, be it Croatia, the Ukraine or Turkey, the Reform Treaty will help the expression of those reservations, but it will not itself have created them or even substantially facilitated their emergence.

Simplified Revision Procedure

16. Throughout the European Union, there is a widespread sense among politicians, officials and commentators that in recent years enough, or even too much time has been devoted by the Union to the discussion of institutional matters. It would be surprising indeed if unanimity could be achieved between the 27 member states in the foreseeable future for any use of the simplified revision procedure or the other passerelles of the Treaty on anything other than genuinely marginal and technical changes. It is worth pointing out in conclusion that modification in the practical workings of the Reform Treaty will be entirely possible in the coming years through inter-institutional agreements rather than new Intergovernmental Conferences and treaty amendments. The respective roles of the High Representative and the President of the European Council in the external representation of the Union would be an obvious candidate for an agreement of this kind.

12 December 2007

Memorandum by Andrew Duff MEP

1. The Committee will be aware of my recent oral evidence, now published in the 35th Report of Session 2006–07. I have also submitted memoranda of evidence to Sub-Committee E and to Sub-Committee G on their respective topics. This memorandum deals with the broader institutional questions, and is intended to be fairly factual.

2. To recall my own interest in these matters, I served in the European Union's Convention on the Charter of Fundamental Rights (1999–2000) and in the Convention on the Future of Europe (2002–03). During 2007, I was one of the Parliament's three representatives in the Intergovernmental Conference (IGC).

3. As we know, the Treaty of Lisbon is due to be signed on 13 December. It is intended to enter into force on 1 January 2009.[1]

4. The new Treaty will much enhance the Union's capacity to act by increasing the efficiency and effectiveness of the institutions and decision-making 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.

5. The Treaty of Lisbon will greatly improve the democratic character of the Union by increasing Parliament's powers, by entrenching the Charter of Fundamental Rights and by strengthening the rule of law. It clarifies the values and reaffirms the objectives of the Union.

6. The Treaty of Lisbon amends the *Treaty on European Union (TEU)* (essentially the Treaty of Maastricht) and the *Treaty establishing the European Community (TEC)* (essentially the Treaty of Rome), which is renamed the *Treaty on the Functioning of the European Union (TFEU)*. Both treaties have the same legal rank.[2] Even if the new Treaty is no longer overtly a constitutional treaty, it manages to preserve most of the important achievements of the *Treaty establishing a Constitution of Europe* which was signed in 2004 but never ratified.

7. The *Charter of Fundamental Rights* becomes binding and has the same legal value as the Treaties, although its text will not be in the Treaties.[3] The Charter will be solemnly proclaimed at a plenary session of the Parliament by the Presidents of the Parliament, the Council and the Commission on 12 December and published in the *Official Journal*. A Protocol introduces specific measures for the United Kingdom and Poland seeking to establish national exceptions to the justiciability of the Charter.[4] The Treaty provides a new legal basis for the accession of the Union to the *European Convention on Human Rights*.[5] The Council will decide this by unanimity, with the consent of European Parliament and the approval of member states.

8. The concept of *EU citizenship* is affirmed and developed.[6] The right of citizens to approach the Court of Justice is broadened.[7] Participatory democracy is enhanced notably through the right of *citizens' initiative* which allows at least one million signatures from a significant number of member states to ask the Commission to take a specific initiative.[8]

9. A clearer and more precise *delimitation of competences* conferred on the Union by member states is introduced.[9] The Union enjoys three categories of competence: exclusive, shared or complementary, and supporting or supplementary. EU competences are in any case limited to those expressly conferred by the Treaties, and, in non-exclusive areas, their use is governed by the principles of subsidiarity and proportionality.[10] The regional and local dimension of subsidiarity is also recognised.

10. There is also a *flexibility clause* to allow the Union to acquire powers to attain its objectives where the Treaties do not already provide them.[11] Competences can either be increased or reduced.[12] Member states gain the *right to secede* from the Union.[13]

11. *Co-decision* between the Council and Parliament is substantially extended (as foreseen by the constitutional treaty) and becomes the *ordinary legislative procedure*.[14] Particularly 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. The European Parliament now becomes the co-equal legislator for almost all European laws. The new *budgetary procedure* ensures full parity between Parliament and Council for approval of the whole annual budget (the distinction between compulsory and non-compulsory CAP expenditure is abolished). The multi-annual financial framework, which becomes legally binding, also has to be agreed by Parliament.[15]

[1] Article 6(2) Reform Treaty.
[2] Article 1 TEU.
[3] Article 6(1) TEU; Declaration 1.
[4] Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom; Declarations 61 & 62.
[5] Article 6(2) TEU and Protocol on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms; Declaration 2.
[6] Articles 8 TEU & 17 TFEU.
[7] Article 230(4) TFEU.
[8] Articles 8b TEU & 21 TFEU.
[9] Articles 2a–2e TFEU and Protocol on the exercise of shared competence.
[10] Article 3b TEU.
[11] Article 308 TFEU.
[12] Article 48(2) TEU; Declaration 18.
[13] Article 49a TEU.
[14] Article 251 TFEU.
[15] Articles 9a(1), 9c(1) TEU & 268–279b TFEU.

12. *Qualified majority voting* becomes the general rule in the Council—defined as a double majority of 55% of states representing 65% of the population (while a minimum number of four states is needed to constitute a blocking minority).[16] 40 significant items move from unanimity to QMV, including the whole of justice and interior affairs. Only the most sensitive areas remain subject to unanimity: tax, social security, citizens' rights, languages, seats of the institutions and the main lines of common foreign, security and defence policies. In some of these areas, such as anti-discrimination measures, Parliament gains the right of consent.[17] And in others, such as ecological taxation, specific *passerelles* to the ordinary legislative procedure are inserted.[18]

13. However, the new system will not come into force until 2014—and will still be subject, until 2017, to being blocked by recourse to the voting rules of the Treaty of Nice.[19] On top of that, a new mechanism based on the "*Ioannina compromise*" will allow 55% of states forming a blocking minority to ask for a delay and reconsideration of a draft law before its adoption.[20] A Protocol negotiated in the last hours of the IGC, at the request of Poland, states that the Council can only amend or repeal the Ioannina clause by consensus.[21]

14. *Enhanced cooperation*[22] among nine or more states becomes both easier and more purposeful, due to the fact that a core group is enabled to introduce QMV where unanimity will still apply in the Council of 27.[23] The militarily capable and politically willing are enabled to go forward to (permanent) *structured cooperation in defence*.[24] A *solidarity clause* means that member states will assist each other in the event of armed aggression.[25]

15. A new "permanent" *President of the European Council* (elected for 2.5 years) will chair and drive forward its work. He or she will prepare meetings of the European Council and report to Parliament afterwards.[26] The European Council becomes a fully fledged institution of the Union, subject to supervision by the Court of Justice.[27]

16. With the exception of the Council of foreign ministers, which is to be chaired by the High Representative, the other *sectoral Councils* are to be chaired by ministers from a team of three member states for a period of 18 months.[28] The Council will have to legislate in public.[29]

17. The new Treaty introduces the principle of degressive proportionality for the apportionment of *seats in the European Parliament*. Paradoxically, this principle was immediately breached by the IGC, which gave one more seat to Italy for the term 2009–14, asserting that the Parliament will now be composed of 750 members plus its President.[30] The largest state (Germany) will have 96 MEPs; the smallest (Malta and Luxembourg) six. MEPs will henceforward represent "the Union's citizens" rather than "the peoples of the States".[31]

18. The *President of the Commission* will be elected by Parliament. The candidate will be proposed to MEPs by the European Council, nominated by QMV, taking into account the results of the parliamentary elections.[32] Parliament will also invest the whole Commission,[33] including the High Representative for Foreign Affairs, who will also be Vice-President of the Commission.[34] The size of the *European Commission* will be reduced after 2014, corresponding to two thirds of the number of member states, unless the European Council decides (unanimously) otherwise. To ensure equality between states, a rotation system will assure each state representation in two colleges out of three.[35]

19. The double-hatted *High Representative for Foreign Affairs* will chair the Council of Foreign Affairs. He or she will be appointed by the European Council with the agreement of the President of the Commission.[36] Parliament will be consulted about the appointment of the first (interim) High Representative, foreseen for January 2009.[37] The High Representative will manage a new *European External Action Service*, formed by a

[16] Articles 9c(4) TEU & 205 TFEU.
[17] Article 16e TEU.
[18] Article 175 TFEU.
[19] Article 9c(5) TEU and Articles 3 & 4 of Protocol on transitional provisions.
[20] Declaration 7.
[21] Protocol on the Decision of the Council relating to the implementation of Article 9c(4) TEU and Article 205(2) TFEU between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other.
[22] Articles 10 TEU & 280a–280i TFEU.
[23] Article 280h TFEU.
[24] Articles 27(6) & 28e TEU and Protocol on permanent structured cooperation established by Article 28a TEU.
[25] Articles 28a(7) TEU & 188r TFEU.
[26] Article 9b TEU; Declaration 6.
[27] Article 230 TFEU.
[28] Articles 9c(9) TEU, 201b(b) TFEU; Declaration 9.
[29] Article 9c(8) TEU.
[30] Article 9a(2) TEU; Declaration 4.
[31] Article 189 TEC.
[32] Article 9d(7) TEU; Declarations 6 & 11.
[33] Article 9d TEU.
[34] Article 9e TEU.
[35] Article 9d(5) TEU; Declaration 10.
[36] Article 9e TEU; Declaration 6.
[37] Declaration 12.

combination of national civil servants, the Council secretariat and the Commission. The External Action Service will be established by the Council during 2008 with the consent of the Commission after consulting Parliament.[38] As the External Action Service will be funded from the EU budget, MEPs will obtain significant control.

20. The jurisdiction of the *European Court of Justice* is expanded to all the activities of the Union with the express exception of common foreign and security policy.[39] However, the Court has 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). It can hear appeals against restrictive measures and give an opinion about an international treaty.[40] Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.[41] The number of advocates-general is increased from eight to eleven.[42] Specialised courts can be set up, with the agreement of Parliament, for example, in patent law.

21. The *primacy of EU law* is affirmed, if rather clumsily.[43] Member states must ensure adequate remedies, and the powers of the Court and the Commission to impose penalties in case of infringement are increased.[44] Any further expansion of the Court's powers has to be agreed unanimously.[45]

22. The Union gains a *single legal personality* in international law across its whole competence.[46] Member states may only sign international agreements that are compatible with EU law. Parliament has to approve all agreements in fields covered by the ordinary legislative procedure, association agreements, and those with budgetary or institutional implications.

23. The single legal personality means that the "third pillar" in the field of justice and home affairs will disappear entirely after a five year transition, with common policies in the *area of freedom, security and justice*, including Schengen, assimilated within the "first pillar" or Community method.[47] The Commission's right of initiative in justice and interior affairs, however, is shared with one quarter of member states.[48]

24. Only the common foreign, security and defence policies, provided for in the TEU, continue, in the main, to have specifically *intergovernmental procedures*.[49] The mandate of the European Defence Agency, however, is broadened.[50]

25. Accordingly, while the powers of the Commission, Parliament and Court are extended to the Union's policies on interior affairs, initiatives by member states remain possible in certain cases. There are also some "*emergency brakes*" which allow states to refer issues to the European Council if they feel that their vital national interests are at stake. In all those cases, other states are propelled forward into enhanced cooperation.

26. The UK and, reluctantly, Ireland have specific protocols which allow them to either *opt into or opt out* of EU common policies concerning Schengen and the area of freedom security and justice. But they may exercise this privilege only according to terms, conditions and timetables to be established in each case by the Council and Commission (who will try to maximise both participation and coherence).[51] The UK may not opt in at the beginning of a legislative procedure and, then, at the end, opt out. Nor may it stick with an existing policy if the others wish to revise it. Nor may it continue to participate in existing common policies if, after a transitional period of five years, it refuses to accept the new powers of the Commission, Parliament or Court.[52]

27. The UK has obliged its partners to raise the barrier with respect to the *free movement of workers*. Any member state may now veto a law on labour mobility by claiming that it affects "important" (rather than "fundamental") aspects of its national social security.[53] The European Council may suspend the legislative process.

28. The time allowed for *national parliaments* to scrutinise draft law is raised from six to eight weeks. One third of national parliaments may object to a draft legislative proposal on the grounds of a breach of subsidiarity—the "*yellow card*". The Commission will then reconsider it. In addition, if a simple majority of national parliaments continue to object, the Commission refers the reasoned objection to the Council and Parliament,

[38] Article 13a TEU; Declaration 15.
[39] Articles 9f & 11(1) TEU.
[40] Article 240a TFEU.
[41] Article 188n(11) TFEU.
[42] Declaration 38.
[43] Declaration 17.
[44] Article 228(2–3) TFEU.
[45] Article 229a TFEU.
[46] Article 46a TEU.
[47] Article 10 Protocol on transitional provisions.
[48] Article 61i TEFU.
[49] Articles 10a–28e TEU.
[50] Article 28a TEU.
[51] Article 5 of the Schengen Protocol; Protocol on position of the UK and Ireland in respect of the area of freedom, security and justice.
[52] Article 10 Protocol on transitional provisions.
[53] Article 42 TFEU.

which will decide the matter—the "*orange card*".[54] A new clause usefully describes all the formal functions of national parliaments in relation to EU affairs.[55]

29. The *Committee of the Regions* gains the right to approach the Court of Justice.[56] Dialogue between the institutions and civil society, including the churches, is enhanced.[57] The tripartite summits, with the social partners, are enshrined in the treaty.[58]

30. *New legal bases* have been introduced for intellectual property rights, sport, space, tourism, civil protection and administrative cooperation.[59] Environment policy has been supplemented by a reference to combating climate change.[60] Common energy policy has been strengthened with respect to security and interconnectivity of supply and solidarity.[61] Enlargement policy will now need to take into account the Copenhagen criteria.[62] The Commission's role in the excessive deficit procedure is enhanced.[63] Whereas competition is no longer one of the official objectives of the Union, the status of competition policy is (probably) undiminished.[64]

31. Otherwise, the economic governance of the Union is adjusted modestly to give more autonomy of action to the eurogroup, including in international financial institutions.[65] A specific legal basis is introduced for *services of general economic interest*.[66]

32. New *horizontal clauses* ensure that, in the definition and implementation of its policies, the Union will take into account the social dimension of the single market, sustainable development and combating discrimination.[67]

33. A new *hierarchy of norms* is established which distinguishes between legislative acts, delegated acts and implementing acts[68]—although, confusingly, the terms "law" and "framework law" postulated in the 2004 constitutional treaty have been abandoned in favour of keeping the present terminology (directives, regulations and decisions). Parliament and Council have co-equal powers to decide how to control delegated and implementing acts (comitology).[69]

34. Parliament has an enhanced role in the procedure for future *Treaty revision*: vitally, it gets the right of initiative, it is part of the Convention which will be the norm for major treaty change (and its consent is necessary if there is not to be a Convention). There are *simplified revision procedures* for minor amendments: common internal policies can be modified by unanimous decision of the European Council with the approval of national parliaments (with the European Parliament consulted); decision making can be switched from unanimity to QMV, or from abnormal to the normal legislative procedure, by a unanimous decision of the Council (and the consent of both European and national parliaments)—the "*passerelle*".[70]

35. If successfully ratified, the Treaty of Lisbon will be a decisive step forward in the constitutional evolution of the European Union. In historic terms it is at least as significant as the Treaty of Maastricht (1991) which introduced the single currency and established early provisions for foreign and security policy and for cooperation in police and judicial affairs.

36. Agreement on the new Treaty will mark the end of the phase of controversial political integration which began with the Convention on the Charter of Fundamental Rights in 1999, and later developed by the Treaty of Nice (2000), the Declaration of Laeken (2001), the Convention on the Future of Europe (2002–03), the Treaty establishing a Constitution for Europe (2004), the referendums in France and the Netherlands (2005), and the subsequent "period of reflection".

[54] Article 7(2) & 7(3) of the Protocol on the application of the principles of subsidiarity and proportionality as well as Protocol on the role of national Parliaments in the European Union. For the role of national parliaments see also Articles 3b, 8a(2), 8c & 48 (2–3) & (7) TEU & 61b, 65 & 308(2) TFEU.
[55] Article 8c TEU.
[56] Protocol on subsidiarity; Article 230(3) TFEU.
[57] Articles 8b TEU; 16c TFEU.
[58] Article 136a TFEU.
[59] Respectively, Articles 97a, 149, 172a, 176b, 176c, 176d TFEU.
[60] Article 174 TFEU.
[61] Article 176a TFEU.
[62] Article 49 TEU.
[63] Article 104 TFEU.
[64] Protocol on the Internal Market and Competition.
[65] Articles 115a & 115ac TFEU.
[66] Article 16 TFEU; Protocol on services of general interest.
[67] Articles 2 TEU & 2a–6b TFEU.
[68] Articles 249–249d TFEU.
[69] Articles 249b & 249c TFEU.
[70] Except in defence policy. Article 48 TEU.

37. With the new Treaty in force, the Union will not need and will not seek the transfer of new competences from member states. Although some further rationalisation and simplification will continue to be both possible and desirable, the system of government achieved by Lisbon should, in all essentials, be strong and durable.

Memorandum by the European Parliamentary Labour Party

1. The development of the European Union has been fundamental in establishing an area of peace and stability in a continent previously ravaged by war, in enhancing prosperity and welfare through the creation of the world's largest single market with common rules for social standards, consumer protection and fair competition in enabling Member States to work together to address issues that transcend national borders, not least the environment, and in giving Europe a stronger voice in world affairs.

2. There has, for some time, been consensus amongst the EU governments on the need to reform and strengthen the structures of the EU in order to consolidate its existing achievements and to improve the capacity of a Union of 27, and potentially more, Member States to function effectively and to be subject to greater democratic accountability.

3. A first attempt to reform, consisting of repealing the previous treaties and replacing them with a Constitution, was ratified by two-thirds of the Member States but stalled when it was rejected by France and the Netherlands.

4. This new attempt, the Treaty of Lisbon or "Reform Treaty" explicitly abandons the idea of a Constitution in favour of a traditional treaty, comprising a set of amendments to the two existing treaties, while preserving the bulk of the institutional adjustments that it contained. This change is very important. The term "Constitution" was probably the factor that caused its defeat in the Netherlands and was an issue in France. In Britain it was used to justify calls for a referendum on the grounds that this was no ordinary treaty but, as a Constitution, was something different and more significant. Whether this would really have justified a referendum is debatable, but now that this has been abandoned it would be extraordinary to hold a referendum on a conventional amending treaty. Besides, Britain, as a parliamentary democracy, has never ratified an international treaty by means of a referendum.

5. Other "constitutional" features have also been abandoned in the Reform Treaty: the upgrading of the High Representative to the status of "Minister"; giving treaty status to the symbols (flag and anthem); the change of the terminology for EU legal instruments, (with EU regulations becoming "EU laws" and EU directives becoming "EU framework laws"). In addition, the Charter of Fundamental Rights will not be a full part of the treaty but will be binding on the EU institutions and will apply to the field of European law with a protocol added to clarify that it does not affect or override UK domestic law; the changes to the voting weights in the Council of Ministers will not start to come into effect until 2014; a right to opt-out is given to Britain on criminal law and co-operation on legal matters.

6. All of the above make the Reform Treaty significantly different from the Constitution, especially for Britain. But the Reform Treaty does retain many of the practical institutional reforms and adjustments that had been in the Constitution and which seek to make the EU function more effectively and to enhance its democratic accountability. Let us begin by focusing on the latter.

More Democratic Accountability and Transparency

7. The Reform Treaty contains a number of innovations that will improve the democratic accountability of the European Union.

8. Under the treaty, the approval of virtually all EU legislation will require the dual approval of elected governments in the Council of Ministers and directly elected MEPs in the European Parliament—the full time representatives that voters choose to represent them specifically at European level. This dual scrutiny provides a double quality control for all European legislation. Similarly, the treaty provides that all budgetary spending must be subject to double approval by the Council and the European Parliament. This is particularly relevant to CAP spending which is currently decided exclusively by the Council of Ministers. Opening these policy areas up to the European Parliament will inevitably make policy delivery more transparent and make the way that the EU spends its budget more open and balanced.

9. The treaty will also provide for the Council of Ministers to meet in public when discussing legislation—a long overdue reform that was driven by the 2005 UK Presidency.

10. One of the key innovations of the treaty provides that all EU legislative proposals must first be sent to national parliaments. This should enhance the ability of national parliaments to shape the position taken by their own government representatives and to scrutinise their actions in Brussels.

11. National parliaments will also have the power to send proposals back to the Commission, if a minority (one third) believe that the proposal breaches the principle of subsidiarity and that the issue should be for national—not European—law. If a majority oppose a proposal, this will trigger a vote in the Council that will kill off the proposal in all but the most unusual of circumstances.

12. The Commons European Scrutiny Committee has voiced concerns about the passage in the text that reads "national parliaments contribute to the effective functioning of the Union". This was amended during the IGC from "national parliaments shall contribute to the effective functioning of the Union", a phrase which some felt inferred a legal obligation on national parliaments. We do not share these concerns. On the contrary, the passage formalises the fact that national parliaments are involved in formulating European legislation not just the EU institutions and national governments and, consequently, has been welcomed by the vast majority of national parliaments across the EU.

13. The treaty provides for the President of the Commission to be elected by the European Parliament. The nomination of a candidate by the European Council must take account of the European election results and the majorities that are possible in the European Parliament. This, coupled with the need for a vote of confidence by Parliament for the entire Commission, will make it clear that the Commission is not a bunch of unelected bureaucrats, but is a politically accountable executive dependant on the confidence of the elected Parliament.

14. The democratic control of the exercise of delegated powers by the Commission will be reinforced through a new system of supervision by the European Parliament and the Council that will enable each of them to call back Commission decisions on delegated legislation to which they object and give each of them the right to revoke the delegation of powers.

15. The procedure for revising the Treaties will be, in future, more open and transparent. The European Parliament will gain the power to submit proposals to that end, and the scrutiny of any proposed revision must be carried out by a Convention which will include representatives of national parliaments and of the European Parliament, unless Parliament agrees that this is not necessary; This will ensure that any future amendments to the treaties are subject to wider scrutiny and more public debate.

16. All in all, these measures are modest adjustments, but, nonetheless, they will create a system with multi-layered and multi-faceted democratic scrutiny, this will give the EU a level of parliamentary scrutiny that exists in no other international structure.

More Efficient Institutions

17. The six-months rotating presidency of the European Council will be replaced by a President elected by its members for a 30 month term, thus allowing for more coherence in the preparation and follow up of its meetings (thereby arguably strengthening the main intergovernmental body of the Union at the expense of the Commission).

18. The Treaty merges the two existing posts of High Representative for Foreign Affairs and External Relations Commissioner to create a "double hatted" High Representative who will be a Vice-President of the Commission and will chair the Foreign Affairs Council. This should avoid duplication and give the EU a single voice on foreign policy issues where the Member States have agreed to act collectively. This High Representative will be both accountable to the Council and, as a member of the Commission, to the European Parliament.

19. The single external action service, composed of civil servants of the institutions and of the national diplomacies, under the responsibility of the Vice-President/High Representative, will ensure coherence of the execution of the Union's external action. Previously, the external representations of the Union around the world came under exclusive responsibility of the Commission.

20. The Treaty will cap the European Parliament, which has grown from 518 members in 1994 to 785 members, at 751 members (roughly the same size as the current House of Lords). Under the Reform Treaty, these will be allocated using a system of "degressive proportionality", with a country's seats decided by its population. This is a fairer method than the current method of allocating seats according to blocks of countries and negotiating skill or trade-offs by EU leaders. However, it is a matter of regret that, at the October summit, an extra parliamentary seat was attributed to Italy in derogation of the principle of "degressive proportionality".

21. Similarly, the new voting arrangements in the Council of Ministers will deliver fairer and more efficient decision making, with a 55% majority of countries representing 65% of the entire EU population required to approve European legislation. Incidentally, basing votes in Council on population will increase Britain's share of the votes from 8.5% to 12%.

22. The number of members of the Commission will be reduced, to avoid it changing, through successive enlargements, from a compact executive into a miniature assembly. As of 2014 it will be confined to a size equal to two-thirds of the number of Member States, thus conferring more cohesion to the college, while a rotation system will ensure equal participation of all Member States. Being without a commissioner for one term in three is better than always having a member of an oversized and unwieldy Commission.

Reform Rather than New Powers

23. The Reform Treaty is an evolutionary rather than a revolutionary treaty, focusing not on giving the EU more responsibilities but on enabling it to use its existing responsibilities more effectively.

24. The treaty defines more clearly the areas where the EU can and cannot act, under the principle that all competencies that are not conferred upon the Union by the Treaties remain with the Member States. The Union's objectives and competencies 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.

25. The treaty also specifies that powers can be returned to the member states. Whether this is necessary or not depends on the member states themselves, because they are the gatekeepers of what goes into the European domain and what does not. And it is worth recalling that the EU cannot deal with any subject unless all member states have agreed to put it into the treaty. Even then, the intensity of EU action is determined by the Council, a body composed of national ministers from national governments accountable to national parliaments. The EU does not determine its own remit—member states do—and the Reform Treaty will not change this.

26. Indeed, the treaty contains, for the avoidance of any doubts, sufficient guarantees that the Union will not become a centralised all-powerful "superstate":

- the obligation to respect the "national identities of Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government", as well as "their 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";
- the principles of conferred powers (whereby the Union's only competences are those conferred on it by the Member States), subsidiarity and proportionality;
- the participation of the Member States themselves in the Union's decision-making system and in agreeing any changes to it; and
- recognition of the right of Member States that wish to do so to leave the Union.

Common Fears

27. The fears of eurosceptics about the provisions that would give the EU "legal personality" are misguided. The EC has always had legal personality (the right to sign binding agreements and to be sued), as most international organisations do. International agreements signed by the EU will require the approval of the Council. The confusion between the "European Community" and "European Union" will end as treaty establishes that the European Union becomes one single legal entity and structure.

28. Others have queried the extension of majority voting. It should be remembered that the veto is a double edged sword: if you have one, so does everybody else. Things that Britain wants can be blocked by the veto of just one of 26 other countries. Of course, unanimity is retained for the sensitive areas of tax, social security, foreign policy, defence and decisions on the method of financing the EU, (including the British budget contribution). In fact, of the 50 extensions of majority voting, most are in areas that are either technical or where Britain has an opt-in/out. The handful that are politically important such as urgent humanitarian aid operations, aspects of energy policy and co-operation in the event of natural disasters are all where it is in Britain's interests not to be blocked by the vetoes of others. In any case, the new system of voting, linked to the size of each country, will actually increase Britain's share of the votes.

29. With regard to claims that the Reform Treaty is "self-amending" and so "the powers of the EU could be increased without the need for any new treaty", it is worth pointing out that no change to the EU treaties can be made without the approval of each and every Member State. Whether or not we want to make further changes to the EU treaty therefore lies entirely in our hands. Even minor changes, according to the treaty, must be "notified to the national parliaments", and if even a single one objects, the changes "shall not be adopted".

Conclusions

30. Discussion on the treaty boils down to the following: "reform versus more of the same". Taken as a whole, the Reform Treaty is a substantial improvement on the existing treaties as amended by the Treaty of Nice, which will bring more democratic accountability to the Union (through a strengthening of the roles of the European Parliament and national parliaments), enhance the rights of European citizens vis-à-vis the Union and improve the functioning of the Union's institutions.

31. Blocking the reform treaty will mean more of the same—the EU as it is now, with less democratic scrutiny, accountability or transparency than it should have, and constrained by a structure that was designed for a union of 15 rather than 27 nations.

32. The Reform Treaty is a set of useful reforms that will make the EU institutions more responsive to Member States, their parliaments and their people. In other words, it will deliver a more focused EU, better capable of delivering in those policy areas where we benefit from common European action, but subject also to stronger safeguards and more scrutiny. This Treaty will provide a stable and lasting framework for the future development of the EU and deserves our support.

Richard Corbett MEP
On behalf of the European Parliamentary Labour Party

13 December 2007

Memorandum by Federal Union

An Opportunity for Democracy

1.1 Federal Union was founded in 1938 to campaign for federalism for the UK, Europe and the world. It has argued since then that democracy and the rule of law should apply between states as well as within them.

1.2 Federalism divides political power between levels of government to achieve the best combination of democracy and effectiveness. It is not the bureaucratic centralisation of popular myth.

1.3. This submission addresses three of the nine questions, numbers 3, 5 and 7, with a conclusion at the end.

3. The impact of the Reform Treaty on the role and functioning of the Council of Ministers, including the effects of the use of team Presidencies, their relationship with the President of the European Council, and the new system of qualified majority voting

3.1 In addition to the points mentioned in the question above, one should also consider the additional requirement (in paragraph 17 of the Lisbon treaty, Article 9C(8) of the future consolidated treaty) for the Council of Ministers to "meet in public when it deliberates and votes on a draft legislative act". This is a provision that could, if applied properly, make a great deal of difference to the way in which the European Union functions.

3.2 Given full access to the relevant information, it will enable national parliaments to hold to account their national representatives in Council meetings much more effectively than they have been able to do in the past. However, a lot still rests on the exact definition of meeting in public. Present practice focuses on the final vote on a legislative proposal, but every stage of the legislative procedure should be open to scrutiny: specifically, all amendments to legislative proposals should be documented, with the identity of the proposer of each amendment and the way in which the votes are cast.

3.3 As an example of this problem, the Commission proposal for reform of the EU sugar regime in 2005 was amended in Council discussions to increase the overall cost of the regime to the taxpayer by 300 million euros per year but, because this change took place by way of amendment to the original proposal, before the final vote was cast, there is no trace of who supported it and who did not. By way of comparison, 300 million euros is more than the EU spends on its environmental programmes annually. Decisions about public money should not be taken in this way. (Source: Openness and secrecy in the EU institutions: lessons from the EU sugar regime, Federal Trust Policy Brief 28, June 2006)

3.4 Adopting this degree of openness would oblige national governments represented in the Council to explain and justify their actions more completely. This would lead both to better government and also to better public understanding.

3.5 To suggestions that this degree of openness would bring the work of the Council to a halt, it should be noted that this proposal relates only to legislation and not the other aspects of the Council's work, and further that this degree of openness on legislation is already practised by the European Parliament (and indeed the two houses of parliament in Westminster).

3.6 It is possible, as a result of this change, that national governments might be less willing to support proposals in Brussels that they could not justify directly in front of their own voters. This might be no bad thing.

5. *The impact of the Reform Treaty on the role, functioning and membership of the European Commission, including the effects of the changes to Commission selection and the accountability of the Commission to the European Parliament*

5.1 One of the most frequent complaints voiced about the European Union relates to the unelected nature of the European Commission. Paragraph 18 of the Reform Treaty (creating a new Article 9D(7) in new treaty) states that future nominations for president of the Commission will be made "Taking into account the elections to the European Parliament and after having held the appropriate consultations" and such a nominated candidate "shall be elected by the European Parliament by a majority of its component members".

5.2 This would give the president of the Commission the same kind of legitimacy as that enjoyed by the prime minister of a Member State—holding office on the strength of an election victory—if properly implemented. To be properly implemented, though, the political parties that fight the European elections must, alongside their manifestos, nominate their candidates for president.

5.3 The alternative is that the identity of the next president of the Commission will emerge, as before, as a result of opaque and distant negotiations behind closed doors. We do not think this is the way that positions of political importance should be acquired.

5.4 Anyone elected to the European Parliament in June 2009 will face, shortly after being elected, the task of voting for or against a candidate proposed by the European Council. It is surely not too much to ask that candidates should declare before the parliamentary election how they will vote if elected. Many voters might consider this rather salient information.

5.5 This duty is incumbent particularly on all those who have complained that the European Commission is too distant or remote from the voters. Party politicians of all parties should therefore be asked to declare their personal support for the idea that their own party should nominate a candidate for president in 2009.

7. *The impact of the Reform Treaty on the role of national parliaments*

7.1 National parliaments are one of the big gainers from the Reform Treaty, or rather, they are if they want to be. This manifests itself in two ways.

7.2 First, there is the opportunity provided by increased openness in the Council (discussed in the answer to question 3). Secondly, there is the new right accorded to national parliaments to scrutinise legislative proposals from the European Commission (Protocol on the role of national parliaments in the European Union). This gives them for the first time a direct stake in the EU legislative process.

7.3 Whether or not they will be able to use this right effectively depends on how they are organised to deal with such legislative proposals or, more correctly, how they organise themselves. It is incumbent on all those national politicians who believe that they have not been involved enough in the European legislative process up until now to rethink the procedures they follow in order to fulfil their new duties more effectively.

8. Conclusion

8.1 In each of the three areas highlighted in this submission, the provisions of the Reform Treaty will increase the democratic nature of the EU's institutions. Some people have remarked that, unlike the Single European Act which created the single market or the Maastricht Treaty which created the euro, the present Reform Treaty lacks a single big idea. This might be true, if democracy itself is not considered a big idea. In that case, Federal Union would respectfully disagree.

8.2 However, the improvements to the democratic quality of the EU's institutions are there in embryo, rather than fully formed. It will require a continuing commitment to maintain and build the EU as a democratic system: the government has not discharged its duty with a mere signature on the treaty.

8.3 Of particular importance in this context are the following:

— the willingness of national governments to live up to their commitments by ensuring a proper approach to openness in the legislative process;

— the willingness of party politicians to make a reality of their rhetoric about the European Commission and support the nomination of candidates for Commission president for the next elections in June 2009; and

— the willingness of national parliaments to engage in the EU legislative process and to examine their own procedures in the light of developments within the EU.

8.4 The adoption of the Reform Treaty creates an unprecedented opportunity to develop the democratic structures of the European Union, while increasing the role of elected politicians at national level and also increasing the political choices and influence of the voters themselves. That is why Federal Union supports it.

8.5 But the treaty remains an opportunity for democracy, rather than the certainty of it. That is why Federal Union will continue to campaign.

Richard Laming
Director, Federal Union

13 December 2007

Memorandum by Professor Simon Hix, Professor of European and Comparative Politics, London School of Economics

1. This note looks at the following issues in relation to the Reform Treaty:

— the role and impact of the President of the European Council;

— the role and impact of the new system of qualified majority voting;

— the impact of the extension of the co-decision procedure;

— the impact of the proposed changes in the selection of the Commission; and

— the overall impact of the Reform Treaty relative to previous EU treaty reforms.

2. The proposed President of the European Council, elected by a qualified majority vote for a two and a half year period renewable once, may improve the efficiency of decision-making in this particular institution, and may establish more identifiable leadership at the European level.

3. However, I see several significant problems with this post. First, the President of the European Council would not have the same authority as any of the sitting heads of government, such as a Prime Minister of the member state holding the Council Presidency under the current rotating system, and so is likely to be beholden to the governments of the larger member states or a particular coalition of governments.

4. Second, and potentially of more concern, the new post may undermine the authority of, and most likely conflict with, the Commission President. The European Council President may have higher prestige than the Commission President, however the Commission President will have considerably more formal policy-making power than the Council President, in terms of the right to initiate legislation and generally influence the policy agenda of the EU. Given the relative powers of the two posts, in a situation of conflict, for example on a major piece of legislation, the Commission President will invariably win out. Any conflict between the two posts 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.

5. For example, comparing the envisaged dual-presidency of the EU to the French dual-executive system, unlike the French President, the European Council President will not be able to hire and fire the Commission President, and due to the competing sources of authority of the two posts the EU will be in a situation of permanent "co-habitation".

6. A potential solution, in the medium-term, would be to fuse the office of the Commission President and the European Council President.

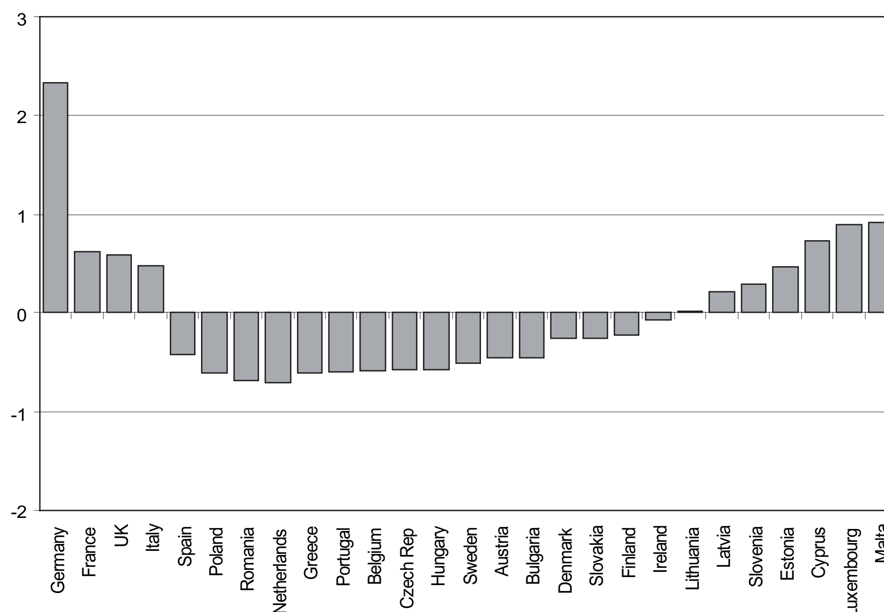
7. At a superficial level the new qualified majority voting rules in the Reform Treaty look simpler than the rules in the Nice Treaty, as the current triple majority (of 255 votes out of 345 plus 50% of member states plus 62% of the population) would be replaced by a new double majority (of 55% of member states plus 65% of population). In reality, however, the difference between the two sets of rules is relatively minor because over 90% of coalitions that commanded a majority under the Nice rules would also command a majority under the Reform Treaty rules.

8. Having said that, most scholars of decision-making are extremely critical of the qualified majority voting rules in the Reform Treaty. This is because these rules are highly inequitable in terms of the relative decision-making power they would give each member state. Under a truly equitable system of voting in the Council, every citizen in every member state should have an equal chance of being on the winning side. It is an established mathematical fact that such an equitable outcome can be achieved by a simple weighted votes system (as in the Rome Treaty), where the voting weight of each member state is some proportion of the square-root of its population. Forty-eight of the world's top political, economic and natural scientists wrote a letter to the governments proposing precisely this model, yet their advice was sadly ignored.

9. To illustrate the inequity of the Reform Treaty consider Figure 1. The figure assumes that the "power" of a member state in the Council is determined by the proportion of times that state would be on the winning side under the qualified majority rules relative to all the other member states. The population-based part of the new voting formula over-represents the four largest states relative to the power they should have in a truly equitable system, while the state-based part of the formula over-represents the six smallest states. Put another way, citizens in these 10 states are far more likely to be on the winning side in the EU than citizens in any of the 18 other states. This could have considerable long-term consequences for the legitimacy of the EU in a large number of states. In this regard, the Reform Treaty is certainly not an improvement on the flawed rules in the Nice Treaty. In my opinion, the lack of equity in the voting rules in the Council may by a sufficient reason for rejecting the Reform Treaty.

Figure 1

RELATIVE VOTING POWER IN THE COUNCIL UNDER THE REFORM TREATY COMPARED TO "TRUE EQUITY"



10. The Reform Treaty would extend the co-decision procedure to a limited number of areas. The changes in this regard would be a relatively minor extension of the powers of the European Parliament compared to the reforms of the Single European Act, the Maastricht Treaty or the Amsterdam Treaty. Nonetheless, co-equal legislative power between the Council and the European Parliament in the area of agriculture may enable the common agricultural policy to be reformed via the European Parliament. Surveys of the MEPs have shown, for example, that there is an overwhelming majority in favour of reforming the common agricultural policy in the European Parliament.

11. Regarding the proposed change to the way the Commission is chosen, at face value it might appear that the Reform Treaty would introduce an "election" of the Commission President by the European Parliament after the European elections. In practice, however, the procedure for selecting the Commission President in the Reform Treaty is exactly the same as the existing procedure. The major change in the Commission President election procedure was the introduction in the Nice Treaty of a qualified majority in the European Council for nominating the Commission President. This means that several rival candidates come forward and that there is a less than unanimous coalition of governments in favour of a nominated candidate, which then

reduces the ability of the governments to impose their preferred candidate on the majority in the European Parliament. As a result, the European Council already has to "take account" of the results of the European elections, as they did in the nomination of Barroso in July 2004. Hence, the provisions of the Reform Treaty in this area are purely symbolic and would change very little.

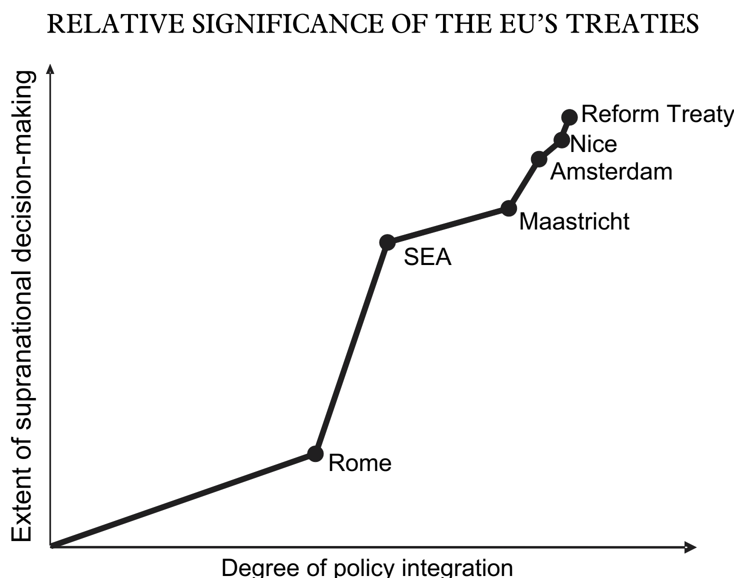
12. Overall, in terms of its impact on the policy competences of the EU and the balance of power between the EU institutions, the Reform Treaty is probably the least significant treaty the EU governments have ever signed. Unlike all previous treaties, there are no major new EU policy competences in the treaty. There is also no major extension of the powers of the European Parliament, the Commission or the Court of Justice, or a change in the balance of powers between the governments and these supranational institutions.

13. The Reform Treaty is the latest step in an almost continuous process of EU treaty reform since the mid 1980s. The fact that the governments have continually changed the treaties in the last two decades might suggest that reforming the treaties is an effective instrument for changing the way the EU works. The opposite is in fact the case. The governments have had to embark on a new round of reforms almost before the ink has been dry on the previous reforms because reforming the treaties is a very ineffective instrument. Despite lofty ambitions at the start of each process, each set of reforms has ended up being less significant than the previous set of reforms. The reason for this is that the basic architecture of the EU is closer and closer to what political scientists call an "institutional equilibrium". Some member states would like the EU to be more federal while others would like it to be more intergovernmental. Meanwhile, some states would like the EU to be more liberal while other member states would the EU to be more social democratic. The current design of the EU is a delicate balance between all these positions.

14. As the EU has got closer and closer to this equilibrium, treaty reforms have become less and less ambitious. This is illustrated in Figure 2. The figure shows how each set of treaty reforms changed the EU architecture on two key dimensions: (1) the degree of policy integration, in terms of the extent of policy competences of the EU relative to the policy competences at the national level; and (2) the degree of supranational decision-making in the institutions at the European level, in terms of the powers of the Commission, the European Parliament and the Court of Justice, and the extend of the use of qualified majority voting in the Council.

Figure 2

RELATIVE SIGNIFICANCE OF THE EU'S TREATIES



15. The Treaty of Rome was less supranational than expected after the Luxembourg Compromise in 1966. The main innovation of the Single European Act was the extension of supranational decision-making to enable the internal market to be created, through greater agenda-setting power of the Commission, qualified majority voting in the Council, and the cooperation procedure. The Maastricht Treaty then added several new policy competences, such as EMU, CFSP, and JHA, but did not significantly change the balance of powers between the institutions—for example, the Commission, the European Parliament and the Court of Justice were restricted in the new policy areas. The Amsterdam Treaty added the area of freedom, security and justice, with extensive supranational decision-making in this area, and increased the power of the European

Parliament by reforming and extending the co-decision procedure. The Nice Treaty then added defence cooperation and made some minor changes to the institutions in preparation for enlargement.

16. In sum, the basic "constitutional architecture" of the EU—of a continental-scale market created and regulated by quasi-federal institutions in Brussels, taxing and spending policies maintained at the national level, and intergovernmental cooperation on foreign policy, macroeconomic policy and some justice and security policies—is extremely stable. This architecture was put in place by the Rome Treaty, the Single European Act and the Maastricht Treaty, and was only moderately changed by Amsterdam and Nice. The Reform Treaty would not change this basic architecture much at all. From this perspective, the debates about the Reform Treaty are a lot of fuss about very little.

17. There are, however, two changes with potentially negative consequences: (1) the European Council President, which may conflict with, and undermine the authority of, the Commission President; and (2) the new system of qualified majority voting in the Council, which is a highly inequitable system and may undermine the legitimacy of the EU in a significant number of member states.

27 November 2007

Memorandum by The Right Hon Sir Francis Jacobs KCMG, QC[71]

The Reform Treaty

Introduction

1. I have sought to address several, but not all, of the questions referred to me by the Select Committee and Sub-Committee E. It seems sensible to submit a combined reply to both sets of questions. I have not dealt with questions relating to special arrangements negotiated by the United Kingdom, in the form of opt-ins, opt-outs, etc, the effect of which must remain obscure until they are applied in practice. Nor have I dealt here with the Charter of Fundamental Rights.[72] Although the Charter does not confer new rights, it could have some effect on the interpretation of existing rights, but the outcome is not easy to predict, and again may be affected as regards the UK, in ways difficult to foresee, by the special arrangements which the UK has negotiated.

Competences of the Union and the Member States

2. In my view, the Reform Treaty contains valuable provisions on the competences of the Union and the Member States.

3. In the first place, the Treaty inserts into the EC Treaty (re-named the Treaty on the Functioning of the European Union (TFEU)), new Articles 2A to 2E, which contain a full statement of the respective competences of the Union and the Member States. It is helpful to have, at the outset of the Treaty, a clear statement on this. There is no such statement of competences in the present treaties, and the subject sometimes requires an analysis of the case-law of the Court of Justice.

4. Moreover, these new articles of the Treaty also specify whether the Union's competence in each case is exclusive, or shared with the Member States. This too is helpful.

5. The Reform Treaty, by the amendments it makes to the Treaty on European Union, also sets out some important and helpful principles on the Union's competences.

6. The new Articles 3a and 3b of the Treaty on European Union make it clear that the Union has competences only where they are conferred upon it by the Member States; and that such conferral can take place only in the Treaties, and only in order to attain the objectives set out in the Treaties.

7. The new Article 3b(2) states explicitly that competences not conferred upon the Union in the Treaties remain with the Member States.

8. Article 3b also sets out limits on the *exercise* by the Union of the competences conferred upon it. All Union action is subject to the principle of *proportionality*: it must not exceed what is necessary to achieve the objectives of the Treaties. And where competence is shared by the Union and the Member States, action by the Union must comply with the principle of *subsidiarity*: the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can be better achieved at Union level.

[71] Professor of Law, King's College London; Advocate General, Court of Justice of the European Communities, 1988–2006.

[72] See however the substantial reservations which I have expressed about the Charter in my Hamlyn lectures: *The Sovereignty of Law: The European Way* (Cambridge University Press 2007), pp 150–151.

9. The institutions of the Union are to apply the principle of subsidiarity as laid down in a Protocol to the Treaty; the Protocol gives national Parliaments a significant role in ensuring compliance with the principle.

10. The Court of Justice, while not substituting itself for political assessments by the political institutions of the Union, can be expected in my view to be called upon more often to address the requirements of the Treaty in this regard, and perhaps to do so more stringently than hitherto, so that there may well be successful challenges to Union measures on these grounds.

What will be the practical effect of expressly conferring legal personality on the Union?

11. The concerns which have been expressed about conferring legal personality on the Union are at least in part based on misunderstandings. It has evoked anxiety about the development of the EU as a "super-State", substituting itself, in international relations, for the Member States.

12. While it is useful to distinguish legal personality under international law from that under domestic law, it is therefore the former which causes concern. The most important attribute of legal personality under international law is a treaty-making power.

13. In that regard, the following points should be considered.

14. First, although there is at present no provision in the EU Treaty formally conferring such personality on the Union, Article 24 already confers a treaty-making power, which has frequently been used, and has been accepted by third States.

15. Second, the European Communities also have treaty-making powers: the European Economic Community (now the "European Community") had had such powers under the original Treaty of Rome of 1957 (notably for external trade, under the then Article 113, now Article 133 of the EC Treaty). In the exercise of their existing treaty-making powers, the Communities have concluded many hundreds of treaties and other international agreements.

16. Third, if the question is raised about the practical effect of conferring legal personality on the Union, it may also be asked what would be the practical effect of denying the Union treaty-making power. Since under the Reform Treaty the Communities would be replaced by the Union, the effect of denying treaty-making power to the Union would be to remove the Community's existing treaty-making power, as well as disabling the Union from exercising its existing power.

The jurisdiction of the European Court of Justice in relation to Freedom, Security and Justice

17. Under the "three-pillar" system introduced by the Maastricht Treaty, the jurisdiction of the ECJ was excluded, with narrow exceptions, under the then new Second Pillar (Common Foreign and Security Policy) and limited under the then new Third Pillar (Justice and Home Affairs).

18. The position became more complex under the Amsterdam Treaty, with some matters being transferred from the Third Pillar to the First (Community) Pillar but being made subject to variable systems of jurisdiction, dependent on different forms of "opt-ins" by Member States, while the remainder of the Third Pillar continued under the title "Provisions on police and judicial cooperation in criminal matters". The resulting patchwork system was widely regarded as opaque, incoherent and generally unsatisfactory.

19. The Reform Treaty does away with the much-criticised three-pillar structure. On the jurisdiction of the Court, the Treaty still broadly excludes the jurisdiction of the Court on the Common Foreign and Security Policy (with the very limited exceptions specified in Article 240a of the TFEU), but it extends the normal system of jurisdiction to the area of freedom, security and justice, which is fully integrated into the TFEU and now comprises the following subjects:

- Policies on border checks, asylum and immigration.
- Judicial cooperation in civil matters.
- Judicial cooperation in criminal matters.
- Police cooperation.

(The Court will not however have 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": see Article 240b of the TFEU.)

20. In my view the revisions affecting the jurisdiction of the Court of Justice have several advantages and some possible disadvantages.

21. A first advantage is that the Treaty establishes a clear and coherent system of jurisdiction to replace the present confusing jumble.

22. Substantively, it is valuable that there will be available in these important areas the normal methods of judicial review and the normal jurisdiction to interpret the Treaty and Union measures. Thus the Commission will be able to take enforcement action before the Court of Justice against Member States; actions for judicial review will be available against Union measures; and the Court will have jurisdiction to rule on the interpretation of the Treaty and on the interpretation and validity of Union measures in these areas. 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.

23. The availability of uniform interpretation is also likely to promote legal certainty.

24. There are also broader considerations. The European Union is unique among all international organisations in the extent to which it is based on the rule of law. It provides a model in this regard to the outside world and is widely respected on that account—as has been illustrated, for example, by the respect shown to it by the recent case-law of the European Court of Human Rights, and more generally by attempts to establish similar judicial systems in other continents. It would be paradoxical, and perhaps unacceptable, if the Union's actions in fields impinging most seriously on civil liberties were to remain immune to the jurisdiction of the European Court of Justice.

25. Possible objections to the Court's jurisdiction being exercised in these areas are, first, that these are subjects of considerable national sensitivity where the Court would be entering areas at the heart of national sovereignty; and second, as far as the UK in particular is concerned, that the impact of Union measures and of Court decisions might not take full account of the special features of UK arrangements in these areas: one size does not fit all.

26. On the first point, part of the answer may be that it is precisely because of the importance of these areas that full judicial review and jurisdiction should be available. On the second point, leaving aside the UK's special arrangements for opt-ins and opt-outs, with which I do not attempt to deal, there is scope for the UK to intervene in all proceedings before the ECJ in order to explain the special features of its own procedures. The decisions of the ECJ may nevertheless have an adverse impact. So too, however, may decisions of UK courts. Moreover a balance has to be struck between the possible disadvantages of ECJ decisions for the UK, and the wider interest, both for the EU and for the UK, of having an effective system of judicial review for the other Member States and for the Union as a whole. This wider interest does not seem to be much recognised in the UK.

27. A final possible disadvantage of extending the jurisdiction of the ECJ is that the Court may be over-burdened and may be unable to decide cases within the required time-scale. The difficulties in that regard are already being experienced under the existing treaties. The extension of the Court's jurisdiction may raise serious problems, and may very soon make it necessary to undertake a full review of the Union's judicial system. The Committee might wish to consider making such a recommendation in its report.

Other changes in the jurisdiction of the Court

28. Other changes are relatively minor, but they include some which significantly strengthen the capacity of the Court to review Union measures for illegality across the whole field of measures subject to the jurisdiction of the Court, including the area of Freedom, Security and Justice.

29. In particular:

(1) Article 230 of the EC Treaty as amended by the TFEU extends review of the acts of the Union institutions to include acts of the European Council.

(2) Article 230 as amended extends review beyond acts of the institutions. Such review will also include review of the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects. That extension is significant as there is an increasing number of entities with power to take decisions directly affecting the interests of individuals but which are at present not subject to the jurisdiction of the Court.

(3) The scope for protection of individuals and companies against regulatory acts will be increased by removing the condition in Article 230 of the EC Treaty that the act should be of individual concern to the applicant. That condition has often made it difficult or impossible for individuals and companies to take cases to the Court. Instead there will only be a requirement, far easier to satisfy, that the act is of direct concern to the applicant and does not entail implementing measures. (In the latter event, the implementing measures themselves would be likely to be open to challenge.)

Although the scope of the term "regulatory acts" is not clear, and the term is not defined, this reform will be widely welcomed.

30. Taken together, these changes can be seen as providing substantially greater judicial protection against European Union measures and as strengthening the rule of law in the Union.

31. Finally, mention should also be made of the innovation in the appointment of members of the Court of Justice and the General Court. Under the new Article 224a of the TFEU, a well qualified panel will be set up to give an opinion on candidates' suitability to perform the duties of Judges and Advocates General before the candidates are appointed by the governments of the Member States. This is likely to ensure the high quality of members of the Courts and to reinforce their independence.

December 2007

Email from Christopher Mowbray

One could list an unending series of objections to the European "non-constitution" masquerading as the Treaty of Lisbon but let two aspects demonstrate that the last vestiges of Britain's sovereignty are being usurped by the 3,500 unelected, unsackable and unaccountable civil servants who work for and whose loyalties are to the European Union.

1. Once this "treaty" is signed the bureaucrats in Brussels will have obtained powers to seize yet more powers—without the need for any new agreements. This will be a political "open cheque". It is a disgrace that it should even have been proposed—and is a fine example of how the EU has a total disregard for democracy and the sovereignty of this national (what is left of it which is not much) not to mention the departed Prime Minister, Blair.

2. Once signed no member State (one should then write that with a small "s") will be able to sign any international agreements—relegating Britain to the status of a local council and vassal state.

If signed, this treaty will be the final nail in Britain's sovereignty—and one might ask "what would be the point of a British Parliament other than to tell us which day of the week to put out our dustbins?". In fact Brussels has already started to tell us even that already. Any parliamentarian who approves of the Treaty of Lisbon will be branded by history as a traitor.

12 November 2007

Memorandum by the National Society for the Prevention of Cruelty to Children (NSPCC)

In response to the House of Lords European Union Select Committee Inquiry into the impact of the Reform Treaty on the EU Institutions, Save the Children and the NSPCC would like to draw your attention to the attached briefing (*not printed*). The briefing is supported by the UK's leading children's charities and outlines the benefits of the Treaty for children's rights. The inclusion of children's rights represents a significant step forward in their protection.

Of particular relevance to this Inquiry is that the Treaty specifies that European Union citizens, including civil society organisations should be properly consulted as part of the EU democratic process (Article 8b). In this way, children's organisations as well as children and young people themselves should be better involved in the development of policies and have a say in the protection and promotion of children's rights throughout the EU's activities.

We hope that you find the briefing of use and that it highlights the impact that upholding children's rights can have on the decision-making processes of both EU institutions and Member State governments.

Kathleen Spencer Chapman
European Advisor
NSPCC

Louise King
UK Policy Advisor Child Rights and Protection
Save the Children

13 December 2007

Memorandum by Lord Pearson of Rannoch

The area upon which I would like to give evidence to your inquiry into the Impact of the Reform Treaty is the judicial activism of the Luxembourg Court and the consequent unreliability of the Government's "red lines".

To this end I very much hope you will be able to hear oral evidence from Martin Howe, QC, who is one of the leading British experts on this subject. I enclose a recent article he has written, which I urge the Committee to read (*not printed*).

I also suggest that your Committee considers the House of Commons Scrutiny Committee's Report on Article 308 of the EC Treaty (29th Report of the 2006–07 Session published on 13th July). This Report should be taken in conjunction with a selection of the Written and Oral Questions I have tabled recently on the use to which Article 308 has been put. Particularly important is the Court's judgement in 1996 that the first condition of Article 308, to the effect that the Community can only take action "in the course of the operation of the common market" need not apply and that action can be taken more generally under the Article "in pursuit of a Community objective". I am of course happy to help you identify any Questions and Answers your Committee might find useful.

Apart from that, I regret that the Committee is merely considering the impact which the Lisbon Treaty will make upon the existing situation under the Treaty of Nice. My colleagues and I in the UK Independence Party believe that that existing situation has largely removed our right to govern ourselves, is already very damaging and will eventually prove disastrous to our economy. My reasons for this are set out in my debate on 8th June, which refers to earlier debates on the same subject, when the Government steadfastly refused to carry out any form of cost-benefit analysis of our membership of the European Union. May I suggest that at some point your Committee should examine and publish the cumulative effects of Treaty changes since the referendum of 1975?

Together with colleagues, I am of course happy to give oral evidence on any of this, should the Committee so require.

14 December 2007

Memorandum by Professor Steve Peers, University of Essex

1. I welcome this chance to comment on the important questions concerning the EU institutions and the Treaty of Lisbon. Below I address all of the specific issues mentioned by the call for evidence in turn.

The Structure of the Treaties/Legal Personality

2. The merging of the Community and the Union is a useful simplification of the Treaty structure, but it is unfortunate from the point of view of transparency and public comprehensibility that the content of the future TEU and TFEU (existing TEU and TEC) could not be further divided between the basic rules appearing in the TEU and the detailed rules appearing in the TFEU. To that end, it would have been preferable if the detailed rules on foreign policy instead had been placed in the external relations Part of the TFEU (since there is no legal distinction any more between placing them there and keeping them in the TEU), and if some of the provisions on the EU's legal instruments, the concept of legislative procedures and the rules on delegated and implementing acts had been placed in the TEU. Some further rules on the nature of EU competences should also have been placed in the TEU, rather than the TFEU.

3. As for the EU's legal personality, the concern about this issue from some quarters is simply misplaced. The EC already has legal personality and has used it to conclude a large number of international treaties. The EU has no express legal personality, but 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. There appears to be some degree of consensus among EU specialists that the EU meets the criteria expressed by the International Court of Justice some years ago for the implied conferral of legal personality. It should be emphasised that the existence and exercise of legal personality is not a badge of statehood, as many other international organisations have express and implied legal personality (there is even an international treaty dating from 1986 concerning the law of treaties as applicable to international organisations), as of course do natural and legal persons. Nor is there any reason to suppose that an express legal personality increases the EU's competence as regards the Member States.

The European Council

4. It would probably have been preferable not to alter the role of the European Council, for the (re-)creation of the European Council as a new formal legal institution with its own formal decision-making powers simply adds a new feature to the EU's institutional framework, which should instead have been simplified. But since the European Council has been given formal decision-making powers, it was essential to ensure that the Court of Justice has jurisdiction over its actions, so the provisions of the Treaty of Lisbon to that end can only be welcomed.

5. It is also unfortunate that the European Council will as a default act by "consensus", a decision-making rule that is not defined in the Treaties. This is a particular problem when the European Council takes decisions by consensus as part of the decision-making process (when it requests a foreign policy proposal from the High Representative, or is asked to settle disputes relating to social security or policing and criminal law when a veto is applied or an "emergency brake" is pulled in certain areas).

6. There seemed to be no particularly pressing need for the creation of a full-time post of President of the European Council. The impact of this post as regards the external representation of the EU and its relations with the other EU institutions have not been thought through, although hopefully a workable *modus operandi* will soon develop in practice. The role would seem to lack the accountability of the individual members of the European Council or of the Commission, and there does not seem to be enough work for the President to do. Any attempt to rival the Commission's role as the detailed agenda-setter for the EU (as distinct from the established role of the full European Council as the general agenda-setter for the EU) would entail duplication of resources and pointless power struggles.

The Council

7. The changes to the Council's Rules of Procedure in 2006 already anticipate the creation of team Presidencies in a slightly less formal way than the Treaty of Lisbon. It is hard to see how such team Presidencies, as defined in the Treaty, will differ much from the status quo. The only significant change to the existing Presidency system would appear to be the loss of the Presidency role as regards foreign policy.

8. The Treaty does not foresee any specific relationship between the Council Presidencies and the European Council Presidency, and nor should there be one. There is no reason to alter the existing framework in which the EU agenda is set very generally at the level of the full European Council and this agenda is then implemented in detail by the Council, Commission and EP, within the context of their specific roles in the decision-making procedure. In other words, 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) than the European Council President.

9. The new Council voting system will modestly increase the possibility of the adoption of legislation and other measures subject to it. There did not seem any pressing reason for this change, since the existing system has not deadlocked EC decision-making in practice, but neither would the new system appear to constitute a massive change in the nature of decision-making by qualified majority, taking into account the possibilities for delays in the vote in the event of concerns by a significant number of Member States provided for by the new Treaty. It is unfortunate that the Treaty requires the negative vote of four Member States to block a measure, as this 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).

10. In the medium term, it would be desirable to consider whether a clearer distinction between the Council's legislative and non-legislative role could be developed, in the interests of greater public comprehension of the Council's role. The extension of public meetings of the Council is welcome, and this principle 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).

The European Parliament

11. The new Treaty will not have a significant impact on the composition or membership of the European Parliament, but it will impact significantly on the EP's powers. Broadly speaking, it is appropriate to extend the co-decision powers of the EP to all areas where the Council adopts legislation by QMV, and to extend the EP's budget powers and powers over the conclusion of international treaties in parallel. It is unfortunate that the new Treaty does not identify general competition and state aids measures as acts which should be

considered legislative (and therefore subject to co-decision), and also the new Treaty missed the opportunity to set out general rules to govern the accountability of other EU institutions to the EP when they adopt non-legislative acts.

12. Obviously the number of acts adopted by co-decision will increase. In order to maintain the efficiency of the EU's decision-making procedures, it will be necessary to adopt more acts by first-reading co-decision deals between the EP and the Council. This is not objectionable in principle, but what is objectionable is the current lack of rules of any kind on the transparency and accountability of such first-reading deals. There should be clear rules agreed to ensure that the public can ascertain whether a proposal is subject to the first-reading procedure, what stage discussions are at, and the content of the latest drafts under discussion as far as possible. Equivalent rules should apply whenever there are informal co-decision negotiations.

The European Commission

13. There is a risk that the reduction in the number of Commissioners below the number of Member States 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.

14. There is no formal change as regards the Commission's accountability to the EP once elected, and the changes to the procedure of selecting the Commission President (there are no real changes to the procedure of selecting the rest of the Commission) at first appear cosmetic as compared to the existing rules. However, the requirement to take account of EP election results when selecting the nominee for President could be important in practice, although this already appeared to be a factor when selecting a nominee in 2004 and there appears to be nothing to prevent it becoming a factor on a regular basis under the present system, since the largest party in the EP, having just been elected, will be reluctant to support a nominee with a different political background. An express rule to this effect would likely cement the significance of this factor, however.

15. This development is wholly appropriate on democratic grounds, as it would ensure a stronger link between direct elections to the EP and the nomination of the Commission President. In fact, it would be appropriate to go further, and to accept in principle not only that the nominee for Commission President should come from the same background as the largest party in the EP, but also that the EP parties should nominate their own preferred candidates for Commission President in the run-up to the elections. The public would therefore know who they were "voting for" as Commission President. There would be a risk of deadlock if the European Council refused afterward to nominate the candidate preferred by the largest party, but 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. It would, in fact, be possible already under the existing Treaty framework for EP parties to nominate preferred candidates for Commission President and to try to insist that EU leaders select the candidate whose party secured the biggest number of votes in elections.

16. This leaves open the question of the party affiliation of the other members of the Commission, and the degree of collaboration between parties in the EP, particularly between the two biggest parties. This collaboration is an anomaly given that it is rare for the largest conservative and social democratic parties to enter into coalitions at the national level, and so in effect the collaboration prevents voters from having the choice at EU level between two broadly different approaches to social and economic regulation that they usually exercise at national level.

17. To this end, it would be preferable in the medium term to accept that the political composition of the Commission should broadly reflect the political composition of the largest party in the EP and its closest ally or allies, regardless of the political orientation of Member States' governments (this orientation will still be reflected in Council voting, of course). It would also be desirable to abolish the requirement to have a special majority for second-reading co-decision votes, since this has the effect of forcing the largest two parties to collaborate. This effect could, however, be abolished *de facto* under the current institutional framework, if there were a higher turnout for EP plenary votes.

18. It might be argued that this change could lead to deadlock in the EU, but this would only be result of voters' choices at the national and EU level. It is common for voters to vote for different parties at different levels of government on some occasions anyway, whether within federal systems or non-federal systems like the UK (as regards regional or local governments as compared to Westminster), and it is rare for total deadlock to result from such "split tickets". In any case, it might be no bad thing if the EU legislated somewhat less frequently. The point is that a political system more closely tied to voters' preferences is more democratic, legitimate, transparent, accountable and comprehensible.

The Court of Justice

19. The role, functioning and jurisdiction of the Court of Justice would change in particular as regards Justice and Home Affairs, where all national courts and tribunals would 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 (in place of final courts only in two Member States, and an opt-out for 11 Member States; for other 14, this would mean no change except a clearer obligation for the final courts to send references). The effect of the latter change would be limited for five years as the Court's current third pillar jurisdiction would be retained in force for pre-existing third pillar cases, unless they were amended in the meantime.

20. This change would obviously result in more cases reaching the Court of Justice, although it should be pointed that only a modest number of criminal law references reach the Court under the current system (an average of two to three a year), even though a majority of Member States, including four of the five largest Member States, have given the Court jurisdiction over national court references. The effect of widening the Court's jurisdiction should not therefore be overwhelming, taking account of the five-year transitional period.

21. There will be some impact of extending the Court's infringement proceeding powers to the area of criminal law and policing, although again the effect will be limited by the five-year transitional period. The effect should be modest, though, given that in practice the EU has adopted only 21 Framework Decisions in 8.5 years (an average of two per year), as compared to about 100 Directives each year.

22. The impact of extending the full Court jurisdiction over references to immigration, asylum and civil cases could well be greater, although it is impossible to be certain in the absence of any evidence what the likely caseload will be. Some of the extra workload could be addressed by adopting the proposed emergency procedure for JHA cases currently under discussion, and this procedure could be amended in future (more easily under the Treaty of Lisbon) if necessary to take account of a large increase in the Court's workload in this area. But it should not be assumed that national courts or tribunals will find it necessary to refer every asylum appeal to the Court, any more (say) than national labour Courts find it necessary to refer every case that falls within the scope of EC labour or discrimination law to the Court.

23. The 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. The EU should seek as soon as possible to address the current workload of the Court of First Instance (the future General Court) by creating new third-level tribunals (particularly dealing with trademark cases) and appointing more judges to the Court. It will then be possible to relieve some of the workload of the Court of Justice by transferring to the General Court some or all infringement actions and references over commercial law issues such as intellectual property, agriculture, competition, state aid and internal market cases, taking account of the General Court's existing specialisation in commercial law issues.

24. The expanded jurisdiction for individuals to bring direct actions before the EU courts is welcome, but 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.

25. The 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. This amendment is unnecessary in light of the speedier application of Article 228; if the Commission frequently applies for fines within the context of Article 226 it will take more time for the Court to adjudicate these frequent cases as Member States will contest them more, and the Commission will have to spend much time arguing about the collection of the fines. It would have been better to replace the existing Article 226 system as regards the initial transposition of Directives by means of 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 encouraging transposition by means of Article 228 proceedings and would reduce the burden on the EU judiciary, without compromising Member States' power to defend themselves. A Member State like the UK, with a relatively good record of transposing EU legislation, should welcome such a move.

26. As for the EU Charter, it seems unlikely that it will have much impact on the Court of Justice, on the assumption, as the Charter declares and as the Court as stated on several occasions, that it simply reaffirms the human rights upheld at present as general principles of EU law, including (although the Court has not yet confirmed this as regards the Charter, it is expressly stated in the Charter) the requirement of a link to EU law for the general principles or the Charter to apply. For that reason, the Protocol relating to the UK (and Poland) and the Charter is simply irrelevant, since it does not restrict the application of the existing general principles to the UK and Poland, and the general principles have the same content as the Charter.

27. This interpretation is quite clearly confirmed by the judgment of the Court of 11 December 2007 in *Viking Line*, a reference from the UK about a planned trade union action which would restrict the freedom of establishment. The Court stated that the existing general principles of law include the right of trade unions to strike, a right which the Charter merely reaffirmed. So since the right to strike forms part of the general principles, the Protocol concerning the UK and Poland and the Charter cannot prevent the continued application of that general principle to the UK and Poland. But the Court also stated that the Charter reaffirmed that the right to strike is subject to conditions as defined by national and EU law, and deferred to the national (in this case, Finnish) definition of the scope of trade union powers. The Court also pointed out that the right to strike could be limited in the public interest and discussed in some detail the extent to which the right to strike could justify derogations from the freedom of establishment; it is clear that the possible derogation for these purposes is not unlimited.

28. As for the ECHR, the Court of Justice has stated for many years that the ECHR is the main source of the general principles, and has moreover stated several times in recent years that it should or must take account of the jurisprudence of the European Court of Human Rights. Since the EU's accession to the ECHR can only take place within the limits of the EU's competences, and since the ECHR and the Strasbourg case law is already taken into account as regards the interpretation and validity of EU acts and Member States' acts linked to EU law, it is hard to see how accession will lead to more cases for the Court of Justice or a different approach to the application of the ECHR within the scope of EU law. There may be a greater impact upon the functioning of the Strasbourg organs, but the sub-committee has focussed upon the impact of the Treaty of Lisbon on the institutions of the EU.

National parliaments

29. The enhanced role of national parliaments is welcome, although it would have been preferable to go further and provide national parliaments with the power (following sufficient objections) to block a proposed EU act entirely, without being limited to specified grounds for their action. It is unfortunate that the new Treaty does not provide more generally for national parliaments to be informed of EU measures and proposed measures.

30. It should not be forgotten that the powers of national parliaments as regards EU matters can always be enhanced as regards each Member State's government by commitments made by governments to their parliaments within each national legal system. The upcoming bill to amend the European Communities Act will therefore be a welcome opportunity to re-examine the powers of the Westminster Parliament as regards the government's conduct of EU affairs, and I hope that our parliament's powers will be enhanced significantly so that parliamentary democracy can be strengthened in this area.

Enlargement

31. Obviously the criteria of Article 49 TEU are essentially political. Absorption capacity is already taken into account in the timing of enlargement and Treaty amendments, and national parliaments already take a close interest in the issue—although a formal information requirement does no harm. But it is hard to see what practical impact the amendments to Article 49 could have. They are 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 (thereby still satisfying those Member States who remain broadly in favour of enlargement).

Revision procedures

32. It should not be forgotten that there are already *passerelles* in the Treaty as regards JHA (including family law), the environment and social policy. The general *passerelle* clauses in the new Treaty, including the specific *passerelle* clause on family law, are not objectionable since they retain the requirement of unanimous voting by Member States' governments as well as the possibility of blocking the application of the clause by any national parliament. In the case of the specific *passerelle* clause on family law, the powers of national parliaments are actually enhanced as compared to the existing legal framework.

33. The specific foreign policy *passerelle* is objectionable, however, to the extent that it does not provide for such a role for national parliaments. Equally it is objectionable that the existing *passerelles* on social and environmental law, and the new *passerelle* on the multi-annual financial framework, are not subject to any form of control by national parliaments.

34. Of course, there is nothing to prevent Member States from providing for greater control by national parliaments than the Treaty provides for. The existing UK law requiring national parliamentary assent for any increase in the powers of the EP would in any event protected the position of Westminster whatever the wording of the new Treaty as regards national parliaments in respect of much of the new or old *passerelles*, and it will be essential to ensure when amending the *European Communities Act* that *all* the *passerelles* in the new Treaty will equally require national parliamentary assent in the UK.

35. As for the simplified revision procedures, any amendments resulting from them are expressly subject to national ratification procedures. It need simply be set out in the amendments to the European Communities Act that this would always entail national parliamentary assent in the UK.

36. In both cases it is misleading the public to suggest that the Treaty would be "self-amending" in future. The word "self-amending" implies that the Treaty can literally amend itself, or at least be amended without any involvement of Member States. But the requirement of national government unanimity in all cases and the application of national ratification procedures or a parliamentary blocking power in almost all others—which the UK Parliament can easily extend to require full national parliamentary assent in absolutely all cases—indicates clearly that national governments and parliaments quite rightly will retain control of any Treaty amendments. The new Treaty will dispense with the formal trapping of formal intergovernmental conferences in some cases, but not with the essential requirements of national control of Treaty amendments.

14 December 2007

Memorandum by the Scottish Parliament's European and External Relations Committee, Malcolm Chisholm MSP, Convener of the Committee

Inquiry into the Impact of the Reform Treaty on the Institutions of the EU

The Scottish Parliament's European and External Relations Committee welcomes the opportunity to contribute to the House of Lords European Union Select Committee's inquiry into the impact of the Reform Treaty on the institutions of the EU. The Committee would like to take this opportunity to raise its concerns about the nature of the consultation between the UK Government and the devolved administrations during the Government's consideration of the draft Reform Treaty.

The Scottish Government has identified 21 EU priorities which it considers are of greatest importance to Scotland's interests as well as six key longer term EU political objectives. One of these key political objectives is the Reform Treaty.

As part of its role in scrutinising the Scottish Government's delivery of this key political objective the Committee has noted the various reports and documents that have been produced by the UK Government on the Reform Treaty as well as the issues that have been raised to date by the UK Parliament.

The Committee has noted that the UK Government's position on the Reform Treaty is set in the White Paper "The Reform Treaty: The British Approach to the European Intergovernmental Conference" (Cm 7174) issued on 23 July 2007.[73] This was followed by an "Explanatory Memorandum on a European Union Document" (11625/07 COM(2007)412) dated 25 July 2007.

The Committee is concerned to note that neither the Explanatory Memorandum nor the White Paper refer to consultation with the devolved administrations or respective Ministerial responsibility for those devolved matters covered by the Treaty. In particular, there does not appear to be any reference to a separate Scottish legal system or that aspects of Justice and Home Affairs are devolved.

In the first instance, the Committee raised these concerns with the Scottish Government. In its response to the Committee, the Scottish Government advised that it had made representations to the UK Government on various aspects of the Reform Treaty. The Scottish Government was unable, however, to explain why the UK Government did not make explicit reference to the interests of the devolved administrations in its White Paper.

The Committee is concerned about the absence of any reference to the discussions that the UK Government has had with the Scottish Government or with the other devolved administrations or reference to the responsibilities of the devolved administrations. The Committee agreed that these concerns should be raised with the House of Lords EU Select Committee in its consideration of aspects of the Reform Treaty.

I trust you will find these comments helpful.

14 December 2007

[73] http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

Letter from Geoff Southall and Michael Clark, The Democratic Party Limited

1. The background to our concern extends over 35 years to the *European Communities Act* 1972 and the four subsequent European Treaties dated 1986, 1992, 1997 and 2001. In our submission these treaties have produced a constitutional illegality at law on the Statute Book, being in conflict with existing great statutes **still in force**. A thousand years of our constitutional history has been placed under the shadow of a near total eclipse, producing a vacuum at the very centre of our unique system of democratic parliamentary monarchial government, ie **"The Queen-in-Parliament under God."** The Head of State is now compromised which will increasingly undermine the stability of the nation.

2. Our **Covenant** system of government aspires to a higher authority than that of man, whereas the European System is dictated by the **Will of Man**, a direct product of the French Revolution. The foundation of our democracy was re-confirmed under ***the* most solemn oath** between the Sovereign and the People on 2 June 1953, in which HM The Queen promised to uphold the **"laws and customs of the Realm"** *for her entire reign*. Since the ECA 1972 the Monarch has been in the position of being **"deceived in her grant,"** being made to do wrong in failing to uphold our laws and customs and our ancient freedoms.

3. A basic dichotomy exists between **English Common Law** and **European (or Roman) Civil Law**, *a fact which has never been faced*. The late Lord Denning likened this legislative force which produced this dichotomy to an **"incoming tide" sweeping into our estuaries which would overflow the land**. His prescient perception and warning has proven true.

4. The First Lord of the Treasury, the Prime Minister, has continued, with parliamentary sanction, to approve the transfer of tens of £ billions of public monies to the European Union (almost £10 billion gross projected for 2008) which organisation for over a decade has failed to pass its audited accounts. The level of financial corruption in the EU is notorious and those of its employees brave enough to expose its fraudulent systems have been subjected to threats, merciless treatment and dismissal.

5. In 2003 we took legal action against the Government in the High Court (*Geoff Southall and the Democratic Party vs Secretary of State for Foreign Affairs*) in respect of the then proposed EU Constitution. The Judges at the first hearing and on Appeal, ruled **only** that we were "premature" and denied us judicial review, which would have given the whole constitutional issue an opportunity for open debate.

6. It is our submission, under advice from our legal team, that Parliamentary Sovereignty on the EU treaties is maintained only by the constitutional doctrine of *implied* repeal or disqualification of existing great and historic statutes, which form the bulwark of our ancient liberties against dictatorship. These statutes HM The Queen stated constitute **"the sure foundation on which the whole edifice of parliamentary democracy rests"** (The Queen, 20 July 1988, to both Houses of Parliament, Westminster Hall) and *not* having been repealed **they remain in force**. The principle of alleged "loaned" sovereignty has never been fully and widely debated, *the concept and knowledge of which has been withheld from the People*.

7. Under the Reform (or Re-named) Treaty, which other leaders have confirmed is 90/95% the same constitutional document signed by Messrs Blair and Straw in Rome on 29 October 2004, a new constitutional settlement will in time become embedded, to the total submission of our present lawful constitutional settlement established since 1215/1295 and reinforced in 1688.

8. With 80% of our laws coming from Brussels, our British Parliament has become over-committed to **a deficit of trust** with the Electorate, who are largely unaware of the vacuum developing at the heart of our government. The vastly reduced powers of Parliament is we believe sensed by the Electorate in the reduced turn-out at General Elections, which is a highly dangerous prospect for the future. If the people, *who themselves remain sovereign*, discover that the political investment in the EU Project is bankrupting their democracy, a constitutional crisis of considerable force will certainly emerge.

9. It is the declared constitutional position that the trust of the people, or their sovereignty, is returned to them **intact** every five years. This has not been possible since Royal Assent was given to the Treaty of Rome in October 1972. In this respect, it should be kept constantly in mind that the golden thread of our history is the way we bring down the over-mighty subjects who take it upon themselves to rule our people out of their own head, ie **"Be you never so high, the law is above you"** (Thomas Fuller).

10. Parliament is Sovereign in the name of the People. Yet under Article 4(3) of the Reform Treaty it is stated that "The member states **shall** facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives," or Article 8c "National Parliaments **shall** contribute actively to the good functioning of the Union." The meaning and effect is very clear. A supra-national alien authority is to be set **above** our own Parliament to subjugate "The Queen-in-Parliament". Even without the word "shall", on both counts those paragraphs sweep away any thought of maintaining Red-lines in the future.

11. It should be kept constantly in mind that the People have never been told that their ancient freedoms under Magna Carta, the Declaration of Rights, the Bill of Rights and Habeas Corpus have been and are being unlawfully overruled by **short-term** politicians. In the event that the People become informed of this betrayal of their trust placed in their representatives, those responsible for the collapse of trust in Parliament and, indeed, in the Judiciary itself, could be held accountable resulting in an indictment of the greatest severity.

12. In view of the very serious nature of the unconstitutional Treaty that is to come before Parliament in the new session, revealed in the Gracious Speech today, we are bound to make what follows very clear. We are now in the process of discussing our return to Court, which we intend should become an historic action for the sake of all those who have an Oath of Allegiance to the Monarch and have fought and died for our freedoms in these British Isles. This in order to prevent something far worse in the future—a descent into civil strife.

6 November 2007

Memorandum by Frank Vibert, Director, European Policy Forum (evidence submitted in a personal capacity)

Institutional Leadership under the Reform Treaty

1. The Treaty Provisions

Terms of Office

(i) In addition to the office of the President of the Commission, the Reform Treaty provides for a new President of the Council and a High Representative of the Union for Foreign Affairs and Security Policy. The President of the Council is elected for a $2\frac{1}{2}$ year term renewable once (Art 9b para 5) and the other two positions for 5 years (Art 9d para 3). Essentially therefore the positions run concurrently with the five year term of the European Parliament. (Art 9a para 3).

Manner of Selection

(ii) The President of the European Council is elected by the Council itself by qualified majority ((Art.9b para.5).

(iii) The President of the Commission is proposed by a qualified majority of the European Council, taking into account the elections to the European Parliament, and elected by the European Parliament by a majority of its component members ((Art 9d para 7).

(iv) The High Representative is appointed by the European Council (by qualified majority vote) with the agreement of the President of the Commission (Art 9e para 1) and subject along with the President of the Commission and other members of the Commission to a vote of consent by the European Parliament. (Art 9d para 7 clause 3).

2. Graduated Involvement of EP or a "Package?"

(i) These provisions can be viewed as allowing for a graduated role for the European Parliament as shown in the table below. On the face of it the Parliament has no role in the appointment of the President of the Council, gives its consent to the proposed High Representative and elects the President of the Commission.

Table

ROLE OF EUROPEAN PARLIAMENT IN APPOINTMENT PROCESS

	President of Council	**High Representative**	**President of Commission**
Council	Elects.	Proposes with consent of President of Commission.	Proposes. (1)
Parliament	--------	Consents to Commission as a body.	Elects.

(1) Taking into account the elections to the Parliament.

Declaration A Para 2.

(ii) There is a highly important qualification to this picture contained in Declaration A para 2. This Declaration applies to each of the articles referring to the method of appointment for each of the offices and reads as follows: "*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"*.

(iii) The effect of this provision is that the three appointments are to be chosen as a package. Under Declaration A Section 3 para 6, the European Parliament and Council are "*jointly responsible for the smooth running of the process leading to the election of the President of the Commission*". Appointments to each position, and the package as a whole, will thus become a matter of inter-institutional bargaining between Parliament and Council.

3. Three Questions

Three questions arise from the packaging of these positions:

1. *The Best Person for the Job?*

The first question is whether packaging will produce the person most suited for the job. The positions themselves call for very different qualities. The President of the Council is to "drive forward" (Art 9b para 6) the work of the Council in giving general political direction and priorities to the Union (Art 9b para 1). The President of the Commission is meant to be independent of any government or institution, (Art 9d para 3) and essentially must oversee the Commission's role as network manager for the Union. The High Representative has to help forge common positions in the Council on foreign and security policy and to help present those common positions to the external world.

2. *A Plus for Parliamentary Democracy?*

The second question is whether the arrangements will be seen by European electorates as a step forward for parliamentary democracy (because of the heightened involvement of the European Parliament). What is clear from the packaging and Declaration A is that the negotiations will take into account not only left/right divides within the Parliament and Council (and coalition formation) but also divides between large and small member states, north and south, and new member state claims against old member state claims. The criteria will thus be blurred.

3. *A Balanced Ticket for Representative Democracy?*

The third question is whether the procedures involved in putting together the package of appointments will be viewed by the electorates as providing for a balanced ticket that will be seen to be more broadly representative than a differentiated process.

In practice, whatever the Parliament and Council agree for the selection procedure will be preceded and accompanied by caucusing by party groupings within the Parliament (as well as by party groupings that may include some members of the Council). Such background caucusing might risk the appearance of a division of the spoils of office between Council and Parliament.

5 December 2006

Memorandum by Margot Wallström, Vice-President of the European Commission

1. *The impact of the Reform Treaty on the structure of the Treaties and the effect of conferring legal personality on the Union*

The Treaty of Lisbon does not repeal or replace the texts of the current Treaties. These remain in force. It contains two substantive articles amending the "Treaty on European Union" (EU Treaty), which will retain its name, and the "Treaty establishing the European Community", which will be renamed the "Treaty on the Functioning of the European Union".

The structure of the EU Treaty is reorganised into six titles. The structure of the TFEU Treaty will to a large extent follow the current EC Treaty, incorporating the agreed amendments.

Finally, the Treaty of Lisbon includes a number of protocols and declarations of the Intergovernmental Conference.

The replacement of the European Union and the European Community by a single European Union enjoying legal personality will clarify the role of the European Union inside the EU and with partners worldwide, and empower the EU to conclude an international agreement within its fields of competence. This will allow the EU to work more effectively, alongside the Member States, who retain their existing role and prerogatives in international relations and international organisations.

2. *The impact of the Reform Treaty on the role and functioning of the European Council, including the effects of the creation of the post of President of the European Council, the election of that President, and his/her role in the external representation of the EU*

The European Council is defined as an institution separate from the Council of the Union. Its President will be appointed by qualified majority for a term of two and a half years, renewable once.

As a consequence, the President of the European Council will have no national mandate and will operate on a "full-time" basis. The Treaty stipulates that the President of the European Council will ensure the external representation of the Union in respect of common foreign and security policy.

3. *The impact of the Reform Treaty on the role and functioning of the Council of Ministers, including the effects of the use of team Presidencies, their relationship with the President of the European Council, and the new system of qualified majority voting*

There are limited changes concerning the workings of the Council of Ministers. The current system of six-month Presidencies remains. With the exception of the Foreign Affairs Council, which will be chaired by the new High Representative, the six-month Presidency of the various configurations of the Council will be held by representatives of the Member States under an equal rotation system. The existing approach of an 18 month Council programme drawn up between three Presidencies will be retained.

The Treaty of Lisbon makes significant changes to the system for calculating the qualified majority within the Council and to the areas to which it applies.

The weighting system for votes laid down in the Treaty of Nice will continue to apply until 1 November 2014.[74] Qualified majority voting will then be based on the principle of a double majority (a majority of the Member States and of the population), which will be attained when at least 55% of the Member States making up at least 65% of the Union's population vote in favour.[75] To make it impossible for a very small number of the most populous Member States to prevent a decision from being adopted, a blocking minority must comprise at least four Member States; otherwise, the qualified majority will be deemed to have been reached even if the population criterion is not met.

However, during a transitional period up to 31 March 2017, a Member State may still request application of the weighting system laid down in Article 205 of the EC Treaty. As a result, if new Member States join the Union between now and 2017, the weighting system will have to be adapted.

Finally, this system will be backed up by another mechanism similar to the "Ioannina compromise", which will allow a group of countries which cannot form a blocking minority to ask for further discussion in the Council.

4. *The impact of the Reform Treaty on the role, functioning and membership of the European Parliament, including the effects of the extension of co-decision*

The composition of the European Parliament will be modified as from 2009, with the number of seats being limited to 751 (750 plus the President). Each Member State will be represented in accordance with the principle of digressive proportionality, with a minimum threshold of six members per Member State and a maximum threshold of 96.

The powers of the European Parliament will be strengthened in legislative matters, most obviously through the extension of the co-decision procedure as the ordinary legislative procedure, in budgetary matters (approval of the multi-annual financial framework; co-decision in setting all compulsory and non-compulsory

[74] A majority will be attained if a measure is approved by a majority of Member States and obtains at least 255 votes out of a total of 345. In addition, if a Member State so requests, the measure will have to be approved by Member States representing at least 62% of the Union's population.

[75] This double 55/65 threshold will apply when the Council acts on a proposal from the Commission. A threshold of 72% of the Member States representing 65% of the population will be required where the Council is not acting on a proposal from the Commission or from the High Representative for Foreign and Security Policy.

expenditure), and as regards international agreements. The European Parliament will have to give its assent to all agreements relating to matters covered by co-decision or requiring its approval. In addition, the European Parliament's role in the election of the Commission President will be extended, including the requirement to take account of the result of the elections to the European Parliament.

5. *The impact of the Reform Treaty on the role, functioning and membership of the European Commission, including the effects of the changes to Commission selection and the accountability of the Commission to the European Parliament*

From 2014 the European Commission will be composed of a number of Members corresponding to two thirds of the number of Member States on the basis of a system of equal rotation allowing each Member State to have a national serving as a Member for two out of three terms of office.[76] The number of Commission Members may be amended by the European Council, acting unanimously. Until 2014 the Commission will be composed of one Member per Member State. The Commission will have a right of initiative (except in respect of the common foreign affairs and security policy) in new areas entering in the Community framework. The role of the President of the Commission will be strengthened: for example, the President will have the power to dismiss a Member of the Commission. The European Parliament will elect the Commission President on a proposal from the European Council (agreed under qualified majority voting).

6. *The impact of the Reform Treaty on the role, functioning and jurisdiction of the European Court of Justice, including the effects of the changes to the status of the Charter of Fundamental Rights, the UK Protocol on the Charter, and EU accession to the European Convention on Human Rights*

The Court of Justice will see its scope for action increased as certain areas, including judicial cooperation in criminal matters and police cooperation, have been brought within the Community framework.[77] In addition, the procedure on penalties (Article 228) has been reinforced.

Through a cross-reference in the Treaty, the Charter of Fundamental Rights, as adapted by the Intergovernmental Conference in 2004, is made legally binding. Its provisions will apply to acts of implementation of Union law, subject to particular provisions regarding two Member States (the United Kingdom and Poland). The Union will be able to join the European Convention on Human Rights, subject to a unanimous agreement of the Council and ratification by all Member States.

7. *The impact of the Reform Treaty on the role of national parliaments*

The Treaty of Lisbon significantly increases the involvement of national parliaments. A new article on national parliaments sets out clearly their role, listing six areas of particular importance. These include the receipt of proposals, respect for the subsidiarity principle, evaluation mechanisms in the area of freedom, security and justice, and revision of the Treaties. Other elements of the Reform Treaty, such as the transparency of legislative proceedings in the Council, and national parliaments' scrutiny of "*passarelle*" clauses, are also of clear relevance for national parliaments.

Protocols on national parliaments and on the application of the principles of subsidiarity and proportionality set out some details. In particular, a new system is established to allow closer scrutiny of subsidiarity by national parliaments. The new system will give national parliaments the opportunity to issue a reasoned opinion if they consider that a proposal does not comply with the principle of subsidiarity, within eight weeks of being sent a legislative proposal. If the number of reasoned opinions represents at least one third of the votes allocated to national parliaments,[78] the author of the proposal (as a rule, the Commission) must review the text. This review leads to a decision to maintain, amend or withdraw the draft.

If the reasoned opinions add up to a simple majority of the votes allocated to national parliaments and the proposal is maintained, a special procedure will come into play for proposals under co-decision. The Commission will have to issue a reasoned opinion to the European Parliament and the Council, explaining how the principle of subsidiarity is being respected. The two branches of the legislator may then decide (by 55% of the members of the Council or by a majority of the European Parliament) whether or not to continue with the legislative procedure.

[76] A declaration by the Intergovernmental Conference stipulates that, with its new composition, the Commission will have to take the necessary internal organisational measures to ensure transparency of its action and consultation of all Member States, and in particular those with no national serving as a Member of the Commission.

[77] There are certain limits, however: the validity and proportionality of police operations and measures taken by the Member States to maintain law and order or to safeguard internal security will remain outside the Court's jurisdiction.

[78] Each national parliament has two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral parliamentary system, each chamber has one vote.

8. *The impact of the Reform Treaty on future enlargement of the EU, including the effects of the use of the concept of integration capacity, and the requirement to inform national parliaments*

Provisions on the accession procedure will now make specific reference to the values of the Union and the commitment to promote those values. The European Parliament and national parliaments will have to be informed of any application for accession. Article 49 expressly refers to the eligibility criteria which have been agreed by the European Council (the "Copenhagen critieria").

9. *The impact of the simplified revision procedure and the other passerelles included in the Reform Treaty*

The Treaty of Lisbon does not fundamentally alter the procedure for the revision of the Treaties. Revision of the Treaties will continue to require the calling of an intergovernmental conference, which will reach decisions by common accord (and thus unanimously), followed by ratification of the agreed amendments by all Member States. An innovation is the formal provision for a Convention to prepare proposals to be submitted to the conference. The European Parliament becomes entitled to submit proposals for revision of the Treaty (as Member States and the Commission already are).

The Treaty introduces a simplified revision mechanism for provisions relating to common policies. This likewise requires unanimous approval of amendments by the Member States followed by national ratification; an intergovernmental conference is however not required.

The Treaty contains a number of *passerelle* or "switchover" clauses. These allow the European Council to decide by unanimous vote that, in future, decisions in a particular area will be taken by qualified-majority vote or by the ordinary legislative procedure (co-decision). The Treaty also gives the opportunity for any national parliament to oppose the European Council's decision and thereby retain the status quo.

20 December 2007

Letter from Mr J A Wheatley

I have read much about this Treaty/Constitution, and consider its most dangerous aspect for any democracy is The Self Amending Treaty Clause. Once we have been signed up to it then any red lines drawn by PM Brown, or anyone else, can and will be readily cancelled.

For this aspect alone, I believe we must have a referendum. If the majority of our population either cannot bother, or do not vote to retain our democracy, then so be it, they will however at least have the opportunity of saving our birthright for which so many fought and died in WWI and WWII.

11 November 2007

Printed in the United Kingdom by The Stationery Office Limited
3/2008 390502 19585