



HOUSE OF LORDS

European Union Committee

6th Report of Session 2003-04

The Future Role of the European Court of Justice

Report with Evidence

Ordered to be printed 2 March and published 15 March 2004

Published by the Authority of the House of Lords
London: The Stationery Office Limited
£price

HL Paper 47

The European Union Committee

The European Union Committee is appointed by the House of Lords “to consider European Union documents and other matters relating to the European Union”. The Committee has seven Sub-Committees which are:

Economic and Financial Affairs, and International Trade (Sub-Committee A)
Internal Market (Sub-Committee B)
Foreign Affairs, Defence and Development Policy (Sub-Committee C)
Agriculture and Environment (Sub-Committee D)
Law and Institutions (Sub-Committee E)
Home Affairs (Sub-Committee F)
Social and Consumer Affairs (Sub-Committee G) (established in December 2003)

Our Membership

The members of the European Union Committee are:

Baroness Billingham	Lord Marlesford
Lord Bowness	Lord Neill of Bladen
Lord Brennan	Baroness Park of Monmouth
Lord Dubs	Lord Radice
Lord Geddes	Lord Renton of Mount Harry
Lord Grenfell (Chairman)	Lord Scott of Foscote
Lord Hannay of Chiswick	Lord Shutt of Greetland
Baroness Harris of Richmond	Lord Williamson of Horton
Baroness Maddock	Lord Woolmer of Leeds

The Members of the Sub-Committee which conducted the inquiry are listed in Appendix 1.

Information about the Committee

The reports and evidence of the Committee are published by and available from The Stationery Office. For information freely available on the web, our homepage is:

http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm

There you will find many of our publications, along with press notices, details of membership and forthcoming meetings, and other information about the ongoing work of the Committee and its Sub-Committees, each of which has its own homepage.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at

http://www.parliament.uk/about_lords/about_lords.cfm

Contacts for the European Union Committee

Contact details for individual Sub-Committees are given on the website.

General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 5791.

The Committee’s email address is euclords@parliament.uk.

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Abstract		6
Chapter 1: Introduction	1	7
Purpose of Report—the fundamental questions	1	7
Conduct of inquiry	5	8
Recommendation	6	8
Chapter 2: Background	7	9
The Court—neglected by the Convention?	7	9
The ECJ—no ordinary court	10	9
The Community Courts	13	10
The standing rule	16	11
A new legal order	17	11
Primacy/Supremacy	19	11
Direct effect	20	12
Chapter 3: The Key Questions	22	13
(1) How should the basic role of the Court be defined?	22	13
(i) Article I-28(1)	22	13
(ii) A Constitutional Court	26	14
(2) Does the draft Treaty merely codify the principle of the primacy of Community Law?		
Essentially a codification	32	15
Relationship with direct effect	34	15
Extension to Second and Third Pillars	35	15
Interaction with national constitutional rules	37	16
An essential/necessary codification?	40	17
(3) Which court should have the final say on whether a matter is within the competence of the Union—the <i>Kompetenz-Kompetenz</i> issue?	46	18
Introduction	54	19
Two views	54	19
Common ground	56	20
View I—The Court as ultimate arbiter	57	20
(i) The need to avoid divergence	58	21
(ii) The provisions of the draft Treaty	60	21
(iii) International law	61	21
View II—Member States—the masters of the Treaty	63	22
(i) The approach taken by national courts	64	22
(ii) Respecting and safeguarding national constitutions	64	22
(iii) Co-operation not excluded	66	23
<i>Kompetenz-Kompetenz</i> —a real problem?	69	24
Does the draft Treaty change the position?	71	24
Conclusion	72	25
UK position—primacy and <i>Kompetenz-Kompetenz</i>	75	25
A new Supreme Court for the United Kingdom	82	27
	90	30

(4) Should the jurisdiction of the Court of Justice be extended in relation to the Common Foreign and Security Policy?	92	30
Jurisdiction over CFSP—the issue in principle	92	30
Need to re-examine the exclusion	94	31
Respect for the rule of law and human rights	96	31
Retaining the exclusion	98	32
Distinguishing procedural questions	99	32
Conclusion	100	32
CFSP—specific issues under the draft Treaty	104	33
(i) Jurisdiction over economic sanctions	104	34
(ii) Monitoring the exercise of Union competence	107	34
(iii) Solidarity in CFSP	110	35
(5) Should the jurisdiction of the Court of Justice be extended in relation to criminal law and procedure? Should the current exception in Article 35 TEU remain?	115	36
The position under the draft Treaty	115	36
(1) Enlarging the Court’s jurisdiction over Third Pillar	119	37
(2) Article III-283—the tail piece	124	37
(6) Does Article III—270(4) (the standing rule) go far enough to safeguard the individual’s right to an effective remedy?	128	38
Background	129	38
The right to an effective remedy—compatibility with the Charter	133	39
The need for change—the practical considerations	138	40
The European Council	143	42
The new text—“regulatory acts”	145	42
Redrafts put forward	149	43
The new Article 28(1)	152	43
Chapter 4: Conclusions and Recommendations	155	45
Appendix 1: Membership of the Sub-Committee		47
Appendix 2: List of Witnesses		48
Appendix 3: Recent Reports from the Select Committee and Session 2002-2003 Reports prepared by Sub-Committee E		49

ORAL EVIDENCE

Professor Paul Craig, University of Oxford

Written evidence	1
Oral evidence, 15 October 2003	4

Eleanor Sharpston QC, Chair of the Bar European Group; Philip Moser, Barrister, Bar European Group and Editor of ‘The European Advocate’; James Flynn QC and Dr Georg Berrisch, Council of the Bars and Law Societies of the European Union

Oral evidence, 22 October 2003	16
Supplementary written evidence	29

<i>Advocate General Francis Jacobs</i> Oral evidence, 27 October 2003	30
--	----

<i>M. Roger Errera, Conseiller d'Etat honoraire</i> Oral evidence, 19 November 2003	40
Supplementary written evidence	50

WRITTEN EVIDENCE

Karen J Alter, Associate Professor of Political Science, Northwestern University, Illinois	53
Professor Anthony Arnull, University of Birmingham	55
Leonard F M Besselink, University of Utrecht	59
Stanislaw Biernat, Jean Monnet Professor of European Law, Cracow	67
Professor Eileen Denza, Visiting Professor of Law, University College London	69
Professor Dutheil de la Rochère, University of Paris II	72
Giorgio Gaja, University of Florence	74
Mathew Heim, Director at Gavin Anderson & Company and Associate Tennant at Tanfield Chambers	75
Anastasia Iliopoulou, University of Paris II	72
Professor Dr Heribert Franz Koeck, University of Linz, Austria	77
The Law Society of Scotland	85
Professor Joakim Nergelius, Örebro University, Sweden	86
Professor Dr Dr h.c. Hans-Jürgen Papier, President of the Bundesverfassungsgericht	86
Professor Dr Ingolf Pernice, Humboldt University, Berlin	89
Jiri Priban, Charles University, Prague, and Cardiff Law School	90
Professor Dr Hjalte Rasmussen, University of Copenhagen	91
Professor Dr Henry G Schermers FBA, together with the staff of the Europa Institute of the University of Leiden	94
Professor A G Toth, University of Strathclyde	99
Professor Takis Tridimas, University of Southampton	101
Stephen Weatherill, Jacques Delors Professor of EC Law, Oxford University	104

NOTE: Pages of the Report and Appendices are numbered in bold type; pages of evidence are numbered in ordinary type. References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of the Report or Appendices or to a page of evidence

ABSTRACT

The Report examines whether the role of the European Court of Justice would change if the draft Constitutional Treaty were adopted in its present form.

The Constitutional Treaty would seek to define the respective competences of the Union and its Member States. In a number of respects the powers of the Union would be increased.

The Report explores the relationship between the Constitutional Treaty and national constitutions and the impact of the doctrine of the primacy of Community law. It also considers the role of the European Court and national courts in defining the respective competences of the Union and the Member States. Which court has the final say is a matter of constitutional and political importance.

The Report queries whether some aspects of Union activity, such as foreign policy, should be immune from supervision by the European Court and whether the new Constitution would give adequate protection to the individual in relation to criminal law and procedures.

The Report makes a number of proposals aimed at:

- clarifying the position of the European Court;
- ensuring that Union policies and their implementation are subject to judicial control;
- enabling citizens to challenge directly Community measures affecting them.

THE FUTURE ROLE OF THE EUROPEAN COURT OF JUSTICE

CHAPTER 1: INTRODUCTION

Purpose of Report—the fundamental questions

1. In this Report we look at the future role of the European Court of Justice (the Court) under the draft Constitutional Treaty (the draft Treaty). Some changes to the Union's judicial architecture were made by the Treaty of Nice and they are now being put into effect.¹ But the promotion of a Constitutional Treaty for the Union has caused us to consider certain provisions of the draft Treaty relating to the Union's legal order and the Court and its jurisdiction and to seek to assess the potential consequences of any changes they might effect.
2. Circumstances have changed since we decided to undertake our inquiry. We commenced our work on the assumption that there would be a Constitutional Treaty and that the Charter of Fundamental Rights would be a part of that Treaty. The InterGovernmental Conference (IGC) was adjourned on 13 December following a failure to reach an overall agreement on the draft Treaty. It is unclear what the future of the draft Treaty will be. The Irish Presidency has been mandated to make an assessment of the prospects of progress and to report to the European Council in March. But even if the premise on which we began our inquiry should prove to be incorrect, we believe that it is useful to consider the issues affecting the Court raised by the draft Treaty, not all of which are dependent on its particular structure or drafting.
3. We have considered four principal issues raised by the draft Treaty:
 - (1) The draft Treaty would state the principle of the primacy of Union law. Does the Treaty merely codify the present position or is it apt to extend the doctrine?
 - (2) The draft Treaty seeks to define which matters are within the exclusive competence of the Union, which shared between the Union and its Member States and which remain for Member States. Should the Court have the ultimate power to decide whether a matter is within the competence of the Union or should the national supreme/constitutional courts of the individual Member States have that power?
 - (3) The draft Treaty would merge the three Pillars (the Community/Common Defence and Security Policy/Police and judicial co-operation in criminal matters). Should the Court's jurisdiction be extended so that the legality of all Union action becomes subject to review by the Court?

¹ See para 6.

- (4) The draft Treaty would go some way to improve the position of the individual seeking to challenge the legality of a Union act. Does that change go far enough to safeguard the individual's right to an effective remedy?²

These questions are considered in Chapter 3 of this Report.

4. In the course of our inquiry we have examined the text of those Articles of the draft Treaty dealing with the primacy/supremacy of Union law and with the jurisdiction of the Court. The discussion of the Treaty by the governments of the Member States has produced some amendments to the text. We draw attention to these where they may be relevant.

Conduct of inquiry

5. The views of interested parties were sought on the above questions and we received a substantial number of written submissions, including several from academics and practitioners from other Member States, from Accession States and from the USA. The Sub-Committee also had the advantage of meetings with Professor Paul Craig (University of Oxford), Advocate General Francis Jacobs, the Bar European Group (BEG), the Council of the Bars and Law Societies of the European Union (the CCBE), and M. Roger Errera (Conseiller d'Etat Honoraire, France). A list of those who gave evidence is set out in Appendix 2. The evidence, written and oral, is printed with the Report. We would like to thank all those who assisted in the inquiry.

Recommendation

6. The issues discussed in this Report raise questions of political and constitutional importance. Our conclusions and recommendations are summarised in Chapter 4. We draw them to the attention of the House and recommend the Report to the House for debate.

² The citizen's right to an effective remedy and to a fair trial is set out in Article 47 of the Charter of Fundamental Rights of the Union.

CHAPTER 2: BACKGROUND

The Court—neglected by the Convention?

7. The draft Constitutional Treaty has given rise to considerable comment and debate, much of it concerned with the proposed changes in the institutional structure of the Union (such as the creation of a President and Union Foreign Affairs Minister) and in voting arrangements (redefining a qualified majority). There has also been discussion of the possible extension of Union competence, at the expense of national competence, in such areas as foreign policy and defence, civil and criminal law and procedure.³
8. But relatively little has been said about the role of the Court. To some that may not be surprising or controversial. The Treaty of Nice effected a number of reforms to the Union's judicial architecture (providing for the extension of the jurisdiction of the Court of First Instance (CFI) and the creation of "judicial panels" below the CFI to deal with such matters as intellectual property and staff cases). Others consider that those who prepared the draft Treaty, that is the Convention on the Future of Europe (the Convention), did too little in this regard. A "discussion circle" was set up, but late in the day. The 'circle' was given limited terms of reference but even so it could not reach agreement on the important issue of the extent to which an individual should be entitled to bring before the Court a challenge to the legality of Union laws. The Convention did, however, propose a slight relaxation in the standing rule.
9. Under the draft Treaty the jurisdiction of the Court has been extended. The draft Treaty would bring judicial co-operation in criminal law and police co-operation within the same overall framework of judicial control as applies to other areas of EU law. The sanctions procedure under Article 226 EC would be slightly strengthened. The Charter of Fundamental Rights would become binding. But a number of witnesses remained critical of the failings of the Convention as regards the Court.⁴

The ECJ—no ordinary court

10. International courts having jurisdiction over sovereign states are, compared to the proliferation of courts (civil, criminal and administrative) in most countries, relatively rare. Even more scarce are international courts to which the individual has a right of access. The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, drawn up in 1950) took the radical step of creating a Commission and a Court having jurisdiction to examine petitions from individuals claiming violation of their human rights. The ECHR regime also subjects States (members of the Council of Europe) to international legal scrutiny of their treatment of their own nationals on their own territory. But when establishing the European Communities the Member States went even further. They created institutions having the power in certain areas to make laws which were

³ We reviewed these matters in our earlier Report on the Constitutional Treaty, 41st Report (2002-03): *The Future of Europe—the Convention's Draft Constitutional Treaty* (HL 169).

⁴ Mathew Heim in particular noted that "despite the ECJ being an institution so fundamental to the successful functioning of the Union, there was no evidence that the Convention adopted a comprehensive, or indeed consistent, approach to it" (p 75).

directly applicable in the Member States. They set up a European Court of Justice with ultimate authority in the Community legal order and the duty (under Article 220 of the EC Treaty) to ensure the observance of the law.

11. The Court was provided with a wide and varied jurisdiction. It may act in different capacities:
 - as a constitutional or administrative court (determining whether Community institutions are acting within the scope of their powers, reviewing the legality of Community measures, such as Commission or Council acts);
 - as an international court (dealing with conflicts between Member States or between the Commission and Member States and with conformity of international agreements with the Treaties, and interpreting conventions such as the EUROPOL Convention and other Conventions made under or in the shadow of the Treaties);
 - as a civil court (hearing disputes over contracts concluded by the Community, usually on appeal from the CFI);
 - as an appeal court (from the CFI in direct actions brought against Union institutions and other bodies).

Formerly the Court also acted as an employment tribunal (appeals by EU civil servants). Staff cases are now dealt with by the CFI, the Court retaining an appellate jurisdiction.

12. Finally, Article 234 of the EC Treaty enables the Court, on a reference from a national court, to give preliminary rulings on the interpretation of Community legislation (whether Treaty Articles or regulations or directives) and on the validity of acts of the institutions of the Union and of the European Central Bank. This jurisdiction provides a mechanism of judicial co-operation between the Court and national courts and is particularly important in maintaining certainty and consistency in the application of Community law.

The Community Courts

13. As the business of the Court has increased (with more Member States and a growing volume of Community law) so have the delays and with them a backlog of cases. A new court, the Court of First Instance (CFI) was created. This was one of the important institutional reforms of the Single European Act (1986). The CFI started hearing cases in 1989. Initially it had quite a limited remit but over time the CFI's jurisdiction has, in response to demand, been increased, with the result that all direct actions against a Community institution brought by natural or legal persons must now begin in that court.
14. The Treaty of Nice envisages that references from national courts might in some cases be transferred from the Court of Justice to the CFI. The Nice Treaty also amended Article 220 TEC to enable "judicial panels", specialized tribunals, to be attached to the CFI in order to exercise, in certain specific areas, the judicial competences of that court. The panels will hear and determine at first instance certain classes of action or proceedings. Panels are to be established to hear staff cases and some intellectual property cases. Appeals from these panels lie to the CFI but, to avoid overburdening the CFI, the grounds on which appeals may be brought are limited.

15. The Court and the CFI, together commonly referred to as the “Community Courts”, propound and enforce Community law and thereby play a key role in the delivery of Community policies.

The standing rule

16. Both Courts have jurisdiction to hear challenges to Community acts. Such challenges can be brought by Community institutions, Member States and by natural or legal persons. But Article 230 TEC requires a private applicant to satisfy a number of criteria before he can challenge, in the Community Courts, an act other than one addressed to him (the standing rule). One such criterion is that of “individual concern”. This qualification has been interpreted strictly by the Court and has been criticised for presenting difficulties to the individual in enforcing his rights and securing an effective remedy.

Treaty establishing the European Community

Article 230(4)

“Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”.

A new legal order

17. The EC Treaty is not like the vast majority of other international treaties, conventions and agreements, which are framed in terms of obligations accepted and enforceable between States as a matter of international law. The Court has stated on a number of occasions that the Community Treaties have established a “new legal order”. One does not find this proposition expressed in the Treaty—it is the creation of the Court, adopting a purposive approach to the Treaty.
18. The essential characteristics of this new legal order are twofold: the primacy of Community law and the direct effect of Community legislation.

“the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals ... The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves”.

Opinion of the Court: Opinion 1/91 (Draft Treaty on a European Economic Area) [1991] ECR I-1061.

Primacy/Supremacy

19. It is well established as a matter of Community law that in the event of a conflict between Community law and national law Community law is supreme and has primacy, irrespective of the source, status or date of the

national law in question. The doctrine of primacy has existed in EC law for almost 40 years and can be traced back to the judgment of the Court in *Costa v ENEL*⁵. That Community law has primacy irrespective of the status of the national law or the organ of the Member State involved was stated most clearly by the Court in the *Simmenthal* case.

“every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside the national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the essence of Community law”.

Case 35/76 *Simmenthal v Italian Minister for Finance* [1976] ECR 1871.

Direct effect

20. It is a well established principle of Community law that provisions of the Treaty can have direct effect and create individual rights which national courts must protect. In the famous *van Gend en Loos* case, the Court of Justice spoke of Community law, independently of the legislation of the Member States, imposing obligations on individuals and also conferring rights upon them which become part of their legal heritage.

Article 25 TEC (which prohibits, as between Member States, customs duties on imports and exports and charges having equivalent effect) “contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects”.

Case 26/62 *van Gend en Loos* [1963] ECR 1.

21. A large number of Treaty Articles have been held to have direct effect. It may not matter that the Article expressly contemplates subordinate legislation to give effect to its provisions. It is also clear that the doctrine of direct effects is not restricted to the Treaty and its Articles. It applies more widely in Community law, including regulations, decisions and directives. These, depending on their terms, may be held to have direct effect and to create rights for individuals enforceable by national courts.

⁵ Case 6/64, [1964] ECR 585.

CHAPTER 3: THE KEY QUESTIONS

(1) How should the basic role of the Court be defined?

(i) Article I-28(1)

22. Under Article 220 TEC the Court is required to “ensure that in the interpretation and application of this Treaty the law is observed”. Under Article I - 28(1) of the draft Constitutional Treaty the Court would be obliged to “ensure respect for the law in the interpretation and application of the Constitution”. What change, if any, is intended by the new formulation?
23. It has been suggested that the notion of “respect” is weaker than that of “observance”. Mr Heim thought that the change in wording might be taken as a “clear political signal that there may be a wider margin for those institutions, bodies, agencies or administrations giving effect to European law” (p 76).
24. A number of witnesses pointed to the differences in the various language versions of the draft Article I-28(1). In particular they noted the similarity of the French text of the Article to that of the existing Article 220 TEC, in contrast to the dissimilarity in the English and German versions. Professor Arnall (University of Birmingham) suggested that the English version of Article I-28(1) looked like a direct translation of the French version by someone unfamiliar with the language of Article 220 TEC. He proposed that for the avoidance of doubt, Article I-28(1) should be amended at the IGC so that it requires the Court of Justice to “ensure that in the interpretation and application of the Constitution the law is observed” (p 56). Professor Weatherill (University of Oxford) argued similarly. In his view, following precisely the current Article 220 TEC would strengthen the message that there should be no abandonment of the Court of Justice’s treatment of the system as “based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty...” (p 104).⁶
25. While Article 220 of the EC Treaty sets out, in a nutshell, the essential role of the Court, its language does not reflect the significance of the Court as a Community/Union institution. The Court’s value and effectiveness are based on the importance of law and legal order to the creation, functioning, cohesion and development of the Union and also on the Court’s independence. We do not envisage that those features will change. **The new wording of the primary obligation of the Court would be unlikely to bring about any change in the Court’s role and approach in ensuring compliance with and the consistent application of Union law. It would, however, be desirable to bring the different language versions of Article I-28(1) more clearly into line with Article 220 of the EC Treaty and with each other.**

⁶ Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339.

(ii) A Constitutional Court

26. Draft Article I-28 is a provision in a “Constitutional Treaty” which includes such matters as a statement of the division of competences between the Union and the Member States and which would incorporate the EU Charter of Fundamental Rights. The Article must be considered in its context. The general view of our witnesses was that if the role of the Court were to undergo change after the adoption of the new Constitution, it would not be by virtue of linguistic variations between Article I-28(1) and Article 220 TEC but as a consequence of the nature and content of the new Treaty.
27. A number of witnesses believed that the character of the Court as a constitutional court would be strengthened on the adoption of the Constitutional Treaty. Professor Tridimas (University of Southampton) said that the Court’s position as the Supreme Court of the Union was likely to be enhanced as a consequence of the constitutionalisation of the Treaties (p 101). Professor Craig (University of Oxford) said: “Everyone has always spoken of the ECJ as being a constitutional court with a small ‘c’ and now it becomes a Constitutional court with a large ‘C’ because it is adjudicating on an explicit Constitution with all the tensions that that necessarily entails. Problematic issues about the division of competence between the Member States and the EU which can arise pursuant to Part I of the Constitution will necessarily have to be resolved initially at least by the European Court of Justice. There will be a real constitutional dimension to its deliberations” (Q 2).
28. A number of witnesses pointed to the incorporation of the Charter of Fundamental Rights in Part II of the draft Constitution as being a significant factor in this context. It was likely to give rise to more challenges to the activities of the Union on fundamental rights grounds (p 56, Q 2).
29. Professor Papier, President of the *Bundesverfassungsgericht* (the German Constitutional Court), envisaged the Court taking on a different role under the new Treaty by virtue of the fact that there would, consequent to the merging of the three pillars, be a change in the structure of the Union. Article I-28(3) demonstrated that the Court would, in principle but with the exception of the Common Foreign and Security Policy (CFSP), be able to rule on all matters in the Treaty (p 87).
30. Advocate General Jacobs, on the other hand, did not see the new Treaty making a very substantial difference in the Court’s role. But he accepted that the Charter might have an impact: “Cases which were previously brought on some other basis may now have a sharper focus on the rights contained in the Charter” (QQ 114-5).
31. We conclude that the Court already has a constitutional character and it is unlikely that any change in the role of the Court would result from the difference in wording between Article 220 TEC and Article I-28(1). However, the constitutional dimension of the draft Treaty and the incorporation, with whatever qualifications, of the Charter may lead to more challenges on constitutional/fundamental rights grounds. The Court would more clearly take on the mantle of a Constitutional Court for the Union.

(2) Does the draft Treaty merely codify the principle of the primacy of Community Law?

32. Article I-10(1) of the draft Treaty provides that the “Constitution, and law made by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States”. We asked whether this text would extend the doctrine of primacy of Community law and if so, to what extent.
33. There were mixed views as to the effect of Article I-10(1) and as to whether it was a helpful provision to include in the draft Treaty.

Essentially a codification

34. In Professor Schermers’ (University of Leiden) view, Article I-10(1) did not extend the doctrine of primacy of Community law. It codified what the Court of Justice had held as long ago as 1964 in the case of *Costa v ENEL*,⁷ namely that Community law had precedence over the national laws of the Member States (p 95). A number of other witnesses also took the view that Article I-10 merely embodied the existing case law of the Court. Professor Weatherill concluded that it “therefore appears to change nothing” (p 105). Professor Papier welcomed the fact that Article I-10(1) made clear that primacy only applies in favour of Community law that has been adopted in the exercise of the competences assigned to the Union’s institutions (p 88).

Relationship with direct effect

35. One issue which is not definitively dealt with in the Court’s case law, but which seems crucial in defining the scope of the primacy of Community law, is the question to what extent it is dependent on the doctrine of direct effect. Professor Arnall said that “the existing doctrine of primacy can only apply where the European rule is sufficiently clear to be suitable for application by a court, a quality known as direct effect”. The draft Constitutional Treaty was defective in not making this clear (p 57). Professor Besselink (University of Utrecht) agreed. If Article I-10(1) was not so restricted it could lead to an assertion of primacy well beyond the present position. He added: “A rupture of the link between primacy and direct effect may greatly affect the rights of citizens. For if the precedence of Community law applies also to non-directly effective EC and EU measures, such a non-directly effective measure may set aside rights which citizens enjoy under national law, whether these are of a constitutional nature or not” (p 65).
36. But not all witnesses shared that view of the relationship between the doctrine of primacy and direct effect. Professor Craig did not believe the doctrine of primacy was limited to Union measures having direct effect. Primacy was not logically conditioned upon direct effect. Further, there was no foundation in the Court’s case law for the view that primacy only operated in relation to directly effective provisions. But Professor Craig acknowledged that where a measure had direct effect the doctrine of primacy was more keenly felt (QQ 23-26). Advocate General Jacobs envisaged primacy applying, for example, in relation to a decision under CFSP which operated between Member States and did not have direct effect (Q 129).

⁷ Case 6/64, [1964] ECR 585.

Extension to Second and Third Pillars

37. The existing doctrine of primacy is a doctrine of Community (not Union) law. It does not extend to Title V TEU (the Common Foreign and Security Policy (CFSP)—“the second pillar”) or Title VI TEU (Police and Judicial Cooperation in Criminal Matters—“the third pillar”).
38. Professor Arnall contended that because the draft Constitution would abolish the Union’s pillar structure, the effect of Article I-10(1) would be to make the doctrine of primacy applicable across the entire range of the Union’s activities. However, while matters currently falling under the third pillar would for the most part be brought within the jurisdiction of the Court, most of the provisions on the CFSP would remain outside the jurisdiction of the Court. (The extent of the Court’s jurisdiction over CFSP is considered under question 4 below.) It was therefore unclear whether a national court would be able to ask the Court for guidance on the effect of Article I-10(1) in relation to CFSP matters. If national courts were left to their own devices, there would inevitably be divergence between Member States. Professor Arnall believed the solution to this problem to be either: (a) to delete the provision excluding the CFSP from the jurisdiction of the Court, or (b) to exclude the CFSP from Article I-10(1). He said: “In a Union which will include the rule of law among the values on which it is based, the former would seem preferable. Regrettably, the latter is likely to prove more politically acceptable” (p 57).
39. Professor Denza (University College, London) identified a more fundamental concern: extending the doctrine of primacy to the CFSP would cause “a significant shift in the balance of power between the Union and the Member States towards the Union”. In her view, the Government appeared to be ignoring the extension of primacy issue and had misrepresented the position.⁸ Further, Professor Denza believed that it could be argued that the formalising and extension of the doctrine of primacy, when taken together with a number of other specific changes to the rules governing the CFSP, were “sufficiently fundamental to call into question the ultimate independence of the Member States in the conduct of their foreign policy”. In international law, loss of such independence would imply loss of the separate sovereign status of the Member States. Professor Denza noted that the draft Treaty was not expressly presented as producing such a fundamental effect and it contained other provisions pointing to the continuance of the Member States as separate sovereign entities. Nonetheless, in her view, it would be reasonable to expect the IGC to determine and make clear the future legal nature of the Union. If the matter were left unclear she thought it would likely fall to be resolved by national constitutional courts and by the Court of Justice (p 70).

⁸ The Government had asserted that supremacy of EU law over domestic law ‘... has been a fact since the Common Market began and has been in UK law since we joined 30 years ago.’ See letter from the Minister for Europe to The Times, dated 6 October 2003. On p. 12 of its White Paper, *The British Approach to the European Union InterGovernmental Conference*, it is stated that ‘primacy is consistent with the principle of international law whereby a State may not plead its national law obligations to escape its international law obligations ...’ but Professor Denza said that there was no mention of the differences in the principle as applied in international law and in Community law (p 70).

Interaction with national constitutional rules

40. We asked, in particular, whether, the Constitution and laws of the Union would take precedence over constitutional rules of a Member State.
41. In the *Internationale Handelsgesellschaft* case,⁹ the Court stated that the legal status of a conflicting national measure was not relevant to the question whether Community law takes precedence: ‘the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.’ And the Court made clear in *Simmenthal*¹⁰ that EC law takes precedence over Member States’ constitutional provisions. Advocate General Jacobs said: “From the perspective of Community law, it has always been the case that Community law prevails even over national constitutions. That does have to be the case as a matter of practice because otherwise the primacy of Community law would depend upon what happens to be included in the particular national constitution. National constitutions do vary widely” (Q 120). But, as Professor Dutheil de la Rochère and Ms Iliopoulou (University of Paris II) reminded us, national supreme/constitutional courts do not necessarily share the same view as the Court on this matter, although they have generally avoided direct confrontation (p 73).
42. As to the effect of Article I-10(1), Professor Pernice (Humboldt University, Berlin) said: “Article I-10(1) does not change, but confirms the law according to the established jurisprudence of the ECJ. The Constitution and the laws of the Union take precedence over constitutional rules of a Member State. This principle—though certainly not recognised by all supreme national Courts—follows from the principle of equality before the law, and it is the very condition for the recognition, validity and functioning of the European legal system” (p 90). Professor Tridimas said that the text of Article 10(1) was “somewhat ambiguous since “law of the Member States” could be taken to mean ordinary law rather than constitutional norms”. But his view was that under Article 10(1) Union law would prevail over national constitutions (p 102).
43. That view was not universally held. Professor Papier, President of the *Bundesverfassungsgericht*, did not believe that the doctrine of primacy, Article I-10(1), could override “the inviolable basic structure” of the German Constitution. Dr Papier said: “In Germany the transfer of sovereign rights to international institutions, and also the European Union, is restricted by a guarantee of identity (Article 23.1 sentence 3 and Article 79.3 of the Basic Law (*Grundgesetz*)). A violation of this core of constitutional provisions, which also include, for instance, democracy and respect for human dignity, could therefore be identified by the Federal Constitutional Court as an exercise of supranational sovereign power that is not covered by the Community Treaties and be declared inapplicable in Germany” (p 88).
44. Professor Rasmussen (University of Copenhagen) argued strongly that Danish constitutional law took precedence over Union law: “This has to be so since the Danish Constitution withholds from the Danish institutions any

⁹ Case 11/70, [1970] ECR 1125.

¹⁰ Case 106/77, [1978] ECR 629.

power to issue binding rules that, if in conflict with some constitutional provision, takes precedence over the latter. Section 20 cannot authorize Union law to override Danish constitutional law” (p 94). Professor Biernat (Jagiellonian University, Cracow) pointed to the debate surrounding this issue in Poland. In his view, although EU law had no formal primacy over the Constitution of Poland, the Polish authorities, including the Constitutional Court, should refrain from stressing the supremacy of the Polish Constitution (p 68).

45. Professor Duthiel de la Rochère and Ms Iliopoulou pointed out that Article I-5(1) specifically required the Union to “respect the national identities of Member States, inherent in their fundamental structures, political and constitutional ...”. They thought that the idea underpinning this Article was “difficult to reconcile with a demand of primacy of EU law over national constitutional rule” (p 73).

An essential/necessary codification?

46. As Professor Denza pointed out, Article 10(1) “makes acceptance of primacy not merely a doctrine derived by implication by the European Court of Justice from the nature of the original Treaty establishing the European Economic Community but an express obligation deriving from the new Constitution” (p 70). This was a cause of concern for some witnesses.
47. Professor Craig had doubts about the inclusion of Article 10(1): “The problem with an Article 10 of Part I is that once you write it down in a constitution and you deliberately leave the scope of primacy ambiguous as to whether it is primacy against constitution as well as national laws, apart from constitutions, you are going to get a nuclear problem which is going to have to be resolved either prior to ... or post ratification” (Q 16).
48. Professor Dutheil de la Rochère and Ms Iliopoulou queried whether the inclusion of the primacy clause in the draft Treaty was necessary. It could even be regarded as a “wrong move”, a “brutal” way of affirming the primacy of Community law. It remained to be seen how the Court of Justice and especially how national constitutional courts would react to this clause (p 73). M. Errera, Conseiller d’Etat Honoraire, also thought that Article 10 might be regarded as provocative in certain quarters. But primarily he thought that the provision was “useless”. It would not resolve the issue of *Kompetenz-Kompetenz* (with which we deal in detail under question 3 below). It would not prevent national constitutional courts maintaining the view that they were the ultimate power to overrule Community law where they considered it infringed their basic values in the national constitution (QQ 172-4).
49. Professor Besselink was similarly critical of the inclusion of Article I-10(1): It might lead to a concept of the supremacy of EU law over all national law (including constitutional values of the legal orders of the Member States). That might undermine the acceptance of EU law rather than promote it. Professor Besselink therefore doubted the wisdom of casting this doctrine in the form of a legal norm, “carved in stone for the centuries to come” (p 66).
50. On the other hand, Professor Weatherill noted that the rule of primacy was a creation of the Court’s case law and its insertion explicitly into the Treaty would prevent the Court changing its mind. He said: “True, that jurisprudential *volte-face* scarcely strikes one as a practical possibility.

Nonetheless it is not wholly far-fetched that a Court ten years from now, in a Union of 27 or more States, will be very different in outlook from today's Court and yesterday's Court. So rooting primacy in the Treaty could be significant in preventing judicial backsliding" (p 105).

51. It is not surprising that Part I of the Constitutional Treaty includes a statement of the primacy of Union law. The doctrine is a well established and key element of the Community's legal order as defined in the jurisprudence of the Court. **We note that Article I-10(1) makes clear that primacy only applies to the Constitution and to Union law that has been adopted in the exercise of the competences assigned to the Union's institutions. There remains, however, some uncertainty as to the scope of the application of the principle.**
52. We understand that in a move to clarify the position it has been proposed that a declaration be annexed to the new Treaty, as follows: "The Conference notes that the provisions of Article I-10(1) reflect existing Court of Justice case law".¹¹ The Government has said: "If agreed it would state the common intention and understanding of all the participating States that Article I-10(1) has this meaning and should be interpreted accordingly".¹²
53. The declaration would be helpful to the extent that it would suggest that Article 10 is merely a codification and is not intended to make any change. The problem is that it presupposes that there is currently no uncertainty as to the meaning and extent of the doctrine of primacy. Second, the declaration does not address the issue of the formal collapse of the three pillars. Primacy is a first pillar doctrine which Article 10(1) would appear to apply generally across all Union business, including the CFSP. **More clarity is needed to address these two concerns.**

(3) Which court should have the final say on whether a matter is within the competence of the Union—the *Kompetenz-Kompetenz* issue?

Introduction

54. Under Community law, if the validity of a Union measure is challenged before a national court, that court may either refer the question to the Court in Luxembourg or decide that the measure is valid. It is not, however, for national courts to declare Community acts invalid. That, as the Court said in *Foto-Frost*,¹³ is a matter exclusively for the Court. (Some leeway has however been recognised in relation to interim measures.) This approach has the merit of avoiding conflicting decisions between the Community and national courts and between individual national courts. It thus acts as a strong integrating element, providing for the uniformity and effectiveness of Community law. But the approach has not gone unchallenged and there has, on occasion, been difficulty in some Member States in reconciling Community law with the provisions of their national constitutions. Professor Karen Alter (Northwestern University) described the position following the Court's rulings on primacy in the *Costa v ENEL*¹⁴ and *Internationale*

¹¹ Doc CIG 52/03 ADD 1. 25 November 2003.

¹² Written Answer 8 December Hansard HOC p 244 W.

¹³ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

¹⁴ Case 6/64, [1964] ECR 585.

*Handelsgesellschaft*¹⁵ cases: “These rulings started what I call a process of negotiation between the ECJ, national governments, and national courts, through which the relationship between European law and national law is continually defined, redefined and nuanced. The outcome of negotiations regarding EU law supremacy was not consensus about the ECJ’s supremacy doctrine, rather it was a détente in which the ECJ and national courts learned to live with their disagreement regarding the primacy of European law” (p 53).

55. The draft Constitutional Treaty sets out the division of competences as between the Union and the Member States (Part I Title III). It defines which matters would be within the exclusive competence of the Union and which shared between the Union and the Member States. In some areas the Union would be limited to taking supporting, co-ordinating or complementary action. The draft Treaty also makes the exercise of Union powers subject to the principles of proportionality and subsidiarity (Article I-9(1)). We asked our witnesses which court, the Court of Justice or the national supreme/constitutional court, should have competence to decide whether, and if so to what extent, the Union or, as the case may be, the Member State has competence in a matter.

Two views

56. The evidence revealed two views. One is that the European Court of Justice should resolve such questions, in a manner binding on the Member States. The other view is that States’ constitutional/supreme courts would decide, in accordance with their own constitutions, whether the powers claimed for the European institutions have in fact been conferred on them.

Common ground

57. Notwithstanding this fundamental division of opinion there was, Professor Craig explained, much common ground: “No one in the debate about *Kompetenz-Kompetenz*¹⁶ denies that the ECJ has authority to rule on all aspects of the Constitution, including necessarily the boundaries between EU and Member States’ competences which are set out in more detail in Part I of the Constitution than ever before. Secondly, no one denies that a national court would think long and hard before finding that the ECJ or the EU legislature—and it can be either—had exceeded the boundaries of EU competence. That is clear from the more nuanced approach of the German courts post the *Brunner*¹⁷ decision. No one denies either—and this is the third point on which everyone would agree—that if any court other than the ECJ could decide on the limits of EU competence there would to that extent necessarily be the possibility that the uniform application of EU law would to some extent be placed in jeopardy, although how serious a problem that is would be open to debate” (Q 3).

¹⁵ Case 11/70, [1970] ECR 1125.

¹⁶ The power (competence) to decide with whom competence lies.

¹⁷ The German Constitutional Court’s Maastricht Judgment of 12 October 1993. BVerfGE 89, p. 155.

View I—The Court as ultimate arbiter

58. A number of witnesses expressed a strong and clear view that the Court had and should have the power to decide definitively questions of Union competence. Professor Pernice put this argument most forcefully. “It should and will be for the ECJ to judge whether the Union has acted within the limits of its competences and in due respect of the principles of subsidiarity and proportionality. National judges may and, eventually, have to submit questions to this effect to the ECJ according to Article III-274 of the Constitution. They will not have competence to decide whether or not European law is valid, and the Court will not have competence to decide upon the validity of acts of the Member States” (pp 89–90). Professor Koeck (University of Linz) was also a strong advocate of this view. Indeed he took the point to its logical conclusion, arguing that the ECJ should be empowered to annul inconsistent national law (p 78).
59. Support for the view that the Court should have the ultimate competence to rule on EU law was based on several grounds.

(i) The need to avoid divergence

60. Some saw it as necessary for such questions to be answered on a uniform basis for the Union as a whole in the interests of certainty and consistency. Professor Schermers said: “The only Court competent to decide upon the validity of Community acts is the ECJ. Leaving this to different national courts would lead to divergences between the Member States. As the Court held in *Foto-Frost*¹⁸: ‘Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.’” (p 95). Advocate General Jacobs did not believe that it was feasible for each national constitutional or supreme court to take its own view of the interpretation of the Treaty and to impose that view (Q 119). Professor Arnulf observed that in a Union of 25 or more Member States the need for a single court to determine such questions would be even more pressing (p 56).

(ii) The provisions of the draft Treaty

61. Support was also found in the draft Treaty itself. Professor Toth (University of Strathclyde) said: “The question whether the Union or a Member State has competence in a matter clearly involves the interpretation of the Constitution and, as such, it undoubtedly falls within the jurisdiction of the ECJ This conclusion also follows from Article III-274 of the draft Treaty (Article 234 EC), according to which where a question concerning the interpretation of the Constitution is raised before a national Supreme Court or Constitutional Court (against whose decisions there is normally no judicial remedy under national law), that court is obliged to bring the matter before the ECJ. Finally, the same result follows implicitly from Article III-209 of the draft Treaty, which confers jurisdiction on the ECJ to monitor compliance with the proper exercise of competences as allocated by the Constitution” (p 99).

¹⁸ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15.

62. There is, however, no express provision in the draft Treaty to the effect that the Court is the ultimate arbiter. The CCBE argued that the Treaty nevertheless had to be read as if there were such a power. It was inherent in the Treaty. Dr Berrisch said: “It is not like in 1957, when you started afresh, without an existing body of case law of the European Court of Justice. This Treaty will be adopted ... by taking into account what has happened over the past years, and the case law of the Court of Justice as it stands. Therefore, I would say, as long as you do not find anything in the Treaty that points that the case law should be changed and that there should be a different rule than has been developed by the Court, there is a presumption that, if that Treaty is adopted by national parliaments, they also agree to the existing interpretation” (QQ 65-6, 68).

(iii) International law

63. Professor Koeck referred to general principles of international law and in particular the principle of workability: “International or supranational organisations, as federal states, will not be able to function if each member state, as each component part, would be able to decide for itself whether a power claimed by the organisation, as by the federation, may or may not be exercised in a given case. ... If applied to the future Union, the principle of workability demands that it is the Union itself, and not the individual Member State, that is to have the power to decide disputes over its competences. And since, in contrast to many international organisations, the future Union will have, as the present Union and, more particularly, the European Community, does have, at its disposal a special organ for deciding legal questions, *viz.* the European Court of Justice, it is most proper to invest the Court with the power to decide questions of competence with binding effect both for the Union and the Member States” (p 81).

View II—Member States—the masters of the Treaty

(i) The approach taken by national courts

64. Most supreme courts in the Member States have accepted that they are bound by the Treaty to make references to the Court of Justice when an issue of EU law presents itself. Few constitutional courts either deny their Treaty obligations under Article 234 TEC to do this or contend that they do not fall within the scope of that Article.¹⁹ On the other hand, the national constitutions of some Member States have been drawn up on the basis that the ultimate constitutional, legislative and judicial authority rests in the Member State. Difficulties have on occasion been encountered in giving effect to Community law. The litigation before the German Constitutional Court (the *Bundesverfassungsgericht*) is perhaps the most often quoted but is not unique. There have been other landmark cases in the Constitutional/Supreme courts of other Member States, including France, Italy, Spain and Denmark.²⁰

¹⁹ Mayer, *The European Constitution and the Courts: Adjudicating European constitutional law in a multilevel system*; Jean Monnet Working Paper 9/03, Max Planck Institute for Comparative Public Law and International Law. February 2003.

²⁰ A summary of and extracts from the case law of the Member States can be found in *The Relationship between European Community law and National Law; The Cases*, edited by Andrew Oppenheimer (Cambridge University Press, 1994).

“The exercise of sovereign power through a system of states such as the European Union is based on authorisations from states which remain sovereign ... If European institutions and bodies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Law on Accession, the resulting legislative instruments would not be legally binding within the sphere of German sovereignty. The German state bodies would be prevented, for constitutional reasons, from applying them in Germany. Accordingly the Federal Constitutional Court reviews legal instruments of European institutions and bodies to see whether they remain within the limits of the sovereign rights conferred on them or whether they transgress those limits.”

Extract from the German Constitutional Court’s Maastricht Judgment of 12 October 1993, BVerfGE 89 p155 at pp 186 and 188.

65. Professor Craig said: “National courts have not in general accepted that the European Court of Justice has the ultimate *Kompetenz-Kompetenz*. It is not just that we have positive counter examples in the form of the *Bundesverfassungsgericht* in *Brunner*²¹ and the Danish Supreme Court in *Carlsen* and cases of that sort, but also from the scholarship that I have read, I do not know of any constitutional court which has unequivocally ever said that they admit that the ECJ has the ultimate *Kompetenz-Kompetenz*. The Belgian court is probably the one that has come closest to it, but I do not think even the Belgian court has accepted that an unequivocal *Kompetenz-Kompetenz* resides within the ECJ” (Q 3).

(ii) *Respecting and safeguarding national constitutions*

66. Professor Arnall said: “In order to ensure that the Community/Union’s powers, as determined by the Court of Justice, do not extend beyond the scope of the act by which a Member State acceded to the Community/Union, the national courts of that State may assert a power to review Community/Union acts to verify that they remain within the limits of that act. The leading example of that approach is the *Bundesverfassungsgericht*’s famous Maastricht decision of 12 October 1993.²² Technically, this is a matter of national law” (p 56).
67. Professor Denza said: “National courts have made clear that their own mandate is ultimately based on their own constitution, that the supremacy of European Community law is accepted because it has been given effect by national constitutional modalities, and that national constitutions may under extreme circumstances impose limits on it” (p 69).
68. Professor Rasmussen was clear that, under Danish constitutional law, Danish courts have “the final say”. It was the Danish Supreme Court’s responsibility to act as the ultimate guardian of the Danish Constitution. If that Court, notwithstanding the respect it owed the EU Court, disagreed with the latter’s interpretation, it would have to say so. Professor Rasmussen said: “It will base its ruling on the solid ground that the Danish Constitution cannot grant the EU a power to expand the scope of a transferred power beyond its size as

²¹ The German Constitutional Court’s Maastricht Judgment of 12 October 1993. BVerfGE 89, p. 155. The decision is reported in English as *Brunner v European Union Treaty* [1994] 1 CMLR 57.

²² *Ibid.* A similar approach was subsequently taken by the Danish Supreme Court in *Carlsen v Prime Minister*, judgment of 6 April 1998, reported in English at [1999] 3 CMLR 854.

defined at the moment of its transfer—*i.e.* in accordance with the Constitution’s Section 20” (p 93).

(iii) *Co-operation not excluded*

69. A number of witnesses described the relationship between the national courts and the Court of Justice as being a dialogue. This was not unhealthy. There had developed, in Professor Arnulf’s view, “a spirit of compromise”. Since the Maastricht decision of the German Constitutional Court the Court of Justice has adopted a stricter approach to the scope of the Community’s powers.²³ For its part, the German Court had adopted a less confrontational posture. Professor Arnulf said: “This underlying tension between the Court of Justice and the supreme courts of the Member States is not unhealthy and shows the extent to which the Court of Justice relies on their cooperation. The position would not change under the proposed Constitution” (p 6). Professor Besselink also considered the dialogue to be a healthy one. He believed that without such dynamics the Court might not have developed its case law on the protection of fundamental rights at the European level. Like Professor Arnulf, he thought it might also provide a bar to a too extensive interpretation of EU competence (p 64).
70. Advocate General Jacobs accepted that there might need to be an accommodation between the Court and national courts on the issue of primacy but queried whether that was feasible in the matter of *Kompetenz-Kompetenz*. He said that national constitutions may contain “provisions of a perhaps more fundamental nature, such as the provisions for the protection of fundamental rights, and it is not easy to see how those provisions can be overridden by Union law without creating serious conflicts. So there some accommodation has to be found between the national constitutions on the one hand and Community law on the other and that has been done, successfully I think so far, by accommodation between the Court of Justice and the jurisprudence of the national constitutional courts, each respecting the position of the other. As regards competences, it does not seem to me that it is possible simply to have an accommodation of that kind. One cannot say that competences of the Union are to be determined unilaterally by each of the constitutional or supreme courts of the Member States. That does not seem a workable hypothesis at all” (Q 120).

Kompetenz-Kompetenz—a real problem?

71. While the draft Treaty aims to clarify the division of competences between the Member States and the Union (and in this respect the draft Treaty is an improvement on the texts first published by the Convention), problems may remain. M. Errera’s view was that the distribution of competences was not, and could not be, a clear cut issue: “It is not in federal states or domestic law, as we all know. It is even less in Union law. So the very notion of shared competences, of subsidiarity, means the main colour is grey and not black

²³ Prof Arnulf referred to Opinion 2/94 on Community accession to the European Convention on Human Rights (ECHR) [1996] ECR I-1759. In that case, the Court said that Art 235 (now 308) EC could not be used as the basis for “provisions whose effect would, in substance, be to amend the Treaty ...” (para. 30). That statement might be seen as a response to the observation of the *Bundesverfassungsgericht* in the Maastricht decision that the interpretation of the Treaty “may not have effects that are equivalent to an extension of the Treaty” (para. 99). Para. 30 of Opinion 2/94 was quoted by the Danish Supreme Court in the *Carlsen* case (p 6).

and white” (Q188). However, Professor Craig thought that problems might be less likely to arise under the draft Treaty. *Kompetenz-Kompetenz* problems had arisen principally in the past “because of the exercise of legislative power under what was Article 235 and then became 308, the general reserve legislative power, and the courts’ interpretation of 308. It was really “anger” at the expansive teleological interpretation given by the European Court of Justice to Article 308 that caused the German courts to do what they did in *Brunner*. One thing that the new Constitution does is to accord the EU specific legislative capacity in the main areas—energy, development cooperation and the like—in which hitherto they had had to fall back on 308, so 308 would be used less and in that sense at least one of the causes of the *Kompetenz-Kompetenz* problem will be alleviated” (Q 3).

Does the draft Treaty change the position?

72. Professor Nergelius (Örebro University, Sweden) took the view that the new Treaty did not resolve the *Kompetenz-Kompetenz* issue. Indeed he thought that it might be another 25 years before this controversial question was resolved (p 86).
73. Although, as mentioned above, there are Treaty-based arguments that the Court is the ultimate arbiter on Union/national competence, it can also be argued that some provisions of the draft Treaty strengthened the position of the Member States in this regard. Professor Craig believed that the draft Treaty, including the principle of conferral, strongly written in Article I-9, and the provisions about competence, made it extremely difficult now to argue that the Court of Justice would have the ultimate *Kompetenz-Kompetenz*. In his view the pre-existing position, that *Kompetenz-Kompetenz* probably resides within the national courts, was even stronger than before. But Professor Craig expressed two caveats: first, no national court would lightly refuse to accept a view from the Court about the limits of EU competence; second, *Kompetenz-Kompetenz* problems were less likely to arise because there was now less need to use Article 308 (ex 235) TEC as the legal basis for measures (Q 3).
74. Professor Alter doubted whether national constitutional courts would change their approach if the draft Treaty were adopted. She observed: “It is worth noting that even when national legislatures changed national constitutions to surmount constitutional barriers, supreme courts have refused to relinquish their final say over what law applies in the national realm. I would not expect a written constitution to change this fact, unless adoption of a constitution was part of a deeper political process of political actors deciding to take a leap towards a Federal Europe. Courts are counter-majoritarian institutions, but they will not stop Europeans from choosing what fate they want for themselves. If the process of crafting and adopting a constitution becomes a genuine political movement, national courts and the ECJ will follow the public will. The political future of Europe is for the people to decide and courts recognize this fact” (p 55).

Conclusion

75. The Court of Justice, as a matter of Union law, has jurisdiction to rule on the division of competences between the Union and its Member States and on whether a particular matter is within the *vires* of the Union as set out in the

Treaty. That is not new. Member States, and their courts, generally respect the rulings of the Court on these and other matters.

76. What is new is the classification and division of competences set out in Part I of the draft Treaty. The critical question is which court, the Court of Justice or national courts, will finally decide whether a matter falls within Union competence. **This is not just a drafting question—one is never going to have sufficiently clear drafting to avoid issues as to what the boundaries of competence are—but an issue touching upon the fundamental nature of the Union and its relationship with the Member States.**
77. In principle there should be one court in the end able to say whether the European Union institutions have exceeded their powers or not. **A strong argument can be made that the effective functioning of the Union requires the Court to be the ultimate arbiter of the extent of the Union’s competences and of the validity of its acts.** It is difficult to see how the Union could work if the courts of each Member State had jurisdiction to declare EU law invalid. There would be a risk of conflicts of decision, “limping” regulation (with legislation valid in some States and invalid in others) and no legal certainty in the absence of a unified legal system.
78. **But if the Court is the ultimate arbiter on the extent of the Union’s competence it follows that the Court also has the final say in defining the extent of Member States’ powers. It is this side of the coin which some find unacceptable, from a political and in some cases constitutional standpoint.**
79. Accepting that there should be one final arbiter it is nonetheless true that whether the Court can have the ultimate decision on issues of competence depends on the agreement of Member States and on the compatibility of that agreement with national constitutions. That agreement is at present absent. One does not find in the existing Treaties or in the draft Constitutional Treaty an explicit statement that the Union/Community can, via Court rulings, itself extend its powers or that the Member States have established a court whose jurisdiction includes the power definitively to decide the respective competences of the Union and the Member States. On the contrary, at least some national constitutions would appear to be incompatible with the inclusion of either of those propositions in the Treaties and, as a matter of fact, some national constitutional courts have exercised the right under their constitutions to determine whether a Union/Community act is within the terms of that Member State’s accession to the Union.
80. **The draft Treaty does not expressly address this question of *Kompetenz-Kompetenz*. Nor does it by implication resolve the issue one way or the other. The draft Treaty does, however, reaffirm and strengthen the position of the national courts by seeking to define the division of competences and by restating, explicitly, the principle of conferral²⁴ (Article I-9). The Union and its institutions (including the**

²⁴ Article I-9(2) states: “Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union by the Constitution remain with the Member States”.

Court) only have the powers conferred on them by the Member States. Consequently there cannot be any expansion by the Court of the Union's competences. Any expansion would be inconsistent with the principle of conferral. Would not national courts be entitled to say of an expansion, "We're not bound by this"?

81. **In practice *Kompetenz-Kompetenz* issues may be no more likely to arise in future than in the past. Were a problem to arise, the Community Courts and national courts would and should seek to work together in a spirit of mutual respect and cooperation.** This has been the lesson of the past. A number of witnesses referred to a healthy "dialogue" that had taken place between the Court and national constitutional courts. Dialogue seems desirable on this most sensitive political subject.

UK position—primacy and Kompetenz-Kompetenz

82. Before leaving the issues of primacy and *Kompetenz-Kompetenz* we venture to say something of the position in the United Kingdom.
83. The issue of the primacy of Community law was addressed in the context of the European Communities Act 1972 (the ECA). Section 2(1) of the Act provides for Community law to be directly applicable in the United Kingdom. Section 3(1) requires any question as to the meaning or effect of any of the Treaties, to be determined in accordance with the principles laid down by and any relevant decision of the European Court of Justice. Our courts should therefore respect the principle of the primacy of Community law.
84. Giving effect to the doctrine of the primacy of Community law nevertheless presents a serious constitutional issue, namely the compatibility of the primacy rule with the constitutional principle that Parliament is supreme and cannot bind itself or its successors. The potential problem of Parliament inadvertently overriding Community law in future legislation is dealt with in section 2(4) of the ECA which provides that "any enactment passed or to be passed shall be construed and have effect subject to the foregoing provisions of this section". Parliamentary sovereignty is maintained—Parliament could expressly enact that a provision should take effect notwithstanding section 2 of the ECA.
85. Professor Alter thought that the lack of a British constitutional court inclined to protect its own prerogatives could affect the debate within the United Kingdom about the limits of EU law authority (p 54). It is true that the discussion focuses more on the issue of Parliamentary sovereignty and the extent to which Parliament may, by the terms of the ECA, have abrogated its authority.

European Communities Act 1972

Section 2(1)

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this section applies.”

Section 3(1)

“For the purpose of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached to it).”

86. The courts have accepted that the 1972 Act has the effect of enshrining the supremacy of Community law in the United Kingdom legal systems. But whether our courts have gone so far as accepting that the Court has ultimate power to define the Union/Member State dividing line in any case is arguable. The question was raised in the evidence before us as to whether Lord Bridge of Harwich had in mind the *Kompetenz-Kompetenz* issue in *Factortame (No 2)*. He had referred to “according supremacy to rules of Community law *in those areas to which they apply*” (emphasis added). There was conjecture as to whether Lord Bridge was thus putting down a marker that there were limits to the supremacy of Community law on which the national court could adjudicate.

“If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. This, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law and from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.”

Per Lord Bridge in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

87. Mr Moser, for BEG, referred us to the case of *Thoburn* (the “metric martyrs” case), in which Lord Justice Laws had drawn a distinction between “ordinary” statutes and “constitutional statutes” (the latter category including the ECA) and had opined that the foundation for all Community competence here was English law (Q 55). Lord Justice Laws reaffirmed the traditional doctrine of Parliamentary sovereignty with only one qualification, namely that “constitutional statutes” cannot be impliedly repealed.

“Parliament cannot bind its successors by stipulating against repeal, wholly or partly of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the EC which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament’s legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament’s legislative supremacy in the United Kingdom necessarily remain in the UK’s hands.”

Lord Justice Laws in *Thoburn v Sunderland City Council* [2002] 1 CMLR 1461, at para 59.

88. Recognition of the effects of the Community’s legal order and rules of Community law depends fundamentally on their acceptance by national courts. National constitutional/supreme courts are unlikely to relinquish their fundamental role as judicial guardians of their constitutions. That position is little different in the case of the United Kingdom, even though we do not have a written constitution, at least in the sense that that term is generally understood, or a constitutional court as such.
89. It is clear from the terms of the European Communities Act, and the judgments of our courts, that our courts should follow all rulings of the Court on matters which have been delegated through the Treaties. The scope of that delegation is in the first instance for the Court to construe. But the jurisdiction of our domestic courts is not necessarily excluded. We do not dismiss the possibility²⁵ of the argument being advanced that Parliament, when referring, in section 2(1) of the ECA, to rights, powers etc “created or arising under the Treaties” under which the Community only has such powers as have been conferred upon Member States did not, notwithstanding Section 3(1), intend the final definition of those powers to be determined by the Court, a body itself dependent on the Treaties for its

²⁵ Nor did Lord Justice Laws in the *Thoburn* case. He said: “In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law”. [2002] 1 CMLR 1461, at para 69.

existence and powers. In short, Parliament did not hand over a blank cheque, legally or politically. **The Government should set out their view on the *Kompetenz-Kompetenz* question clearly to Parliament and to citizens in the UK. This could go a long way in assuring the public that the Union is not some Frankenstein creation over which there may be little or no control.**

A new Supreme Court for the United Kingdom

90. The present question has a particular interest at this point in time. As part of its programme for reforming our constitutional arrangements the Government have proposed the creation of a new free-standing Supreme Court for the United Kingdom. The jurisdiction of the new Supreme Court has been the subject of a consultation exercise.²⁶ However, the Government has said that there is “no proposal to create a Supreme Court on the US model with the power to overturn legislation” or “a specific constitutional court, or one whose primary role would be to give preliminary rulings on difficult points of law”. It appears therefore that the Government’s proposals do not envisage that the new court would have an original constitutional jurisdiction analogous with those in some Member States. Questions of a constitutional nature, including validity of Union laws, would come up through the courts in the usual way.
91. The scope for the new Supreme Court to adjudicate on the reach of Union law may need to be considered further and possibly defined in the legislation establishing the new court.

(4) Should the jurisdiction of the Court of Justice be extended in relation to the Common Foreign and Security Policy?

Jurisdiction over CFSP—the issue in principle

92. The current position is that the Court’s jurisdiction in relation to the Common Foreign and Security Policy (CFSP) is extremely limited.²⁷ The draft Treaty (in particular Article III–282) would not change that. The general rule is set out in Article III-282. The Court’s jurisdiction is expressly excluded with respect to Articles I-39 (Specific provisions for implementing common foreign and security policy) and I-40 (Specific provisions for implementing the common security and defence policy). Article III–282 also expressly excludes jurisdiction in relation to Chapter II (Common Foreign and Security Policy) of Title V (The Union’s External Action) of Part III.
93. Professor Gaja (University of Florence) said that the draft Treaty “still reflects the attitude of Member States that are reluctant to submit to the Court’s review CFSP acts, which they consider the result of the use of their sovereign prerogatives. This attitude contributes to keep the pillar structure

²⁶ Constitutional reform: a Supreme Court for the United Kingdom. CP 11/03 2003.

²⁷ Professor Denza ascribed the exclusion of the jurisdiction of the Court of Justice from the CFSP to three factors: “(1) the fact that until the entry into force of the Treaty of Maastricht, European Political Cooperation (the predecessor of the CFSP) was not a matter of legal obligation at all; (2) the fact that most CFSP instruments are both sensitive and essentially short-term in character. Unlike treaties they are not designed to lay down a permanent framework of mutual legal obligations but to mould a collective response to a particular situation, crisis or international negotiation; and (3) suspicion on the part of a number of Member States that the specific character of the interGovernmental pillars could be put at risk by opening them to possible extension of Community law doctrines developed by the Court” (p 71).

in existence in spite of the declared intention to merge the three pillars into a single Union” (p 75).

Need to re-examine the exclusion

94. Professor Denza identified three factors pointing to the need to re-examine the scope of any exclusion of CFSP from the jurisdiction of the Court. First, the fusion of the Union and the Community so as to give full international legal personality to the Union, when taken together with continued exclusion of the CFSP from the Court’s jurisdiction could have the effect of excluding this area of potentially sensitive action from the jurisdiction of any court, national or Union. This, she argued, could give rise to incompatibility with the fundamental right of the individual to a legal remedy. Second, it would be difficult to explain to non-member States why the conduct of the foreign and defence policy of the Union should not be amenable to judicial review, given the emphasis placed on judicial settlement of disputes in modern international law and in the Union’s external relations. Third, some of the features in the draft Treaty which appeared unsatisfactory or unclear to international lawyers resulted from a failure by the Convention draftsmen to understand the special nature of the InterGovernmental pillars.
95. Professor Denza contended that “a more consistent and coherent Constitution would clarify the special character of the common foreign and security policy as based on public international law and would also open it to the supervision of the European Court of Justice”. She had confidence in the Court being able to appreciate the differences between Community law and public international law and to clarify rather than obscure these differences (p 72).

Respect for the rule of law and human rights

96. There were differing views as to whether the Court should have greater jurisdiction over CFSP matters. Some were clearly in favour of extending the Court’s jurisdiction. Professor Pernice contended that the exemption of any area of Union policies from the jurisdiction of the Court would seem to be contrary to the principles of Article 2 of the Constitution, and in particular, to the rule of law and the respect of human rights (p 90). The CCBE took a similar view (Q 74). Both Professor Arnall and Professor Schermers emphasised the need for natural and legal persons to have a remedy in the event of a breach of the draft Treaty provisions in CFSP, particularly in cases of alleged violations of fundamental rights (pp 96, 58). Ms Sharpston, for BEG, said: “Like [the CCBE], I am troubled by the idea of, in a sense, a legal vacuum, by powers being there, being exercised, without control, by the ECJ” (Q 76).
97. It was noted that the European Court of Human Rights (the Strasbourg Court) did not exclude foreign policy as such from judicial review. As regards the possible implications of judicial review of CFSP by the Court, Professor Craig said: “I think it is a fantasy problem to imagine that it is suddenly going to start substituting judgment on delicate issues of foreign policy for those taken by the European Council or the Council in its decisions on the CFSP. It would exercise very low intensity review over those issues and would review with a very, very light touch” (Q 28).

Retaining the exclusion

98. Other witnesses were more cautious. Professor Priban (Charles University, Prague) expressed a concern that giving the Court jurisdiction over CFSP might result in limitations of national sovereignty in the field of international politics (p 91). Professor Tridimas noted that while the Constitutional Treaty gave the Court competence at the margins of foreign policy the general effect of Article III-282(1) was to exempt matters concerning the CFSP. He said: “As a general rule, this approach seems correct. CFSP is a highly political area where involvement of the Court does not seem appropriate. It also accords with the laws of the Member States under which political actions in the field of foreign policy are not normally justiciable” (p 102). Professor Papier and M. Errera drew attention to the limited approach taken by national courts (in Germany and France, respectively) (p 88, Q 211).

Distinguishing procedural questions

99. Professor Papier noted that the Court’s tasks included protecting the institutional balance between the institutions. He considered that the Court might be given competence, for example, to ensure that rights of participation of the institutions and other procedural rights were respected (p 88). Professor Koeck suggested that a distinction might be drawn between political questions and legal questions: “Political questions are those which concern the end of the CFSP and the means for attaining this end. Legal questions are those which concern the procedure by which the end is defined and the means are adopted”. In Professor Koeck’s view, the Court should not have jurisdiction over decisions on the principles and objectives of the CFSP, but should have jurisdiction on “procedural matters” in the working out and realisation of the objectives of the CFSP. There were precedents in Articles III-282(2) and III-276 of the draft Treaty for such a distinction being applied in respect of the jurisdiction of the Court (pp 83–84). But Professor Craig doubted whether such a distinction in relation to CFSP would be workable in practice (Q 27).

Conclusion

100. We are aware that the subject of conferring jurisdiction on the Court of Justice in relation to CFSP is controversial. Governments may be averse to subjecting foreign policy decisions and actions to scrutiny before the courts, even though the experience is that courts, respecting the separation of powers, tread most carefully in this area.
101. The arguments for restricting the Court’s jurisdiction over CFSP matters are essentially arguments against giving the EU competence in this field. We are conscious that Member States have been reluctant to increase the powers of the European Parliament and the Court in relation to foreign policy. But if the Union and its institutions are to have any competence at all, and the common foreign and security policy is just one example, there ought to be some ability to test the legality of action taken in reliance on that competence. This is especially the case where that action may affect the interests and rights of the individual.
102. Looking at the matter juristically, and not politically, the jurisdiction of the Court should not automatically be excluded by the words “foreign policy” or the initials “CFSP”. Nonetheless, even where courts have jurisdiction there

are some matters which may, exceptionally, not be justiciable in a court of law; for instance, where the reasons for the relevant decision or act do not involve questions amenable to the judicial process or which involve political decisions properly belonging to the executive. The latter would almost certainly include high policy decisions of governments in relation to foreign affairs. But, as the Master of the Rolls said in *Abassi*, the issue of justiciability depends, not on general principle, but on subject matter and the suitability in the particular case.²⁸

103. In our Report on the Future Status of the EU Charter of Fundamental Rights, we concluded that in principle the actions of the Union and/or Member States in giving effect to CFSP should be subject to judicial review/supervision in both the Court and the Strasbourg Court.²⁹ Recent events, including the detention of individuals at Guantanamo Bay, show that the rights of the individual may be seriously affected in the execution of foreign policy. The Union is becoming increasingly involved in peace-keeping operations and the possibility cannot be ruled out that challenges may be brought on human rights grounds in relation to the particular conduct of those acting in the name of the Union. Article III-282 would maintain the present anomalous position. There could be no direct challenge in the Court to CFSP measures and action pursuant to such measures. Were the scope or legality of such a measure or action to be called into question in a national court, that court would not be able to refer the question to Luxembourg. The national court would, if necessary to resolve the case before it, have to rule on the issue of legality of the measure³⁰ or action in question as well as to the scope and meaning of the measure. There would therefore be the possibility of inconsistent rulings in courts across the Union. The measure or action might also be subject to review in the European Court of Human Rights. But the Strasbourg court would only address the legality point to the extent that the measure or action was alleged to interfere with a Convention right. The Strasbourg court therefore would not necessarily have competence to rule on all issues arising before the national court. The anomalies inherent in the state of affairs described seem inconsistent with the principle of certainty and respect for the rule of law that ought to underlie the provision of the proposed Constitution. **We invite the Government to reflect on the problems to which maintenance of this position could give rise, bearing in mind the need to safeguard the fundamental rights of the individual.**

²⁸ *Abassi and another v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, Judgment of 6 November 2003, at para 85.

²⁹ 6th Report, 2002-03, HL Paper 48, para. 146.

³⁰ It is a moot point whether the rule in *Foto-Frost* (requiring national courts to treat Community legislation as valid until set aside by the Court—see fn 13 above) would apply. If the Court in Luxembourg has no jurisdiction to rule on the matter, national courts would have to assume the role, else the legality of the measure (and the conduct in question) might go unchecked by any court and the claimant might be left without a remedy.

CFSP—specific issues under the draft Treaty

(i) Jurisdiction over economic sanctions

104. The second paragraph of Article III-282 enables the Court to rule on the legality of measures (in effect economic sanctions) taken against natural or legal persons pursuant to Article III-224(2). There is a problem here.
105. First, Article III-224, which corresponds to Articles 60 and 301 TEC, is contained in Chapter V of Title V of Part III, a chapter that is not listed in the first paragraph of Article III-282 as one of those over which the Court has no jurisdiction. So the second paragraph of Article III-224 appears to be unnecessary. Second, the express grant of jurisdiction where the sanctions are taken against natural or legal persons seems to suggest that there is no jurisdiction where the sanctions are taken against countries. If that is right, the Court's jurisdiction under the draft Treaty would be more limited than presently exists under the Treaties. Article III-224(1) enables restrictive measures to be taken against one or more third countries. The Court at present has jurisdiction in respect of these restrictive measures. But the second paragraph of Article III-282 refers only to restrictive measures adopted against natural or legal persons. Professor Arnulf noted that the draft Treaty thus appeared to deprive persons of rights currently enjoyed to challenge any measures for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries adopted pursuant to the CFSP. In Professor Arnulf's view, both types of restrictive measure could have adverse consequences for natural and legal persons, who ought therefore to have the right to challenge either of them. The second paragraph of Article III-282 should therefore be deleted, thus preserving the Court's jurisdiction over all restrictive measures taken under Article III-224 (p 58). Advocate General Jacobs also considered the drafting of Article III-282 to be unsatisfactory and that it should be amended to make clear that it covers restrictive measures affecting the rights or interests of natural or legal persons irrespective of the object against which such measures were directed (Q 137).
106. **We agree. The second paragraph of Article III-282 should either be deleted or amended to read: "The Court of Justice shall have jurisdiction to rule on proceedings reviewing the legality of measures adopted by the Council on the basis of Article III-224". Deletion seems preferable.**

(ii) Monitoring the exercise of Union competence

107. Under the draft Treaty as proposed by the Convention the Court would also have jurisdiction "to monitor compliance" with Article III-209, which provides that the implementation of the CFSP shall not affect the competences listed in Articles I-12 to 14 (matters within the exclusive competence of the Union, areas of shared competence and the coordination of economic and employment policies) and I-16 (areas of supporting, coordinating or complementary action). Article III-209 also states that the implementation of policies listed in those Articles shall not affect the competence referred to in Article I-15 (that is the Union's competence in CFSP matters).
108. As Professor Arnulf explained, the purpose of Article III-209 is to stop a power or a process applicable in one field from being used to take steps

which ought properly to be regarded as falling within a different field. Article III-209 would, for example, prevent the provisions relating to the CFSP from being used for the purposes of other competences enjoyed by the Union under the draft Constitution and vice versa.³¹ Article III-209 is an application of the principle of conferral, according to which “the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution.”³² In Professor Arnall’s view, the fundamental nature of that principle explained the grant to the Court of jurisdiction to apply Article III-209 (p 57). In Professor Craig’s view, the Court’s jurisdiction ‘to monitor compliance’ with Article III-209 was “a potentially important power, all the more so given the breadth of the triggering condition, which is that implementation of the CFSP must not ‘affect’ the other spheres of competence” (pp 1–2).

109. It appears, however, that during the negotiations in the IGC Article III-209 has been amended.³³ One consequence of the amendment is that the Article no longer contains provision for the Court to have jurisdiction to ensure that implementation of the CFSP does not prejudice the competences set out in Articles I-12 to 14 and I-16. Is this omission deliberate or accidental? **The position should be clarified. We would be grateful for the Government’s confirmation that the Court will have the power to monitor compliance with Article III-209.**

(iii) Solidarity in CFSP

110. Article I-15(2) would require Member States “actively and unreservedly [to] support” the CFSP “in a spirit of loyalty and mutual solidarity”, to “comply with the acts adopted by the Union” and to “refrain from action contrary to the Union’s interests or likely to impair its effectiveness”. Witnesses noted that this obligation is not expressly excluded from the Court’s jurisdiction by Article III-282. Were the Court to have the power to review compliance by Member States with Article I-15(2) this would have potentially significant implications.
111. A number of witnesses doubted whether it was intended to give the Court such power or whether, on a proper analysis of the relevant Treaty Articles, that was the effect. Professor Koeck took the view that the Treaty did not give the Court jurisdiction to enforce compliance with Article I-15(2). He argued that Part I (the institutional and political framework of the Union) must be read together with, and interpreted in the light of, the articles contained in Part III (dealing with the policies and functioning of the Union in detail). Article I-15(2) was therefore subject to Article III-195(2) subparagraphs 1 and 2, which was in turn subject to Article III-282(1) which explicitly excluded the CFSP from review by the Court. In Professor Koeck’s view, the principle of *lex specialis derogat legi generali* was applicable (p 84).

³¹ Professor Arnall described Article II-209 as a refinement of Article 47 TEU, which the Court applied in the “Airport Transit Visas” case, Case C-170/96 *Commission v Council* [1998] ECR I-2763.

³² Art I-9(2).

³³ Doc CIG 60/03 ADD 1. Annex 44(A) contains a revised Article III-209: “The implementation of the common foreign and security policy shall not affect **the application of the powers and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union** competences listed in Articles I-12 to I-14 and I-16. Similarly, the implementation of the policies listed in those Articles shall not affect **the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences under this Chapter**”.

112. Professor Arnall noted that if the Court were to take too broad a view of its jurisdiction to apply Article I-15 the effect might be to undermine Article III-282 so far as the obligations of Member States were concerned. If, on the other hand, it were to take a narrow view, the effect might be to undermine the apparently deliberate exclusion of Article I-15 from Article III-282 (p 57). Professor Papier considered that it could be argued that as a general rule the assignment of specific competences was more likely to be justiciable than comity obligations formulated in general terms. He also doubted whether the Treaty intended to create an asymmetry of legal protection where the conduct of the Union in CFSP matters could not be subject to judicial review but a Member State's conduct as regards comity in relation to CFSP would be (p 88).
113. Professor Denza argued that position must be made clearer. Otherwise, "the position is therefore likely to turn on declarations made by Member States, subsequent practice of the institutions and the Member States and assertions made by outside commentators. Given the important implications for national treaty-making this would be highly unsatisfactory" (p 71).
114. **We agree that the position as regards the Court's jurisdiction in relation to Article I-15(2) needs to be clarified.**

(5) Should the jurisdiction of the Court of Justice be extended in relation to criminal law and procedure? Should the current exception in Article 35 TEU remain?

The position under the draft Treaty

115. The EU's powers in relation to judicial co-operation in criminal matters and police co-operation are set out in Articles III-171 to 178. Thus the EU is able to enact framework laws, establishing minimum rules relating to a broad range of matters concerning criminal procedure (Article III-171(2)). The EU is also empowered to make framework laws laying down minimum rules concerning the definition of serious criminal offences with a cross-border dimension (Article III-172(1)). It is further empowered to harmonise criminal legislation where this is essential to ensure the effective implementation of a Union policy that has been harmonised.
116. Under the draft Treaty the Court's general powers would apply to this area. Thus, the legality of laws and framework laws may be subject to review under Article III-270, and the preliminary ruling procedure will be available under Article III-274. There is, however, one major limitation on the Court's jurisdiction. This is to be found in Article III-283, which repeats, with one modification (discussed below—paras 124–7), the limitation on the Court's competence currently found in Article 35(5) TEU. This prevents the Court from reviewing the validity or proportionality of operations by the police or law enforcement agencies, or the exercise of responsibilities of Member States with regard to the maintenance of law and order, and the safeguarding of internal security.
117. We note that the draft Treaty would substantially increase the Court's powers from those currently set out in Article 35 TEU. The draft Treaty would bring judicial co-operation in criminal law and police co-operation within the same overall framework of judicial control as applies to other areas of EU law, subject to the exception in Article III-283.

118. Article III-283 needs to be considered from two standpoints: first, the general policy of the Article and second, its particular wording.

(1) Enlarging the Court's jurisdiction over Third Pillar

119. While witnesses generally welcomed the extension of the Court's powers in relation to police and judicial co-operation in criminal matters they have also agreed that the limitation on the Court's powers under Article III-283 was not justified and should be removed.
120. Professor Papier, President of the *Bundesverfassungsgericht*, believed that in principle the Court's jurisdiction should extend to all legal acts in the field of justice and home affairs which encroach upon the citizen's rights. That would include examining the proportionality of operations carried out by the police and other law enforcement authorities, though national courts should retain the prime responsibility for the legal protection of the individual (p 89).
121. Professor Koeck considered it to be "highly unsatisfactory—both from the point of view of a coherent legal system and from the point of view of judicial protection of the rights of individuals—that the performance" of the Member States' obligations were not reviewable by the Court (p 84). Professor Pernice put it even more forcefully: "Whatever may be the reasons, based on sovereignty considerations or other, it does not seem tolerable to have European legislation or binding acts without appropriate judicial review" (p 90).
122. Professor Schermers said: "Criminal law without court control is unacceptable. If there has to be exclusion of criminal jurisdiction, then criminal jurisdiction of the Union should be excluded but not criminal jurisdiction of the ECJ alone" (p 96).
123. The retention of the limitation on the Court's jurisdiction set out in Article III-283 was not unexpected. Member States appear loath to have the activities of their police forces subject to scrutiny by the Community Courts. But there are strong arguments for the Court having jurisdiction over all justice and home affairs matters that are within EU competence, including co-operation in relation to criminal law and procedure. As we said in our earlier Report on the Charter of Fundamental Rights,³⁴ recent developments, and in particular the European Arrest Warrant, show that such matters may impinge directly on the interests and rights of the individual. **The Court should be entitled to measure the legality of action, whether that of the Union or of Member States and their authorities when implementing Union legislation, against the norms contained in the Charter.**

(2) Article III-283—the tail piece

124. Article III-283 largely repeats Article 35(5) of the TEU. But an additional clause has been added at the end. The draft Treaty would exclude the Court's jurisdiction only where the action of the Member States "is a matter of national law".

³⁴ *The Future Status of the EU Charter of Fundamental Rights* (6th Report, 2002-03, HL Paper 48, at para 148).

125. It was generally agreed that the effect of these words is puzzling. The words at first sight appear to make the Article redundant: that the Court has no competence over matters which have no EU element. Professor Schermers said “the addition of the words: ‘where such is a matter of national law’ in Article III-283 makes the provision so obvious that one may doubt whether it serves any purpose. In principle the ECJ has no competence in fields which belong to the exclusive competence of the Member States” (p 96).
126. Witnesses were uncertain as to the purpose or effect of the words in question. Even those more charitably disposed to this apparently infelicitous drafting found difficulty with it. Professor Toth said that the problem was that police and judicial co-operation in criminal matters falls within the shared competence of the Union and the Member States as part of the area of freedom, security and justice (Article I-13 of the draft Treaty), so that in practice it might be difficult to establish in what situations maintenance of law and order and the safeguarding of internal security was purely a matter of national law rather than Union law (for example in the case of combating serious crime affecting two or more Member States, including terrorism) (pp 99–100).
127. **The intention and effect of the final clause of III-283 (“where such action is a matter of national law”) remains unclear. It is certainly not well drafted. The purported exclusion of the Court’s jurisdiction is neither meaningful nor desirable. Here, as elsewhere, the Court’s jurisdiction should extend to all action taken in implementation or purported implementation of Union law.**

(6) Does Article III—270(4) (the standing rule) go far enough to safeguard the individual’s right to an effective remedy?

128. There has been ongoing debate on the issue of the standing of natural and legal persons to bring actions against Community institutions challenging Union measures. The issue was addressed in detail most recently in the *UPA* case,³⁵ when Advocate General Jacobs proposed a possible new test of substantial adverse effect.

Background

129. The ECJ held, in *Plaumann*,³⁶ that persons other than the addressees of a decision can only claim to be “individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”. While the *Plaumann* test has been less rigorously applied in some areas, such as State aid and anti-dumping³⁷ it remains a substantial obstacle to an individual seeking to challenge a Community measure of which he or she is not the addressee.
130. The Court has resisted change. It has taken the view “that in the Articles [230] and 241, on the one hand, and in Article [234] on the other, the

³⁵ Case C-50/00 P *Union de Pequeños Agricultores v Council* [2002] ECR I-6677.

³⁶ Case 25/62 *Plaumann v Commission* [1963] ECR 95.

³⁷ Case 169/84, *Cofaz v Commission* [1986] ECR 391, Case C-358/89 *Extramet Industries SA v Council* [1991] ECR I-2501.

Treaty established a complete system of legal remedies and procedure designed to permit the Court of Justice to review the legality of measures adopted by the institutions”.³⁸ Individuals are protected against general measures which they cannot contest directly in the Community Courts. Where a Community institution is responsible for the administrative implementation of such measures, individuals may bring a direct action before the Court against implementing measures addressed to them and plead the illegality of the underlying general measure. Where implementation is a matter for national authorities, the individual can plead the invalidity of the general measure before the national court and cause the latter to request the Court of Justice for a preliminary ruling.

131. But Advocate General Jacobs (and the Court of First Instance in *Jégo-Quéré*³⁹) pointed out in the *UPA* case (and again in *Jégo-Quéré*) the “complete system” of remedies provided by Articles 230, 234 and 241 TEC, may not always provide an effective remedy. There may be circumstances where individuals, denied access to the Community Courts because of the restrictive standing rule in Article 230(4), may not be able to gain access to a national court otherwise than by infringing the law in expectation that criminal or other enforcement proceedings will be brought against them when the national court may be persuaded to refer to the Court of Justice the issue of the validity of the measure. In Advocate General Jacobs’ view, “besides the various practical disadvantages which may attend the making of a reference in the context of criminal proceedings, such a procedural avenue exposes the individuals in question to an intolerable burden of risk”.⁴⁰
132. The Court of Justice, in the *UPA* case,⁴¹ did not feel able to reinterpret the admissibility conditions in Article 230(4). Any reform of the Union’s system of judicial review would be dependent upon action by the Member States to amend Article 230(4).

The right to an effective remedy—compatibility with the Charter

133. Article II-47 of the Charter of Fundamental Rights provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal. That provision of the Charter is derived from Article 13 ECHR.⁴² The updated “explanations” to the Charter recite the fact that the Charter right is more extensive than the ECHR since it guarantees the right to an effective remedy before a court. They also recite that the Court has enshrined the right in its case law. But the explanations continue: “The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court”.
134. Professor Papier, President of the *Bundesverfassungsgericht*, noted that the standing to challenge primary legislation rule may be restricted in national

³⁸ Case 294/83 Parti écologiste ‘*Les Verts*’ v *European Parliament* [1986] ECR 1339, at para 23.

³⁹ Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365.

⁴⁰ Opinion of Mr Jacobs Case C-2763/02 P *Jégo-Quéré et Cie SA*, 10 July 2003, at para 43.

⁴¹ Case C-50/00 P *Union de Pequeños Agricultores* [2002] ECR I-6677.

⁴² “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

legal systems. In German law, “legal norms can only in exceptional cases be directly challenged before the courts. As a general rule, the person seeking recourse to the courts must strive for incidental review of the norm, in particular before the administrative courts. This is regarded as sufficient to ensure effective legal protection pursuant to German constitutional law and also pursuant to the European Convention on Human Rights” (p 89).

135. Professor Dutheil de la Rochère and Ms Iliopoulou took the view that while the new Article was certainly an improvement the condition of “individual concern” remained concerning all other acts of the Union. They said: “This obviously restricts in a significant way the individuals’ right to challenge an EU act before the Court of First Instance. This is incompatible with the fundamental right of access to a court and to an effective judicial remedy; in fact, in certain types of cases the only effective remedy for individuals aggrieved by the adoption of normative Community measures would be the possibility of challenging them directly before the Court of First Instance in the form of an action for annulment” (pp 73–74).
136. Professor Arnall contended that the “explanations” of the Charter (to which the Community Courts and national courts should have “due regard” when interpreting the Charter) implicitly acknowledge that Article III-270(4) might be regarded as incompatible with Article II-47 of the Charter and seek to prevent that conclusion from being drawn. He commented: “If the present standing rules are changed in the manner suggested, it will be interesting to see how much weight the Court of Justice accords that statement, given that it does not “as such have the status of law” (pp 58–59).
137. On the other hand Professor Besselink believed that Article 270(4) and the current Article 230(4) were compatible with the Charter and the ECHR. In his view, Article 13 ECHR did not require access to a court of justice in all cases. Other remedies might also satisfy the ECHR’s requirements. Since Article 6 ECHR does not grant an unlimited right of access to any court, Article 13 when read in conjunction with Article 6 ECHR, did not grant a right to citizens of access to any court for any complaint they might have. This remained the case also under Article II-47 of the Charter (p 59).

The need for change—the practical considerations

138. M. Errera queried the extent of the problem in practice. No evidence existed as to the size of any shortcomings under the present rules (Q 202). Professor Besselink said that the role of national courts was too easily dismissed by those who criticized the Treaty standing rule: if a Community measure constituted, or was alleged to constitute, an infringement of a legal right of a private party, it was not hard to find a means by which to bring that matter before a national court. The approach dictated by the Court’s *Fotofrost* case law according the Court exclusive jurisdiction to entertain actions for the annulment of Community acts, had served an important purpose and had considerable advantages. Professor Besselink believed that national experience had shown that a decentralized approach to judicial review of legality of measures of general application could exist without severe drawbacks (p 60).
139. But the CCBE was critical of the “complete system” of remedies provided by the Treaty and doubted the value of the role of the national court in it. National courts could not declare invalid a Community measure. Only the Court could do that. Dr Berrisch said: “The only function I can see is that

the Member State court is there to filter out the most ridiculous cases”. In his view, it made no sense to maintain the system, with all its problems just to serve that function. The Community Courts could filter unmeritorious cases. The preliminary reference procedure was itself unsatisfactory. For example, the parties only had one exchange of pleadings and there was not the same kind of adversarial procedure as in a direct action (QQ 90-92, 101).

140. Further, a system of remedies devised for the Community as it was in 1957 is not appropriate for today. Dr Berrisch, for the CCBE, said: “What we see now is a vast area regulated by Community law, either by Regulations or by Directives which are hardly distinguishable from Regulations because they are so detailed nowadays ... Community law has now a much more direct and immediate effect on individuals in the Community, and therefore it calls for a different system of judicial control from that devised in the beginning” (Q 91). The CCBE also pointed out that challenging Directives may bring special problems. Mr Flynn said that the party challenging the legality of a Directive may, if it wants to set aside the national implementation of this Directive or stop it coming into force, have to start proceedings in more than 15 courts. Mr Flynn said: “it must be possible to devise a mechanism under which that is done in Luxembourg, once and for all, for the whole Union, rather than requiring this sort of merry-go-round in the Member States” (Q 104).
141. However, M. Errera believed that it was necessary to assess carefully the likely consequences of relaxing the standing rule. The Luxembourg Court should not be drowned in cases as is the Strasbourg Court. He was also concerned that a wide standing rule might lead to abuse and actions being brought as a delaying tactic (Q 202). The CCBE did not accept the floodgates argument: Dr Berrisch said: “On the question of the court being swamped, first of all, I would say, if there is a legal problem that merits legal protection, the argument that a court is swamped cannot be an argument to deny legal protection, to begin with. Secondly, in countries where it is possible to challenge directly an act of general application, the courts are not necessarily swamped with such actions, because not only must you be able to get to Luxembourg, you must also have a reasonable chance to win in Luxembourg, because otherwise you are going to waste your money. The European Court of Justice has not lightly struck down Regulations and Directives of the Community in the past, and that is also something that is well known” (Q 105). Advocate General Jacobs explained that the problem of overload would be for the CFI, not the Court, and he confirmed that both Community Courts had efficient procedures in place for dealing with unfounded appeals. As to the floodgates argument, he said that courts “generally find methods of dealing with large numbers of cases if they do arise by means of test cases or class actions, or the like” (Q 148).
142. Access to justice is an essential element of the Union’s legal framework. The issue of standing is therefore of considerable practical importance in the effective exercise of rights. **The current Article 230(4) presents a serious obstacle to the individual seeking to challenge a Union measure directly.** The Union’s legal system needs to be able to protect the individual citizen against an excess or abuse of power by EU institutions affecting his or her rights. In some cases the national court may be able to provide a remedy, but the case law of the Court shows the difficulties of a decentralised system in which national courts have no power to invalidate Community rules. **There is, we believe, a clear need for change.**

The European Council

143. Professor Arnall also drew our attention to another defect in Article III-270. The European Council should be added to the list in Article III-270(1) of institutions whose acts may be reviewed by the Court. The draft Constitution elevates the European Council to the status of an institution⁴³ and confers on it formal decision-making powers. The exercise of those powers needs to be subject to judicial control if respect for the rule of law is to be ensured (p 59).
144. This point was taken up in the discussion of the draft Treaty under the Italian Presidency and it has been proposed to amend Article III-270 (and III-272) to include a reference to the European Council.⁴⁴

The Court of Justice shall review the legality of European laws and framework laws, of acts of the Council of Ministers, of the Commission and of the European Bank, other than recommendations and opinions, and of acts of the European Parliament and **of the European Council** intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies or agencies of the Union intended to produce legal effects vis-à-vis third parties.

The new text—“regulatory acts”

145. Article III-270(4) of the draft Treaty picks up the Convention’s recommendation for enlarging the scope of the standing rule. It would allow a natural or legal person to institute proceedings against an “act addressed to that person or which is of direct and individual concern to him or her”, and against a “regulatory act which is of direct concern to him or her and does not entail implementing measures”. The term “regulatory act” appears to mean any act other than a legislative act.⁴⁵ Legislative acts would continue to be only open to challenge by natural and legal persons where they could establish direct and individual concern, as is currently the position under Article 230 TEC.
146. A number of witnesses took the view that this Article III-270(4) represented some, but not sufficient, improvement. The problem was that it would add a further complication and, more importantly, it did not go far enough.
147. The new text created its own problems by providing two different standing rules: one in respect of “acts”, and another in respect of “regulatory acts”. “Regulatory acts” is not a term used elsewhere in the draft Treaty. Professor Toth criticised the terminology used in Article III-270(4) for being inconsistent with that used in both Articles I-32 to I-36 and Article III-270(1) of the draft Treaty. It was confusing, could lead to unacceptable results and should be brought into line with Articles I-32 to I-36 and Article III-270(1) (pp 100–101). M. Errera was particularly critical of the use of the term “regulatory acts”: “This is not the best way to obtain legal certainty” (Q 201).
148. Professor Arnall said that it would remain very hard for natural and legal persons to seek the annulment of legislative (as opposed to regulatory) acts which were of direct concern to them without the need for implementation.

⁴³ See Art I-18(2).

⁴⁴ Doc CIG 52/53 ADD 1–Annex 7.

⁴⁵ See CONV 734/03, p.20.

In his view, this was likely to lead to continuing pressure for relaxation of the test for individual concern, particularly in cases where a violation of fundamental rights was alleged. He also thought that it might make it difficult to maintain a clear distinction between legislative and regulatory acts (p 58).

Redrafts put forward

149. Professor Tridimas proposed that Article III-270(4) should enable an individual to challenge “any act, whether legislative or regulatory in nature, which affects him directly and which does not require implementing measures”. Such a rule would be simpler and would promote legal certainty. It would avoid, in particular, arguments as to whether an act is, or should be, regulatory rather than legislative in nature. The proposed solution would enhance access to justice and the protection of the individual. Professor Tridimas argued that the fundamental right to judicial protection required that *locus standi* should not depend on the nature of the contested measure but on whether it affects adversely the interests of the individual (p 104).
150. Professor Craig informed us that a more radical solution had been put to the Convention’s discussion circle on the Court by Lord MacLennan of Rogart. He had proposed that Article III-270(4) might be amended to read: “Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct concern and has, or is likely to have, a substantial adverse effect on his or her interests”. Professor Craig thought that this would be a preferable text. It drew on the test proposed by Francis Jacobs in his opinion in the *UPA* case (Q 41). Advocate General Jacobs thought that it would be “a valuable drafting amendment”, with which he would not see any difficulty (Q 152).
151. **The new text, Article III-270(4), is an improvement but it remains unsatisfactory.** First, it is unclear in its use of language and therefore in its scope of application. Second, it does not go far enough. **The text put forward, regrettably without success, by Lord MacLennan during the Convention⁴⁶ would seem preferable.** Widening individual access to the Community Courts, as Lord MacLennan’s text would do, would help ensure the application of Articles 6 and 13 ECHR as well as Article 47 (Right to an effective remedy and to a fair trial) of the Charter. **We urge the Government to promote this text in the continuing IGC.**

The new Article 28(1)

152. A number of witnesses drew attention to the second sub-paragraph Article I-28(1), which states:

“Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law”.

M. Errera described the provision as “a kind of expression of remorse”. He was unclear what kind of obligation Article 28 imposed (Q 210). Professor Dutheil de la Rochère and Ms Iliopoulou asked whether it meant that the Union was trying to shift the burden of providing an effective remedy as required by the Charter and the ECHR to the Member States (p 74 fn.).

⁴⁶ Lord MacLennan and Lord Tomlinson served as Alternates for Parliament’s Representatives on the Convention.

153. Professor Tridimas believed that the purpose of the provision was twofold: “It serves to underlie that national courts play an important part in the application and enforcement of Union rights. It also seeks to counter-balance the restrictive *locus standi* under Article 230(4). It mandates Member States to fill the remedial gap left by the strict interpretation of direct and individual concern” (p 101).
154. Article I-28 would oblige Member States to provide rights of appeal sufficient to ensure effective legal protection in the field of Union law. But requiring the individual to use the national courts, rather than the Community Courts, to challenge the legality of Union measures may be inefficient and time-consuming. In some cases he or she may even have to subject themselves to the risks of criminal prosecution in order to test the legality of the underlying Union measure. **Article I-28 appears to be a poor substitute for amending the standing rule in Article III-270(4) in the way suggested in paragraphs 150–151 above. We invite the Government to identify what extra benefits Article I-28 would give the citizen and to say how it would propose to implement the Article in the United Kingdom.**

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

155. Article I-28(1) of the draft Treaty would be unlikely to bring about any change in the Court's role. But the different language versions of that Article should be brought more clearly into line with Article 220 of the EC Treaty and with each other (paragraph 25).
156. The Court already has a constitutional character. However, the constitutional dimension of the draft Treaty and the incorporation of the Charter may lead to more challenges on constitutional/ fundamental rights grounds. The Court would more clearly take on the mantle of a Constitutional Court for the Union (paragraph 31).
157. We welcome the fact that Article I-10(1) makes clear that primacy only applies to the Constitution and to Union law that has been adopted in the exercise of the competences assigned to the Union's institutions. There remains some uncertainty as to the scope of application of the principle (paragraph 51).
158. The declaration which it is proposed to attach to Article I-10 may not be as helpful as it is intended. It presupposes that there is currently no uncertainty as to the meaning and extent of the doctrine of primacy. It does not address the issue of the formal collapse of the three pillars. More clarity is needed to address these two concerns (paragraph 53).
159. Part I of the draft Treaty provides for the classification and division of competences set out in the Treaty. The critical question is which court, the Court or national courts, will finally decide whether a matter falls within Union competence. This is not just a drafting question but an issue touching upon the fundamental nature of the Union and its relationship with the Member States (paragraph 76).
160. A strong argument can be made that the effective functioning of the Union requires the Court to be the ultimate arbiter of the extent of the Union's competences and of the validity of its acts. But if the Court is the ultimate arbiter on the extent of the Union's competences it follows that the Court also has the final say in defining the extent of Member States' powers. It is this side of the coin which some find unacceptable (paragraphs 76–8).
161. The draft Treaty does not resolve the question of *Kompetenz-Kompetenz*. However, the draft Treaty reaffirms and strengthens the position of the national courts by seeking to define the division of competences and by restating, explicitly, the principle of conferral (paragraph 80).
162. In practice *Kompetenz-Kompetenz* issues may be no more likely to arise in future than in the past. Were a problem to arise, the Community Courts and national courts would and should seek to work together in a spirit of mutual respect and cooperation (paragraph 81).
163. We do not dismiss the possibility of the argument being advanced that Parliament did not intend, by the European Communities Act, the final definition of the Union's powers to be determined by the Court. The Government should set out their view on the *Kompetenz-Kompetenz* question (paragraph 89).
164. The scope for the new Supreme Court for the United Kingdom to adjudicate on the reach of Union law may need to be considered further and possibly defined in the legislation establishing the new court (paragraph 91).

165. Conferring jurisdiction on the Court in relation to Common Foreign and Security Policy (CFSP) is controversial. The arguments for restricting the Court's jurisdiction over CFSP matters are essentially arguments against giving the EU competence in this field (paragraphs 100–1).
166. Article III–282 would maintain the present anomalous position. The Government is invited to reflect on the problems to which this could give rise, bearing in mind the need to safeguard the fundamental rights of the individual (paragraph 103).
167. The second paragraph of Article III-282 should be deleted (paragraph 106).
168. The Government is asked to confirm that the Court will have the power to monitor compliance with Article III-209 (paragraph 109).
169. The Court's jurisdiction in relation to Article I-15(2) needs to be clarified (paragraph 114).
170. The Court should have jurisdiction over all EU justice and home affairs matters, including co-operation in relation to criminal law and procedure. The Court should be entitled to measure the legality of action, whether that of the Union or of Member States and their authorities when implementing Union legislation, against the norms contained in the Charter (paragraph 123).
171. The intention and effect of the final clause of Article III–283 remains unclear. The purported exclusion of the Court's jurisdiction is neither meaningful nor desirable. The Court's jurisdiction should extend to all action taken in implementation or purported implementation of Union law (paragraph 127).
172. The current Article 230(4) presents a serious obstacle to the individual seeking to challenge a Union measure directly. There is a clear need for change (paragraph 142).
173. Article III-270(4) is an improvement but it remains unsatisfactory. The text put forward by Lord MacLennan of Rogart during the Convention is preferable. We urge the Government to promote this text in the continuing IGC (paragraph 151).
174. Article I-28 is a poor substitute for amending the standing rule in Article III–270(4) as suggested above. We invite the Government to identify what extra benefits Article I-28 would give the citizen and to say how it would propose to implement the Article in the United Kingdom (paragraph 154).

APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Brennan
Lord Clinton-Davis
Lord Denham
Lord Grabiner
Lord Henley
Lord Mayhew of Twysden
Lord Neill of Bladen
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

The following were members of the Sub-Committee during session 2002-03 when the inquiry began:

Lord Fraser of Carmyllie
Lord Lester of Herne Hill
Lord Plant of Highfield

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- Karen J Alter, Associate Professor of Political Science, Northwestern University, Illinois
- Professor Anthony Arnull, University of Birmingham
- * Dr Georg Berrisch, Council of the Bars and Law Societies of the European Union
- Leonard F M Besselink, University of Utrecht
- Stanislaw Biernat, Jean Monnet Professor of European Law, Cracow
- * Professor Paul Craig, University of Oxford
- Professor Eileen Denza, Visiting Professor of Law, University College London
- Professor Dutheil de la Rochère, University of Paris II
- * M. Roger Errera, Conseiller d'Etat honoraire
- * James Flynn QC, Council of the Bars and Law Societies of the European Union
- Giorgio Gaja, University of Florence
- Mathew Heim, Director at Gavin Anderson & Company and Associate Tennant at Tanfield Chambers
- Anastasia Iliopoulou, University of Paris II
- * Advocate General Francis Jacobs
- Professor Dr Heribert Franz Koeck, University of Linz, Austria
- The Law Society of Scotland
- * Philip Moser, Barrister, Bar European Group
- Professor Joakim Nergelius, Örebro University, Sweden
- Professor Dr Dr h.c. Hans-Jürgen Papier, President of the Bundesverfassungsgericht
- Professor Dr Ingolf Pernice, Humboldt University, Berlin
- Jiri Priban, Charles University, Prague, and Cardiff Law School
- Professor Dr Hjalte Rasmussen, University of Copenhagen
- Professor Dr Henry G Schermers FBA, together with the staff of the Europa Institute of the University of Leiden
- * Eleanor Sharpston QC, Chair of the Bar European Group
- Professor A G Toth, University of Strathclyde
- Professor Takis Tridimas, University of Southampton
- Stephen Weatherill, Jacques Delors Professor of EC Law, Oxford University

APPENDIX 3: RECENT REPORTS FROM THE SELECT COMMITTEE AND SESSION 2002-2003 REPORTS PREPARED BY SUB-COMMITTEE E

Recent Reports from the Select Committee

Review of Scrutiny of European Legislation (1st Report session 2002-03, HL Paper 15)

The Draft Constitutional Treaty (41st Report session 2002-03, HL Paper 169)

Annual Report 2003 (44th Report session 2002-03, HL Paper 19)

Correspondence with Ministers (49th Report session 2002-03, HL Paper 196)

The Commission's Annual Work Programme (50th Report session 2002-03, HL Paper 200)

Evidence from the Minister for Europe on the Brussels European Council (2nd Report session 2003-04, HL Paper 25)

Session 2002-2003 Reports prepared by Sub-Committee E

The Future Status of the EU Charter of Fundamental Rights (6th Report, HL Paper 48)

The Future of Europe: Constitutional Treaty—Draft Articles 1–16 (9th Report, HL Paper 61)

The Future of Europe: Constitutional Treaty—Draft Articles 24–33 (12th Report, HL Paper 71)

The Future of Europe: Constitutional Treaty— Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice) (16th Report, HL Paper 81)

The Future of Europe: Constitutional Treaty— Draft Articles 43–46 (Union Membership) and General and Final Provisions (18th Report, HL Paper 93)

The Future of Europe: Constitutional Treaty— Articles 33–37 (The Democratic Life of the Union) (22nd Report, HL Paper 106)

If At First You Don't Succeed ... Takeover Bids Again (28th Report, HL Paper 128)

Reforming Comitology (31st Report, HL Paper 135)

The Proposed Framework Decision on Racism and Xenophobia—an Update (32nd Report, HL Paper 136)

EU/US Agreements on Extradition and Mutual Legal Assistance (38th Report, HL Paper 153)

Evidence by Lord Filkin CBE on the Proposed Council Directive Defining Refugee Status and Those In Need of International Protection (43rd Report, HL Paper 173)