

HOUSE OF LORDS

European Union Committee

3rd Report of Session 2005-06

**The Constitutional
Treaty: Role of the
ECJ: Primacy of
Union Law—
Government
Response and
Correspondence**

Ordered to be printed 28 June and published 7 July 2005

Published by the Authority of the House of Lords
London: The Stationery Office Limited
£6.50

HL Paper 15

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The Constitutional Treaty: Role of the ECJ: Primacy of Union Law— Government Response and Correspondence with Ministers

1. In its Report *The Future Role of the European Court of Justice*¹ the Committee examined the role of the Court of Justice under the proposed Constitutional Treaty. The Report considered *inter alia* the relationship between the Constitutional Treaty and national constitutions and the impact of the doctrine of the primacy of Community law. We made a number of recommendations aimed at clarifying the position of the Court of Justice and ensuring that Union policies and their implementation would be subject to judicial control. The Government provided a Response to the Committee's Report, which was debated on Friday 21 May 2004.²
2. The Committee was concerned about the brevity of the replies given in the Government's Response and their failure to provide any further clarification during the debate on the Report. The Committee therefore decided to write to the Government in order to secure the clearest possible explanation of Article I-6 (Primacy of Union Law) of the Constitutional Treaty and of the jurisdiction of the Court of Justice under the Treaty.
3. An exchange of correspondence followed, concluded by a letter of 4 April 2005 from Dr Denis MacShane, the then Minister for Europe, to Lord Grenfell, Chairman of the Committee. The Government have now provided a clearer explanation of their understanding of the legal position, which we believe will be helpful in any future discussions of the Constitutional Treaty. The Government's Response to the Committee's Report and the subsequent correspondence are published with this Report for the information of the House.

¹ 6th Report, 2003–04, HL 47.

² Hansard vol 661 no 88 cols 1001–27.

Government Response and Subsequent Correspondence

Government Response to Report on The Future Role of the European Court of Justice

1. BASIC ROLE OF THE COURT

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).

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).

We see no significance in the differences of language between the draft I-28.1 and TEC Art 220. The jurist-linguist process, carried out after political agreement of the Treaty, will provide the opportunity to ensure that different language versions are consistent with each other.

The important question with regard to whether the Court of Justice will have a constitutional character under the Constitutional Treaty is whether the Treaty will greatly change its jurisdiction and role. In fact the Court's jurisdiction and role will remain essentially the same as under the European Community Treaty although the scope of the Constitutional Treaty itself will, of course, be different. Under the Constitutional Treaty, the Court of Justice will give the authoritative interpretation of Union law and will ensure that the Union's institutions and the Member States will respect the provisions of the Treaty, as it does currently in relation to the European Community Treaty. As now, it will examine the way the Union's institutions exercise their competences and will measure their performance against the yardstick of human rights.

2. ARTICLE I -10

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).

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).

We are clear as to the current meaning of primacy and that the declaration on Article I-10 would clarify that it is not intended to expand the meaning of primacy beyond its meaning under existing ECJ case-law. While the scope of the Constitutional Treaty will be different from that of the European Community Treaty, ECJ jurisdiction will remain mostly excluded in respect of CFSP and excluded to the extent of Article III-283 in respect of the area of Freedom, Security and Justice.

3. KOMPETENZ KOMPETENZ

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).

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).

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).

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).

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).

The Member States have in previous treaties and also in Article I-28(1) of the current draft Treaty decided to confer on the Court of Justice the function of ensuring respect for the law in the interpretation and application of the Treaties. Its role of interpretation includes interpreting the extent of the Union's competences. We agree with the argument quoted above from paragraphs 76–8 of the Report, that this role is necessary for the effective functioning of the Union. It is clear however from Article I-9(2) of the Constitutional Treaty that competences not conferred upon the Union by the Treaty remain with the Member States.

Under Article III-274, the Court, as now, has jurisdiction to give preliminary rulings concerning the interpretation of the Constitution and the validity and interpretation of acts of the Union's institutions where a question is referred to it from national courts. Where such a question is raised in a national court against whose decisions there is no judicial remedy in national law, that court must refer it to the Court of Justice.

We agree also with the verdict of paragraph 81. We have commented previously, in a letter from the Foreign Secretary to the Head of the European Scrutiny Committee on the House of Commons of 5 February 2004, on our understanding of the “Kompetenz Kompetenz” issue. We said there that the controversy arose in the context of the particular constitutional situation in Germany, as interpreted by the German Constitutional Court. The UK's position is different. The effect of Treaties upon UK domestic law is decided by Parliament. We will consider how to set this view out to citizens of the UK, although publication of this Response will go some way to achieving this.

A judgment of Lord Justice Laws last year reconciled the primacy rule—which is currently given effect by Article 2(4) of the European Communities Act 1972—with the constitutional principle that Parliament is supreme and cannot bind itself or its successors. The judgment came in the case of *McWhirter and Gouriet v Secretary of State for Foreign and Commonwealth Affairs* (2003) about the Nice Treaty.

He said:

“... the Treaty of Nice... like any other treaty... cannot change the domestic law of the United Kingdom unless and until it is incorporated into that law by Parliament (by the 2002 Act)... In my judgement, it is of the first importance to have in mind that it is fully open to Parliament to repeal or amend the 2002 Act, just as it may repeal or amend the European Communities Act 1972. That is the ultimate guarantee of constitutionality which is in place here.”

4. UK SUPREME COURT

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).

The Supreme Court will have the jurisdiction presently exercised by the House of Lords. EU matters do not come before the House of Lords as “EU matters”, but as issues raised in cases under the general jurisdiction of the House. That will not change when that jurisdiction is transferred.

5. CFSP

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).

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).

The second paragraph of Article III-282 should be deleted (paragraph 106).

The Government is asked to confirm that the Court will have the power to monitor compliance with Article III-209 (paragraph 109).

The Court's jurisdiction in relation to Article I-15(2) needs to be clarified (paragraph 114).

The Government sees no basis for changing the overall current position under which the ECJ does not have jurisdiction over CSFP. CFSP is, and will remain, a distinct area of activity subject to separate and distinct procedures. However as noted below, the Court will have the jurisdiction to rule on proceedings to review the legality of restrictive measures against natural and legal persons adopted on the basis of the CFSP chapter. This is in addition to the Court's jurisdiction in relation to restrictive measures adopted under Article III-224 and any rights of redress that individuals have before national courts.

The Committee suggested that the second paragraph of Article III-282 should be deleted or amended, questioning whether the second paragraph led to a narrowing of the current jurisdiction on restrictive measures. The text of Article III-282 has in fact been revised during the technical discussions in the IGC to correct discrepancies between the different language versions. The revised text is available in the Library of both Houses and reads:

Article III-282 (new)

The Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V ~~of Part III~~ concerning the common foreign and security policy.

However, the Court of Justice shall have jurisdiction to monitor compliance with Article III-209 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-270(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons, adopted by the Council on the basis of ~~Article III-193, and brought in accordance with the conditions laid down in Article III-270(4)~~ of Chapter II of Title V.

The Government can confirm that the Court will have jurisdiction to monitor the compliance with Art III-209 (just as it currently has jurisdiction in relation to Article 47 of the Treaty on European Union). This is expressly confirmed in paragraph 2 of Article III-282.

The Committee commented that the Court's jurisdiction in relation to Article I-15(2) needs to be clarified. The Government agrees with the view of Professor Koeck, contained in the Committee's report, that Article I-15 needs to be read in conjunction with the CFSP provisions elsewhere in the Treaty. Article I-15 can only be implemented by the provisions of Art I-39 and I-40 and the provisions of Chapter II of Title V, which list the specific provisions for CFSP and are explicitly excluded from the Court jurisdiction.

6. JUSTICE AND HOME AFFAIRS

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).

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).

Whilst the Government supports greater EU action to safeguard collective security, it remains of the view that the ECJ should not be given the competence to review measures taken by Member States relating to police and law enforcement operations, or to the exercise by a Member State of its responsibility to maintain law and order or its security. The Constitution reaffirms that the maintenance of law and order and the safeguarding of its security is the responsibility of individual Member States; a position that is already enshrined in the existing Treaties.

As Part II Article 51 of the draft Treaty makes clear, the provisions of the Charter of Fundamental Rights are "addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". The ECJ will examine the conformity of the action taken by these addressees with relevant Charter provisions in respect of the areas for which the ECJ will have jurisdiction.

7. EFFECTIVE REMEDY

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).

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).

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).

The issue of widening individual access to the ECJ was extensively discussed in the Convention and a range of views were canvassed. In addressing the ECJ Discussion Circle, the then President of the ECJ noted that “the Court considers the current system, which is based on the principle of subsidiarity in that the national courts in particular are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights, including fundamental rights”. The UK Government strongly endorses this view of the fundamental role played by national courts in providing legal remedies at the local level. It also underlines the need to ensure that the workload of the ECJ is kept within manageable proportions. We consider that the increase in individuals’ access to the ECJ set out in Article III-270(4) represents a balanced, and wholly sufficient, reflection of the Convention’s deliberations.

The UK Government strongly welcomes the inclusion of the wording of the second sub-paragraph of Article 28(1). It provides explicit recognition of the fundamental role which national courts currently play in applying and enforcing Community law and ensuring that there is access to legal remedies at the local level. The enforcement of Union law by national courts will, as now, be secured by the implementation of the Constitutional Treaty in domestic legislation.

CORRESPONDENCE

Letter from Lord Grenfell, Chairman of the European Union Committee, to Dr Denis MacShane MP, Minister for Europe

GOVERNMENT’S RESPONSE TO REPORT: FUTURE ROLE OF THE EUROPEAN COURT OF JUSTICE

Thank you for your letter of 7 June enclosing a copy of the Government’s Response. This was considered by Sub-Committee E at its meeting on 9 June. As you will be aware the Committee’s Report was debated on Friday 21 May. On a number of questions neither the Response nor the Government’s interventions in the debate are particularly forthcoming. This is most disappointing and the Committee would therefore be grateful if you could provide a full response to the questions set out below.

ARTICLE I-5(A)—THE DOCTRINE OF PRIMACY

The Government say that they are clear as to the current meaning of primacy. Unfortunately the Response does not address the two areas of uncertainty identified in the Committee’s Report. The first is the question whether the primacy of Community law only applies in relation to Community measures having direct effect. The issue, you will recall, is discussed at paragraphs 35 and 36 of the Report. What do the Government believe to be the law on this point? Is primacy restricted to measures having direct effect? Secondly, the Government does not fully address the issue raised in paragraphs 37–39 of the Committee’s Report relating to the application of primacy in the Second and Third Pillars. Your letter of 7 June goes little further in helping the Committee understand the Government’s view of Article I-5(a). To what extent in the Government’s view does the doctrine of primacy apply to matters in the Second and Third Pillars? The Committee would be grateful if you would give a fuller and clear explanation of the Government’s understanding of the position.

CFSP

We note that the Government do not see any need to extend the Court’s jurisdiction so as to cover CFSP matters, as recommended by the Committee. It would be left to national courts, insofar as they have jurisdiction over a matter, to rule on the legality of any action under the CFSP. As Baroness Crawley acknowledged in the debate on 21 May, there may be discrepancies and inconsistency between the courts in the different Member States “but no more than exists at present where two or more countries adopt a foreign policy”. This is hardly a compelling argument for denying to individuals the opportunity to have an authoritative ruling from the Union’s most senior court in the sort of circumstances described in paragraph 103 of our Report and for the development of a coherent foreign policy subject to the rule of law.

As regards the problems raised by the text of Article III-282, the Government argue that the problem has been solved by the clarification of the text of that Article. You will recall that this was raised by Lord Lester in the debate on 21 May. It is by no means clear what the proposed amendment to Article III-282 seeks to achieve and whether by implication it is arguable that the ECJ has no jurisdiction to review restrictive measures

adopted under Article III-224(1). The position, we believe, still needs clarification. Otherwise the effect may be to deprive individuals of a possibility which they have at present (as described in para 105 of the Report). Further uncertainty has been added by the addition of a paragraph 3 to Article III-224, though we note the background to this provision as explained in your letter of 7 June. Finally, as regards the Court's jurisdiction over Member States' obligations to support the CFSP (Article I-15(2)) the Government do not consider the matter needs to be clarified. The Government agree with the argumentation put forward by Professor Koeck (set out in paragraph 111 of the Report). We note the Government's confidence that the ECJ would regard the exclusion of Articles 1-15 from the list in Article III-282 as devoid of any consequences whatsoever.

JUSTICE AND HOME AFFAIRS

The Government resist any extension of the jurisdiction of the Court over police and law enforcement operations, matters which they consider are the responsibility of individual Member States. The Response does not comment on the certainties raised by the final words of Article III-283, "where such action is a matter of national law". What is the Government's understanding of the purpose and meaning of these words?

EFFECTIVE REMEDY

The Government do not accept the recommendations of the Committee on the standing rule. The changes made as a result of the Convention's deliberations are described as "a balanced, and wholly sufficient reflection of the Convention's deliberations". But it does not seem that the Government's interpretation of the discussions in the Convention is universally held. We would draw your attention to intervention made by Lord MacLennan of Rogart during the debate on 21 May.

Was the Government aware that there were contrary views within the Court of Justice? In this context you may recall earlier evidence given by Advocate General Jacobs to this Committee (*The Future Status of the EU Charter of Fundamental Rights*, 6th Report 2002–03).

Lord MacLennan also referred to the question of the potential costs involved in granting greater access to the Community Courts. What research have the Government undertaken on the question of the costs? It would be helpful if the Government could make available to the Committee the figures as to the likely costs on which the Government based its arguments before the Convention. How far do such figures take account of the costs involved in using the domestic courts as a filter?

As regards the new Article I-28 the Government strongly welcome the inclusion of this provision. The Committee invited 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. The Government's Response says that the Article provides explicit recognition of the fundamental role which national courts currently play in applying and enforcing Community law. Can you therefore confirm that there would be no extra benefits and no need to amend our law to give effect to Article I-28 of the Treaty?

10 June 2004

**Letter from Lord Grenfell, Chairman of the European Union Committee, to Dr Denis MacShane MP,
Minister for Europe**

DRAFT CONSTITUTIONAL TREATY—PROPOSED AMENDMENTS

Thank you for your letter of 7 June which was considered by the Select Committee at its meeting earlier this week and is now also being examined by the Sub-Committees. A number of points arise immediately. Others may emerge when the Sub-Committees finish their work. I would also expect a number of questions to be raised at our meeting on 22 June. The Committee is, as always, grateful to you for appearing before us on this occasion.

At the outset of your letter you note that the Presidency proposals may be subject to further negotiation and amendment. We would be grateful to have sight of texts as soon as possible and, where texts are not available, to be kept informed of developments.

In addition, we would welcome the Government's response on the following points.

ANNEX 3—PRIMACY OF UNION LAW

You will be aware that the statement of the doctrine of primacy in Part 1 of the draft Constitutional Treaty has given rise to a considerable amount of comment. It is therefore most important, if any unjustified criticism is to be avoided, for the position to be made as clear as possible. You will recall that the Committee dealt with this subject in considerable detail in its Report on the Future Role of the Court of Justice. I am writing to you separately with reactions to the Government's Response to that Report. I hope the Government will be able to respond fully to the questions raised in our Report and reiterated in that letter.

ANNEX 7—PRESIDENCY OF THE PSC

We note the Government consider that the President of the Political and Security Committee should be appointed by the Minister for Foreign Affairs. We remain concerned that the PSC, if chaired by an appointee of the Minister, may lack independence in its role "to monitor the implementation of agreed policies, without prejudice to the responsibility of the Union Minister for Foreign Affairs" (Article III-208). We remain of the view that the appointment should be made by the Council of Ministers. Do the Government agree that the PSC should be independent in its monitoring role?

ANNEX 20—JUDICIAL COOPERATION IN CRIMINAL LAW MATTERS

We note that the Government welcome the statement that measures in the field of criminal judicial cooperation must take into account the different legal traditions and systems of the Member States. We also note that you say that the Government has not changed its position and you say that the Irish Presidency is expected to issue new proposals before the European Council. The Committee would be grateful for sight of those proposals as soon as they are available.

ANNEX 21 (CIG 73/04)—EUROPEAN PUBLIC PROSECUTOR'S OFFICE

AND

ANNEX 39 (SIMPLIFIED PROCEDURES FOR REVISING THE CONSTITUTION)

You will recall that in both these provisions any changes proposed would have to be approved by the Member States in accordance with their constitutional rules. We asked what procedure the Government envisaged would be adopted in the United Kingdom for securing such approval and what role Parliament would have. You replied that "it will be for Parliament, when examining legislation designed to give effect to the draft Treaty, to decide what procedure the Government would need to follow in such cases". Are we to conclude that the Government has no view on this matter? We would be most surprised if the Government had not already given some consideration to the question. We again seek clarification of the position and in particular invite the Government to say whether they envisage that the approvals referred to in Article III-175 and IV-7(a)(3) would be given by legislative or non-legislative means and if the former, whether by primary or secondary legislation.

ANNEX 21 (CIG 76/04)—ARTICLE III-2(A)

We note what you say, but are unable to find any wording in Part 1 of the Constitutional Treaty which would justify the use of the expression "guarantee of social protection" in the revised Article III-2(a). The use of the word "guarantee" goes beyond our understanding of the Treaty provisions and we remain very concerned about the risk of misinterpretation if the phrase is incorporated as it stands. We continue to believe that an expression on the lines of "the need for adequate social protection" would be more appropriate and satisfactory.

ANNEX 22—JUDICIAL COOPERATION IN CIVIL MATTERS

It would appear that the Government are content that the restriction currently found in Article 65 EC (requiring that measures must be necessary for the proper functioning of the internal market) would no longer apply so as to limit the extent of Community competence to legislate in the area of judicial cooperation in civil matters. You draw attention to the fact that the words "*inter alia*" have been omitted from paragraph 2 but as I indicated in my earlier letter the potential width of some of the subject matters in the now exhaustive list is quite extensive. It therefore appears that the Government is prepared to accept a substantial extension of

Union competence in this area. You refer to the opt-in under the Protocol, but given the Government's general statement of policy regarding the Protocol and the experience in recent years (in particular in relation to family law), the existence of the opt-in is a source of little comfort to the Committee in this matter.

ANNEXES 38 AND 39—REVISION OF THE CONSTITUTION

Thank you for giving some examples of cases which fall within Article IV-7(b). You largely confirm the Committee's understanding that the provision would mainly be restricted to procedural matters not falling within Article IV-7(a). But at least one, if not two, of your examples may have substantive implications. We would be grateful if you could explain what is meant by "insert references to national law". Presumably this is something different than repatriating competences, which incidentally would seem to fall within Article IV-7(b).

ANNEX 41—PROTOCOLS

You have kindly provided copies of the Protocols on monetary union and on border controls, asylum and judicial cooperation. We would be grateful for information, and have copies if available, of the Protocols dealing with the Schengen acquis and also dealing with the application of (then) Article 7(a) of the Treaty in relation to the United Kingdom and Ireland.

ANNEX 44—ACCESSION OF THE UNION TO THE ECHR

We asked whether the Government were content that QMV should apply on the question of accession to the ECHR. You say that the Government will take a view on the merits of alternatives to EU accession to the ECHR in the light of the overall IGC package on human rights. Presumably this is an implied reference to the position of the Charter in the new Constitutional Treaty. This is a matter to which we may wish to return.

ANNEX 48—RESTRICTIVE MEASURES

You will recall that this is another matter which was address in the Committee's Report on the Future Role of the European Court of Justice. The issue was also raised by Lord Lester in the debate on 21 May. This is another matter which I address in my letter on the Court of Justice.

11 June 2004

Letter from Baroness Crawley, Government Whips Office, to Lord Scott of Foscote, Chairman of Sub-Committee E of the European Union Committee

I promised to write in follow-up to various points you raised during the 21 May debate on the EU Select Committee's report on the ECJ.

First, you asked whether the draft Constitutional Treaty should address the question of whether it is the national constitutional courts of Member States, or the ECJ, that has the final say in any dispute over which competences have been conferred on the EU, the "Kompetenz Kompetenz" question.

The Government does not see a need for a specific provision in the Constitutional Treaty addressing the Kompetenz Kompetenz issue. The situation is already clear. The Court of Justice has the role of interpreting the extent of the Union's competences—not those of the Member States. Equally, however, it is for the Court of Justice, and not for the national courts, to decide on the legality of a Union measure (see Article III-270) and therefore whether or not such a measure should apply in the Member States.

As the Committee's Report itself said, and as Lord Slynn (for example) emphasised during the debate, it is difficult to see how the Union could work if the courts of each Member State had jurisdiction to declare EU law invalid. If a national court is deciding a question of national law, this is clearly within its jurisdiction; but issues on the validity of Union law fall ultimately to the Court of Justice to decide.

You also suggested that the courts in this country may have to treat domestic legislation as invalid in order to give effect to the primacy rule. They would do this, as at present, if the legislation were contrary to Union law. This is the result, as the question suggests, of the long-standing principle of primacy which is itself a corollary of the Member States having agreed to be bound by the EC Treaty. Such courts could seek the ruling of the Court of Justice, as now, on the issue of whether the particular domestic legislation complied with Union obligations (Article III-274 of the draft Constitutional Treaty).

You referred to the possibility of disputes about the boundaries of EU competences when the national courts are examining issues of police and law and order. If an issue to do with the interpretation or application of EU legislation adopted under sections 4 and 5, Chapter IV, Title III of the draft Constitutional Treaty (judicial cooperation in criminal matters and police cooperation) were to come before a national court, guidance on the boundaries of EU competence would be available to the national court by means of a reference to the ECJ under Article III-274 of the draft Treaty. If there were a doubt as to whether the EU legislation in fact had strayed into an area of Member State competence, it would be open to the Member States to challenge the legality of the European legislation before the ECJ under Article III-270 of the draft Treaty.

You asked about avenues of legal redress for individuals injured by the conduct of troops in an EU-led military operation. EU member states and the host country of the EU-led military operation will enter into a bilateral understanding regarding claims for damages caused by personnel participating in specific EU missions. According to this understanding the personnel in such operations are contributed by Member States and remain the responsibility of those States. It is therefore for the relevant national authorities, rather than the European Court of Justice, to have jurisdiction over their conduct.

Turning to the rule of standing at the ECJ, you raised the prospect of the EU finding itself in breach of Article 6 of the European Convention on Human Rights (ECHR), which refers expressly to the availability of a remedy within a reasonable time.

We believe the risk of a breach of Article 6 of the ECHR is small; but the Government has in any case always been a strong supporter of continuing efforts to ensure that the EU Courts are able to deal with their heavy case-load as quickly and effectively as possible. Most recently, under the Nice Treaty a number of reforms were introduced to reform the EU Court system. These included amendments to the Protocol on the Statute of the Court of Justice to give the Court of First Instance some of the jurisdiction of the Court of Justice and to reduce the number of cases held in plenary session before the Court of Justice. A third tier of Community courts, the judicial panels, will be established to hear cases in certain specific areas.

15 June 2004

Letter from Baroness Crawley, Government Whips Office, to Lord Lester of Herne Hill QC

I promised to write in follow-up to various points you raised during the 21 May debate on the EU Select Committee's report on the ECJ.

You asked for the Government's response to paragraph 103 of the Report. The official Government Response commented on this paragraph:

"The Government sees no basis for changing the overall current position under which the ECJ does not have jurisdiction over CFSP. CFSP is, and will remain, a distinct area of activity subject to separate and distinct procedures. However as noted below, the Court will have the jurisdiction to rule on proceedings to review the legality of restrictive measures against natural and legal persons adopted on the basis of the CFSP chapter. This is in addition to the Court's jurisdiction in relation to restrictive measures adopted under Article III-224 and any rights of redress that individuals have before national courts."

You also asked why the Government did not believe that the European Court of Justice should be able to review measures taken by member states relating to police and law enforcement operations. The Government supports greater EU action to safeguard collective security. Its view remains, however, that the ECJ should not be given the competence to review measures taken by Member States relating to police and law enforcement operations, or to the exercise by a Member State of its responsibility to maintain law and order or its security. The Constitution reaffirms that the maintenance of law and order and the safeguarding of its security is the responsibility of individual Member States; a position that is already enshrined in the existing Treaties.

You mentioned also during the debate the Select Committee's recommendation that the Government should support the accession to the European Convention on Human Rights by the European Union, so that it would be clear that in the hierarchy of courts the Strasbourg Court would remain the ultimate arbiter on the European Convention. You raised this with regard to a point made by Lord Slynn, on the incorporation of the Charter of Fundamental Rights into the draft Treaty.

In reply to your question about accession by the European Union to the European Convention on Human Rights, I can reassure you that the European Court of Human Rights will remain the ultimate arbiter on the European Convention. The Government supports Union accession to the European Convention provided accession takes place with due regard to the limitations of the Union as regards competence and jurisdiction.

Article II-52(3) of the draft Constitutional Treaty provides that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. The official Explanation to Article 52 notes that this provision is intended to ensure the necessary consistency between the Charter and the ECHR and clarifies that the meaning and scope of the guaranteed rights are determined not only by the texts of the ECHR but also by the case law of the European Court of Human Rights.

You intervened at the end of the debate to ask for clarification of Article III-209 and our comment on that Article in our Response. Article III-209 is one of the articles in respect of which the Court of Justice will have jurisdiction under the Constitution (see Article III-282, second paragraph. Art III-282 was revised at the end of 2003: a copy of the revision was placed in the Library of the House). It will have jurisdiction to monitor compliance with Article III-209. Article III-209 is helpful in assisting to keep the Common Foreign and Security Policy distinct from the other Union competences which are referred to in Articles I-12 to I-14 and I-16. The article is intended to ensure that a CFSP measure does not affect these other Union competences and that in turn measures taken under such competences do not affect the Common Foreign and Security Policy.

In our Response we did not, in fact, intend to suggest that the ECJ would have jurisdiction to review the legality of European decisions in relation to Article III-209, providing for restrictive measures against natural or legal persons.

Rather, the Government was making the point that, while the Court of Justice would not have jurisdiction over Articles I-39 and I-40 and Chapter II of Title V of Part III concerning the Common Foreign and Security Policy, it would have jurisdiction to monitor compliance with Article III-209. In addition it would be able to rule on proceedings, brought in accordance with the conditions laid down in Article III-270(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons, adopted by the Council on the basis of Chapter II of Title V. The revised Article III-282, second paragraph, rather than the Article contained in the Convention text, makes clear that the Court has jurisdiction over such European decisions providing for restrictive measures adopted under the CFSP framework.

15 June 2004

Letter from Baroness Crawley, Government Whips Office, to Lord Slynn of Hadley

I promised to write in follow-up to various points you raised during the 21 May debate on the EU Select Committee's report on the ECJ.

First, you commented on the powers of the European Court of Justice in deciding issues on the validity of Union law, and you are of course right that these fall ultimately to that Court to decide.

Secondly, you suggested that the obligation on a national court of final instance to send to the ECJ all cases raised before it which concern the interpretation of the Constitution or the validity and interpretation of acts of the institutions, organs, bodies and agencies of the Union, could be limited to sending cases with a constitutional significance or which are important from the Community point of view.

We disagree with this suggestion because it would mean that for other cases, a final decision on the interpretation of the Constitution or on the validity and interpretation of acts of the institutions of the Union would be decided not by the Court of Justice, but by national courts. This would detract from the role of the Court of Justice—which is given the task of ensuring respect for the law in the interpretation and application of the Constitution. It would also lead to divergent interpretations of Union law by national courts, which could have serious effects for the uniform application of Union law.

However, on another point you raised during the debate—the standing of individuals and companies to bring cases before the Court of Justice—I can reassure you that this is not going to be significantly extended by the draft Treaty.

Finally, you raised the Charter of Fundamental Rights and its implications for the European Court of Human Rights. Here too I can provide some reassurance. The European Court of Human Rights will remain the ultimate arbiter on the European Convention. The Government supports Union accession to the European Convention provided accession takes place with due regard to the limitations of the Union as regards competence and jurisdiction.

Article II-52(3) of the draft Constitutional Treaty provides that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. The official Explanation to Article 52 notes that this provision is intended to

ensure the necessary consistency between the Charter and the ECHR and clarifies that the meaning and scope of the guaranteed rights are determined not only by the texts of the ECHR but also by the case law of the European Court of Human Rights.

15 June 2004

**Letter from Dr Denis MacShane MP, Minister for Europe, to Lord Grenfell,
Chairman of the European Union Committee**

Thank you for your letters of 10 and 11 June with further questions on the Constitutional Treaty. I am grateful for the Committee's continued expert involvement in the negotiations, and enjoyed my appearance before you on 22 June. This reply to your letters picks up on points made there, as well as the written questions handed to us afterwards.

You ask in your 11 June letter for various texts. These are all available in the Printed Paper Office and I am happy also to enclose copies:

First (attachment "A") of the final text on criminal judicial cooperation (referred to under annex 20 in your letter); and secondly (attachment "B") of the Protocols dealing with the Schengen acquis and the application of the (then) Article 7 (a) of the Treaty in relation to the UK and Ireland.

You asked in your letter of 11 June whether the Government had a view on the procedures that would be used to secure Parliamentary approval for any changes proposed under III-175 and IV-7(a) (3). We have not made a final decision on the procedures that we will propose to Parliament for such changes.

Lord Scott specifically raised this question at the 22 June session in relation to Article III-175 and the creation of a European Public Prosecutor. He was concerned that the final version of the Treaty omitted the phrase "The European Council's decision shall not enter into force until it has been approved by the Member States, in accordance with their respective constitutional rules."

I can reassure you that this omission changes nothing substantively as far as the UK is concerned. We did not regard that phrase as binding us to a specific Parliamentary procedure. We in any case see no need for an EPP, so the question of the procedures we would follow before setting one up is hypothetical. Clearly also the procedures for such a significant move would have to involve a high degree of Parliamentary scrutiny. The creation of an EPP with powers over cross-border crime would require primary legislation.

You also remarked in that letter on Article III-170. This also makes a reference to the functioning of the common market. We also welcome the fact that paragraph 1 of the Article makes clear that the activity is concerned with measures "having cross-border implications" and "based on the principle of mutual recognition". Moreover, the fact that paragraph 2 of the Article sets out a closed list of activities, unlike Article 65 TEC which made clear that it did not list all possible activities, is a counterweight to the change. Most of the activities are familiar from the existing Article 65. Those which are new broadly reflect activities which had previously been carried out under Article 65 or other provisions of the Treaty, for example access to justice, and the provision of financial assistance to activities such as training for lawyers and judges in Community law.

You ask the significance of the phrase "insert references to national law" in our Response. Examples from the draft Treaty of references to national law, of a kind that might be added to it subsequently under Article IV-7(b), include the following provisions on legal bases for adopting laws and framework laws: "having regard to the conditions and technical rules obtaining in each of the Member States" (see eg Article III-104(2b)); "shall not affect the right of Member States to define the fundamental principles of . . ." (see eg Article III-104(5a)); "shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Constitution" (see eg Article III-104(5b)); or "such measures shall not include the approximation of Member States' legislative and regulatory provisions" (see Article III-173). Adding a provision on the lines of the first example would not repatriate competences; but the last three examples, if added as new riders to existing provisions, would repatriate competences in a minor fashion. So we share your view that competences could be repatriated under Article IV-7 (b).

In your letter of 10 June you ask for the Government's view on whether the primacy of Community law only applies in relation to Community measures having direct effect. From the starting point that the Member States must comply with their treaty obligations, the Court of Justice developed this principle into a rule for resolving conflicts between directly applicable and directly effective Union measures and conflicting national law. In our view, Article I-5a is intended to reflect the principle as set out in the jurisprudence of the Court of Justice, as the proposed accompanying Declaration would confirm.

You asked likewise for a fuller reply on the application of primacy to the second and third pillars. In accordance with a long-standing principle of international law, the UK's Treaty obligations take precedence over its domestic law. Because of our dualist system these Treaty obligations take effect in UK domestic law when they are incorporated into that law. Within the Constitutional Treaty, it is true to say that the Pillar system has collapsed. But the UK has secured a carve-out for ECJ jurisdiction over Common Foreign and Security Policy (CFSP), as set out in Article III-282. The ECJ's jurisdiction will only arise in respect of the adverse consequences for individuals of CFSP decisions imposing sanctions. In any event most foreign policy decisions are executive, not legislative, in nature.

We note in that 10 June letter that the Committee continues to believe that the ECJ should be expanded to cover the whole of CFSP. We continue to disagree. The character and content of CFSP remain quite distinct from the other areas of the EU's work. CFSP must of course be subject to the same checks and controls as those applicable in other areas of foreign policy—and so the systems of redress and legal challenge must remain those provided for under each Member State's legal and constitutional arrangements.

The possibility of different rulings in different Member States is no greater than that arising in other areas where States participate in joint arrangements at the international level.

We do however fully agree that if CFSP measures are directed at individuals in the form of sanctions, those individuals should have the opportunity to challenge them before the ECJ. The Constitutional Treaty does therefore extend the jurisdiction of the Court to cover such measures.

The Government is clear that the Court does have jurisdiction over sanctions adopted under Article III-224(1). Article III-224(1) is in Chapter V of Title V so clearly does not fall into the carve out extended to CFSP in the first paragraph of Article III-282, which says "The Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-39 and I-40, the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-194 in so far as it concerns the common foreign and security policy." The revised second paragraph of Article III-282 makes clear that although the Court does not have jurisdiction over CFSP, it can rule on restrictive measures taken under the CFSP Articles. This is in addition to the Court's existing jurisdiction over measures taken under Article III-224.

The Government remains of the view that Article I-15 can only be implemented through Articles I-39 and I-40, and the provisions of Chapter II of Title V, and therefore the Court does not have jurisdiction over Article I-15.

You asked in your 10 June letter for the Government's understanding of the purpose and meaning of the words "where such action is a matter of national law" in Article III-283. I apologise for not addressing this in my earlier letter. We agree with the Committee that these words were unclear and advocated their deletion. The words were removed from Article III-283 in the Presidency's closed package, CIG 81/04 and this revised text has been carried through to CIG 86/04.

With regard to the rules of standing before the Court of Justice, raised in your letter of 10 June, there were of course a range of views expressed in the Convention—from those who wanted no change, to those who wanted an extensive widening of the rules. As indicated in my earlier letter, the Government considers that the Convention text, and therefore the final agreement, represent a balanced reflection of that range of views.

We also aware of the difference of views among Members of the Court itself. These are evident from the judgment of the CFI in the case of *Jego-Quéré-v-Commission* (Case T-177/01; judgment, 3 May 2002) and Advocate General Jacobs' Opinion in *Union de Pequenos Agricultores-v-Council* (Case C-50/OOP), on the one part, and the ECJ's contrary decision in the UPA case on the other.

We are not aware of any statistics produced either by those advocating or opposing relaxing the rules of standing in relation to the potential costs to the Court of Justice. What is clear is that relaxing the rules on standing would lead to an increase in the number of cases coming before the Court, with implications not only for the Court's already stretched resources but for the speed with which its heavy caseload could be handled.

Full account must also be taken of the role of national courts as an integral part of the Union's legal order. The Court itself underlined, in the UPA case cited above, the importance of the national courts in ensuring that adequate remedies are available to individuals. The United Kingdom Government therefore strongly welcomes the inclusion of the additional language in Article I-28. This provides explicit recognition of the role of national courts as set out in the UPA case and we can confirm that as such it confers no extra benefits, other than greater clarity, and that there is no need to make additional legislative provision to give effect to it.

Let me now turn to our 22 June session. First of all let me take this opportunity to clear up any misunderstanding of the meaning of Article III-174.2. Lord Scott suggested at the evidence session that the Article might lead to Eurojust needing an investigative agency because of new powers it may acquire to initiate criminal investigations. He further suggested that Eurojust might turn for this purpose to OLAF. We see no

reason why this should be so. The Article provides for European laws to allow Eurojust to initiate criminal investigations, but not to conduct them. Indeed the Article specifically makes clear that the criminal investigations initiated by Eurojust are to be “conducted by national authorities”. The Article will not therefore lead to new powers for OLAF nor will it require that Eurojust itself should possess an investigative capacity.

You gave us several written questions at the session. I thought it might be useful if I set out your written questions in bold type, numbered as they were in your question sheet, and then below each provide our reply.

Your question 16: Charter of Fundamental Rights

“CIG 80/04 contains, in its last two pages, various options regarding the legal force of explanations to the Charter. Which, if any, of these has now been agreed and is HMG satisfied with this result?”

The final text is in CIG 85/04. It says (AII-52(7)): “The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.”

HMG is satisfied with this result. The Charter is a showcase of existing fundamental rights, freedoms and principles which the EU must recognise. But before agreeing to incorporate the Charter in the Treaty and give it legal force, we insisted on greater legal clarity; and on ensuring the Charter would not extend the powers of the EU. These have been achieved.

Your question 19: Turkey

“To what extent have political developments in Turkey (including the release of prisoners) enhanced prospects for agreement on a date for negotiations to begin being reached in December and what other outstanding issues remain to be resolved?”

We believe the recent political developments in Turkey demonstrate the momentum behind the reform process in Turkey and hope the Commission will reflect this in its October report. The June European Council welcomed the significant progress made by Turkey to date and explicitly mentioned the important and wide-ranging constitutional amendments adopted in May. Other significant developments include the release, pending appeal, of Leyla Zana and her three co-defendants and the start of minority language broadcasting, including in Kurdish.

The Council reiterated that it would continue to assist Turkey to implement its pre-accession strategy, in particular in the areas identified in the December 2003 Council Conclusions. We look forward to the introduction of a new Turkish penal code in July to harmonise recent legal reforms, and continued efforts towards full implementation of all the packages of reform.

Your question 20: Serbia and Montenegro, and Republic of Macedonia

“The Embassies of Serbia and Montenegro and of the Former Yugoslav Republic of Macedonia have written to the Chairman to say that their Parliaments have established European Integration Committees and the Chairman has replied that he would be happy to meet their Chairmen in due course. Does HMG support parliamentary co-operation with these states and is there any indication at this stage of when they might seek formal candidate status?”

We fully support parliamentary co-operation with Serbia and Montenegro and the Republic of Macedonia.

The June European Council reaffirmed its commitment to the full implementation of the Thessaloniki agenda, which makes clear that the future of the Western Balkan countries rests within the European Union. Macedonia submitted an application to join the EU on 22 March 2004. The May General Affairs and External Relations Council (GAERC) asked the Commission to give advice on this application, to be judged against the agreed criteria. Serbia and Montenegro has yet to negotiate a Stabilisation and Association Agreement (SAA)—the first stage in developing closer relations with the EU.

Your question 21: Mediterranean and Middle East

“In what ways has HMG sought to ensure that the EU Strategic Partnership with the Mediterranean and the Middle East is truly complementary to existing US, G8 and Arab League initiatives?”

The Presidency, Commission and other member states have worked closely with the US, G8 and Arab League to ensure that the initiatives are complementary. As a member of the EU and the G8, the UK has been fully aware of the importance of complementarity between EU and G8 initiatives. And we have encouraged close consultation with the region itself.

Your question 22: Lamfalussy

“Are there any suggestions that the Lamfalussy Process should be extended from banking and insurance to areas such as telecoms, post and the environment? If so how likely are they to find favour? What would be the implications for national parliamentary scrutiny and accountability of Ministers to their national parliaments?”

There have been no suggestions that the Lamfalussy process might be extended to other areas beyond financial services, such as post, telecoms and environment. It is unlikely that any such suggestions would be made before the Lamfalussy process has been formally reviewed in a few years’ time.

The Lamfalussy process involves the Council, Commission and European Parliament adopting by co-decision “level 1” framework legislation. This is supported by more technical secondary legislation at “level 2”. Level 2 legislation can be amended relatively quickly and this more flexible approach to EU-level legislation may be attractive in areas outside financial services. The Lamfalussy process involves a high degree of transparent and formal consultation on proposed EU-level legislation, and involves committees of national regulatory authorities working together to advise the Commission on technical measures and to improve the consistency of implementation across the EU. These features might also be attractive in areas outside financial services.

Lamfalussy legislation is subject to the same national Parliamentary scrutiny and Ministerial accountability arrangements as other EU-level legislation.

30 June 2004

**Letter from Lord Grenfell, Chairman of the European Union Committee, to Caroline Flint MP,
Parliamentary Under Secretary of State at the Home Office**

PROPOSED CONSTITUTIONAL TREATY—ROLE OF THE ECJ

Your letter of 30 June, replying to my letters of 10 and 11 June, was considered by Sub-Committee E (Law and Institutions) at its meeting on 3 November. The Committee is grateful for the explanations of the Government’s view of the role of the Court of Justice under the proposed Constitutional Treaty. We are also grateful for the information provided by Baroness Crawley to Lord Scott, Lord Slynn and Lord Lester following the debate, on 21 May, of our Report *The Future Role of the European Court of Justice*.

THE DOCTRINE OF PRIMACY

Article I-6 (formerly 5a) provides: “The Constitution and the law adopted by the Union’s institutions in exercising competences conferred on it shall have primacy over the law of the Member States”. In their White Paper on the Treaty establishing a Constitution for Europe (CM 6309) the Government refer to the observation made by the Committee in its Report (at paragraph 51) that it is not surprising that the Constitutional Treaty includes a statement of the primacy of Union law. It is unfortunate that the quotation is not in fact verbatim and that the White Paper does not refer (even in a footnote) to any of the comments or criticisms that the Committee has made in relation to the text or to the continuing correspondence on the issue. You will agree that it is imperative that the general public has the fullest explanation of the new Treaty and that the implications of provisions having such constitutional weight as Article I-6 should be explained. Your letter provides helpful clarification of the Government’s position for which, as mentioned above, we are most grateful but nonetheless leaves some issues unsettled.

On the question whether primacy is restricted to measures having direct effect, you say:

“From the starting point that the Member States must comply with their Treaty obligations, the Court of Justice developed this principle into a rule for resolving conflicts between directly applicable and directly effective Union measures and conflicting national law. In our view Article I-5(a) is intended to reflect the principle as set out in the jurisprudence of the Court of Justice, as the proposed accompanying declaration would confirm.”

From this the Committee concludes that the Government takes the view that primacy is restricted to measures having direct effect.

On our second question, the extent to which the doctrine of primacy would apply to matters in the Second and Third Pillars, you say:

“In accordance with a longstanding principle of international law, the UK’s Treaty obligations take precedence over its domestic law. Because of our dualist system these Treaty obligations take effect in UK domestic law when they are incorporated into that law. Within the Constitutional Treaty, it is true

to say that the Pillar system has collapsed. But the UK has secured a carve out for ECJ jurisdiction over Common Foreign and Security Policy (CFSP) as set out in Article III-282. The ECJ's jurisdiction will only arise in respect of the adverse consequences for individuals of CFSP decisions imposing sanctions. In any event most foreign policy decisions are executive, not legislative, in nature."

This response is helpful, but only up to a point. Firstly, it fails to address the Third Pillar. Secondly, by apparently restricting primacy to the situation where the ECJ has jurisdiction, it raises a further question. Is it not arguable that even if the ECJ does not have jurisdiction a national court would nevertheless have to give effect to the doctrine of primacy expressed in Article I-6? And any issue as to how and when it should give effect to that principle would presumably be a matter on which the national court could seek guidance from the ECJ itself? The Committee's preliminary conclusion is that the position remains unclear. Were the issue to arise the matter would have to be resolved by the ECJ. But if the Government is able to shed any further light on these issues that would be welcome.

CFSP

We note that the Government firmly reject the notion that CFSP matters should be subject to the jurisdiction of the Court. You apparently reject the point that this might lead to discrepancies and inconsistency between the courts in different Member States. However, we also note that, in response to Lord Slynn (dealing with the extent of the obligation of national courts to refer questions to the ECJ) Baroness Crawley emphasises the importance of the ECJ "which is given the task of ensuring respect for the law in the interpretation and application of the Constitution". Limiting the obligation on national courts to refer matters to the ECJ, she says, "would also lead to diversions in interpretations of Union law by national courts which could have serious effects for the uniform application of Union law". We strongly support this view, for all Union law.

EFFECTIVE REMEDY

We note that the Government are not to be persuaded that the standing rule (Article III-365(4)) should be widened. No doubt this is a matter to which the Committee will wish to return at an appropriate opportunity.

4 November 2004

**Letter from Lord Grenfell, Chairman of the European Union Committee, to Dr Denis MacShane MP,
Minister for Europe**

CONSTITUTIONAL TREATY—ROLE OF THE ECJ—PRIMACY OF UNION LAW

You may recall that I wrote to the Government on this subject on 4 November 2004. Unfortunately my letter was addressed to Caroline Flint at the Home Office but I understand that officials there quickly forwarded it to the Foreign Office. However, we have not yet received any reply. We look forward to doing so. In the meantime the European Union Bill has been published. It will be helpful when preparing your reply if you could take into account the following points which are raised by the Bill.

Clause 1 of the Bill amends the definition of "Treaties" in section 1 of the European Communities' Act 1972. "The Treaties" or "the EU Treaties" would mean "the EU Treaty" except the "common foreign and security policy provisions" (listed in Clause 5(12)). One effect of this is that sections 2 and 3 of the 1972 Act will not apply to the common foreign and security policy provisions. The doctrines of the primacy of Union law and of direct effect take effect in our law by virtue of section 2 of the 1972 Act. Can we conclude from this that in the Government's view those doctrines will not apply to the Common Foreign and Security Policy under the Constitutional Treaty?

The doctrine of primacy is enshrined in Article I-6 of the Constitutional Treaty. You will recall from the discussion of the issue in our Report, *The Future Role of the European Court of Justice*, that it is not clear how far the doctrine of primacy extends. Article I-6 is not in its terms limited to any particular Articles of the Constitutional Treaty. We note that the Declaration on Article I-6 states that Article I-6 reflects existing case law of the Court of Justice and of the Court of First Instance. But, as you know, the question of whether the doctrine of primacy of Union law extends to the Common Foreign and Security Policy is not clear. The Community courts have not yet addressed the issue, either because they have not had jurisdiction to do so or because a case has not so far arisen. It is not in any event clear that the Court of Justice would regard a provision as apparently fundamental as Article I-6 as capable of being qualified by a mere declaration. Further, we note that the list of "common foreign and security policy provisions" in Clause 5(12) of the Bill

includes Article I-16 of the Constitutional Treaty, a provision which in principle falls within the jurisdiction of the Court of Justice.

As mentioned above, it would be helpful if you could take these points into account when replying to my letter of 4 November. We regret that you are not coming to meet the Committee. We regard it essential to our work for the Committee to have a reply before 9 March.

28 February 2005

**Letter from Dr Denis MacShane MP, Minister for Europe, to Lord Grenfell, Chairman of
the European Union Committee**

CONSTITUTIONAL TREATY—ROLE OF THE ECJ—PRIMACY OF UNION LAW

Thank you for your letter of 28 February, which referred to your earlier letter of 4 November 2004. The Home Office did forward the letter to me, but it was not obvious, that a specific response was required. I am of course happy to set out the Government position again in full.

GOVERNMENT WHITE PAPER

Firstly, you are right that the quote we used was not verbatim (omitting the words “of Part I” and “as defined in the jurisprudence of the Court”) but we did not feel that by slightly shortening the text in this way, we were in any way altering the sense of the Committee’s comments. In drawing up the White Paper we felt that it was important to keep the explanations of the Treaty as simple and accessible as possible while maintaining accuracy.

DOCTRINE OF PRIMACY

The principle of primacy has a wide and a narrow meaning. In its wider sense, the principle means that a Member State may not invoke the provisions of its national law as an excuse for failing to give effect to its obligations under the EC Treaty. In this sense the principle reflects the general rule of international law set out in Article 27 of the Vienna Convention on the Law of Treaties.

In the narrower sense in which it is usually used in EC law, the principle of primacy is simply a refinement or elaboration of that general rule. As developed by the European Court of Justice (ECJ) the principle of primacy means that where a national court in a Member State is faced with a conflict between a rule of EC law and a rule of national law, the national court must apply the rule of EC law and disapply the rule of national law to the extent necessary. The principle of primacy in this narrower sense can only apply if the rule of EC law is directly effective or directly applicable.

The Government is clear, as it said in reply to the Committee in response to the report on the ECJ in May 2004, that the Constitutional Treaty does not change the meaning or content of the doctrine of primacy in EC law in the narrower sense enunciated by the ECJ. This is, in the Government’s view, the clear effect of Article 1-6 taken with Declaration 1 (and the Government does not share the Committee’s doubts about the legal efficacy of Declaration 1). Under the Treaty, the principle can apply in any area where the EU can generate directly effective or directly applicable law. This will include areas formerly falling within the so-called Third Pillar (now known as Freedom Security and Justice) as well as areas currently falling within the competence of the Communities.

The principle in its wider sense also applies to CFSP. All Member States must give effect to CFSP obligations and may not use national law as an excuse for failure to do so.

CFSP

It is also arguable, as the Committee has said, that Article I-6 means that the principle of primacy in the narrower sense in theory could apply to CFSP too. But the ECJ has no jurisdiction over the CFSP provisions of the Treaty or most measures adopted under them. It will not adjudicate on the meaning of such provisions nor will a national court be able to refer a question to the ECJ for a preliminary ruling.

Measures adopted under the CFSP (other than certain “restrictive measures” or sanctions) will continue to be of an executive rather than a legislative character. Accordingly, because of their content and subject matter, they will be highly unlikely in practice to contain provisions that are directly effective or directly applicable, as those concepts have been developed by the ECJ in Community law. This is clear from the content of

measures already adopted under the CFSP. For example, in the next few weeks the Council will adopt a Common Position setting out the EU's policy on conflict prevention in Africa and a Joint Action appointing a new EU Special Representative for Moldova.

This analysis of the CFSP provisions of the Treaty and of the special character of CFSP measures in part explains why the European Union Bill is drafted as it is. Clause 1(1) has the effect of excluding the Treaty's CFSP provisions from the definition of the EU Treaties for the purposes of the 1972 Act under the new subsection 1(2A) of the 1972 Act. As a result, the UK's CFSP obligations will not be implementable under section 2(2) of the Act. But clause 5 of the Bill provides a new delegated power for implementation of CFSP provisions modelled on and parallel to section 2(2). So in the rare cases where the Government judges that a CFSP measure requires amendment of national law to enable it to be given effect in the UK, implementing legislation can be adopted under the powers in clause 5.

Finally the Committee suggests that Article 1-16 of the Treaty, which describes the scope of the CFSP, is itself subject to the jurisdiction of the ECJ. As the Government has said in reply to the Report on the ECJ, Article 1-16 must be read in conjunction with the CFSP provisions in the rest of the Treaty. First, Article I-16 can only be given effect by measures adopted under Articles I-40 and I-41 and both of these Articles are excluded from the jurisdiction of the ECJ. CFSP measures and the procedures by which they are adopted are therefore outside the jurisdiction of the Court. Secondly, although Article I-16 (2) contains a so-called "solidarity clause" on CFSP matters, that clause is given definitive expression in Article I-40(5). The exclusion of Article I-40(5) from the ECJ's jurisdiction means that the question of compliance with the obligation in the solidarity clause could not be raised in judicial proceedings before the ECJ.

In conclusion, the Government does not believe that these issues, though complex in theory, will prove to be a problem in practice. It is satisfied with the provisions of the Constitutional Treaty, including those on primacy and on the CFSP. And it is confident that the EU Bill will enable the UK to give full and proper effect to all its obligations under the Treaty.

10 March 2005

**Letter from Lord Grenfell, Chairman of the European Union Committee, to Dr Denis MacShane MP,
Minister for Europe**

CONSTITUTIONAL TREATY—ROLE OF THE ECJ—PRIMACY OF UNION LAW

Thank you for your letter of 10 March in response to my letters of 4 November and 28 February. It is very helpful in explaining in detail the Government's understanding of Article I-6 of the Constitutional Treaty. Your reply was considered by Sub-Committee E (Law and Institutions) at its meeting on 23 March.

We note that you say that the principle of primacy may be given both a wide and a narrower meaning and that the Government accept that in its wider meaning the principle would apply to CFSP. You also accept that it is arguable that Article I-6 means that the principle in its narrow sense could apply to CFSP though because of the limits of the ECJ's jurisdiction over the CFSP and the fact that most measures under the CFSP are executive rather than legislative, the principle of primacy (in the narrow sense) is unlikely to apply. You restate the Government's view of the relationship between the CFSP and the European Court. You also explain how the European Union Bill has been constructed to take account of the special nature of the CFSP. There is, however, one provision in the Bill which appears to be of some relevance in the present context, namely the proposed amendment to section 3 of the 1972 Act by the inclusion of a new subsection 6. The amendment, you will recall, is set out in Schedule 2 paragraph 3(2) to the Bill. The new subsection seems to contemplate the European Court having jurisdiction over some CFSP matters. But you say that "the ECJ has no jurisdiction over the CFSP provisions of the Treaty or most measures adopted under them". Because sanctions ("restrictive measures" made under Article III-322) are not "common foreign and security policy provisions" listed in Clause 5(12) we wonder what "subject matter" the Government have in mind. It would be helpful if you could explain the purpose and effect of the proposed new section 3(6).

In order to enable the Committee to close its file on this matter I would be grateful if you could let us have your reply by the end of the Easter recess.

24 March 2005

**Letter from Dr Denis MacShane MP, Minister for Europe, to Lord Grenfell, Chairman of
the European Union Committee**

Thank you for your letter of 24 March, in reply to my letter of 10 March, on the Government's view of Article I-6 of the EU Constitutional Treaty.

I am glad that you found my letter of 10 March helpful in explaining the Government's understanding of Article 1–6 of the Constitutional Treaty. Your letter sought clarification about the extent of the ECJ's jurisdiction over CFSP.

You refer to the proposed amendment to section 3 of the 1972 Act by the inclusion of a new subsection (6), which is set out in Schedule 2 paragraph 3(2) to the Bill. The new subsection (6) is included in the Bill to reflect the very limited jurisdiction in CFSP matters conferred on the ECJ in Article III-376 (2) of the Treaty. Article III-376 (1) provides that the ECJ shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning CFSP. But paragraph 2 states,

“However, the Court shall have jurisdiction to . . . rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V”.

In practical terms, this new subsection (6) would allow our Courts to recognise ECJ rulings on restrictive measures against individuals adopted under a CFSP provision. A good example of a measure of this type would be a CFSP decision imposing a travel ban such as that imposed against certain officials in Belarus, as referred to your Committee in December 2004.

As you point out in your letter, the ECJ already has jurisdiction over restrictive measures adopted under the current equivalent provision to Article III-322, and these can apply to individuals. But Article III-322 is not one of the CFSP provisions.

4 April 2005

ISBN 0-10-400720-6



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