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Initiation of EU Legislation

Report with Evidence

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FOREWORD—what this Report is about

In this Report, we seek to describe how draft European Union legislation comes into being. We examine the sources of ideas for legislation and the processes by which ideas are developed to the point when they are submitted, as formal proposals for legislation, to the legislating institutions of the Union.

We consider the "right of initiative"—the power to make formal proposals—and who has it. We look at how, in practice, the principal institution with a right of initiative—the European Commission—develops draft legislation. We examine how other institutions influence the initiation and development of proposals by the Commission, and how other organisations within civil society seek to make their influence felt. We consider how the Member States influence the Commission's work, and the use they make of their own right of initiative in the field of police cooperation and criminal justice. We ask whether the Commission's near-monopoly of the power to make legislative proposals is justified.

Most of this Report is descriptive; we hope to shed some light on an area of EU activity that is not often examined. In the final chapter, we draw out some themes and set out some observations, conclusions and recommendations.

Initiation of EU Legislation

CHAPTER 1: INTRODUCTION

1. The purpose of this report is to explore the processes by which ideas are transformed into EU legislation, principally by the Commission, and to draw conclusions as to the appropriateness of those processes in today's EU. Our starting point was to ask: "Where do the ideas for legislation come from?" and "How are ideas developed to the point when they are brought forward as formal legislative proposals?"

2. The focus of this Report is legislation. We did not consider the initiation of proposals for action in the second pillar, the Common Foreign and Security Policy. Nor did we consider powers delegated by EU legislation to the Commission to make subordinate legislation subject to a committee procedure (so-called "comitology"). We concentrate on the initiatives of the Commission and the Member States and only note, without discussion, the right of initiative in certain specific areas of other institutions and bodies.

3. The EU Treaties set out the procedures by which proposals for legislation may be adopted, and the way in which a proposal proceeds to adoption can be followed by those interested, for example, through the websites of the EU Institutions. Our inquiry considered what happens before draft legislation is formally submitted for adoption, and was intended to lift the veil, to the extent possible in an investigation of this sort, in order to examine the processes of creation and development of legislative proposals. In the final chapter of this Report, we draw out some themes which emerged from the evidence we received and set out some conclusions.

Can the sources of legislation be traced?

4. Dr Eve Sariyiannidou commented: "The way in which legislative proposals are created is not subject to observable rules and processes." (p 156) Is it possible to say where the germ of an idea for legislation comes from?

5. Some of our witnesses thought this could not be done, at any rate in relation to an individual proposal. Catherine Day (Secretary General of the Commission), for example, regarded it as not practical, indeed "impossible", because there is a myriad of sources for ideas. "How can you get into a Commissioner's brain and say 'Where did this idea come from?'" (Q 377) Lord Brittan of Spennithorne (a former Commissioner) was of the same view: "the Commission puts forward a proposal. It has to take the responsibility … Whether it would have come up with the idea if somebody had not made the proposal is a pretty abstract question, which I do not think is really capable of an answer." (Q 60) Nevertheless, our witnesses were able to point to the sources of ideas both in general terms and in relation to some specific measures.

6. Dr Sariyiannidou thought the difficulty of identifying sources arose from the informality of the processes. "The Treaties set out the general competences of the institutions and govern only the basic principles of the operation of the specific legislative procedures", whereas "the actual process is *ad hoc*, unconstrained by formal rules, and characterised by informal institutional

practice and various channels of consultation and cooperation." She recommended focussing on the internal institutional and administrative practices of the Commission but also on organised interests at national and sub-national levels. (p 154) That is what we have sought to do.

7. The membership of Sub-Committee E which undertook this inquiry is set out in Appendix 1. We have taken evidence in Westminster and in Brussels. Those who submitted evidence, written and oral, are listed in Appendix 2. We are grateful to them all. The Call for Evidence is reproduced at Appendix 3.

8. In this Report, we use the expression "European Union" or "EU" to include the European Communities on which the EU is founded. For other EU expressions, readers may wish to refer to Appendix 4, which reproduces the glossary in our recent Report: *The Treaty of Lisbon: an impact assessment*.[1]

9. **We make this Report to the House for debate.**

1 10th Report, 2007–08, HL 62.

CHAPTER 2: THE RIGHT OF INITIATIVE

A legislature without the power to propose legislation

10. The EU makes legislation which has legal force within the territories of the Member States. In the first pillar,[2] the Treaty establishing the European Community (TEC) provides for proposals to be submitted, in most cases, to the European Parliament and the Council of Ministers ("co-decision"); in other cases, the Council may act after consulting the Parliament. In the third pillar, under the Treaty on European Union (TEU), all legislation is adopted by the Council after consulting the Parliament. A proposal undergoes a process of consideration and negotiation; and, if agreed, the legislation is eventually adopted and published. Unusually, by contrast with national legislatures where members have a right (though it may be limited in practice) to introduce legislation, the members of the legislating institutions are not able, as such, to table draft legislation for approval by the legislature.

11. The power to submit proposals for adoption as EU legislation is commonly called the "right of initiative".

Whose initiative?—the first pillar

12. The right of initiative is conferred by the TEC on a third institution, the Commission. The Council and the European Parliament initiate and adopt their own Rules of Procedure, and other institutions have specific powers to initiate certain measures within their particular spheres of operation. But otherwise, in the first pillar, where the Treaties confer on the EU power to make legislation, they require that a proposal must first be made by the Commission.

13. This requirement is set out generally for legislation to be made under the co-decision procedure,[3] for which Article 251(2) provides:

> "The Commission shall submit a proposal to the European Parliament and the Council."

In other cases, the Treaty article which confers the power to legislate itself specifies that legislation is to be made "on a proposal from the Commission"—see, for example, Article 37 TEC on the common agricultural policy.

14. Although the right of initiative is generally thought of as the right to bring a legislative proposal for the consideration of the EU legislature, Professor Anne Rasmussen (Max Weber Fellow, European University Institute, Florence) pointed out that there are related powers of the Commission which reinforce the basic role. (Q 3)

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2 Under the current treaties, the "first pillar" of the European Union comprises the European Communities; the "second pillar" is the Common Foreign and Security Policy under Title V of the Treaty on European Union; and the "third pillar" is Police and Judicial Cooperation in Criminal Matters under Title VI of the TEU. No legislation is made in the second pillar.

3 Under co-decision, a Commission proposal can only become law if it is agreed by both the Council and the European Parliament.

- The Commission may, up to the point when the Council has acted,[4] amend its proposal.[5] In practice, this is frequently done informally during negotiations in Council working groups.
- If the Council wishes to amend a proposal, and the Commission is unwilling to agree, then generally the Council must act unanimously even where it might adopt the proposal, unamended, by Qualified Majority.[6]
- The Commission may withdraw its proposal before the Council has acted on it.[7]

15. The Commission has indicated its willingness to decline to amend a proposal or to withdraw it in cases where changes to be introduced by the Council would be manifestly illegal or would unduly "dilute" the proposal. (Q 338) It is not however clear whether (if at all) the Commission has, in practice, exercised those powers.

Whose initiative?—the third pillar

16. Article 34 TEU provides that legislation on police cooperation and criminal justice may be made on the initiative of any Member State or of the Commission. This is an important exception in terms of its subject matter but only a small proportion of EU legislation is adopted in this field.

The Treaty of Lisbon

17. Were the Treaty of Lisbon to come into force, it would leave the position unchanged except with regard to police cooperation and criminal justice. That Treaty would bring the provisions on Justice and Home Affairs currently in Title IV TEC and Title VI TEU together in a single Title called "Area of Freedom, Security and Justice".[8] Legislation on police cooperation and judicial cooperation in criminal matters would continue to be made on the initiative either of the Commission or Member States, but in the case of Member States, a proposal would require the support of a quarter of their number, instead of a single state.[9]

The right of initiative—a misnomer?

18. We have used the expression "right of initiative" since that is the commonly used term for the authority under the Treaties to propose legislation. We acknowledge that this is not a self-explanatory phrase. Like Lord Kinnock (also a former Commissioner), we think it would be good to have a single term that more accurately reflected what the term "right of initiative" represents (Q 103), but it is difficult to find one and it is probably too late to displace the time-honoured phrase. Professor Steve Peers (Professor of Law,

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4 Under the co-decision procedure, the reference to the Council acting means establishing the Council's common position under Article 250(2) TEC. Where the Council alone adopts legislation, the reference means deciding to make the legislation.

5 Article 250(2) TEC.

6 Article 250(1) TEC.

7 See footnote 4.

8 We described the provisions on the Area of Freedom, Security and Justice in our report: *The Treaty of Lisbon: an impact assessment* (10th Report, 2007–08, HL 62); see Chapter 6.

9 Article 76 of the Treaty on the Functioning of the European Union (TFEU) (as the TEC would be re-named by the Treaty of Lisbon).

University of Essex) thought it more accurate to speak of a "monopoly of initiative" (Q 1) at least so far the first pillar is concerned. More generally, taking account of the exception for police cooperation and criminal justice, one might speak of the Commission having a near-monopoly.

A right to propose, not dispose

19. Lord Brittan noted that the right of initiative is a right to propose. (Q 93) That does not prevent others from initiating ideas which they would like the Commission to take up. Nor does it give the Commission the right to dispose, in the sense of legislating. As Lord Kinnock observed, once draft legislation has been submitted, it then becomes the property of the legislature. Subject to the points mentioned at paragraph 14, it is for the EU legislators to determine what becomes of a proposal. (Q 103) Professor Rasmussen noted that the Commission is, nowadays at least, cautious about putting forward proposals that will not get adopted in the end. For example, the modern Commission would not table an integrationist proposal and just hope that the Member States would go along with it. (Q 20)

CHAPTER 3: INSIDE THE COMMISSION

Initiation of Proposals

Holding the initiative

20. While the right of initiative is not a power to legislate, the Commission's right of initiative gives it real power in the legislative process. When deciding whether and when to bring forward a proposal, it may select from among competing ideas. It determines the form and content of a draft measure. If an idea for legislation is put forward which the Commission does not wish to pursue or prioritise, there will be no legislation. Taking account of the reinforcing provisions mentioned by Professor Rasmussen (see para 14 above)—the power to amend and withdraw proposals, and the requirement for unanimity for the Council to amend proposals without Commission approval—the Commission is, as Sir Kim Darroch (the United Kingdom's Permanent Representative to the EU) told us, "*de facto* in a strong position as the sole initiator of legislation". (Q 261)

21. Even if legislation is adopted which calls for a further proposal from the Commission by a specified date, that will not necessarily result in a draft coming forward by that date. Professor Rasmussen explained that such provisions may, for example, be written into legislation by the Council or the European Parliament as a compromise to enable legislation to be adopted, leaving remaining matters to be decided later. (Q 12) But the Commission does not always bring forward proposals in response to such legislation. Professor Peers gave the example of the Regulation[10] on access to documents, which, at the prompting of the European Parliament, included a clause requiring the Commission to review the legislation after three years. The Parliament expected amendments to be proposed but the Commission declined to do so. (Q 41) Catherine Day acknowledged that "it sounds like we are very naughty and disobedient" but said that in the Commission's view "it is not possible to instruct the Commission to come forward with a proposal … and we have the right to say no." (Q 383) (This view is no doubt based on the Commission's independent right of action, guaranteed by Article 215 TEC; the right, conferred on it by the Treaties, to propose legislation should not be over-ridden by legislation made under the Treaties.)

Policy-making networks

22. In the Commission, as in any policy-making body, policy is not developed in a vacuum. As Lord Brittan of Spennithorne put it: "the people who are working in the Commission department are not operating in thin air…They do not sit with a blank piece of paper in front of them and think 'What shall we suggest?'". (Q 59) In Lord Kinnock's view, "The development of ideas … comes with the assistance, or sometimes at the prompting, of a wide network of contacts". (Q 101) Richard Corbett MEP (Deputy Leader of the European Parliamentary Labour Party) noted (referring to government generally) that in practice the role of initiating legislation is usually taken by the executive branch of government, even where that right is traditionally

[10] Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents; OJ L 145, 31 May 2001, p.43.

associated with the legislature. But like many of our witnesses he went on to note that the Commission's monopoly on drafting proposals did not equate to a monopoly of ideas. (p 139)

Tracing the sources

23. The Commission has itself analysed the origins of legislation that it has proposed, by reference to a number of sources, as set out in the following table.

TABLE 1

Exercise of the Commission's Right of Initiative in 1998

	Number of proposals	%
Adaptation of Community law to the development of scientific, economic or social data (of which 15 per cent are also responses to requests from other EU bodies)	129	35
International obligations entered into by the Community	118	31
Response to an express request from other EU bodies, Member States or economic operators	63	17
Mandatory instruments under the Treaty or secondary law	46	12
New initiatives from the Commission	18	5

Source: Contribution from Mr Barnier and Mr Vitorino to the European Convention, 3 September 2002.

24. Lord Kinnock drew particular attention to these analyses. He pointed out that they showed that only what he called a "minor proportion" of the output of the Commission was found to relate to purely original Commission initiatives. (Q 100)

25. We were told that a similar analysis, carried out subsequently by the Commission, showed much the same picture. Catherine Day explained that the Commission does not carry out this kind of research regularly but only *ad hoc* for the Commission's purposes. (Q 386)

26. Is the table representative? A degree of caution is necessary when interpreting a table of this kind. Professor Rasmussen noted that, as the compiler of the analyses, the Commission might have thought it advisable to play down its own role as originator of proposals and that might have influenced its categorisation. (Q 10)

27. Sir Kim Darroch did not find the small proportion of proposals, attributed (according to Table 1) to thinking by Commission officials, improbable, given the categories used in the Commission's analysis. He described the huge amount of discussion, lobbying and interaction that goes on "in this town" [that is, Brussels] in a comparatively open environment, whether from Member States, the business community, trade unions, other non-governmental organisations, or consumers. (Q 295)

28. In any event, it is clear that the boundaries between the categories used in the Commission's table are permeable. For example, the adaptation of legislation because of scientific or other developments may overlap with the category of legislation prompted by existing legislation, or might be attributable to an initiative from within the relevant part of the Commission.

29. The categories helpfully direct attention to the fact that there are multiple sources. Professor Maria Kaiafa-Gbandi (Aristotle University of Thessaloniki) and Athina Giannakoula (also of that University) considered that it was important to consider existing legislation, which may require or call on the Commission to bring forward further legislation. (p 149) Such provisions are presumably within the Commission's category of "mandatory instruments" although, as we have noted (paragraph 21), the Commission does not in fact regard an express requirement in legislation as mandatory. The category of legislation required by virtue of international obligations entered into by the EU might also be considered as falling within the category of mandatory measures.

30. Dr Christina Eckes (Lecturer, University of Surrey) drew attention to another set of measures which might be regarded as mandatory, namely, legislation made under Article 301 TEC imposing economic and other sanctions. Article 301 provides that where a measure has been adopted by the EU in the Common Foreign and Security Policy (CFSP) providing for the European Community to take action to impose economic sanctions against a third country, "the Council shall take the necessary urgent measures … on a proposal from the Commission". The CFSP measure sends a very strong signal, if not a legally binding one, to the Community—and to the Commission, in particular—that legislation must be initiated and adopted in the first pillar. This example illustrates that, to the extent that there are measures falling into the category of mandatory legislation, there are exceptions to the Commission's monopoly of initiative in the first pillar since, as Dr Eckes notes in the case of sanctions, the Commission's right of initiative is severely restricted. (pp 142–144)

31. The category of responses to requests from other EU bodies, Member States or economic operators clearly covers a lot of ground. We consider these sources in the following Chapters.

One source among many

32. The Commission was surely right to say that: "The rationale for legislation comes from many sources." (p 86) Their analyses illustrate that, although there is (for most purposes) a single source of formal legislative proposals, there is no single source of ideas which prompt those proposals.

33. Many witnesses pointed out that the Commission is one actor among many. As Richard Corbett MEP put it: "The adoption of Commission legislative proposals does not take place in a vacuum". (p 139) It works both in a

formal institutional framework and within informal networks of political actors.

34. The Commission sees the current position as "a system … where legislation results from a complex interplay of different actors". (p 86) From its point of view, its role is "to sift through the ideas, to make a judgement between competing interests, and to apply the test of the common European interest. Then it takes its responsibility to make the final choice on whether to make a legislative initiative, and if so at what point and with what content". (p 87)

35. The Commission gave the current package of measures on climate change as an illustration. In January 2008, the Commission put forward proposals for a complex and far-reaching set of measures to address the issue of climate change and the development of renewable energy. It describes the origins of the package (p 87) as including:

- positions taken by the European Parliament, the European Council and the Council of Ministers;
- consultations and meetings with stakeholders;
- the international context, taking into account the need for renegotiation of the Kyoto Protocol by 2012; and
- the wider public and media debate which proved influential in creating political momentum behind an ambitious approach.

An evolving role

36. The role of the Commission in initiating policy and legislation had changed "enormously" since the days of the smaller EU, Catherine Day thought. It was no longer a question of "churning out" a lot of detailed proposals. Increasingly the Commission is now trying to simplify and consolidate the framework of legislation. (Q 352) There may still be some way to go. David Harley (Deputy Secretary General of the European Parliament) said that, from the perspective of the European Parliament, there was no slackening off in the Commission's production of draft legislation. "In the parliamentary committees there is still, as we see it, as much legislation coming through". (Q 395)

37. In Catherine Day's view, the Commission's role is "more and more in terms of dealing with big, long-term issues"—issues that Member States cannot deal with on their own; and to act as a catalyst, to stimulate Member State thinking, whether in relation to specific legislative proposals or broader policy development. The Commission seeks to put a well-argued paper on the table and "even if they do not all like it, it gives them something to define themselves around". (QQ 352, 354) The Commission increasingly seeks to add value by analysing and mapping out strategies for dealing with the big issues, a very different role from when the internal market was being developed. "If you think of the big projects that the Union has successfully done, whether it is the internal market, the single currency or enlargement, these are all 20-year plus projects." (Q 352) We note that, in this respect, the Commission is asserting a role in relation to long-term planning not dissimilar to, and so overlapping or combining with, that undertaken by the European Council and the Council of Ministers.

The administrative culture

38. A number of witnesses commented that the Commission should concentrate on doing fewer things better. Against that background we asked whether the culture of the Commission encouraged ambitious officials to bring forward ideas for legislation. Lord Brittan thought that was possible in areas where legislation is part of core business: "I suppose people would think that if they did not come up with anything, people would think that they had not done very well". But there were systems which sifted the ideas. As the Commissioner responsible for financial services, "I would not allow them [i.e. officials] to waste their time coming up with ideas, however clever or brilliant they were, if they stood no chance of getting anywhere". Lord Brittan also pointed out that parts of the Commission are not much concerned with legislation. "Anyone in the competition or foreign trade areas would think it daft to be judged by the number of legislative proposals they put forward." (QQ 60, 65)

39. Lord Kinnock thought the culture differed depending on the directorate general concerned. In the Directorate General for Transport for which he had been responsible, "people were encouraged to come up with good ideas". But they had to be practical. He gave two examples of legislation where the original idea was brought forward by an official in the Commission. One was the programme called Project Action for Combined Transport which was conceived by an "expert and enthusiast" in the Directorate General in the late 1990s. The other was legislation requiring airlines to compensate passengers who are "bumped" off flights due to over-booking by the airline, the idea for which formed in the mind of an official who observed bumping in practice. (Q 102) Lord Kinnock noted, however, that an "ill-judged proposal, either in terms of its quality, in terms of its refinement or in terms of its timing, will probably find its way into the sand". (Q 106)

40. Chris Welsh (General Manager of Campaigns, Freight Transport Association) said that individual officials had considerable responsibility and therefore influence, as they are able to promote legislation up to heads of unit, in particular if the proposal is consistent with the grain of Commission policy. When lobbying the Commission, he found working with a bright young administrator who wants to get things done was a good way of promoting legislation. (Q 176)

41. Professor Rasmussen thought it was difficult to say whether the culture of the Commission put pressure on officials to put forward proposals. But she noted that the current Commission, under the Presidency of Mr Barroso, had not launched many entirely new proposals; much of what was going on related to simplification of existing legislation. In current circumstances at least, she thought "it would be very hard for a Commission official sitting in a DG [directorate general] speculating, 'If I launch this new proposal, I would promote my career', because there is not much ground now for new proposals". (Q 32)

42. The Minister for Europe, Jim Murphy MP, thought the European Institutions generally still had "pro-activist instincts" and the most effective officials were attracted by that aspect of the culture of the Commission. (Q 452) Lord Kinnock was less concerned. He thought that under the presidencies of Mr Prodi and Mr Barroso, the Commission has tended to

take an approach based on "less is better" and placed greater emphasis on self-regulation (that is, getting effective results without legislation). (Q 118)

Development of proposals

Strategic planning

43. On entering office, every Commission sets out its objectives for its five-year term of office. This takes account of existing multi-annual programmes established by the Council and of debates in the European Parliament in the period before the appointment of the Commissioners (by the Council). (p 109) The European Parliament has influence at this stage through its role in the process of appointing the Commissioners. Under Article 214 TEC, the Parliament must give its approval to the members of the Commission.

44. The Commission sets out its Annual Policy Strategy for the year ahead.[11] There is a system of structured dialogue between the Commission, the Council and the Parliament to inform the content of the Strategy. Each Commissioner discusses matters within her portfolio with the relevant committee of the European Parliament. (p 109)[12]

Analysis and consultation

45. Catherine Day told us that "When we are at the beginning of developing a new policy, if we have a feeling that there is an issue which is problematic and where the Union is the right level to try to address it, then we would normally start by doing an analysis and putting that analysis out for consultation." Deciding how to tackle the issue is an iterative, and elaborate, process. (Q 357) On technical matters—for example, in relation to technical standards or environmental issues—the Commission draws on the work of its Joint Research Centre, a source of scientific research and information. (Q 379)

46. Catherine Day explained that, within the Commission, "we are doing a lot of intensive upstream coordination now working, under the instruction of the President, with all the major DGs on all the major policy initiatives to make sure that they have involved everybody who needs to be involved and that we do the trade-off between different legitimate policy considerations months before things come for final adoption" (Q 373). The Commission saw this as representing a change from earlier years and requiring a different kind of skill in Commission officials. Then, "you had somebody who was an expert working quietly in their office"; now, you need someone capable of "chairing a meeting of 200 stakeholders which might be very unruly. For us, it is also a voyage of discovery …". Catherine Day acknowledged that experience of this way of working is longer established in some areas of the Commission than others. (Q 370)

47. The Commission has prescribed standards of consultation.[13] Professor Peers explained that "Behind any significant set of proposals, there is often some form of consultation—a green paper or white paper, or just a consultation

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11 See, for example, the Annual Policy Strategy for 2009—COM(2008) 72, 13 February 2008.

12 We reported last year on the way in which the Annual Policy Strategy is prepared: *The Commission's Annual Policy Strategy for 2008* (23rd Report, 2006–07, HL 123).

13 See the Commission's internal guidelines: COM(2002) 704.

paper, as well as impact assessments—the results of which are published on the Commission's website". He considered that these are genuine consultations (Q 44). The Government consider that the Commission has made considerable efforts to hear and respond to the views of stakeholders and that, in most cases, the Commission has complied with its own standards for consultation. Improvements could be made, notably in engaging with small and medium-sized enterprises. (pp 112–113) The Commission publishes at least a summary of responses to its consultations. (Q 370).

48. William Sleath (Secretariat General of the Commission) pointed to a number of other opportunities in the pre-legislative stage for stakeholders to make their views known. In certain areas, the Commission has "developed quite a close relationship with particular stakeholder groups". (Q 369) This can lead to discussion of a draft text in the development stage.

49. The Council of Europe has a position of particular significance in the development of EU legislation, which is now the subject of a Memorandum of Understanding.[14] The Memorandum acknowledges that that Council of Europe remains the benchmark for human rights protection and the rule of law and democracy in Europe. It contains guidelines for increased cooperation between the EU and the Council, and foresees consultations at an early stage in the elaboration of standards in the area of human rights and fundamental freedoms, with a view to ensuring the consistency between EU law and the relevant Council of Europe standards. Such consultations may take place with the Commission while legislation is under development. (p 141)

50. The Bar Council of England and Wales raised with us a problem in the Commission's choice of stakeholder representatives with whom to have a dialogue. At the first meeting of the Justice Forum, recently established by the Commission, pan-European associations were represented but there were no places for representatives of national stakeholders. Having regard to the different legal systems in the EU, this limited the value of the Forum. (p 52) Catherine Day acknowledged that the Commission can have difficulties ensuring a fair representation of interests. "We sometimes insist on only having representatives from organisations that are established in several Member States." But she continued, "We have to try not to be too rigid about these things. What is important for us is to be genuinely representative." She undertook to look into the particular issue raised by the Bar Council. (Q 371)

Justice and the common law

51. The Bar Council pointed out that the exclusion of national stakeholders from the Justice Forum carried the risk, in particular, that the voice of the common law systems[15] would not be heard. They drew our attention to a lack of knowledge of common law systems among Commission officials, and problems which occurred where draft legislation, particularly in the fields of police cooperation and civil and criminal justice, was drafted without proper

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14 Memorandum of Understanding between the Council of Europe and the European Union, May 2007.

15 The Member States with legal systems based on common law are the Republic of Cyprus, Ireland, Malta and the United Kingdom.

consideration of the implications for common law countries. They gave the example of the Commission's green paper on wills and succession. (p 53)

52. Professor Peers agreed that the Directorate General concerned with Justice and Home Affairs had relatively few officials from a common law background, and said it was relatively under-staffed. Many proposals have presented huge problems from a common law perspective even where, as in the case of proposals on criminal procedural law and on a European evidence warrant, they had been drafted by English and Scottish nationals, respectively. The need for unanimity in the third pillar and the opt-in arrangements gave protection to the UK and Ireland, however, and the Treaty of Lisbon would require respect for the different legal systems and traditions of the Member States.[16] (QQ 51, 52)

53. When we put this point to Catherine Day, she noted that the position of the UK and Ireland was further differentiated, owing to their opt-in arrangements and non-participation in the Schengen system (the arrangements for the area within the EU within which border checks are being abolished). But what the Commission "has insisted on on a number of occasions is where the Schengen countries are going to be getting together to discuss future policy, we try to inject somebody with a common law background, even as an observer, just to make sure that the other school of thought is represented". (Q 372)

54. The risk of the common law countries being at a disadvantage was recognised by the Minister for Europe, though he considered there was a genuine understanding in the EU of different legal traditions. He told us that the risk is mitigated, in part, by working with the other three countries in the "common law club". He referred to the importance of seconding staff to the Commission to embed knowledge of the common law. The Ministry of Justice and the Home Office were actively seeking to post staff permanently or on secondment. (QQ 486, 488, 489)

55. Professor Peers thought the best solution would be to increase the representation of the common law within the Commission. He suggested that the Commission might consider how it is organised and the way in which it obtains information in the early stages of a proposal, to ensure that different legal traditions are represented. (Q 52) Vijay Rangarajan (Counsellor, UKRep) referred to the Government's work to raise awareness of the common law systems among Commission officials from civil law countries by promoting both training and the secondment of officials from the UK. (QQ 303, 305)

Annual plans

56. Each autumn the Commission publishes its Annual Legislative and Work Programme for the following year, which it presents to the European Parliament.[17] Catherine Day told us that all major new initiatives for legislation are included in the Programme. (Q 366) In the past the Programme was "simply the sum of all the proposals that came out of the system" but the Commission, conscious of how cross-cutting modern policy-

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16 Article 67(1) TFEU.

17 See, for example, the Commission Legislative and Work Programme 2008—COM(2007) 640, 23 October 2007.

making is, now uses the process of compiling the Programme, among other things, to ensure coordination among the different parts of the Commission. The Work Programme had become a key planning tool. (Q 373)

57. The Work Programme is not the place to find new ideas. As Sir Kim Darroch explained: it is a significant document but primarily about the prioritisation, by the Commission, of material already in the pipeline. (QQ 308, 309)

58. Catherine Day explained that as draft legislation is developed and before it goes into the Annual Legislative and Work Programme, there is now a process of vetting proposals, undertaken through the Secretariat General of the Commission working with the *cabinet* of the President. The Secretariat General conducts "sessions with each pairing of *cabinet* and DG [Directorate General] to establish what it is they are working on, what degree of maturity it has reached, have they got a good impact assessment under way, have they done their stakeholder consultation, and we only put in the Work Programme things that pass all of those tests". This is "a very intensive process of vetting". (Q 373)

59. Lord Kinnock commented on the process of compiling the Work Programme. The content is derived from streams of work being undertaken within the Commission; those that are ready to proceed to legislation are considered for the coming year. There is inter-service consultation where, to a degree, there may be contests between directorates general fought out by the Commissioners' *cabinets*. The President of the Commission and his office have considerable influence in coordinating what goes into the draft Work Programme that is finally presented to the College of Commissioners. (Q 111)

Too many plans, not enough coordination?

60. David Harley considered that legislative programming could be improved, with a view to making the planning process better coordinated and more understandable. From the perspective of the Directorate General of the Presidency of the European Parliament, there were "three different and dissonant legislative programmes from the Parliament, the Commission and the Council". Although he chaired a monthly meeting with senior officials from those institutions, this did not overcome the fact that there are three dissonant programmes. He thought an improved planning process would improve the quality of legislation. He thought the lack of coordination may mean, for example, that of the four key policy proposals currently "going through the system of the three institutions"—on climate change, energy unbundling, telecoms, and the small business act—one or more may not be adopted before the next European elections in 2009. (QQ 435, 436)

61. Some criticism was made by the Bar Council that legislative proposals in the third pillar emerge in an unsystematic way. (p 52) But this may be no different from the development of legislation in the national context. Vijay Rangarajan acknowledged that the long gestation period for third pillar measures might give the impression of a lack of system, but noted that the European Council had given structure to a programme of measures through the Tampere Programme and the Hague Programme, each of which covered a five-year period. He cautioned against over-ambitious plans covering wide areas of law, pointing out that proposals for codification of areas of civil law have not met with success. Sir Kim Darroch added that some flexibility is

needed to enable the EU to respond quickly to events or new circumstances. He gave the example of the set of measures which followed the "9/11" outrage in the United States in 2001. (Q 310)

Impact assessment

62. Impact assessment is now required for every proposal. This is an assessment of the economic, social and environmental impacts of different options, which takes account also of the principles of subsidiarity and proportionality. The Commission has published guidelines on its conduct of impact assessment,[18] and told us that impact assessment is now embedded in its working practices and decision-making. (p 88) It undertook 130 assessments in 2007. Of these, three (in the areas of company law and criminal justice) resulted in work on an idea being stopped because the assessment showed that the EU action would not add sufficient value; and one (on road safety) was reduced in scope. In 2008, the Commission expects to complete 200 impact assessments.

63. An assessment is intended, as Catherine Day put it, "as a way of helping the Commission to take better informed decisions". In her view, it was important that impact assessment is undertaken by the departments of the Commission "because it is about a reasoning process, about looking at a problem, looking at options and being able to explain in the end why you recommend one option and not others". It would be possible to have an independent body to conduct a cost/benefit analysis of Commission proposals but to contract out the impact assessment would take responsibility away from where it should be exercised. The impact assessment is about how the Commission makes its selection of proposals in the first place. (QQ 380, 381, 382)

Assessing the assessors

64. With a view to quality control, the President of the Commission set up an Impact Assessment Board within the Secretariat General. Its members are high-level officials independent of the policy-making departments. Our UKRep witnesses explained that the Board scrutinises all the main impact assessments against the Commission's published guidelines for impact assessment, which set out a wide range of matters which an assessment should cover, including subsidiarity, impact on competitiveness, social, financial and environmental impact. The Board produces a report and discusses this with the director general responsible for the proposal in question. The reports are published on the Commission's website.[19] The intention was to introduce real accountability at director general level. (Q 277)

65. Catherine Day considered that the Board's work had resulted in the average quality of assessments improving, even if not all have yet reached the high standard of some. The existence of the review Board has resulted in some ideas not being pursued or being radically revised because directorates general know that their proposals have to be explained to an independent board which examines whether proper consultation and analysis have been done. (Q 380)

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[18] SEC(2005) 791, June 2005, updated in March 2006. The Commission began a consultation on revised guidelines in June 2008.

[19] See, for impact assessments carried out in 2007, http://ec.europa.eu/governance/impact/cia_2007_en.htm

66. Sir Kim Darroch confirmed, from UKRep's perspective, that more impact assessments were now being done and their quality is improving. (Q 275) The reports are sometimes negative. The Board's reviews are not a box-ticking exercise. (Q 277) The European Regions Airline Association commented, in relation to recent legislative proposals affecting civil aviation,[20] that the principles adopted by the Commission to guide the development of legislation, including those on impact assessment, have yet to be embedded in practice in all parts of the Commission's administration. (p 148) The Minister told us that historically there had been a significant problem in relation to impact assessment. The situation was improving but was nowhere near perfect. (Q 443) In particular, the quantitative costing of the impact of regulatory measures was something to be improved. (Q 504)

67. An evaluation of the Commission's impact assessment system was carried out in 2007 by independent consultants, the Evaluation Partnership Ltd. Among the key findings in the report to the Commission[21] were: that too often the process of impact assessment was started too late in the process of policy development; and that quantification should be improved. The Government agree with the conclusions of the evaluation. (p 112)

Inter-service consultation

68. Towards the end of the development stage, there is a period of inter-service consultation, when the responsible directorate general must circulate its proposal to the other DGs and the Legal Service. Catherine Day accepted that the opportunity at that stage to influence the proposal was limited but said that the earlier processes of coordination had moved inter-service consultation from "a sort of surprise ambush" to being a process of final checking. (Q 373)

Drafting

69. The Commission's Legal Service is formally involved in the drafting of legislation only at the relatively late stage of inter-service consultation. When we asked about this, Catherine Day accepted that producing draft legislation without involving specialist legal drafters is a problem. The Commission sought to involve the Legal Service at an early stage when drafting complex proposals. It was important to have a good master copy. This was normally in English or French and, since in a multi-lingual organisation like the Commission most officials were not drafting in their mother tongue, work is continuing with the Translation Service to provide an editing service. The Commission Legal Service is also working with the Council's Legal Service to seek to promote high standards of drafting. (QQ 374, 375)

70. Sally Langrish (Legal Counsellor, UKRep) thought the adoption of the Inter-Institutional Agreement on Better Law-making[22]—an agreement made in 2003 between the Council, the European Parliament and the Commission—indicated that all the institutions were trying hard to improve the quality of drafting. The Commission reports annually on better law-

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20 Draft Regulation on common rules for the operation of air transport services in the Community (COM(2006) 396); and draft Regulation on a Code of Conduct for computerised reservations (COM(2007) 709).

21 Evaluation of the Commission's Impact Assessment System, Final Report, April 2007.

22 OJ C 321 (13 December 2003) p 1.

making, and Sally Langrish referred us to the 2006 Report which sets out the initiatives undertaken and the internal arrangements the Commission has put in place. (Q 323)

CHAPTER 4: OTHER INSTITUTIONS AND THE ADVISORY COMMITTEES

The European Council

71. The European Council is composed of the Heads of State or Government of the Member States and the President of the Commission. Its role is set out in Article 4 TEU:[23]

> *The European Council shall provide the Union with the necessary impetus for its development and define the general political guidelines thereof.*

Calls for legislation from the European Council

72. The role envisaged by the Treaties is that of leadership, and is political rather than legislative—setting the strategic direction and giving political impetus. Within the institutional environment, "the European Council often emerges as the *de facto* higher level decision-maker in the EU". (p 154) In fulfilling that role, the European Council can be an important stimulator of legislation. Lord Brittan considered that this had become an increasingly important part of setting the agenda for legislative proposals. (Q 83)

73. Sir Kim Darroch explained that, while not all meetings of the European Council produce Conclusions calling for legislation, they frequently do so. (Q 259) For the European Automobile Manufacturers Association (ACEA), in relation to legislation, "it is mainly the European Council that sets the direction for EU policy". (p 145) That is also the view of the Freight Transport Association who give the recent example of the climate change Declaration. (p 42)

74. Professor Peers pointed out that in the field of justice and home affairs, the role of the European Council in setting out ideas for legislation has been significant. Most of the ideas have been set out in programmes—the Tampere Programme and, currently, the Hague Programme—taking their names from the location of the meeting of the European Council that approved them. Professor Peers noted that on several occasions, notably in the emergency meetings that followed "9/11" and the terrorist bombings in Madrid in 2004, the European Council has devoted a large part of its discussion to aspects of justice and home affairs. (Q 48)

Commission responses to the European Council

75. The Commission is not bound to comply with a request from the European Council but Sir Kim Darroch told us his office had not been able to find any call for legislation that had been explicitly rejected or ignored by the Commission. European Council requests tend to carry even more weight than those of the Council of Ministers. One reason is, no doubt, that the President of the Commission is a member of the European Council and an active participant in its deliberations. As Sir Kim Darroch said: "if the Commission is really against something, they will find a few natural allies around the table." (Q 263)

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[23] This statement of its role would be unchanged if the Treaty of Lisbon were to come into force.

76. Dr Sariyiannidou described the role of the European Council as one of increasing dominance over the Commission's role under its right of initiative and a "hijacking of policy". (p 155) But the process is not, as the TEU might suggest, all one way. Many of the calls for action in European Council Conclusions originate in ideas and preparatory documents submitted by the Commission. (p 145) Catherine Day noted that "on the big issues, the Commission will provide a paper which sets the scene for the Member States to have a debate." (Q 354) Sir Kim Darroch referred to the Conclusions leading to the 2008 climate change package; the discussion in the European Council was begun by a presentation by the President of the Commission. (Q 263)

77. The initiatives begun by the European Council are often described in rather general terms. This leaves the Commission with the responsibility for developing the ideas. Take the completion of the Single Market: the European Council, taking its cue from the Single European Act, approved the idea of completing the Single Market but left the considerable task of working out the necessary legislative proposals to the Commission. (Q 15) The process may be iterative. The Commission considered that the most important single contribution to the Commission's ability to make the detailed proposals that formed the climate change package was the agreement of the European Council in March 2007 to setting precise and binding targets. (p 87)

The Council of Ministers (the Council)

78. Article 208 TEC provides that:

> *The Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals.*

"Proposals" here includes draft legislation.

Calls for legislation from the Council

79. The power in Article 208 is rarely used as such. Sir Kim Darroch told us that his office could only find a single example of a request from the Council which referred to Article 208: a request in 1997 which called for proposals for a Single Programme for Culture, which led to what became the Culture 2000 Programme. (Q 252)

80. But that does not mean that the Article has no effect. The fact that the Article provides a legal power is sufficient, in practice, to imbue a less formal request with as much force as one which expressly referred to Article 208, as Sir Kim Darroch explained. (Q 252) Council Conclusions are adopted by consensus and carry the authority due to the expression of the collective view of all the members of the Council—a strong signal, as Sally Langrish agreed. (Q 258)

81. By way of example, Sir Kim Darroch referred us to the draft Directive on facilitating cross-border enforcement in the field of road safety,[24] the proposal for which was brought forward in March 2008 in response to a request contained in Conclusions of the Transport Council in June 2006. (Q 252)

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[24] COM(2008) 151.

Another example, the Registration, Evaluation and Authorisation of Chemicals (REACH) Regulation, was referred to in the evidence submitted by the FCO. (p 110)

BOX 1

The REACH Regulation

The first EU law covering the classification and labelling of chemicals was adopted in 1967. In the late 1990s, concerns were expressed that the law was inadequate, largely because most chemicals were not required to be accompanied by basic safety information.

EU Ministers, meeting informally in Chester in 1998, encouraged the Commission to review EU chemicals legislation and, if appropriate, propose a new EU-wide system. This led to a Commission proposal[25] which became Regulation (EC) 2006/1907 adopted by the Council and the European Parliament.[26]

82. Requests from the Council are unlikely to come as a surprise to the Commission. While it not unknown for a Minister to raise at a Council meeting an idea which has not previously been ventilated, usually the idea will already have been put forward to the Commission; or as Sir Kim Darroch put it, it will have been "worked through the system". (QQ 266, 267) Proposing a new piece of legislation at a Council meeting or COREPER, without having secured support from most of the other members in advance, "would be a recipe for failure". (Q 292)

83. The Council may seek to set the agenda for legislation by adopting a multi-annual strategy in a policy area. The FCO told us that such plans can be very effective and gave the example of the 6th Environment Action Programme. This was agreed in July 2002, by the Council and the European Parliament, and set out a framework for environmental policy-making for the period to 2012. The proposals for revision of the Waste Framework Directive,[27] for example, resulted from the Programme. (p 114)

84. Less formal contacts between the Council and the Commission provide ways in which the Council can continually seek to influence the output of draft legislation. In the Commission's view: "the informal political interplay of the different institutions and political groups is the normal channel to make the Commission aware of a demand for legislation". (p 86)

Commission responses to the Council

85. The Commission is not obliged to comply with a request for a legislative proposal but usually does so. Catherine Day confirmed that it is rare for the Commission to decline to make a proposal where legislation calls for it, and in such cases, the Commission gives its reasons. But she explained that while the Commission is very conscious of its position as servant of the EU

25 COM(2003) 644.

26 OJ L 396 (30 December 2006) p 1.

27 Codified as Directive 2006/12/EC—OJ L 114 (27 April 2006) p 9.

legislature, it also holds to the position that it does not exist to do the bidding of the Member States. (Q 335)

86. In paragraph 9 of the Inter-Institutional Agreement on Better Law-making, the Commission undertook to "take account" of Article 208 requests made by the Council and to "reply rapidly and appropriately". Sir Kim Darroch interpreted this commitment as a promise always to consider a Council request seriously (whether or not it cites Article 208) and to explain, if it chooses not to respond positively. (Q 252) Where the Commission does not bring forward a proposal, that may mean that opinion within the Commission is opposed to the request. It may alternatively reflect the Commission's perception of the low priority it should accord the request in relation to other business.

The European Parliament

87. The European Parliament sees itself as one of the principal actors in the process of initiation and development. David Harley saw this as a role that has increased in recent years, particularly since 2004. This is partly due to the additional influence attributable to the extension of areas of EC competence subject to the co-decision procedure but also to the beginning of attempts to improve legislative programming. (Q 389)

88. The Treaty provides one way in which the European Parliament can influence the initiation of a legislative proposal. Article 192 TEC provides:

> *The European Parliament may … request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty.*

Calls for legislation from the European Parliament

89. Richard Corbett MEP noted that 17 resolutions have been adopted under Article 192. (p 139) David Harley pointed to six reports by the current parliament (i.e. since the European Parliamentary elections of 2004): (Q 390)

- Heating and cooling from renewable sources of energy (February 2006);
- Access to the Institutions' documents (April 2006);
- Protecting European healthcare workers from blood-borne infections due to needle-stick injuries (July 2006);
- Succession and wills (November 2006);
- European Private Company Statute (February 2007); and
- Cross-border disputes involving injuries and fatal accidents (February 2007).

90. He explained that the Commission always follows up the reports to some extent, and he considered that the Commission does its best to satisfy the Parliament by bringing forward legislation corresponding to the Parliament's wishes, though he added that this occurred where those wishes could be integrated into the Commission's own priorities. For example, the Commission's recent proposal for a revised Regulation on access to

documents[28] refers, in its preamble, to the report of the European Parliament of April 2006.

91. The small number of formal reports shows that the Parliament has other ways in which its influence is brought to bear. Richard Corbett MEP drew our attention to "own initiative" reports. These are not made formally under Article 192 TEC but are used to call on the Commission to take action on a particular matter, frequently including calls for new legislative proposals. (p 139) David Harley also mentioned reports responding to green papers and white papers published by the Commission as part of a consultation process. (Q 389) While individual members of the European Parliament (MEPs) as well as committees and the political groups may make demands of the Commission, those adopted by the Parliament in plenary session carry most weight. Box 2 provides an illustration.

BOX 2

Legislation to combat discrimination

Article 13 TEC provides for "appropriate action" by the EU (including legislation) to combat discrimination based on sex, racial or ethnic origin, religion or belief, age or sexual orientation. The EU has adopted two directives under Article 13: on discrimination based on race or ethnic origin, and on all forms of discrimination in employment.

The Commission's Annual Legislative and Work Programme for 2008 included in its list of Priority Initiatives the publication of a proposal for a directive, under Article 13 TEC, implementing the principle of equal treatment outside employment.

Reports appeared in the press in 2008 that some, at any rate, of the members of the Commission were hesitating to propose legislation covering discrimination based on sexual orientation, fearing opposition on the part of some Member States.

On 20 May 2008 the European Parliament in plenary session adopted an "own initiative" report noting that the Commission might put forward legislation not covering all grounds of discrimination, and reminding the Commission of its commitment in its work programme to complete the package of anti-discrimination legislation under Article 13.[29]

At a hearing before the Civil Liberties Committee of the European Parliament on 16 June 2008, the Commissioner-designate, Jacques Barrot, announced that the Commission was drawing up a proposal for a cross-cutting directive aimed at combating all the forms of discrimination referred to in Article 13 of the Treaty.

On 2 July 2008 the Commission published a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.[30]

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28 COM(2008) 229, 30 April 2008.

29 European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU (transparency of Directives 2000/43/EC and 2000/78/EC (2007/2202/INI).

30 COM(2008) 426 final.

92. David Harley explained the process by which the reports are made. There is fairly extensive discussion in the relevant committee of the Parliament, sometimes in more than one committee, on the basis of a draft report prepared by the member acting as *rapporteur*. A draft report goes to the political groups and then to the Parliament in plenary session where a vote is taken. He made the point that, in contrast with the work of the parliamentary committees, the role of the political groups in this process is sometimes neglected. (Q 393)

93. Richard Corbett MEP also drew our attention to the use of written declarations which, he explained, can be tabled on any matter within the EU's sphere of activity (and are similar to Early Day Motions in the House of Commons). (p 140) Normally, a declaration does not attract much attention but one that achieves an absolute majority becomes the position of the Parliament. He gave the recent example (2006) of a declaration calling on the Commission to bring forward legislation to ban the import of commercial seal products.

Commission responses to the European Parliament

94. Paragraph 9 of the Inter-Institutional Agreement on Better Law-making, the Commission gave the same undertaking to the European Parliament as it gave the Council, namely, to take account of the Parliament's requests for legislative proposals made under the Treaty and to "reply rapidly and appropriately". The Commission responds to reports in the parliamentary debate on the report, and in a later report back stating how it has responded to the request for action. Richard Corbett MEP gave two example of legislation resulting from calls by the Parliament: the ban on tobacco advertising, which he traced back to a parliamentary initiative of 1990, and a directive on trans-frontier television broadcasts. (p 139) David Harley summarised the Commission's responses to the six "own initiative" reports made since 2004. (p 108)

95. Comparing the influence of the European Parliament's requests for legislation with that of the European Council, David Harley acknowledged that the European Council may well be considered to carry greater weight and authority. On the other hand, he thought the Parliament made fewer, more focussed, requests which makes them easier for the Commission to follow up. (Q 394) Professor Rasmussen noted that, in the past, the Parliament and the Commission were allies, the Parliament supporting legislative provisions delegating power to make subordinate legislation to the Commission subject to a committee procedure. But more recently, the Commission/Parliament relationship had tended to become more "conflictual". (Q 41)

The planning process

96. The European Parliament has some opportunity to influence legislative planning through the Commission's Annual Legislative and Work Programme. The planning process begins with the annual 'state of the Union' debate in the Parliament each spring, continuing with meetings between the parliamentary standing committees and their counterpart Commissioners, and concluding with the presentation of the Programme to the Parliament by the President of the Commission in the autumn. Although the Programme is primarily concerned with prioritising proposals,

Richard Corbett MEP pointed out that the Parliament can seek to influence relative priorities and may press for the inclusion of additional items (for example, based on an "own initiative" report) or the exclusion of items. (p 140)

The Economic and Social Committee

97. The Economic and Social Committee (ESC) was established when the European Community (then the European Economic Community) was founded. Its composition and responsibilities are now set out in Articles 257–262 TEC. Its 344 members represent the "various economic and social components of organised civil society" (Article 257 TEC). Its formal role is to assist the Council and the Commission in an advisory capacity (Article 7(2) TEC) and in that capacity it gives opinions on legislative proposals. The Commission has been working recently with the ESC, for example, on sustainability and, at the Commission's request, the ESC keeps a database on voluntary regulation and self-regulation. (Q 387)

98. The ESC pointed out that increasingly it seeks to give its opinion "upstream" in order to influence the initiation or the nature of Commission proposals. A Protocol of Cooperation between the ESC and the Commission provides a framework for such activity. The ESC has used "initiative opinions" for this purpose.[31] Since 2001, it has also become customary for the ESC to make "exploratory opinions". In 2007, in response to a request from the German Presidency the previous year, the ESC adopted such an opinion on the subject of food labelling in support of animal welfare standards.[32] The Agriculture and Fisheries Council in May 2007 took note of the opinion and referred to its recommendations when calling on the Commission to submit a report on the matter. (pp 146–147)

The Committee of the Regions

99. The Committee of the Regions (CoR) is another body established by the Treaties with advisory status (Article 7 TEC). Its composition and responsibilities are set out in Articles 263–265 TEC. Its members represent regional and local government bodies, and it must be consulted by the Council and the Commission in particular on matters concerning cross-border cooperation (Article 265). The Commission worked actively with the CoR, for example, on the revision of legislation concerning waste management. (Q 387)

100. Within a framework established by a Protocol governing arrangements for cooperation with the Commission, the CoR has regular contact with the Commission, for example, during the preparation of the Commission's Annual Legislative and Work Programme. It provides input into the development of legislation through the consultation process (opinions on green papers and the like), "outlook opinions" on future policies at the request of the Commission, and "own initiative opinions" on matters of particular significance from a regional or local perspective. In 2006 the CoR adopted an opinion on the Commission's mid-term review of its 2001 white

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[31] For example, the Opinion of the European Economic and Social Committee on Defining the collective action system and its role in the context of Community consumer law, 14 February 2008 (INT/348).

[32] Opinion of the European Economic and Social Committee on Animal Welfare—Labelling, 15 March 2007 (NAT/342).

paper on transport, calling for harmonisation of the conditions governing the rail and land transport sectors. The Commission's draft Directive published in 2007 made proposals for strengthening the criteria for transport operators. (p 137)

CHAPTER 5: STAKEHOLDERS, INTEREST GROUPS AND OTHER LOBBYISTS

Definitions

101. In addition to the other EU institutions and the Member States, there are many others seeking to influence EU legislation. There are those who may be affected by particular legislation or the lack of it, often called "stakeholders". There are interest groups representing professional groups and trade associations and, more generally, civil society, whose areas of interest range across the whole of EU activity. There are firms of consultants who lobby on behalf of particular interests. For convenience, in this chapter we refer to all these as involved in "lobbying".

102. Lobbying should be distinguished from consultation. The former involves organisations "pushing" forward their views to (in this case) the Commission, whereas the latter involves the Commission seeking to "pull" views from others. The Commission is the object of much lobbying activity, at all stages from policy formation, through the initiation of a legislative proposal and its development, to the adoption and implementation of legislation. Lobbying may also seek to influence the Commission's use of its right of initiative indirectly, through the European Parliament.[33]

Purpose of lobbying

103. Lobbying may be aimed at persuading the Commission not to make a proposal, as well as positively to promote particular legislation. Lobbying groups know that since the Commission has a monopoly of bringing forward draft legislation, if it chooses not to make a proposal, "it is going nowhere". (Q 19) But Tony Long (Director, European Policy Office, World Wide Fund for Nature), from the perspective of an interest group, told us that currently "the lobbying in Brussels, especially towards the Commission, is the lobbying of propositions, rather than opposition." (Q 143)

Lobbying in practice

104. Roberto Ferrigno (Vice-President for Public Affairs, Weber Shandwick) and Chris Welsh explained how they approached their work of lobbying. Mr Ferrigno saw policy-making as a circular process, not a linear one. "You need really to spot the right moment at the right place where you get into the process." But generally for legislation, "the closer you are to the starting point … the better for trying to influence the process." You need to be timely, focussed and, if possible, have allies. Mr Welsh added that another means of influencing Commission thinking is through seminars and workshops. His organisation had organised a workshop on standards of heavy goods vehicles from the point of road safety, attended by senior Commission officials (and a number of MEPs). He thought it had promoted understanding of the issues, and the subsequent emergence in proposed

[33] The Commission has estimated that there are around 15,000 lobbyists seeking to influence EU officials and Members of the European Parliament: see European Parliament resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European Institutions. FN: 2007/2215/INI.

legislation of points that had been discussed indicated that the Commission had taken on board ideas which came out of the workshop. (Q 175)

Impact of lobbying

105. Assessing the impact of lobbying is difficult. Professor Rasmussen pointed out that although lobbying has been the subject of political science research, this has generally looked at access to institutions rather than attempting to measure impact directly. (Q 46) But Professor Peers mentioned research covering the 1980s indicating that "the Commission was strongly influenced by a coalition of large industrial groups, to push for the internal market in general and presumably also to influence the details of legislation as they affected each particular area of industry." (Q 16)

106. Lord Brittan thought "lobbyists have a hard time on the whole" since those being lobbied are aware that the lobbyists have an axe to grind. (Q 68) In his view, much more weight is given to the consultation process and the views and the arguments of stakeholders in that process. Particularly in a technical area, the Commission wishes to hear from people in the business and can then judge the extent to which they are self-interested. (Q 69) Tony Long echoed that thought, arguing that one of the reasons his organisation has the standing it enjoys in Brussels is the quality of the argumentation and soundness of policy propositions that it puts forward. (Q 146)

107. The representations of public bodies with national standing are likely to be given particular weight. The Government gave the example of lobbying by national telecoms regulators (through the European Regulators Group) on the issue of "roaming" charges for international mobile phone calls, prompting the Commission's proposals for legislation for what became the Regulation on roaming on public mobile telephone networks within the Community.[34] (p 110)

Utility of lobbying

108. Both the European Parliament and the Commission took what David Harley described as "fairly conventional views" on the role of lobbying in the legislative process—that it is useful in providing information to institutions and part of the necessary dialogue in a pluralistic, democratic political context. (Q 424)

109. Lord Kinnock considered that the contribution to policy development, drafting of law and assessment of effectiveness made by professional bodies of repute and expertise was invaluable. The submissions of such bodies were grounded in real experience. He drew a distinction between "professional bodies with recognised expertise that are prepared to donate advice, information and ideas" and professional lobbying firms which have not done service in the area of activity concerned. He thought that, so long as Commission officials understood whom a lobbyist represents and the purpose of their lobbying, it was fairly easy to tread the strait and narrow. The Commission had, for this reason, been trying to draw up guidelines and rules of the game for lobbying. He noted that "there are reputable, established lobbying firms in Brussels who would be very happy to have that body of rules." (Q 114)

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34 Regulation (EC) 717/207; OJ L 171, 29 June 2007, p 32.

110. The European Parliament has had a register of lobbyists since 1996. It is *de facto* mandatory since registration is a requirement for obtaining an identity pass permitting access to the Parliament's premises. Those registered must abide by the Parliament's Code of Conduct, breach of which may lead to withdrawal of the pass.[35] The Parliament appears further advanced in a number of respects than the Commission, which announced the establishment of its register of lobbyists and Code of Conduct only on 23 June 2008.[36] The Parliament's register is mandatory; there appears to be an effective sanction for breach of its Code; and individuals (rather than organisations) must register.

111. David Harley told us that the European Parliament considered that, properly registered and regulated, lobbyists perform a useful function in the legislative process. He referred to the European Parliament's resolution[37] calling for a common (Parliament and Commission) register and a mandatory system of registration, including full disclosure of financial contributions to lobbyists' funds. (Q 424) Subject to that, the Parliament encourages lobbyists. The Minister for Europe agreed that lobbying was not yet sufficiently transparent. He considered the current proposals from the European Parliament were sensible, though the Government had yet to take a firm view on the proposals. (QQ 474, 480)

EU funding

112. Some interest groups receive funds from the EU budget. Tony Long told us, for example, that about 35 environmental groups benefited from funding from the EU budget amounting to some 7 million euros in total. His own organisation (the World Wide Fund for Nature (WWF)) received about 600,000 euros, which represented about 15% of its annual expenditure. (Q 123)

113. Lord Brittan said that, were he still a Commissioner, he would have been profoundly unhappy with a consultation where the only NGOs consulted were those in receipt of funding from the EU budget. (Q 71)

114. Catherine Day argued that the system of funding was justified. At the beginning of developing a policy, the Commission seeks to consult widely with relevant interests including civil society generally and non-governmental organisations (NGOs) in particular. "We need them to be organised and participate in the consultative process." NGOs which depend on public subscriptions can find it difficult to survive. Funds are, therefore, made available in the EU budget for NGOs in the environment, social and development areas in particular. In answer to the point that such funding might raise problems (for example, that the Commission might only fund NGOs sympathetic to its views) Catherine Day argued that the "fact that it is an uncomfortable arrangement keeps both Commission and the NGOs on their toes", and that the NGOs were "in no sense tame poodles". (Q 358) Roberto Ferrigno from the perspective of a professional consulting agency, also saw this as part of an effort by the Commission and the EP to improve access to policy-making for groups which have not had a voice. (Q 189)

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35 Rules of Procedure of the European Parliament (16th edition), rule 9(4) and Annex IX.

36 Press release "Shining a light on EU law-making", 23 June 2008.

37 European Parliament resolution of 8 May 2008 on the development of the framework for the activities of interest representatives (lobbyists) in the European Institutions (2007/2215/INI).

CHAPTER 6: THE MEMBER STATES

115. In considering the ability of the Member States to influence the initiation of legislation, it is helpful to distinguish the position in the first pillar, where only the Commission may make proposals, and the third pillar, where Member States have a concurrent right of initiative. We consider the latter more fully in the next chapter.

Successful influencing

116. There are some instances where it is reasonably clear that an idea from a single Member State was successful in beginning a process leading to legislation in the first pillar. Professor Peers reminded us of the initiative announced by Gordon Brown, as Chancellor of the Exchequer, to persuade the Commission to make proposals to raise the threshold for the amount of goods which individuals could import free of customs duties. The threshold had not been raised for many years. Shortly afterwards, the Commission made a proposal on the lines the Chancellor had suggested. (Q 28) Whether the Commission had planned to bring forward a proposal in any case is not known, but it seems likely that the Chancellor's call (and public support for it) played a significant part in initiating the legislation.

117. The Government gave examples where, in their view, UK representations had been successful in influencing the initiation of legislation in the first pillar in the dossiers on aviation emission and small claims. (p 110)

And a failure

118. Another case mentioned by Professor Peers, also involving duty-free imports, illustrates how Member States do not always get what they want, even when a call for legislation is supported by a number of them. In 1992, as part of the legislation to complete the Single Market, a Directive was adopted to end duty-free allowances for travellers moving between the countries of the EU after seven years. The principle of the Single Market required that consumers should be able to import goods freely but having paid tax (in particular, VAT) in the country of purchase.

119. As Professor Peers explained: towards the end of the seven-year period, the "duty-free industry kicked up a huge row and got one Member State and then another, and eventually the United Kingdom and Germany and others, to ask the Commission to make a proposal to extend that period." The Commission declined to do so. It is probable, as Professor Peers noted, that there was an element of game-playing by the governments which all appreciated that the Commission was unlikely to act, in particular because a unanimous decision of the Council was necessary to change the duty-free Directive. (Q 28) But this example shows that even if several large and small Member States pressure the Commission, it is willing to say "No" where it perceives that the interest of the EU as a whole requires that.

Contacts with the Commission

120. In addition to taking advantage of their membership of the Council to influence Commission thinking, Member States are continually in touch with the Commission at all levels. Sir Kim Darroch told us: "we always regard it as almost the most important thing we [UKRep] do, trying to influence

legislation as it emerges from the Commission." (Q 298) This kind of activity is not untypical of Member State approaches to legislation. The UK is one of the most active Member States in interacting with the Commission. (Q 319)

121. It is not only the national officials in Brussels who are involved. Before the climate change package was published, for example, "there was a massive amount of contact between Whitehall and the Commission in the 12 months between [the] Spring European Council and the call for this package to come out and the package coming out on 23 January [2008]". On the current ideas for legislation on the mobility of health services, Sir Kim Darroch told us "there will be any number of visits all the way up to and including the Secretary of State for Health to talk to the Commission as they produce this legislation to try to make it come out right." (Q 298) Bilateral contact between Ministers is also important. The Minister mentioned that, alongside the things that attracted media attention at the time of the visit of President Sarkozy to London earlier in 2008, there were ten meetings of Ministers with their opposite numbers in the French government. (Q 461)

Holding the Presidency

122. It might be thought that a Member State holding the rotating presidency of the Council would, during its six-month tenure, have a particular facility to influence legislation. Our UKRep witnesses gave us two examples from the area of justice and home affairs.

- Sally Langrish referred to a legislative proposal which would not have come forward without a push from the UK Presidency at the time: a Regulation on cross-border small claims in civil cases (such as cases based on contracts). The UK Presidency in 1998 called for a legislative proposal; the idea was included in the Tampere Programme; the Commission produced a green paper in 2002; a draft Regulation was published which the UK pursued in its 2005 Presidency; and the Regulation was finally adopted in 2007.[38] (Q 270)
- Vijay Rangarajan referred us to the case of the draft Decision to incorporate the provisions of the Prüm Convention[39] in EU law,[40] telling us that Germany, "having constructed the original Prüm Treaty, managed to see it through into European legislation very successfully". (Q 271)

Tony Long saw a risk to the quality of legislation where a Member State holding the Presidency rushed through the adoption of legislation in order to claim a victory for its Presidency. (Q 155)

123. The Minister for Europe thought the influence of a Presidency was not as a short-term burst of legislative activity but was felt over months and years. He gave the example of the better regulation agenda which was given impetus by the meeting at Hampton Court in the UK Presidency in 2005. (Q 458)

124. The extent of Presidency influence should not be exaggerated. Sir Kim Darroch explained why. Presidencies inherit an agenda from their predecessors, which may include proposals agreed with their direct

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38 Regulation (EC) 861/2007 establishing a European Small Claims Procedure; OJ L 191, 31 July 2007, p 1.

39 Signed on 27 May 2005.

40 Draft Council Decision on the stepping up of cross-border cooperation, particularly combating terrorism and cross-border crime, Council document 6002/07, 6 February 2007.

predecessors in an 18-month programme or priorities to cover a future period of three presidencies,[41] as well as draft legislation already under discussion. Even if they add some ideas of their own, they would need support from the Commission and within the Council to push an idea through to legislation. The current Presidency (Slovenia), he added, was very effectively focussed on the inherited programme. (Q 269) The Minister thought that the position would be unchanged if the Treaty of Lisbon were to come into force. He believed the Presidency's role would remain one of maintaining momentum on the inherited work rather than about initiation. (Q 460)

National parliaments

125. Under the Barroso initiative, now some two years old, the Commission sends all its communications and legislative proposals directly to the national parliaments. Catherine Day told us that this was in recognition of the fact that, previously, most parliaments had not been involved in the processes of European law until the stage of transposition into national law. The Commission determined to provide an opportunity to make an impact at the beginning of the process, for example, to comment on green papers. The Commission had to date received over 200 opinions from national parliaments. (Q 361)

126. Do those views of national parliaments have much influence over the development of legislative proposals? Sir Kim Darroch said that reports of the House of Lords, for example, were taken into account by the Government in formulating and developing policy, and thus might indirectly influence the Commission. His colleague, Paul Heardman (Head of European Parliament Section, UKRep), told us that the Reports were well regarded in the European Parliament. (QQ 299, 300) As one voice among many seeking to influence legislation, the direct influence of a national parliament should not be exaggerated, but it may be able to influence the Commission to a degree. The Minister advised that influence on the initiation of legislation would be greater if focussed on multi-annual programmes. (Q 468)

127. Each national parliament is offered an office and office facilities in the European Parliament in Brussels. David Harley noted that there are now representatives of the parliaments permanently based in Brussels. (Our EU Liaison Officer is based in the UK National Parliament Office.) He thought the presence of national parliaments was growing, for the purposes of obtaining and exchanging information and, potentially, for pre-legislative contacts. (Q 431)

128. Were the Treaty of Lisbon to come into force, would that make any difference? Richard Corbett MEP thought the Treaty "should strengthen the voice of national Parliaments in developing European legislation" since they are guaranteed the opportunity to comment on every Commission proposal.[42] (p 140) David Harley thought the arrangements permitting national parliaments to communicate directly with the EU institutions was an interesting development which the European Parliament welcomed.

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41 See, for example, the combined programme of the French, Czech and Swedish Presidencies for the period July 2008 to December 2009, Council document 10093/08, 9 June 2008.

42 See the Protocol on the Role of National Parliaments in the European Union.

National parliaments might regard the Subsidiarity Protocol[43] as "a kind of foot in the door" and an opportunity to do more (that is, before a formal proposal for legislation is made). (Q 415)

129. The Minister agreed there was scope to develop Parliament's influence. (Q 463) Paul Heardman thought that the growing network of links between national parliamentarians and MEPs would increase the influence of the national parliaments. (Q 300) David Harley thought the Conference of the Parliamentary Committees for the Affairs of the Union (COSAC) was likely to become even more important. (Q 408)

Citizens

130. The TEC gives every EU citizen the right to petition the European Parliament on any matter which come within the European Community's fields of activity and which affects him or her directly.[44] The Treaty of Lisbon would, if it came into force, enlarge the scope of that provision to include all the fields of activity of the EU.[45] It would add provision for "citizens' initiatives", by which a million or more citizens from a "significant" number of Member States might invite the Commission to submit a proposal for legislation.[46]

131. Richard Corbett MEP thought the provision in the Lisbon Treaty for citizens' initiatives would strengthen participation in the European political process. (p 141) In Professor Peers' view, citizens' initiatives would have a higher profile than the current provision for petitions, on the basis that the Commission (and, perhaps, the Council) might well pay greater attention to a request representing the wishes of a million or more citizens from several Member States. (QQ 37–38)

132. David Harley was less convinced that this development would make a difference, though from the admitted perspective of the European Parliament which preferred the current arrangements for citizens to be able to petition the Parliament. (Q 419) Under that procedure, the Parliament's Petitions Committee examined petitions. A petition may prompt the setting up of a committee of inquiry, as occurred for example in relation to the collapse of the UK insurer, Equitable Life, where the report of the inquiry[47] made specific suggestions to the Commission. (Q 420)

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43 The Protocol on the Application of the Principles of Subsidiarity and Proportionality.

44 Articles 21 and 194 TEC.

45 Articles 24 and 227 TFEU.

46 Article 11(4) TEU and Article 24 TFEU.

47 Report by the Committee of Inquiry into the crisis of the Equitable Life Assurance Society, 4 June 2007 (2006/2199(INI)).

CHAPTER 7: POLICE COOPERATION AND CRIMINAL JUSTICE—A SPECIAL CASE

133. As we have mentioned (paragraph 16), in the third pillar—the field of police and judicial cooperation in criminal matters, under Title VI TEU—both the Commission and the Member States have the right of initiative. No doubt there were many motives for the introduction of a shared right of initiative in this field. Professor Peers thought that issues of national sovereignty and divergences between legal systems and the concepts underlying their criminal laws were probably influential. This was confirmed by Catherine Day who noted that working in the third pillar was very sensitive, (Q 341) and by David Harley who recognised that judicial and police matters traditionally lie at the heart of national governments' prerogatives. (Q 403)

Exercise of the right of initiative

134. Professor Peers gave us some statistics for the period following the coming into force of the Treaty of Amsterdam in 1999 after which the Commission shared the right of initiative with the Member States. (QQ 47–48)

TABLE 2

Initiative for legislation adopted under Title VI TEU

(Police and Judicial Cooperation in Criminal matters) since 1999

	Number proposed by Commission	Number proposed by Member States	Total
Framework Decisions	9	12	21
Decisions	11	16	27
Conventions (including protocols)	0	6	6

Concurrent proposals

135. It is possible for Member States to forestall or sideline a Commission proposal by making one of their own. If a proposal has come forward from a Member State, the Commission is reluctant to make a competing proposal, Professor Peers told us. He referred to the case of the amendments to the Decision establishing Eurojust[48] which were put forward by Member States in January 2008 even though the Commission had previously announced that it would bring forward a proposal in July 2008. In the case of the Prüm Convention, an agreement on exchange of information among law enforcement bodies made by seven EU countries, the Commission made a proposal for an EU Framework Decision on one aspect of the Prüm Treaty but the Council ignored it in favour of a proposal, made by 13 Member States, to incorporate the whole of the Treaty into EU law. (Q 49)

[48] Eurojust is a judicial cooperation unit, based in The Hague. Its role is to promote and facilitate cooperation in the investigation of serious and organised, cross-border, crime. It is composed of one senior magistrate, prosecutor, judge or other legal expert seconded from each Member State.

Individual Member States

136. The use made by individual Member States of their right of initiative attracted criticism from a number of our witnesses. Perhaps unsurprisingly, the Commission saw difficulties with the Member States' right of initiative. Indeed, Catherine Day's view, expressed bluntly, was that there had been "some fairly badly prepared proposals", as well as proposals that did not take account of the need for consensus among the members of the Council. (Q 341)

137. Professor Rasmussen also considered that the experience of Member State initiatives was "not necessarily positive". While acknowledging that there were good and bad examples, she thought there had been "a tendency for certain Member States to present proposals that were dominated very much by national interests and perhaps did not always take the interest of the Community as a whole into account". (Q 26) Vijay Rangarajan agreed that some Member States' initiatives had wasted time and political effort. He noted that there were cases of Member States, particularly when holding the Presidency, bringing forward proposals largely prompted by national political events. (Q 311) The Law Society of England and Wales referred to specific examples where such initiatives had failed to make progress. (p 58) The Law Society and the Bar Council also saw some problems with the shared right of initiative, in terms of the coherence of legislation and coordination of policy generally. (Q 244) In the cases referred to by the Law Society, the Member State initiatives were inconsistent with the European Council's programme or sought to anticipate a proposal's place in the programme. The Presidency proposals jumped the queue. (p 58)

Groups of Member States

138. Recently, Professor Peers told us, it has become more common for proposals to be submitted by groups of Member States. The proposal to amend the Decision establishing Eurojust, for example, was made by 15 Member States. (Q 48) Vijay Rangarajan thought that initiatives with the support of a number of countries tended to be better prepared as they had had to undergo the testing process of negotiation among the sponsors. (Q 311) Catherine Day and Julia Bateman (Head of the Law Society's Brussels office) took the same view. (QQ 347, 244) Even so, there are concerns that decisions taken by a small group may pre-empt consideration of options that would otherwise have been considered. When we considered the meetings of the "G6" group of Ministers of the Interior, we concluded that they should inform other Member States and the Commission of their discussions fully and in good time for them to be carefully considered, before making formal proposals for negotiation by all Member States in the appropriate EU fora.[49]

139. The Minister for Europe, UKRep officials, the Commission and the Law Society (QQ 444, 311, 341, and p 58) all commented that proposals from Member States rarely included an impact assessment or even (the Law Society mentioned) explanatory notes. In other words, the Member States do not practise what they preach to the Commission.

140. As we have mentioned (paragraph 17), if the Treaty of Lisbon were to come into force, Member States would retain a right of initiative in the field of

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[49] *After Heiligendamm: doors ajar at Stratford-upon-Avon* (5th Report, 2006–07, HL 32).

police and criminal justice, but a proposal would require the support of at least one-quarter of their number (that is, currently, seven). The Minister thought this a sensible reform. The initial threshold would require "taking the temperature as to whether there is a willingness across a European Union of 27". (Q 441) Professor Peers noted that that number was close to the minimum number of states (nine) that may take advantage of the provision for groups of Member States to adopt decisions under Enhanced Cooperation.[50] There might be some inter-play between the right of initiative and the use of Enhanced Cooperation. (Q 50)

[50] See Article 20 TEU, as amended by the Treaty of Lisbon. Under Enhanced Cooperation, fewer than the 27 Member States may be authorised to adopt acts, in exercise of EU competences, binding only on the participating States.

CHAPTER 8: IS THE COMMISSION'S NEAR MONOPOLY DESIRABLE?

The rationale

141. The rationale for conferring a near-monopoly on the Commission is usually attributed to the recognition by the founding states that a body representing the collective interest of the EU would be better placed to act in the general interest, and would be trusted by each Member State to act impartially. Professor Peers said that it was considered preferable to let the Commission, as a neutral actor in the institutional framework, have the right of initiative, on the assumption that a Member State might make proposals in its own economic interest. He thought the more limited scope of both the objectives of the Communities and the subject matter of the original Treaties, comprising economic and other more technical matters, also played a part. A further reason was that the smaller states saw the Commission as a bulwark against their interest being overridden by the larger states. (Q 1)

Legitimacy

142. The near-monopoly gives the Commission real power within the institutional framework, even if its relative power has been seen by some as diminished by the more recent Treaties, in particular by the increased role for the European Parliament. That monopoly of initiative is sometimes criticised on the grounds that the Commission does not have democratic legitimacy.

143. Lord Kinnock described the Commission as having a "monopoly right of pulling things together, trying to present them in a coherent form, initially consulting exhaustively about them, and then eventually putting them in the form either of a policy draft or into draft legislation". (Q 103) In his view, the legitimacy of the Commission is not definable in democratic terms. Indeed, he considered it a waste of energy to attribute democratic legitimacy to the Commission, since its roles do not require it. The Commission should be judged by its "operational legitimacy". If the Commission is efficient, relevant, prudent and accountable, "it has legitimacy as a policy-developing, law-enforcing, administrative executive". (Q 120)

Is the monopoly a good thing?

144. Lord Brittan of Spennithorne favoured continuing the present position. Looking at the historical position: "The whole thing is a great bargain of some genius". The founders of the EU did not want to create a federation (or at least recognised that would not get support) but wanted continuity and momentum. The "ingenious idea was to create a body which was not a government … which would have continuity and give that body the unique right of proposal … but leaving it to the Member States to decide whether or not to accept the proposals". He did not think anything had happened that suggested that balance was wrong, and to move away from the current position would mean either inertia or a move in a federal direction. (Q 95)

145. Lord Kinnock agreed. He considered the monopoly gave substance to the Commission's roles as guardian of the treaties and enforcer of the law. It is the body which has to follow through the policies adopted by the Union, and thus contributes to the coherence of policy. (Q 117) Ideas may come from

other sources but they have to be costed; account must be taken of the economic and environmental implications, and the effects on the Single Market; consultation has be undertaken; and an assessment must be made of the balance of opinion among the Member States. That is the role of the Commission. "That is not a jealous protection of the right of initiative; this is a pragmatic view of what is and is not likely to work". (Q 119)

146. Catherine Day thought there were many reasons why the right of initiative makes sense today. The Commission works full-time in the European interest. It helps to make sure that proposals reflect a balance of interests across the EU, not those of the more powerful states or particular groups of states. In a union of 27 states, the legislating institutions would have great difficulty sifting through proposals if they could come forward from any of the states and, perhaps, also from the Parliament or its members. She added that the way in which the right of initiative is exercised has evolved over the years with the development of the roles of the other institutions and the culture of consultation. (Q 334)

147. If support for the continued monopoly from the Secretary General of the Commission and two former Commissioners is perhaps unremarkable, more telling might be the view of the European Parliament. David Harley told us that the Parliament does "not quarrel with the Commission's right of initiative", describing it as part of the balance between the institutions which the Parliament considers important and to have worked satisfactorily. He noted an "unspoken trade-off between … the Commission's exclusive right of initiative and the Parliament's right and duty to hold the Commission to account". This had worked well up to now and was an important part of the EU system. (Q 398) As to accountability, Professor Rasmussen drew our attention to the requirement which would be introduced under the Treaty of Lisbon for the Commission to give reasons where it decides not to bring forward a legislative proposal in response to a request from the European Parliament or the Council (Articles 225 and 241 TFEU). (Q 34)

148. The Minister for Europe told us that the Government are generally content that the Commission has the right of initiative. (Q 440) The retention by the Commission of a core set of powers was of "fundamental importance to effective governance of the European Union". (Q 450) Like a number of other witnesses, he thought some proposals arising from the Member States' right of initiative in the third pillar did not deserve the support of the Council because they showed a lack of preparation or forethought as to their impact on other states. The change proposed in the Treaty of Lisbon, to require Member State initiatives to secure the support of seven states reflected the fact that proposals without at least a degree of support were unlikely to progress. (Q 441)

CHAPTER 9: OBSERVATIONS AND CONCLUSIONS

The right of initiative in perspective

149. When the Commission's near-monopoly is considered, it should be borne in mind that the right of initiative is a power to propose, not to dispose. The EU legislature—the Council or, more usually, the European Parliament and the Council—determines whether a proposal will become law and how much of the original proposal will appear in the text finally adopted. Moreover, the European Council and the Council are powerful players in setting the agenda for legislation and, in some cases at least, determining the content of legislation. Multi-annual programmes agreed by the European Council (such as the Hague Programme for justice and home affairs) and the Council (for example, the 6th Environment Programme) have provided both a framework for legislation in those fields and specific policy goals. The European Parliament, through its reports and other initiatives, has become increasingly influential in the development of legislation, as the example of the anti-discrimination proposal at Box 2 illustrates. When it makes a formal proposal, the Commission seeks to anticipate the positions that will be taken in the Council and the Parliament.

150. The power which the right of initiative confers in the EU institutional system should not be under-estimated, however. The Commission is a repository of knowledge received from a variety of sources and is likely to be in a position to use that knowledge to promote its policies. The right to wield the pen provides the power to select among the many ideas for legislation which come forward from other parts of the system and outside it, and to determine priorities. The European Council may give a lead by setting strategic priorities, but it often does so (and may do sometimes at the Commission's initiative) at a level of generality that leaves the Commission with considerable freedom of manoeuvre as to the detailed content of draft legislation. The Commission is not isolated from the preparatory work that goes into the conclusions and programmes of the European Council and the Council, and the President of the Commission is a member of the European Council. The Commission must necessarily take account of the expectations and wishes of the Council, even if expressed in informal Conclusions, and of the European Parliament, but is not bound to bring forward draft legislation. Unless the Commission proposes legislation, none can be adopted. Member States may need to expend political capital to secure the presentation of proposals in any particular case.

151. The Commission has greater power in the legislative system, therefore, than the analysis of sources of legislation given in the table in Chapter 2 suggests. But there is a limit to the usefulness of analysing the relative power of the institutions in the initiation of legislation. From the perspective of the EU as a whole, the constitutional framework established by the Treaties provides for a balance among the powers of the three institutions involved in law-making.

The sources of ideas for legislation

152. The Commission has a near-monopoly of initiative, but that does not mean it is the sole source of ideas. The evidence gives a flavour of the inter-connections between the institutions and those seeking to influence them.

There is a myriad of sources. The difficulty of identifying the sources of particular ideas which eventually emerge as legislation arises from the informality and complexity of the processes at work. That is not a criticism of the EU system. It is, rather, a reflection on the complexity of decision-making in any modern polity. It also points up the multinational, multilingual forum that is Brussels: we were struck by the extent of the overlapping networks and communities of interest, formal and informal, mentioned to us by those operating in and around the EU's decision-making process.

Planning

153. The institutions have processes for planning in place, and these have become increasingly important in the initiation and development of draft legislation. The European Council produces strategies; sectoral Councils agree multi-annual programmes, sometimes with the European Parliament; and the Commission publishes an Annual Policy Strategy and an annual programme of legislation. We heard criticism of a lack of coordination, from which it appears that the institutions have not fully achieved the improvement in coordination called for by paragraph 4 of the Inter-Institutional Agreement on Better Law-making. A degree of competitiveness among the institutions seems to us healthy, however, given the different interests that the institutions represent.

Consultation

154. The Commission operates in a very open way, both in publishing information about its activities and in listening to views put to it. We welcome the steps taken by the Commission to enlarge the scope of its consultation processes to assist its analysis, and to improve its processes. The kind of large-scale consultation required for the strategic approach adopted by the Commission[51] requires organisational and coordinating skills which may not have been necessary for policy-makers at earlier times in the EU's history.

155. While we understand that it may be necessary to limit the number of stakeholders that the Commission consults in particular cases, it is clearly vital that the views of all interests are represented. **We urge the Commission to take account of national stakeholders, such as professional bodies, as well as pan-European associations in its consultation, in particular where the subject matter is in an area where national law or practices are significantly different.**

Impact assessment

156. We commented on the use of impact assessment in the development of EU policies in our Report, *Ensuring Effective Regulation in the EU*.[52] We note that the Commission's internal processes are evolving. The developments in Commission practice—in particular, the emphasis on consultation and the introduction of impact assessment—are positive. The preparation by Member States of impact assessments as an integral element in policy

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51 To take one example: in relation to the development of a Common Frame of Reference for contractual matters.

52 9th Report, 2005–06, HL 37.

development is relatively recent, even in states which are in the forefront of better regulation practice, such as The Netherlands and the UK. It is not, therefore, surprising that, within the Commission, some parts of the administration are more advanced than others. **We emphasise the importance of impact assessment, especially good quantitative analysis, and we welcome the Commission's intention to embed best practice throughout its organisation.**

Drafting

157. The Commission acknowledges that there can be problems with the quality of drafting of legislation. It is taking steps to address this issue and the associated difficulties of operating in many languages. The issue of drafting quality should not be exaggerated: lack of clarity often arises not in the original proposal but from the changes introduced as a proposal goes through the legislative process. **The Commission should give serious consideration to the creation of a cadre of specialist legislative drafters.**

Lobbying

158. Lobbying is a fact of political life. It is often seen as simply a means by which influence is unduly brought to bear, particularly by those with deep pockets, but in a complex world, it can be a useful source of information and advice to policy-makers and those developing legislation. Lobbying is both inevitable and useful to the initiation and development of legislation. However, **the practice of lobbying should be transparent and appropriately regulated.** We agree with the witnesses who told us that well-run lobbying organisations would welcome such regulation. We note that the European Parliament has a *de facto* mandatory register for lobbyists and a Code of Conduct backed by sanctions, whereas the Commission has introduced a voluntary register. We doubt whether purely voluntary arrangements will provide the necessary degree of public confidence, in particular in relation to lobbying organisations which are in receipt of funding from the EU budget.

159. We initially found it surprising that the EU provides funding for interest groups who are engaged in lobbying the Commission. There is plainly a risk that such an arrangement results in a tendency for funded groups to support the Commission's views. But we were reassured that, in practice, NGOs are not afraid to bite the hand that feeds them by providing information which may contradict that of the Commission and unpalatable submissions. We understand the viewpoint that, where some organisations are well-funded, a financial contribution for relatively impecunious organisations may help to ensure that all viewpoints are represented in consultations on issues, frequently of considerable complexity and controversy. **On balance, we consider such funding arrangements may be justified so long as they are transparent. We draw attention to this issue as meriting further consideration.**

National parliaments

160. The parliaments of the Member States are engaged in the scrutiny of proposals for legislation once published, as well as in the procedures for transposition of EU legislation into national law. **Those parliaments,**

including our own, should take advantage of the opportunities provided, for example, by the Barroso initiative[53] and the publication by the Commission of consultation papers, to contribute to the development of EU legislation. The Minister's suggestion that greater attention should be given to multi-annual programmes merits further consideration.

Different legal systems

161. There appears to be a problem in developing legislation in the area of justice and home affairs which takes proper account of the differences between the legal systems of the Member States and the particular position of the common law systems. The Commission is aware of this and seeks to ensure that its proposals take account of the differences. We doubt that the same can be said for proposals put forward by Member States.

162. **The Government should do all they can to ensure that the common law approach is taken into account in developing legislation on justice and policing, including making common cause with the other common law countries. We welcome their intention to press ahead with plans to second good personnel to those directorates of the Commission dealing with these issues, and their involvement in promoting training for Commission officials.**

Member States' initiatives

163. The Member States' right of initiative in the third pillar has been a mixed blessing. It was understandable that, when powers in relation to justice and home affairs were initially conferred on the EU, the Member States wished to retain some control over the draft legislation that came forward. In principle, the sensitivity of the subject matter warrants the continuation of the current position. But the experience of proposals made by groups of countries, compared with those of individual Member States, suggests that **a requirement for sponsorship of legislation by a minimum number of states would result in better prepared initiatives.**

164. **Member States making legislative proposals should practise what they preach and provide impact assessments and the other explanatory material which is required to accompany proposals from the Commission.**

The Commission's near-monopoly

165. The Commission's right of initiative is part of the system of constitutional balances put in place by the Treaties. The way in which that right is exercised has evolved as the EU's legislative system has matured. The experience of the third pillar shows that institutional dynamics would undoubtedly change if there were a concurrent right of initiative for Member States generally under the Treaties.

166. The Commission is a political body, not just an administrative one, so no matter how good the development process and the technical quality of its legislative drafts, its proposals will inevitably not appear satisfactory to everyone. But that does not mean there is a fault in the system. Though we

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53 The transmission of Commission documents direct to national parliaments—see paragraph 125.

might not go so far as Lord Brittan in describing the institutional arrangements as an act of genius, we consider that they were designed with some care and are appropriate for the unique multinational organisation which the EU constitutes. **Developments since the establishment of the EU have not cast doubt on the validity of the arrangements and we believe the Commission should retain the right of initiative.**

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

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

Lord Blackwell
Lord Bowness
Lord Burnett
Lord Jay of Ewelme
Baroness Kingsmill
Lord Lester of Herne Hill
Lord Mance (Chairman)
Lord Norton of Louth
Baroness O'Cathain
Lord Rosser
Lord Tomlinson
Lord Wright of Richmond

Declarations of Interest

A full list of Members' interests can be found in the Register of Lords Interests: http://www.publications.parliament.uk/pa/ld/ldreg.htm

The following interests relevant to this inquiry have been declared:

Lord Blackwell

Non-executive Director, SEGRO plc (12 February 2008)
Non-executive Director, Standard Life plc
Chairman, Interserve plc

Non-executive Board Member, Office of Fair Trading
Special Advisor, KPMG Corporate Finance

Shareholder, 4C Associates Ltd (business consultants)

Joint Owner (with wife) of an apartment in SW1, let on an assured short hold tenancy

Chairman and Director of the Centre for Policy Studies (independent 'think tank')
Chairman and Director of Global Vision (independent campaign group)

APPENDIX 2: LIST OF WITNESSES

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

* Ms Julia Bateman, Head of the Law Society of England and Wales Brussels Office
* Rt Hon the Lord Brittan of Spennithorne

Mr A M Burchell

Directorate-General Environment, European Commission

Committee of the Regions

Mr Richard Corbett MEP

Council of Europe Secretariat

* Mr Gian Marco Currado, First Secretary, Environment, UK Permanent Representation
* Sir Kim Darroch, UK Permanent Representative, UK Permanent Representation
* Ms Catherine Day, Secretary General, European Commission

Dr Christina Eckes

European Automobile Manufacturers Association (ACEA)

European Economic and Social Committee

European Regions Airline Association

* Ms Evanna Fruithof, Director of the Bar Council of England and Wales Brussels Office
* Mr Chris Welsh, Freight Transport Association

Ms Athina Giannakoula, Lawyer, LLM, Aristotle University Thessaloniki

* Mr Ananda Guha, Deputy Head of Europe Delivery Group, Foreign and Commonwealth Office
* Mr David Harley, Deputy Secretary General of the European Parliament
* Mr Paul Heardman, Head, European Parliament Section, UK Permanent Representation

Professor Maria Kaiafa-Gbandi, Aristotle University Thessaloniki

* Rt Hon the Lord Kinnock
* Mr Andrew Laidlaw, Deputy Head of the Law Society Brussels Office
* Ms Sally Langrish, Legal Counsellor, UK Permanent Representation
* Mr Tony Long, Director, World Wide Fund for Nature, European Policy Office
* Ms Helen Malcolm QC
* Mr Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office
* Professor Steve Peers

* Mr Vijay Rangarajan, JHA Counsellor, UK Permanent Representation
* Professor Anne Rasmussen

  Dr Eve Sariyiannidou
* Mr William Sleath, Assistant, Office of the Secretariat-General, European Commission
* Ms Clelia Uhart, First Secretary, Single Market, UK Permanent Representation
* Mr Roberto Ferrigno, Vice-President for Public Affairs, Weber Shandwick

NOTE: 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

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords European Union Committee is to conduct an Inquiry, to be undertaken by its Sub-Committee on Law and Institutions (Sub-Committee E), into the initiation of EU legislation.

The Sub-Committee invites you to submit written evidence to the Inquiry.

Introduction

The process by which EU legislation is made is reasonably well known. A proposal is put forward, usually to the European Parliament and the Council of Ministers, it undergoes a process of consideration and negotiation, and (if agreed) it is eventually adopted and the legislation is published. The legislative process is set out in the Treaty establishing the European Community or, in the area of Police and Judicial Cooperation in Criminal Matters (the third pillar), in the Treaty on European Union. The way in which a proposal proceeds to adoption is more or less transparent and can be followed by those interested, for example, through the websites of the EU Institutions.

But where do the ideas for legislation come from, and how is a proposal for legislation developed? Most such proposals are made by the Commission by virtue of its "right of initiative", while some (in the third pillar) are made by Member States. The way in which their proposals are created is not a matter for the Treaties and is not obvious to the outside observer. The Sub-Committee would like to lift the veil and examine that process of creation.

Scope of the Inquiry

The Sub-Committee wishes to focus on EU legislation. The initiation of proposals for action in the Common Foreign and Security Policy (the second pillar) is therefore outside the ambit of the Inquiry.

As indicated above, the process by which a proposal, once formally submitted, is considered and adopted is also outside the Inquiry's scope.

While certain other EU actors have a right of initiative in their field of operation (for example, the European Court of Justice and the European Central Bank), the Sub-Committee suggests that the focus should be on initiation of proposals by the main actor, namely the Commission. But you may wish to comment, for purposes of illustration or comparison, on the creation of proposals by other EU Institutions or by Member States.

The issues

With those points in mind, the Sub-Committee invites views. In order to provide a degree of concrete focus for the evidence, we invite witnesses to illustrate their views as much as possible with examples of legislation or legislative proposals and, where possible, to draw illustrative material, in particular, from three areas of EU activity—the Area of Freedom, Security and Justice (criminal justice), the Internal Market (transport) and Environmental Policy (control of pollution and CO2 emissions).

In addition to any general points you wish to make, the Sub-Committee would welcome evidence on the following issues. We recognise that not everyone will have an interest in all aspects and you may, therefore, wish to be selective.

1. Where do the ideas which trigger work towards legislation come from? For example, what are the processes by which legislation is generated inside the Commission? The Commission operates in an open way; does that openness extend to ideas for legislation from external sources? If so, what are the sources of information or ideas on which the Commission draws? Does it actively seek out ideas and views? How effective are multi-annual strategies and annual work plans in setting the agenda for the creation of legislative proposals?

2. How are the ideas developed? What arrangements are in place for quality control and to determine priorities? What are the arrangements for the drafting of texts?

3. How significant are the views of the other EU Institutions? The European Council's role is to "provide the Union with the necessary impetus for its development" and to define its "general political guidelines". How important are the Conclusions of the European Council in the development of legislative proposals? Are the likely reactions of the European Parliament and the Council a significant factor in triggering work or determining the scope and extent of proposed EU legislation during the development of proposals? Are the views of EU bodies and agencies, such as the Economic and Social Committee or the Committee of the Regions anticipated or sought informally? What role do judgments of the European Courts play?

4. How significant are the views of individual Member States in the process of initiation?

5. How significant are the views of other interested parties, such as national Parliaments, international bodies such as the Council of Europe, non-governmental organisations, pressure groups, the news media, the general public?

6. What is your assessment of the quality of proposals submitted by the entities which have the right of initiative (Commission, Member State or other)?

APPENDIX 4: GLOSSARY

This glossary describes the current situation, not the situation which would be created by ratification of the Lisbon Treaty.

Acquis: the *acquis communautaire* encompasses the whole range of principles, policies, laws, practices, obligations and objectives that have been agreed within the EU. See also Schengen.

CAP: Common Agricultural Policy.

Charter of Fundamental Rights: the Charter sets out the fundamental rights, freedoms and principles applicable at EU level and was first proclaimed by the Presidents of the Council, Parliament and Commission at the Nice European Council in December 2000. It is a political document, not a legally binding one.

Co-decision procedure: introduced by the Treaty of Maastricht and modified by the Treaty of Amsterdam, this procedure is set out in Article 251 of the EC Treaty and now applies to many areas of Community legislation. Under it, a Commission proposal can only become law if both the Council and EP agree it.

Commission: an EU institution comprising 27 Commissioners, one from each Member State. It has the tasks of ensuring the Treaties are correctly applied, of proposing new legislation to the Council and European Parliament for approval, and of exercising implementing powers conferred on it by the Council.

Common Foreign and Security Policy (CFSP): an area of intergovernmental activity within the Union, but outside the European Communities, created by the Treaty of Maastricht. The CFSP covers all areas of foreign and security policy, including the progressive framing of a common defence policy.

Competence: a term describing the powers conferred by the Member States on EU institutions under the EU Treaties to undertake specific action or propose legislation in a particular policy area.

Consultation (of the European Parliament): a procedure which requires the Council to consult the EP and take its views into account before voting on a Commission proposal.

Council of Ministers: this is the principal decision-making institution of the Union. It meets in a variety of configurations (e.g. the General Affairs and External Relations Council, the Economic and Financial Affairs Council) attended by the relevant national ministers and is chaired by the Presidency. Working Groups and COREPER prepare the Council's work. It is supported by the Council Secretariat.

Court of Justice: the Court of Justice, also known as the ECJ, is based in Luxembourg and comprises 27 judges (one from each Member State) assisted by eight Advocates-General. Its broad task is to ensure that the law is observed in the interpretation and application of the Treaty. It has jurisdiction in the first, or Community, Pillar, more limited jurisdiction in the third Pillar (police and judicial cooperation in criminal matters) and no jurisdiction in the second Pillar (CFSP). There is also a Court of First Instance (CFI) to deal with certain specified issues.

European Community: the present name for what was originally called the European Economic Community (EEC). The EEC was established by the Treaty of Rome but was renamed the European Community by the Treaty of Maastricht.

European Communities: this term refers to the three founding Treaties. The first, the European Coal and Steel Community (ECSC Treaty), was signed in Paris in 1951 and entered into force in 1952. It expired in July 2002. Two further Treaties, signed in Rome in 1957, established the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). Both Treaties entered into force in 1958.

European Council: a meeting of Heads of state or government of the Member States, their Foreign Ministers and the President of the Commission. The European Council meets twice during each six-monthly Presidency in Brussels. Its meetings are sometimes referred to as European Summits. The European Council provides the EU with strategic direction and necessary impetus for its development. It operates by consensus and will normally agree "Conclusions" signalling the future course of EU action. It does not exercise legislative functions.

European Court of Justice (ECJ): see Court of Justice.

European Parliament (EP): the EP is currently composed of 785 members (MEPs—72 from the UK) directly elected every five years in each Member State by a system of proportional representation. See Table 3. Originally a consultative body, successive Treaties have increased the EP's role in scrutinising the activities of the Commission and Council and extended its legislative and budgetary powers through co-decision. The EP meets in plenary session in Strasbourg and, occasionally, in Brussels.

European Security and Defence Policy (ESDP): the ESDP seeks to strengthen Europe's capability for crisis management through NATO and the EU. The policy is designed to give the EU the tools to take on humanitarian and peacekeeping tasks where NATO as a whole is not engaged.

European Union: the European Union was created by the Treaty of Maastricht. It consists of three "Pillars". The First Pillar comprises the pre-existing European Communities (the European Community, Euratom and the ECSC) and covers largely, though not exclusively, economic business. The Second Pillar is the Common Foreign and Security Policy. The Third Pillar, after amendment by the Treaty of Amsterdam, covers certain police and judicial cooperation in criminal matters. Under the First, or Community, Pillar most legislation is proposed by the Commission and adopted as law by the Council and EP. Inter-governmental procedures apply under the Second and Third Pillars. Member States, as well as the Commission, have the right to propose policies or laws for approval by the Council.

EU Treaties: these refer principally to the Treaty establishing the European Community (TEC), and the Treaty on European Union (TEU or Treaty of Maastricht) and acts or treaties supplementing or amending them, notably the Single European Act, the Amsterdam Treaty and the Nice Treaty.

High Representative: the representative of the Council of Ministers for Common Foreign and Security Policy matters, who is also Secretary-General of the Council and, as such, head of the Council Secretariat. The current High Representative is Javier Solana.

Internal Market: refers to policies facilitating the free movement of goods, services, persons and capital, thereby opening up markets and removing obstacles to free trade. Also referred to as the Single Market.

JHA: cooperation in the fields of Justice and Home Affairs, introduced by the Maastricht Treaty as the third inter-governmental Pillar. Police and judicial

cooperation in criminal matters remain in the third Pillar but the Amsterdam Treaty transferred some areas of JHA cooperation, such as asylum and immigration, to the first or Community Pillar.

Legal base: the legal base refers to the Article or Articles of the Treaties giving the Union power to act. The relevant Article describes the voting requirements and type of legislative procedure (e.g. co-decision) that should be used for a proposal to be made into an EU law. EU laws must clearly state the legal base on which the Union is acting.

Member State: a country that is a member of the European Union.

MEP: Member of the European Parliament.

Passerelle: A Treaty provision enabling procedural requirements to be reduced, or other adjustments made, without formal Treaty revision. Literally "a bridge".

Pillars: there are three "Pillars". The first Pillar refers to the Community or EC Treaty (TEC). The second and third Pillars refer to the two areas of inter-governmental cooperation established by the Maastricht Treaty. These are the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (the latter amended by the Amsterdam Treaty to include only police and judicial cooperation in criminal matters).

Presidency: this refers to the Member State chairing meetings of the Council and European Council. The Presidency rotates every six months among the Member States.

Qualified majority voting (QMV): this is a voting mechanism in the Council under which a proposal can be adopted without every Member State agreeing to it. New QMV arrangements agreed in the Nice Treaty came into force on 1 November 2004. 255 votes are needed for a qualified majority out of a total of 345 weighted votes. The weighting of votes refers to the allocation of votes to each member state and roughly reflects population size. In addition, the votes in favour of a proposal have to be cast by a majority (or in some cases a two-thirds majority) of Member States, and at least 62 per cent of the Union's population. See Table 2.

Schengen Agreement: a separate agreement originally outside the EU Treaties between some Member States (not the UK or Ireland) on the gradual elimination of border controls at their common frontiers. The "Schengen *acquis*" refers to the original agreement, concluded in Schengen, Luxembourg in 1985, and subsequent measures building on the agreement. The *acquis* was incorporated into the EU Treaties by the Treaty of Amsterdam in 1999. The UK and Ireland secured opt-outs to enable them to maintain their own border controls but participate in the police and judicial cooperation elements of the Schengen *acquis*.

Subsidiarity: the principle that action should only be taken by the Community or Union if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore be better achieved at European level.

TEC: the Treaty establishing the European Community as amended by subsequent Treaties up to and including the Treaty of Nice.

TEU: the Treaty on European Union, also known as the Maastricht Treaty, as amended by subsequent Treaties up to and including the Treaty of Nice.

Unanimity: a form of voting in the Council. A proposal requiring unanimity must have no Member State voting against (abstentions do not prevent the adoption of acts requiring unanimity).

APPENDIX 5: REPORTS

Recent Reports from the Select Committee

Priorities of the European Union: Evidence from the Minister for Europe and the Slovenian Ambassador (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62–I: Report, HL Paper 62–II: Evidence)

Annual Report 2007 (36th Report, Session 2006–07, HL Paper 181)

The EU Reform Treaty: work in progress (35th Report, Session 2006–07, HL Paper 180)

Evidence from the Ambassador of Portugal on the Priorities of the Portuguese Presidency (29th Report, Session 2006–07, HL Paper 143)

Evidence from the Minister for Europe on the June European Council and the 2007 Inter-Governmental Conference (28th Report, Session 2006–07, HL Paper 142)

The Further Enlargement of the EU: follow-up Report (24th Report, Session 2006–07, HL Paper 125)

The Commission's Annual Policy Strategy for 2008 (23rd Report, Session 2006–07, HL Paper 123)

Evidence from the Ambassador of the Federal Republic of German on the German Presidency (10th Report, Session 2006–07, HL Paper 56)

The Commission's 2007 Legislative and Work Programme (7th Report, Session 2006–07, HL Paper 42)

Government Responses: Session 2004–05 (6th Report, Session 2006–07, HL Paper 38)

Evidence from the Minister for Europe on the Outcome of the December European Council (4th Report, Session 2006–07, HL Paper 31)

The Further Enlargement of the EU: threat or opportunity? (53rd Report, Session 2005–06, HL Paper 273)

Annual Report 2006 (46th Report, Session 2005–06, HL Paper 261)

Correspondence with Ministers March 2005 to January 2006 (45th Report, Session 2005–06, HL Paper 243)

The Brussels European Union Council and the Priorities of the Finnish Presidency (44th Report, Session 2005–06, HL Paper 229)

Recent Reports from Sub-Committee E

Green Paper on Succession and Wills (2nd Report, Session 2007–08, HL Paper 12)

European Supervision Order (31st Report, Session 2006–07, HL Paper 145)

An EU Competition Court (15th Report, Session 2006–07, HL Paper 75)

The Criminal Law Competence of the EC: follow-up Report (11th Report, Session 2006–07, HL Paper 63)

Breaking the deadlock: what future for EU procedural rights? (2nd Report, Session 2006–07, HL Paper 20)

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

European Arrest Warrant—Recent Developments (30th Report, Session 2005–06, HL Paper 156)

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

Minutes of Evidence

Taken before the Select Committee on the European Union (Sub-Committee E)

WEDNESDAY 23 APRIL 2008

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

Examination of Witnesses

Witnesses: Professor Steve Peers and Professor Anne Rasmussen, examined.

Q1 ***Chairman:*** Welcome to the European Union Sub-Committee E (Law and Institutions). Thank you for coming. We are on air; the proceedings will be recorded and afterwards a transcript will be available for you to make any comments or supplementary observations by reference to it. The position relating to interests is that they are declared and available in the Register of Interests, so far as Members of the Committee have interests which might be relevant to this inquiry. This is the first evidence session, so you must expect us to be starting from a relatively low level. Thank you for your papers. May I start by asking what you understand by the term "right of initiative" in the context of EU legislation? Who has it in law and in what circumstances? And perhaps begging that question slightly, what was the purpose of granting the right of initiative in the First Pillar almost exclusively to the Commission and do the reasons still hold good?

Professor Peers: Thank you, My Lord Chairman. I suppose the concept of the right of initiative is at least partly a legal concept, although its application is political. I have never liked the term "right of initiative" because I think it is more accurate to call it a "monopoly of initiative", to the extent that it is a monopoly. The Commission likes to call it a right, but I think that it is less misleading to call it a monopoly. Who has the right of initiative? The Commission has it as regards essentially all Community legislation, except for certain types of very technical or procedural issues, such as the Council's Rules of Procedure, for instance—obviously, the Commission does not have a monopoly there—or the Statute of the Court of Justice, where either the Court or the Commission can make a proposal. Otherwise, it applies to all Community law. The interesting thing is that as regards the Second and Third Pillars—I want to make some specific comments about the Third Pillar later on—it is shared between the Commission and the Member States. Looking particularly at the Third Pillar, you get an idea of what would happen if the right of initiative was shared across the board. Perhaps I can talk a bit more about that more later when we talk about the statistics on who makes proposals in specific areas. In the Third Pillar, the Commission and the Member States are roughly equal in making proposals. In the Second Pillar (foreign policy) the Commission tends not to make them but refrains from making them for whatever reason. Otherwise, for almost all Community law, it has the full right of initiative. For a five-year period they have to share it as regards immigration, asylum and civil law and, again, Member States were quite active during that five-year period in making proposals. If the Commission did not have the monopoly of initiative, Member States would be making a significant number of proposals. We have proof of that from having that separate area of justice and home affairs, where they have had that power and have used it. What was the purpose of granting the right of initiative to the Commission? I do not think we can be certain of that; it is a more political question, obviously. Probably, the intention was when the context of the Community was purely economic and also more technical, because the issues, given the more limited scope of the Communities' powers in 1958 and the more limited objectives of the Community in the very beginning for both political and technical reasons, it was felt better to give the exclusive right to the Commission, because these were technical issues so, therefore, you could trust it to a secretariat or a civil service to have the right of initiative. But, to the extent that they were political, and there were some economic interests of the Member States involved, it would be better to let the Commission, as a neutral observer or neutral actor in the institutional framework, make those proposals rather than for the Member States to do that, because the assumption would be that Member States might

make proposals in their own economic interest and the interests of the Community would not be so well represented. Perhaps a further political reason is that the Commission has always been seen as the guarantor of small States' interests; the small States might in particular—the original small States, but probably those who have joined since—agree that they would want the Commission to have that monopoly of initiative because it would then weaken the possibility that they would be overridden by the larger Member States, which is a likelihood if Member States were able to exercise the right of initiative.

Q2 ***Chairman:*** I would like to pick up the dichotomy you drew as to the rationale. Either the issues were technical, in which case presumably they were not going to be political, or if they were political, they were best entrusted to a non-political body. That really covers the whole field. Does that explain it?
Professor Peers: Yes, I think that would be the explanation of it.

Q3 ***Chairman:*** Is there anything you would like to add to that, Professor Rusmussen?
Professor Rasmussen: I can fully support what Professor Peers has already said. The only thing I would like to draw attention to would be that from a political science perspective, we could understand the right of initiative in both the narrow and broad sense. Right of initiative in a narrow sense would be about the possibility to put forward a proposal; a proposal power in itself. If we understand the right of initiative in a broad sense, which I would very much encourage Members of the Committee to do, it is important to be aware of the additional powers that the Commission has during the policy process, which it can use to protect its proposal. I am referring here, for example, to the Commission's possibility to influence the required majority for adoption within the Council. It is important for someone who puts forward a proposal how easy it is to get that proposal adopted in the end. As the Committee Members are probably well aware, there are many instances where the Commission has the possibility to force the Council to agree to its proposals by unanimity if it disagrees with the text that is on the table. Additional powers that would be very important to be aware of are the powers to withdraw legislative proposals during the policy process, which the Commission has, at least in formal terms; and finally, there is also the additional power that is very important to be aware of, which is the Commission's formal power to amend legislative proposals. What we will talk about later on, I hope, during this hearing, will be how these formal powers are applied in practice because what is very interesting with having selected a topic such as the Commission's right of initiative, is that it is a very good example of a formal legislative power that is not used in the same way in practice as one would think, if one only read the Treaty text itself. There are substantial modifications of how all of these formal powers are used in practice, which effectively means that it may not only be the Commission that has the right of initiative in the European Union in practice.

Q4 ***Chairman:*** That is extremely interesting and relates to my next question. Just before I get there, as to the three headings of additional power, which you have mentioned, I understand the last two, but the first was to influence the required majority in the Council and to force the Council in some context to agree its proposals. In what sense is that a formal power?
Professor Rasmussen: It is a formal power in the sense that it is written into the Treaty. Basically, the Treaty says that in certain circumstances—and we are talking about the circumstances where the Council has the possibility to adopt proposals with a qualified majority—for example, in the consultation procedure, the Council will have to adopt the decisions by unanimity if it wants to change the Commission's modified proposal. This is a formal power because, in practice, it is very sensitive for the Commission for political reasons to force the Council to do that, but it is a formal power that it has according to the Treaty. It is also a formal power that the Commission, for example, has in the second reading of the co-decision procedure.

Q5 ***Lord Jay of Ewelme:*** May I ask one point of clarification. When you are talking about the additional powers that the Commission has, are you talking just about additional powers that the Commission has because of amendments to the Treaty following various intergovernmental conferences, or are you talking about powers that the Commission has taken over time through the practice of the powers in the Treaty? Are they formal changes or changes in the way that the Commission has managed to operate?
Professor Rasmussen: No, these are not changes in the way that the Commission has managed to operate. These are powers that the Commission has had in the Treaty for many years. Where you will find changes is in the way these powers are applied. Very often, even if the formal powers are there in the Treaty, it is politically very sensitive for the Commission to use them. So, I think you would see, over time, a decline in the extent to which these formal additional powers are used in practice.

Q6 ***Chairman:*** I am going to ask the Legal Adviser to give us the Treaty references. You have probably got them off by heart, yourself.
Professor Rasmussen: Yes.

Q7 ***Chairman:*** The next question follows from what you have just said about the substantial factual modifications over the years. I would like to ask you to outline what there have been and perhaps also why they have occurred.
Professor Rasmussen: I have written an article, which I do not know if the Committee Members have been able to have a look at, but I will send it to the Committee Members afterwards, if not.

Q8 ***Chairman:*** Yes, we have and we are extremely grateful.
Professor Rasmussen: Basically, that article outlines first how I understand the right of initiative in a narrow and broad sense. What it then subsequently does is to go over these different powers and show how they have been modified in practice. If we, for example, take the right to propose legislation, it is clear that from a formal point of view it is only the European Commission that can put forward a legislative proposal. However, in practice, we have very often seen that these proposals are not drawn up by the Commission in a closed room, without paying attention to what is going on in the world around it. Very often these proposals are drawn up in response to concrete requests by the other institutions, or to live up to international obligations that the Union has entered into. This means that even if it is the Commission that submits the formal proposals, there are other actors on the European scene who have important agenda-setting powers.
Chairman: I am afraid we will have to go and vote now, but will resume shortly.

The Committee suspended from
4.33 pm to 4.49 pm for a division in the House

Q9 ***Chairman:*** You were dealing with the factual development of the position in respect of the right to initiate legislation.
Professor Rasmussen: Yes. I will continue. If you have my article in front of you, you can look at page 248. If you do not, I will make sure that it gets sent to you.

Q10 ***Chairman:*** We all have it.
Professor Rasmussen: Basically, table 1 outlines the eight developments that I am looking at, which reflect modifications in the way these rights are used in practice. I have already mentioned the first one, which is that often these proposals are drawn up in response to requests by other institutions. You have the statistics in table 2. You have to be aware when looking at these statistics that they are produced by the Commission itself, so there might be some strategic purpose behind them as well, in the sense that the Commission would not over-exaggerate the number of proposals that it initiates based on its own judgment. The Commission might have an incentive to signal to outside actors that most of the proposals are drawn up in response to requests by other institutions or international obligations. Having said that, even if there is some scope for interpretation, it is very clear what the trend is, which is that there are very few proposals that originate from the Commission itself.

Q11 ***Baroness O'Cathain:*** These statistics are from 1998, which is ten years ago. Has it changed markedly or are the proportions still the same?
Professor Rasmussen: That is a very interesting question. We only have these statistics if the Commission itself produces them. We have similar statistics from another year which present similar findings but I cannot provide you, for example, with statistics from last year because they have not been produced. The Commission would probably say that the figures are similar nowadays, but I cannot give you firm evidence here because I do not have the data available from later years.

Q12 ***Chairman:*** One could do an exercise of looking at certain proposals. In this Sub-Committee, we see many proposals which derive from Tampere, for example, and avowedly so. Could you explain table 1, item 2? I did not entirely follow it.
Professor Rasmussen: Yes, that is another example of how the other institutions—in this case the Council of Ministers and the Parliament—have tried to encourage the Commission to put forward legislative proposals, not by using the formal rights that these two institutions have in the treaties, according to which they can invite the Commission to put forward a legislative proposal, but instead, by writing into concrete legislative acts adopted that the Commission must submit a proposal before a given date. These would be concrete regulations or directives. Let us say the institutions are negotiating a proposal on gene modified organisms. Very often, in order to agree to the proposal, part of the compromise will then be that the institutions decide to write into the final legislative text that there are remaining issues out there, on which the Commission is required to put forward such legislative proposals. It is relatively clear, of course, that the Commission is not very happy with this and there has been much discussion between the institutions, which has led to serious inter-institutional disagreements. Now that the relationship is a bit calmer, it is still the case that these provisions are often written into the legislative acts but a standard formulation has been agreed to, which is interpreted as being less constraining on the Commission. The Commission would always claim, of course, that it has the exclusive right of initiative and that it is not bound by such provisions in the legislative acts being agreed to by Parliament and the Council. Politically, it would probably be quite

difficult for the Commission not to live up to such requests.

Q13 ***Chairman:*** Is there a shift here towards institutions which may be regarded as being more directly representative of the Community as a whole? Is that part of the underlying reason for the change, or is it simply a shift in institutional power?
Professor Rasmussen: That is difficult to judge, because the Council has been doing this for many years. The new thing in co-decision is that it has very much been the Parliament that has tried to use this tool in order to force the Commission to come up with legislative proposals, but it is not a new practice for the Council to try to constrain the Commission in this way; it is something that we have seen before.

Q14 ***Lord Jay of Ewelme:*** Following on from Baroness O'Cathain's question, I think that I am right in saying that after the Single European Act was passed in 1986 and entered into force, an enormous number of legislative proposals and directives came forward, in order to implement the single market programme. Would they be classified in your table as adaptation of Community law, or as new initiatives?
Professor Rasmussen: I would think that they would be in the first category, but I cannot give you firm evidence because I have not produced the statistics myself. These are statistics that were produced by the European Commission in a document prepared by the Commission to the European Convention. The Commission provided the European Convention with a contribution where it outlined how its right of initiative is being used and applied in practice.

Q15 ***Lord Jay of Ewelme:*** Do you know whether there are any statistical analyses of the subject-matter of proposals and how that has changed? In other words, in the late 1980s and early 1990s, a huge number of proposals were related to the single market, then that has fallen away and I suspect there have been more in relation to the Third Pillar. Is there any statistical evidence which shows the subject-matter of directives over time?
Professor Peers: I do not know of anything that the Commission has produced to show that. But to answer your earlier question, it is possible that the Commission would have defined the single market proposals as a response to a request from the European Council, which had approved in principle the idea of the single market. But, of course, it is one thing to say in principle we should have a single market and another thing to be responsible for drawing up nearly 300 pieces of legislation. And the list dealt with the legislation as well, which is what the Commission did. You could describe it as a shared right of initiative in political terms but then you have to look at the details to see how much of the initiative really rests with the Commission—in that case, a tremendous amount—having to define the list and then make the proposals for legislation, and how much rests with the European Council—in that case, not very much, because it agreed with the basic idea of the single market without at first going into much detail. The European Council only did so in response to lobbying from the Commission President Jacques Delors. He defined it as something he thought could be a major project for the Community and convinced the EU prime ministers and presidents of the idea. You can trace the European Council's role back to him. If he had not convinced them to agree to it, it would have had much less weight as an initiative purely coming from the Commission with no endorsement of the European Council. If they had rejected it, it would not have got very far at all. In a sense, you need both of them to work together for the political right of initiative to be effective.

Q16 ***Lord Burnett:*** But as for the actual basics of these 300 pieces of legislation, they would emanate from the Commission, which would then have its own ideas and presumably put them forward?
Professor Peers: Absolutely. Legally, it has to be the Commission that makes the proposals. There is a lot of political science and economic research about the 1980s period, saying that the Commission was strongly influenced by a coalition of large industrial groups, to push for the internal market in general and presumably also to influence the details of legislation as they affected each particular area of industry. If you want to look at the idea of an informal concept of the right to initiative, there is that role, that private sector role, in pushing for the single market to be completed in the first place and then pushing for the scope of ambition and to some extent for the sorts of details that were in the legislative proposals.

Q17 ***Lord Burnett:*** Presumably, much lobbying goes on of the Commission by various interest groups?
Professor Peers: Exactly, and that is also a well-studied topic. Once the proposal is made, the lobbying goes on in the Council and in the European Parliament. Certainly, in that initial stage . . .

Q18 ***Lord Burnett:*** That is a very important stage, that initial stage.
Professor Peers: Of course, because you can set it in stone. Also, lobbying sometimes is a negative; to try and get the Commission not to make a proposal because you fear from your industry point of view, or NGO's point of view, that this is going to be a negative development, something you do not want to see, then it is very important to convince the Commission not to make the proposal because then nobody else can make it; no one else formally has the right of proposal; neither the Member States nor

anyone else can formally put the issue on the table. If the Commission is not willing to make it, no matter how much pressure is placed upon it, then the issue is off the agenda.

Q19 ***Lord Burnett:*** It is dead?
Professor Peers: As long as the Commission does not make the proposal, it is dead, for as long as the Commission does not do that. It could always change its mind, but for as long as it does not make the proposal it is going nowhere, it is not even alive, it has never been born.

Q20 ***Lord Rosser:*** I read your paper, Professor Rasmussen, with interest. I think you made the distinction between the formal powers that the Commission has and the way non-formalised powers have grown up as far as the Parliament is concerned and as far as the Council is concerned and one or two other bodies. You use the expression about leverage and this is about the ability to get your own way from the powers that are there. It does not really matter, as you argue in your paper, whether they are formal or informal, it is not the theory that matters, it is what happens in practice. What I could not glean from your paper was whether you felt that with—what, as I understood it to be arguing about—the growth in reality of informal powers, which the Council and the Parliament now have, vis-à-vis the formal powers which the Commission has, and the leverage it gives both sides—and I will use it in that expression, because it is about who has got the influence and power—are we, if I can use a sporting analogy—and I will put on one side the Council and the Parliament and the other institutions, and on the other side the Commission—are we talking about Manchester United and Barcelona, i.e., roughly equal, in football, or are we talking about, in cricket, England and Australia, where it is hopelessly one-sided, i.e., am I asking the question in favour of one part or the other?
Professor Rasmussen: I do not know enough about football, but I think I can still get the point. We can have different games. If we say we have a game between the Council and the Parliament, I would probably still say that the Council is the most powerful. In relation to the Commission, you have to be aware that there are significant developments over time. You have just heard the example about Delors and what he was able to do with the single market programme. I would say that the Commission in recent years has been a much weaker body. It is not the case generally now that the Commission would table quite pro-integrationist proposals and hope that the Member States go along with it. Even if it is the Commission that has the right of initiative, it very often screens what it will be able to get adopted later on in the policy process. It is absolutely true that the Commission determines the contents of those proposals. At the same time, the Commission is very cautious about putting forward proposals that will not get adopted in the end. We know, based on rumours, that the Barroso Commission decided not to move ahead with certain proposals that were in their initial planning stages, under the Prodi Commission, exactly for the reason that it would be very difficult for the Commission to get these proposals through the Council. I think it is very important to be aware of these changes over time in the strength of the Commission.

Q21 ***Chairman:*** Can you identify specific areas in that regard? Are there specific areas where there has not been progress?
Professor Rasmussen: There were some concrete proposals, but I have to be honest with you and say that I do not know which proposals they were, but there were proposals, yes.

Q22 ***Lord Lester of Herne Hill:*** I am very troubled about some of this. The European Committee of the Bar Council of England and Wales, in their evidence to us, said that the process of deciding the topics, subject to a legislative proposal is, at best, ad hoc. The Law Society of England and Wales talk about coherency in policy-making and definition being a matter of concern. The example that has been brought to my notice by Lady Ludford in the European Parliament and by Gay Moon of the Equality and Diversity Forum, seems to me to be a really good one to take simply as a specimen. The example is that in the Work Programme for 2008, published in November 2007, the Commission proposed a generic anti-discrimination directive that would cover all the main grounds beyond employment, and they gave a list of extraordinarily powerful reasons as to why that was a good idea. Then the European Parliament and various NGOs pressed very firmly for that to happen. The documents that I have seen, which can be circulated later, indicate that for purely internal political reasons, the Barroso Commission retreated from that and is now considering only a disability directive on largely political grounds and grounds partly about the Council. The result of that will be more piecemeal ad hoc legislation of an incoherent kind. It troubles me that—and here is my question—there is no real public consultation process and no real accountability when something like that occurs, which does not seem to me to benefit the citizens of Europe. Is that summary—and I apologise for its length—a fair example of one of the problems?
Professor Rasmussen: Your summary shows that the Commission takes into account what the political situation is in the Council.

Q23 ***Lord Lester of Herne Hill:*** In the Commission, the allegations that I have seen indicate ways in which individual Commissioners have been exercised.
Professor Rasmussen: This may be the case, but we do not know if those individual Commissioners have taken into account what their Member States would be willing to agree to later on or not. We have to take into account here that it is, after all, the Member States which appoint the Commissioners. We also know that when the Barroso Commission resigned office, many of the Member States indicated that they were very keen on getting a Commission president of the same political colour as the majority of the governments in Europe. So, even if we are talking about separate institutions, we have to be aware that there are political links between the different EU institutions.
Lord Lester of Herne Hill: My concern is about the lack of citizens' participation in producing a coherent programme, but I suppose one could make the same criticism of the way in which our national Parliament and Government introduce legislation.

Q24 ***Chairman:*** I think you have also drawn attention to the fact that framework programmes have been developed, both at the Council level and at the Parliament level, there has been encouragement to the Commission to take action in specific general areas, and in those areas the Commission has tried to come forward with proposals.
Professor Rasmussen: Yes.

Q25 ***Lord Burnett:*** May I follow up Lord Rosser's question—a very good question, I thought. Why has the Commission lost a little power? Is that a temporary phenomenon?
Professor Rasmussen: I do not have the definitive answer to your question, but some would say that one reason that it has lost a little bit is partly something to do with the fact that the Parliament has gained. That is something worth speculating about. The Commission was a very important institution earlier. Even when the Parliament was involved under the consultation procedure, negotiations would often go through the Commission. With co-decision, the Parliament and the Council have started interacting much more with each other. It is often the case that the Commission still participates in negotiations, but it plays much less of a role than it used to; there is much less need for a mediator.

Q26 ***Lord Burnett:*** Has the Commission got the inherent power to reassert its former, rather more trenchant and strong position?
Professor Rasmussen: Again, I do not have the definitive answer to the question, but one of the reasons that the Commission has sometimes had difficulty is that the criticism of it has been that it does not have the same democratic legitimacy as the Parliament or the governments in the Council of Ministers. The other concern that should be taken into account, which relates to the reasons we just talked about, is why did we give the right of initiative to the Commission in the first place? As Professor Peers said, it was because we need an independent body that can define the European interests and think broader than the national interests. I hope we will get the opportunity to talk about the experiences within the field of justice and home affairs, where the Member States have had a right of initiative. These experiences are not necessarily positive. There are good and bad experiences, but I think it is acknowledged, even by the Member States themselves, that it creates certain challenges if they give themselves the right of initiative. We have seen a tendency for certain Member States to present proposals that were dominated very much by national interests and perhaps did not always take the interest of the Community as a whole into account. Both systems have advantages and disadvantages, but it is worth being aware of the disadvantages of alternative systems, which may be one of the reasons why we have not seen any changes to the Commission's right of initiative.

Q27 ***Chairman:*** Going back to the point about the relationship with the European Parliament. The European Parliament is a body that has a European perspective. Speaking anecdotally from instances I have seen, it takes active steps in co-decision procedures to make Commission legislation more European in outlook and to extend its scope—just dealing with the point that Lord Lester of Herne Hill was making, I can certainly think of examples. Does that correspond with your impression that the European Parliament is quite often prepared to say nowadays, "this does not go far enough, you ought to cover this, and you ought to do that"?
Professor Rasmussen: Yes, absolutely. Now it is perhaps a bit less clear than it used to be but, in earlier Parliaments, that was a very clear trend. Political scientists have conducted studies of the preferences of the institution in a large number of legislative proposals.

The Committee suspended from 5.05 pm to 5.20 pm for a division in the House

Q28 ***Baroness O'Cathain:*** I want to deal with the question of how the Commission's ideas for future legislation area generated. You have answered much of that in your very informative replies and in the information you have given us. But, is it the case that a Member State, deciding that they want such-and-such—whoever shouts the loudest and has the greatest lobbying power—can get it on to the Commission's agenda?

Professor Peers: I can think of a couple of examples of when Member States have or have not been able to influence the Commission. One of which is very recent when Gordon Brown was Chancellor in one of his later budgets, he said he was going to pressure the Commission to make proposals on raising the threshold of the amount of goods which you can bring back from outside the EU without facing customs duty—there had been an example of Wayne Rooney's girlfriend spending £10,000 in America. That was of general public concern because the threshold had not been raised for many years. So he was successful. Perhaps the Commission was considering a proposal along these lines anyway, but the Commission shortly afterwards made a proposal along these lines and it has been agreed by the Council. Going back to 1998-1999, there was a Council Directive that had been agreed back in 1992 to give a seven-year reprieve to the duty free industry for flights within Europe and that was about to expire in 1999. The duty free industry kicked up a huge row and got one Member State and then another, and eventually the United Kingdom and Germany and others, to ask the Commission to make a proposal and the Commission resolutely refused to make a proposal to extend that period. Had it done so, it would still have had to convince unanimously all the Member States—because this is tax legislation—to extend it and it might not have been able to do that. Some of those Member States were not even serious about pressuring the Commission, they just thought it was the populist thing to do, but they never expected the Commission to make a proposal or for the proposal to be adopted if they had made the proposal, so you get a few votes by pretending to be in the interests of duty free passengers, while being reassured that the treasury is still going to get that extra income in a few months time because there is no chance of it happening. So, maybe there was a political game being played. It shows that even if several large and small Member States pressure the Commission, sometimes it is willing to say, "No, we think it is wrong in the interests of Europe, we are not going to make a proposal for legislation". In that case, they could at least point to a unanimous agreement of the Member States to adopt legislation several years before that abolished the duty free exemption after the transition, so at least they could say, "We're just going to stick to the Council's original position". In that sense, they could link themselves to the legitimacy of the Council's original decision. You can find examples of pressure being successful and pressure not being so successful. There is also a specific issue with justice and home affairs where there was a greater role for the European Council in defining the parameters of future legislation in other areas.

Professor Rasmussen: If I were a Member State government, I could lobby the Commission but if I really wanted to be successful, I would lobby my colleagues in the Council. If I could manage to persuade the Council to ask the Commission to do something, or even better, the European Council, then I would have a very high chance of being successful. Whereas, if I came as an individual Member State to the Commission with an interest that was regarded as a national one, I would probably have a much harder time.

Q29 ***Chairman:*** You have been concentrating on the influence of other actors on the Commission; I would be interested to know to what extent the Commission may be driven, if at all, by internal pressures—this has been described as the "motor" of Europe in the past. Its role is obviously to promote the development of Europe and European initiatives; individuals who join the Commission are committed to that. How far do individuals within the Commission need to put forward proposals in particular areas in order to justify their existence and promote their careers? This may, of course, be subject to constraints—I see that from what you have said—you could not put something forward that was obviously unacceptable externally, but as a matter of fine tuning, is it right that individuals can influence the particular direction in that way?

Professor Rasmussen: That is extremely difficult to answer. What I can do, which might be relevant to the question, is to refer you to studies that have been done of the attitudes of senior Commission officials and the Commissioners themselves. Work has been done by Professor Liesbet Hooghe, who has conducted survey research of the attitudes of these senior Commission officials and the Commissioners themselves and to find out whether socialisation occurs once these people get to Brussels. What she finds is that national factors play a very strong role in the socialisation of these actors. Even if it is fair to say that most of those who work for the EU institutions are more pro-European than an average citizen would be of his or her country, it is not the case that they cut their ties to their national context once they start working in Brussels. National socialisation factors are still very important—that is what research shows in the latest survey of these Commission members and officials.

Q30 ***Baroness O'Cathain:*** Could we have a copy of that survey, My Lord Chairman?

Professor Rasmussen: Yes.

Q31 ***Chairman:*** Yes, I hope we have the name, I did not catch it.

Professor Rasmussen: Liesbet Hooghe. She has for example published a book and an article in the prominent political science journal, *International Organization.* I can give you the reference.

Q32 ***Chairman:*** That would be very helpful. I was simply drawing on a particular instance, which I will not identify, where it could be suggested that most of the project was spent working out what it was for, what it should be targeted at and what it was aimed at. There was a slight impression that the project had developed simply because some project was necessary in the area and there was a certain amount of money and there were people willing to do it. Are any examples that you can think of that bear any resemblance to that?
Professor Rasmussen: I can say now for the current Commission, as you know, one of the criticisms of the Barroso Commission is that it has not launched many entirely new proposals; that much of what is going on is related to the simplification agenda, where we see a lot of simplification and codification of existing legislation. At the moment, at least, it would be very hard for a Commission official sitting in a DG, speculating, "If I launch this new proposal, I would promote my career", because there is not much ground now for new proposals; this is not what is on the agenda at the moment. Whether that was the case earlier, I would not be able to say.

Q33 ***Lord Lester of Herne Hill:*** That is why I was putting forward my equality example, because here you have the Commission itself putting forward a coherent proposal, rationally motivated, a European Parliament which seems to be in favour, and then a complete retreat from it to something that is not apparently justifiable as a piece of coherent legislation. I am trying to get my mind round the democratic principles in this area. Obviously, in a national parliament, a government is elected and it can decide on its programme. It has a democratic mandate; there is parliament that is accountable, which is also in evidence in the other House. Here we have a situation where the Commission, with the right of initiative, has decided on the public interest; a parliament seems to agree with it; the Parliament and the Commissioners in their different ways have different kinds of mandate; and the citizen has a very weak involvement in the process. Can this be described in terms of the Law Society and Bar Council's concern as more than ad hoc and somewhat incoherent, without any real democratic input or ultimately transparency?
Professor Peers: I suppose that might beg the question as to what would be the process of having the Commission's discretion as regards its legislative agenda endorsed, approved or controlled in some way by the Parliament and the Council. If you wanted to ensure that those sorts of proposals were made more often, perhaps you should have the European Parliament put forward a legislative agenda each year and insist the Commission endorse it. It would be difficult to do within the existing Treaty because of the Commission's right of initiative. Or, perhaps you should have the European Council, or the Council, or all of these bodies together having that role. If you go down that road then the Commission's right to initiative effectively ceases to exist and probably would end up eventually being removed from the Treaty in favour of some different process by means of which the other bodies will agree between themselves on a list of legislative proposals and give it to the Commission as a secretariat to draw those proposals up. Perhaps that is the way that we should exploring or going down. But if you really want to object to what seems to be happening with that proposal, you would have to ask yourself the question, do we want to give the Commission discretion to draw up a list of legislation and to take into account whether it would be difficult to get unanimity in the Council, as it would be on a broad discrimination proposal extending beyond employment, or do we want the institutions to draw up that list between them? If you give the Council or the European Council the role, you would still have the problem of getting unanimity on that proposal as a concept so it would be rejected at that stage, rather than the stage of the Commission taking into account the difficulty of getting the legislation approved. The basic problem is unanimity on that particular area of law. That is the problem at issue.

Q34 ***Lord Lester of Herne Hill:*** I am not going to follow you down that road. What I am suggesting is much more modest. Ought there not, at the very least, to be a form of accountability when the Commission behaves, for example, in the way I have just tried to describe, at least reason-giving or some process vis-à-vis the Parliament and Council, so that the citizen can be satisfied that there is not horse trading of an undesirable kind, where the Commission itself has decided the public interest, produced a coherent proposal and for no public reason, withdraws from it. That is really what I was getting at.
Professor Rasmussen: I do not know about that concrete case. A good guess would be that the Commission has refrained from introducing it because it does not expect to be able to get it through the Council. On the more general question of whether there is accountability, it may also be relevant to look at whether the Commission gives reasons when it does not live up to requests by the democratically-elected institutions, no matter whether we are thinking of the European Parliament or the Council of Ministers? Here we see an interesting change in the Lisbon Treaty in the articles where it is stated that the Parliament and the Council can invite the Commission to put forward legislative proposals. A couple of lines have been added to the articles now stating that in case the Commission decides not to live up to these requests, it will have to provide either

the Parliament or the Council with the reasons for not doing so. That is not a significant change in practice because, as you probably also know, the Commission has already agreed to do this with the Parliament in the Framework Agreement that it has with the Parliament so, in practice, if the Parliament has used its formal treaty power to invite the Commission to put forward a legislative proposal, the Commission would inform the Parliament in writing if it does not live up to that request. That rarely happens, but in case it happens, the Commission will do that. Informally, the Commission has always responded to requests by the Council by indicating to the Council in the very few cases where it has not presented a proposal, why that has been the case. So, we have some sort of accountability.

Q35 ***Baroness O'Cathain:*** Are those reasons published?

Professor Rasmussen: I have to admit that I do not know. I know that the Commission will respond in writing; to the Parliament; whether it is publicised, I am not entirely sure.

Professor Peers: I am thinking of one recent example. As Professor Rasmussen said, it is quite rare for the European Parliament to make an official, formal, request for legislation. One case I know of where that happened recently was a unanimous vote in the Parliament to suggest a very detailed proposal for legislation, amending the legislation on access to documents. In that case, the Commission produced a White Paper last year, in which it barely mentioned the Parliament's proposal and certainly did not respond to it promptly or in detail as it is required to do by the Framework Agreement. The mere fact that you have this essentially political agreement in place does not mean that it is actually applied, and that is a graphic example of it not being applied. We will see a legislative proposal soon from the Commission on this issue and I guess we will see whether they have taken the Parliament's position into account. I suppose since that is a co-decision area, the Parliament can always use its co-decision powers, once it gets the proposal on the table, as it will do in a week or so, to influence the legislation. But, it has to get the proposal on the table first and that is perhaps the biggest issue here for Lord Lester of Herne Hill. But to take your example, if there is a proposal extending Community equality law to more areas in relation to disability, the Parliament could always try and get an amendment to extend that to other areas as well, but at least it would have the disability proposal on the table and it can then seek to expand it. So that might be an approach that the Parliament would wish to take, but it does not have so much power in that area. It does not have co-decision powers so it is obviously going to be harder for its position to be successful.

Q36 ***Chairman:*** How far does it ever occur that the Parliament invites a member of the Commission, or a Commissioner or the President to attend either before a committee or the plenary in relation to a legislative proposal to explain why it is not being put forward, or why it is being put forward in the form that it is? Has that ever occurred? It is theoretically open.

Professor Rasmussen: The Commission always participates in the internal deliberations of the European Parliament when they are debating legislation that is on the table, but whether a Commissioner or a high-level civil servant would appear and explain to the Parliament the reasons for not living up to a request, I do not know.

Professor Peers: I have heard a number of press reports about plenary sessions of the European Parliament, where members asked when a proposal was coming and MEPs' questions to the Commission are published—though not in every language now—which have appeared in the past—I used to read them regularly—that it is a common thing for MEPs to ask the Commission, "When is this proposal you promised coming?" or "Where is this proposal, which we think is a good idea, coming?" So, it is not unusual to put pressure on the Commission that way.

Lord Bowness: Looking at the evidence from a member of the European Parliament, are they not able to use the sessions on the Annual Work Programme to ask the questions? It may be there to discuss the Annual Work Programme, but according to this evidence they hold a series of bilateral meetings with the relevant Commissioners, the results of which are assessed by the Chairs of the parliamentary committees and the Commission Vice-President, so presumably parliamentarians have an opportunity to ask questions at that time, about why something is or is not in the Work Programme.

Q37 ***Lord Lester of Herne Hill:*** The issue that I have raised is exemplified by the fact that in the new Work Programme it is no longer in the form it was in the previous one last year, so there is a mismatch and therefore, presumably, that could be raised in a question and answer form.

Professor Peers: Yes, I do not know when the European Parliament would be able or would want to ask that question of the Commission. Perhaps it would wait until the actual proposal is made in a few weeks' time and then a question could be put to the relevant Commissioner in the plenary session when it is presented, or shortly afterwards, "Why, having made this commitment for a very broad ranging proposal, have you cut it back to disability?" That

would be a good opportunity for them to ask the question. But, at least, since they will have a legislative proposal on the table, they can seek to expand it. Another issue, since the Treaty of Lisbon, if it is ratified, will come into force quite shortly, this could well be a subject for a citizens' initiative. If we only have a proposal on the table and it gets adopted dealing with disability, perhaps NGOs interested in discrimination issues should make a subject of citizens' initiative the issue of asking the Commission to make a more broad-ranging equality rights proposal. Perhaps the Commission would politically—and perhaps the Council politically—would also then feel that they had to respond to the citizens' initiative and that might change the political dynamics of the issue because of the perceived necessity to respond to public opinion in the form of a citizens' initiative.

Q38 ***Lord Lester of Herne Hill:*** Is that the same thing as a petition? There has been a massive petition already on that issue. Is that what we mean by a citizens' initiative?
Professor Peers: Yes, the Treaty already provides for petitions. But the Treaty of Lisbon would provide for a citizens' initiative, which is where there has to be legislation first adopted to set up an official procedure and at least one million citizens would be needed across Europe to sign it, the details of which would be set out in the legislation. That would then be a formal citizens' initiative, so perhaps that would have a higher profile than petitions. Even though you could say that it is a similar thing, it is likely to have a higher profile. The Commission and perhaps the Council as well, more importantly, in the case of unanimous voting, might well be more likely to pay attention to something that has been requested of them in the form of a citizens' initiative.

Q39 ***Lord Tomlinson:*** During my time in the European Parliament, I was very much of the view that the European Parliament was somewhat schizophrenic between those who sought power in a political sense and those who sought powers in a juridical sense. The European Parliament has used their political power particularly effectively in relation to the Council of Ministers where, for example, they put the budget for comitology into reserve. Do you see any evidence of a willingness in the Parliament to use power over the Commission, in the same way as they have begun to exercise it in relation to the Council? Do you see any evidence of them building the confidence, the competence, and the coherence to use their political power, rather than become concerned about juridical powers?
Professor Peers: Do you mean in the particular context of pressing for legislative initiatives, or more generally?

Q40 ***Lord Tomlinson:*** That in particular, in the context of this, or any other example which might be a precedent for them extending into this area.
Professor Peers: Of course, you have very prominent examples of the Parliament gaining more powers over the appointment of the Presidents and Commissioners.

Q41 ***Lord Tomlinson:*** But they are juridical powers.
Professor Peers: Yes. In terms of pressing for legislative proposals, the official procedure by which the Parliament can request a proposal is very rarely used but there are often informal suggestions for legislation made in a resolution of the Parliament, for instance, in response to a White Paper. The Parliament might well say, "this is a good idea as a topic for legislation, let's see legislation right away and it should have these main aspects to it". So, you have that as an example and other own-initiative resolutions often raise issues that the Parliament thinks are good ideas for legislation without being a formal request for legislation. You can find quite a few examples of that. To come back to Professor Rasmussen's example, you find many examples of legislation where the Parliament insists on some kind of review clause where the Commission is called upon to make proposals for legislation. Again, I have to give you the same example of access to documents, where that is not always effective. One of the main things the Parliament did in negotiating the access to the documents Regulation of 2001, was to get a review clause; the Commission had to review it within three years—2004. I remember the rapporteur telling NGOs at the time who were concerned about the regulation, "this is a great victory, we are going to have to have it revised in three years' time". But then, when it came to it in three years' time, the Commission said, "No, we're not going to propose an amendment". It is only now, four years later, that they are imminently about to propose one. So, you cannot overstate the importance of the Parliament getting those review clauses placed into the legislation, you would have to do an analytical survey of them all within a particular area of law to see how often they are effective in getting the Commission to make further proposals in a reasonable period of time, because often they are reasonably successful, often they are not. In general, the Parliament has been trying to use those mechanisms to pressure the Commission to make proposals and sometimes it is successful, sometimes it is not. It is rather hard to quantify how often it is using that kind of power and how often it is successful.
Professor Rasmussen: The relationship between the Parliament and the Commission is an interesting one because in many areas the Commission has been an ally for the Parliament that MEPs could use in order to put pressure on the Council. For example, when

the co-decision procedure was introduced, it was not a bi-cameral procedure as we know it for many bi-cameral parliaments because, even if it provided for the Parliament and the Council to get together and directly negotiate in the Conciliation Committee, there was the possibility for the Council in case it did not manage to reach agreement in the Committee, to reinstate its common position, which would become law unless the Parliament gathered an absolute majority of its members against it. The Parliament was, of course, unhappy with this; it felt that it was not on equal terms with the Council, so it stated in its Rules of Procedure that in case it did not manage to reach agreement with the Council in the Conciliation Committee, the Commission would be required to withdraw the proposal so that the Council could not just reinstate its previous position. That is just one example. Another example where the Parliament has tried to establish a close relationship with the Commission has been when it comes to comitology because, even though now we have a new comitology decision where the Parliament will get more power over those cases that come out of the co-decision procedure, for many years the Parliament has not had any real power when it comes to comitology and it has tended to rely on the Commission. So it has usually supported the comitology procedure set-up, which gives the Commission as much power as possible and the Council as little power as possible. For years these two institutions have been allies, but we have seen in recent years a tendency for this Commission/Parliament relationship to become more conflictual.

Q42 ***Baroness O'Cathain:*** I want to pursue the point that Lord Lester of Herne Hill made about the proposal which was watered down. In your responses, I have to say the words "might", "could", "maybe", keep cropping up. Can we ask a straight question: if Lord Lester of Herne Hill's example came back again to the Commission, could the Commission just say, "No, we're not going to bother"? Like, for example, extending from disability into the other rights.
Professor Peers: If there were a legislative proposal that the Council has announced will come soon and it only relates to disability, the Parliament can always try and table amendments to it to expand it.

Q43 ***Baroness O'Cathain:*** Try?
Professor Peers: Yes, it can, as such, table an amendment to it; that can be where the Parliament votes for; but the most important thing at that point, once the legislation is on the table, is to convince the Council. It might well convince the Commission to expand the scope of the proposal, it does not actually matter, because the voting is by unanimity anyway in the Council and will remain so after the Lisbon Treaty. So, that is the problem that the Parliament would have; it would gain a power of consent, rather than consultation after the Lisbon Treaty on that proposal. But, still, it has to get the Council to agree unanimously; that is going to be the real debate, although the real dynamic will be between the Parliament and the Council, if that happens. It is not so important any more that the Commission make that proposal.

Q44 ***Lord Jay of Ewelme:*** We have talked a great deal, when talking about other actors, about people putting pressure on the Commission and trying to influence the Commission, which is one side of the coin, but there is presumably another side of the coin, which is the Commission genuinely wanting to consult and seek the views of people before they come forward with a proposal. I did not want that side of things to get lost. It seems to me to be a rather important part of the process for proposals coming forward. Is that an important part of the process in your view?
Professor Peers: Behind any significant set of proposals there is often some form of consultation—a green paper or white paper, or just a consultation paper, as well as impact assessments—the results of which are published on the Commission's website in some form and you could perhaps do a comparison between the position of the consulted parties and what the Commission eventually comes up with. Certainly, the Commission is genuinely interested in the consultations. Inevitably, since those consulted take different views, and the Commission has to be more concerned about the Parliament and the Council and whether they will adopt the legislation, it probably takes more account of what Member States think or what it perceives Member States are likely to say and what the European Parliament majority is likely to say than it does of the consultees. It can, of course, rely on the consultees' arguments if there is an overwhelming point of view on one point or another to try and give it legitimacy in terms of any proposal it makes that corresponds to the views of the consultees.

Q45 ***Lord Bowness:*** We have talked a great deal about the interaction between the Commission and the Parliament and it is fairly clear from what you have said that one is able to see when the Parliament wants to put forward an idea, whether by way of formal process or whether included in resolutions. But what about the Council? How open is all that? Do you find their proposals in the Presidency Conclusions, or is it something which is "hole-in-the-corner" lobbying? How open is the process in terms of when the idea comes from them?

Professor Peers: Usually, the final result of the process is open because the Council's Conclusions or the European Council's Conclusions are published as part of a press release of one or the other. There might, of course, be some private lobbying going on outside of the formal Council Conclusions; and there is also a question of how open the process is of arriving at the Conclusions, because the final Conclusions of the European Council or the Council on a particular point do not tend to be published or made available until the very end of the decision-making, when those conclusions have already been agreed. That is the problem with openness; the ability to influence the Council and the European Council during that process of drawing up the Conclusions, where it is perhaps more important to have that influence for national parliaments or for civil society, for instance.

Q46 ***Chairman:*** Has anyone done a study on the impact and effectiveness of lobbying? It must be very difficult at the European level to get a representative picture of all the issues and all the interests, and lobbyists obviously feel that there is a point in having offices in Brussels.
Professor Rasmussen: We do have studies, yes, but very often studies of interest representation do not try to measure influence, as such, because of the challenges involved in doing that. What they would often measure would be access to the different institutions and there we can say something about the conditions under which a given type of group enjoys access or which type of groups enjoys access to which kind of institutions. Those are the kind of studies that exist.

Q47 ***Chairman:*** If there is a particular telling one, maybe either you or Lord Norton can assist us. We should move on to the area of Third Pillar legislation. What is the reasoning behind the shared right of initiative? Roughly what percentage of legislative proposals are Commission proposals and what percentage are Member States' initiatives? And, where do ideas for Third Pillar legislation come from? Can you give us some examples?
Professor Peers: I can start with giving you exact statistics on where the proposals come from. As regards adopted legislation in the Third Pillar, adopted since the Treaty of Amsterdam, when the Commission more fully shared the right of initiative with the Member States on policing and criminal law, it is interesting to break it down between Framework Decisions, which harmonise national law and mainly deal with criminal law issues, and Decisions, which are otherwise binding but tend to deal with more policing issues. In the case of Framework Decisions, the balance of the 21 adopted is 12 proposed by Member States, nine proposed by the Commission. Nine more have been agreed of which only two were proposed by Member States, seven by the Commission, so that adds up to 14 proposed by Member States and 16 proposed by the Commission, so it is about half and half. In the case of Decisions, which deal with policing law, it is more overwhelmingly Member States where 27 adopted proposals were proposed by Member States, only 11 by the Commission, of which seven only dealt with funding programmes from the Community budget where the Commission has a role in implementation and it is natural that it would make a proposal for a funding programme. It is interesting to see Member States having a greater influence in one area and as regards one type of instrument.

The Committee suspended from 5.47 pm to 5.59 pm for a division in the House

Q48 ***Chairman:*** I think we can resume now.
Professor Peers: I was in the middle of the statistics: there were six proposals for conventions or protocols, all by Member States, and also there was a transitional period where Member States shared the right of initiative over immigration, asylum and civil law. During that five years, I counted 38 proposals from the Commission, 25 from Member States, so about two-thirds were from the Commission. Again, it is different depending on subject-matter; the Commission made almost all the proposals on admission—on asylum and legal migration; Member States made the majority relating to control of migration—on illegal migration and visas and borders. Again, the topic dictated the relative influence of the Commission as compared to the Member States. As for the reasoning behind this shared right of initiative, probably it is lack of expertise in the Commission considering that it did not have a Directorate-General on justice and home affairs until 1999, and it took a while to build that Directorate-General once it was set up. Also, the national sensitivity and issues of national sovereignty, which arise in most areas of the Third Pillar and the degree of national divergences in the concepts underlying civil and criminal law, in particular, probably also led to a shared right of initiative. As to where the ideas for legislation come from, most of them are set out quite generally in the programme of the European Council. My Lord Chairman, you have already mentioned Tampere in 1999; we have also had the Hague programme in 2004, and at various times the European Council has reviewed or dealt with justice and home affairs issues, most obviously in an emergency meeting after September 2001, but on several other occasions it has devoted quite a big chunk of its discussion to aspects of justice and home affairs. Again, there was an emergency meeting after the Madrid bombings in 2004; at one point in Seville in 2002, immigration and asylum was a big part of discussions, and on several

other occasions also. You can point much of the general ideas for legislation back to the original conclusions of the European Council at those times. There is a difference in the way that the European Council reached its conclusions in Tampere and The Hague. The Tampere conclusions were basically drafted by presidents and prime ministers, whereas the Hague Programme was drafted by the interior ministers and justice ministers of the Member States, trying to make sure their prime ministers did not get any influence five years later on the programme. In any case, it has a big influence and more influence over time on the proposals made by the Commission and the proposals made by Member States also in the Third Pillar. The Member States proposals in particular are more and more within the framework of the general programmes rather than just ideas that occur to particular ministers for domestic political consumption. What influence do national bodies have and how are national concerns accommodated? Obviously, they are more directly accommodated where Member States make proposals. It has been more common recently for a group of Member States to make proposals. In the last year, several times, there have been seven and even up to 15 Member States making group proposals. You might think it would be almost impossible to co-ordinate officials from the Member States to draft those proposals, but it has been possible in practice. It is understood that the Council Secretariat and the Council Legal Service in practice does much of the drafting of these legislative proposals. In one interesting example recently, 15 Member States proposed to amend the Eurojust Decision, but the United Kingdom Government—not being one of those 15 Member States—told the Commons Committee that most Member States did not agree with at least aspects of what they proposed—which is a little unusual—but they just wanted to get an initiative on the table. Another interesting feature is that several times recently Member States or groups of Member States have made proposals precisely quite clearly knowing that they would forestall the Commission making one. The Eurojust initiative is a good example of that. The Commission had long said it was going to make a proposal in July 2008; Member States went ahead and made a proposal of their own in January, as well as proposals on *in absentia* trials and recognition and probation decisions, where the Member States deliberately forestalled a Commission proposal. In at least some of those cases, the Commission has probably already spent money on a consultant's report for the impact assessment that it would be doing. Obviously, if that impact assessment is ever produced and made public, it is now a bit pointless because Member States have already made their proposal without having any chance to consider it.

Q49 ***Chairman:*** Could you get concurrent proposals? Could you get a competing proposal from the Commission in that sort of situation at the moment?

Professor Peers: That is possible, yes. It is possible you could have some concurrent proposals from different Member States. That happened years ago, in the case of Eurojust, when it was first established, but that has not happened since. The Commission shies away from making competing proposals; rather it comments on the Member States' proposals. In a few cases, the Member States have made a few proposals even after the Commission has tabled one. In the case of the Prüm Treaty; that was negotiated between a group of Member States, the Commission then proposed a Framework Decision on the principle of availability of policing information and then Member States just ignored that. What they did instead was to bring the Prüm Treaty, on the initiative of Member States, within the framework of EU law, so the Commission was undercut that way. You can find plenty of examples of the Commission being undercut by the shared right of initiative of Member States. Even though the Treaty of Lisbon would require one quarter of Member States to make a proposal—not any individual Member State—it has frequently been the case recently that you have had a quarter or even a half of Member States making a proposal, so that Member States already have experience of being able to get together and make collective proposals so they may well be thinking about continuing to do that.

Q50 ***Chairman:*** Would you remind us, is that going to be generalised? At the moment the Member States' initiative is in the Third Pillar context; once you have a merging of the Pillars, the right of a quarter of Member States to make a proposal is going to be generalised?

Professor Peers: No, that would still be confined to policing and criminal law. If it were generalised, that would radically change the right of initiative of the Commission. It would still be confined to policing and criminal law. Another interesting feature is that the seven Member States required to make a proposal is very close to the nine Member States which have the right to go ahead on the basis of enhanced co-operation which would be facilitated in policing and criminal law; they could go ahead with it more easily, so that may be a factor also. Seven Member States who wanted to make a proposal would always be aware that they just needed two more to join them and they could go ahead with that measure, usually on an expedited basis as regards enhanced co-operation without needing the Commission and the Parliament, or the other Member States, to agree to it. So, that may be a feature there; the interplay

between the right of initiative and enhanced co-operation. All this shows you what would happen if the Commission more generally had to share its right of initiative with Member States in the formal sense, not just in the informal sense that Member States or the Council can ask for proposals; it would change the institutional dynamics quite profoundly. Even though it is fair to say that the Commission's right of initiative is not that strong even in the Community framework—there are many constraints upon it—certainly it would be possible to weaken it further; if you ever moved towards a system of officially sharing the right of initiative the Commission would be quite dramatically weakened and the evidence clearly shows that.

Q51 ***Lord Lester of Herne Hill:*** My question does not quite fall within the point we are on now, but I wonder if I could just ask this: James Flynn, QC, on behalf of the European Committee of the Bar Council, in paragraph 17 of his evidence to us, points out that Commission departments, especially in the justice field, are understaffed and rarely have common law lawyers within them, much less in all key areas. He suggests that proposals are therefore often drafted by someone with little knowledge of the subject matter, and likely no knowledge at all of the implications for the common law of what they are suggesting. Bearing in mind that only four Member States are common law States anyway, in what we are looking at about initiating legislation, is that a matter which should be of some concern to us?
Professor Peers: The United Kingdom and Ireland, of course, have an opt-out as far as civil law and would have it as regards criminal law, replacing a veto that they have at the moment, as regards criminal law. So, at least for those two common law States, there are ways to avoid a piece of legislation which would have a problem from the point of view of the common law being imposed upon us. It is true to say, yes, that Directorate-General is relatively understaffed and has relatively few people from a common law perspective, although two proposals which the United Kingdom had some concerns about on criminal suspects and the European evidence warrant were drafted by English and Scottish people respectively, and still in the case of criminal suspects, the United Kingdom was entirely unwilling to agree to it, even though by the end of the negotiations on that proposal, it resembled the European Convention on Human Rights, which of course was drafted by British lawyers anyway and has been implemented within our national law. That did not stop the United Kingdom from leading the opposition to the adoption of that proposal. So, not many of the proposals that have been generated, in practice, would lead to huge problems from a common law perspective, either in the case of civil law or criminal law, but that is a possibility in the future, particularly with the clarified competence under the Treaty of Lisbon, as relates to criminal law in particular; proposals of that sort might come forward or the competence to propose a European public prosecutor almost inevitably would cause problems for the common law approach to criminal procedure. Then, again, the right to opt out is there, and the right to veto in that particular case of the public prosecutor is there if we did opt in. So, there are ways in which the United Kingdom and Ireland can protect their position.

Q52 ***Chairman:*** The best way presumably would be to have serious representation within the Commission of the common law.
Professor Peers: Yes, that would be ideal. The Treaty of Lisbon has a particular provision saying that the diversity of national law in the area of criminal justice should be respected when making proposals on criminal procedure in particular. Perhaps one thing that could be considered is that the Commission should have some thought about the way it organises itself and the way it obtains information in the early stages of drafting a proposal and thinking about drafting a proposal, to make sure that those different legal traditions are represented, rather than a couple of people with a Franco-German tradition, etc., making the assumption that their tradition is broadly representative. You would need to have a process put in place at the level of the Commission, making sure that right from the very beginning, the proposal is sensitive to divergences of national legal systems.

Q53 ***Chairman:*** I am not sure how far the Commission's legal department is involved in proposals; I am not aware that it is, on a drafting basis or formulation basis.
Professor Peers: My understanding is that they look at draft proposals and make comments—and I have seen some comments a few times that they have made on draft proposals and communications—but I do not think they have a direct role in drafting; not generally speaking.
Chairman: We are very grateful for your answers to the questions. Unless there is anybody else who wants to ask a pressing question, we ought to allow you to go, with our thanks.

WEDNESDAY 30 APRIL 2008

Present	Blackwell, L	O'Cathain, B
	Bowness, L (in the Chair)	Rosser, L
	Burnett, L	Tomlinson, L
	Jay of Ewelme, L	Wright of Richmond, L

Examination of Witness

Witness: LORD BRITTAN OF SPENNITHORNE, a Member of the House, examined.

Q54 ***Chairman:*** Good afternoon, Lord Brittan. May I welcome you to this meeting of Sub-Committee E, Law and Institutions, for this evidence session on our inquiry into the initiation of European Union legislation. Lord Mance sends his apologies, which is why I am sitting here. I am advised that this session will be recorded and televised. Also, any interests declared by Members of the Committee are available in the register of interests published by the House. Lord Brittan, first of all may I ask you whether there is anything that you would like to say in opening, having seen the call for evidence?
Lord Brittan of Spennithorne: No, I am happy to answer the questions as they come.

Q55 ***Chairman:*** Perhaps I may start. You, with your experience, are very well placed to be able to tell us where the ideas for future legislation are actually generated within the Commission itself. Does the Commission develop these ideas and do you feel that the Commission encourages people who work for the Commission to bring forward ideas for legislation?
Lord Brittan of Spennithorne: The process is diverse; it is not a single process. Of course, in a way like a national government, the Commission has its particular directorates-general whose job it is to be abreast of the subject, and they do that by contact with national governments, with NGOs, with businesses, and with anybody else. Take, for example, the environment. They will be thoroughly appraised of what is going on in the area of the environment generally and will come up with ideas for legislation, which will be considered in the hierarchy, by the Commissioner, and by the Commission itself if necessary. That is one method by which legislation is put forward. However, already from the description I have given of that, it will be apparent that lots of ideas are put forward by Member States. Member States do not hesitate to suggest legislation and, even though the right of initiative is with the Commission, Member States are free to suggest ideas for legislation. The European Parliament is another source for legislation, which will put forward ideas, again which will be considered; and the same goes of course for NGOs, business bodies, or anybody else. As to the degree of openness, having been in Whitehall before going to Brussels—let us put it this way—I would say that the European Commission is at least as open to suggestions for legislation as any Whitehall department is and, in some cases, rather more so.

Q56 ***Lord Tomlinson:*** Arising from that, My Lord Chairman, perhaps I could pursue one small point. Do you think that there is any evidence as to whether or not the Commission is more open to proposals from its own directorates-general than it is to proposals for legislation that might come from Member States, or do you think that they are relatively even-handed about it?
Lord Brittan of Spennithorne: I think it is very difficult, even with the best will in the world and even if you had all the material you could possibly get, to answer that question; because, as I have described the process within the Commission, the ideas may be put forward from the Commission but may have arisen from perhaps quite informal discussion with Member States or NGOs or businesses, or members of the European Parliament. They do not come from thin air. All of those sources lead to proposals. I think that it would be a futile exercise, and I certainly do not know the answers, to try and decide where the most prominent source of ideas is from; but I would suspect that it is from national governments. I would suspect that, but it is purely a guess.

Q57 ***Lord Rosser:*** We did see some information relating to 1998 on the exercise of the Commission's right of initiative, which showed new initiatives from the Commission being simply five per cent of the total number of proposals. Included in the "Others" was "response to an express request from other EU bodies, Member States or economic operators". Could I for a moment be what I am sure you will regard as a bit cynical in asking a question? Bearing in mind the Commission must get all sorts of views being expressed to it from other EU bodies, Member States or economic operators, is it not open to the Commission then simply to wait until somebody expresses a view on action that should be taken that happens to be in line with what the Commission would like to do, and then they can announce that they are pursuing it because they have had a request from another EU body or a Member State?
Lord Brittan of Spennithorne: I do not regard that as cynical at all. I think that, obviously, when the Commission does put forward a proposal, people will say, "Why have you come up with this idea? Where

did it come from?" and they are bound to invoke any institution or body that has supported it. Your figures of 75 per cent, I would venture—

Q58 ***Lord Rosser:*** Five per cent.
Lord Brittan of Spennithorne: I am sorry, five per cent. Whatever the figures are, I would venture to suggest that, for the reasons I gave in answer to the question by Lord Tomlinson, it is a misleading figure.

Q59 ***Lord Rosser:*** They are Commission figures.
Lord Brittan of Spennithorne: It is misleading to give too much weight to it, because when something is proposed by the Commission that means it is not in response to a formal request, but the people who are working in the Commission department are not operating in thin air; they have to get their ideas from somewhere. They do not just sit with a blank piece of paper in front of them and think "What shall we suggest?". I would therefore think that those figures greatly underestimate the impact of other sources than the Commission itself.

Q60 ***Lord Rosser:*** I think that you may have misunderstood the way I put it over. The extent to which proposals came forward that were simply new initiatives from the Commission and did not come as a result of other reasons was only 5 per cent, *i.e.* it was very low; but, equally, there was another category that came as a result, or is described here in these figures as an express request from other bodies. I was simply saying that, obviously, if the Commission had a particular view about the direction in which it wanted to go and did not want to put forward a proposal as a new initiative from itself, it could simply wait until another body came up with the idea that the Commission had and then it could argue that it was pursuing it in response to a proposal from another organisation. It is presumably in the Commission's interest to make it appear at times as though the number of proposals that it pursues that are at its own initiative is as small as possible.
Lord Brittan of Spennithorne: That may be the case. That is pretty speculative. What I am saying is that the Commission puts forward a proposal. It has to take the responsibility. It is at its own initiative that it is doing it, and then it will say who will support it or who has put forward the idea. Whether it would have come up with the idea if somebody had not made the proposal is a pretty abstract question, which I do not think is really capable of an answer. Also, remember of course, as everybody will, that lots and lots of people may have bright ideas in the Commission but they will have some idea of the degree of support that a particular idea will have. Many a time when I was in the Commission people came up with ideas and I said, "It may be a good idea or it may not be a good idea, but we know that it will have no support from among the Member States; so there is no point in putting it forward. You can talk about it and see if you can gather more support, but one of the reasons why I am not prepared, for example, to put the thing forward is because I know that at the moment the degree of support is so limited that we would be wasting our time". I think that one must not underestimate the fact that the Commission is a comparatively small institution. To take, for example, when I was responsible for financial services, the number of people responsible for insurance, say, was very small. I would not allow them to waste their time coming up with ideas, however clever or brilliant they were, if they stood no chance of getting anywhere.

Q61 ***Lord Jay of Ewelme:*** On the same question and to remove what may be a kind of *canard*, sometimes one hears the suggestion that there are people beavering away in the engine room of the Commission who see it as very much the route to advancement to produce some clever proposal, and that that is a sort of motivation. Was that your experience while you were there?
Lord Brittan of Spennithorne: It sounds more like an investment bank than the Commission! No, that was not the case at all. Nobody would score any brownie points for just coming up with lots of silly proposals. You might score brownie points if you came up with a proposal that seemed to make sense and actually got through; but just to come up with lots of clever ideas I do not think would get you very far.

Q62 ***Baroness O'Cathain:*** The second part of the question by Lord Jay was whether the culture of the Commission encouraged officials to generate ideas for legislation. I take it from your answers that it is really reactive. The officials are more in reactive mode than in proactive mode, because some of the other areas that generate these ideas have to be sifted through by the Commission officials. Is that right?
Lord Brittan of Spennithorne: It is certainly the case to say that there are so many people wanting the Commission to do things—whether it is national governments, industry bodies or NGOs—that they are not going to be sitting twiddling their thumbs, unless they come up with brilliant ideas which nobody has ever thought of, and it is extremely unlikely that they would do so. It is an iterative process. Coming up with a formal idea is the end of a long process rather than the beginning. Supposing somebody did think of an idea which he had not been aware that anybody else had thought of, instead of putting it up to the Commission or the directorate-general he would first of all take soundings to see what people thought of it as an idea and also what support it was going to get, and he would probably report back saying, "I have taken soundings and, if

you like it, I think there is a reasonable degree of support for it".

Q63 ***Lord Wright of Richmond:*** Lord Brittan, I do not want to pre-empt later questions about the role of the European Council, but I am interested that you listed three sources of Commission ideas: the Member States, the European Parliament and NGOs. The Bar Council of England and Wales have given us written evidence in which they list nine sources of initiatives for the Commission, the first of which is formal Council meetings. Do you yourself remember initiatives arising out of formal Council meetings?

Lord Brittan of Spennithorne: In the sense of going to a Council meeting and hearing an idea put forward for the first time at such a Council meeting which we then go away with and get going on, no. That would be rare. I could not think of an example, but we are talking about some years back. What is much more likely is that the Member State that is airing it at the Council will have already put it forward to the Commission; the Commission might not yet have decided to accept it and put forward a proposal, and the Member State might very well then seek to gather support for it by raising it, *foro público* as it were, in the Council. That would add more weight to it as far as the Commission's consideration of it. But just to sit and go into the Council and somebody suggesting something for the first time—it might happen but it is not a common source of legislation.

Q64 ***Lord Blackwell:*** I imagine that this process generates more ideas for legislation than can be fitted into each session, and so I wonder if you could talk a little bit about how the Annual Policy Strategy and the Annual Legislative and Work Programme are developed out of this? How are the priorities set? To what extent is there a top-down view of what areas are important? Do you sift them or is it, as sometimes in Whitehall, that every directorate gets its chance to have a bit of legislation and then have a spot on the programme?

Lord Brittan of Spennithorne: I suspect the process is remarkably similar to the Whitehall one. It is a bit of both, in that the Commission, led, if you like, by the President and his team, would have some idea of the broad priorities that they wanted, which would have to be approved of course by the Commission itself—the members of the Commission sitting as such. Then there would be a cull from the departments of what they had come up with; because, again, even the President of the Commission and his team do not operate in a vacuum. There would be an iterative process, which would lead to a plan of action and priorities being put forward to the Commission by those drafting it; and the Commission would then have to consider it and decide whether those are the priorities that it wishes to put forward, or whether it wishes to vary them. It might say, "Yes, but we don't like item no.5" or "We think that item no.5 ought to be item no.16" or vice versa. I think that is the way it would work. Can I say in answer to the previous question, developing it further, that in terms of the number of sources I was not seeking to be exhaustive at all. As far as the European Council is concerned, I counted that as being part of the Member States, because that of course is what it is.

Q65 ***Lord Blackwell:*** Just to press you a little more on this annual programme—and there are, as we know, a lot of Commissioners—presumably it must be something of a brownie point for a Commissioner to have an important piece of legislation going through. Putting it the other way round, a Commissioner would feel a bit empty if they spent their period of time there without a single piece of legislation; so is there not an element of jockeying, to make sure that everyone—

Lord Brittan of Spennithorne: It depends what your portfolio is. Of the two that I mainly did, when I was Competition Commissioner we did not normally put forward legislative proposals at all—hardly ever. There were very few of those, because the job was to look at state aids, mergers, cartels and so on, and rule on them in most cases. We were not concerned with legislation very much, therefore.[1] Similarly, in the area of foreign trade, when one was negotiating, I spent my time trying to get an appropriate mandate from the Council of Ministers to conduct a particular negotiation, or conduct the negotiations and try to get Member States to approve the outcome if we got an outcome—not seeking legislation. Certainly, anyone in the competition or foreign trade areas would think it daft to be judged by the number of legislative proposals they put forward. On the other hand, in some of the other areas where legislation is more to the fore, I suppose people would think that if they did not come up with anything, people would think that they had not done very well. However, it is the job of the Commissioner to do the sifting and then of the Commission as a whole to exercise the priorities and also to decide. While I was there, for example, during the course of the period I was there, at the beginning lots of legislation was put forward but, towards the end—and I was there for nearly 11 years—there was a very conscious decision that there should be much less legislation.

Q66 ***Lord Blackwell:*** If you looked back at the end of each year, were you generally satisfied that the right priorities had been promoted?

[1] *Note by witness:* With the major exception of the Merger Regulation which had been under discussions for years and was finally agreed at the end of my first year as Competition Commissioner.

Lord Brittan of Spennithorne: I could not guarantee that that was so. I had my personal prejudices and they were sometimes met and sometimes were not. Like anything, I was satisfied that the process was a reasonable one.

Q67 ***Lord Blackwell:*** It was a rational process.
Lord Brittan of Spennithorne: It was a rational process but I did not always get my way.

Q68 ***Lord Jay of Ewelme:*** I want to ask a question to follow up what you were saying about stakeholder relations. I suppose there are two sorts of these. There are the lobbyists, who are always getting at the Commission to push their own point of view, and there is the consultation which the Commission will want to do, I imagine, in its own right. Could you say something about the balance between those who get at the Commission and those whom the Commission wants genuinely to consult, and if you felt that balance was right? Also, if you thought that this process of consultation or lobbying on the whole genuinely improved the quality of legislation, or to some extent distorted it?
Lord Brittan of Spennithorne: I think that the lobbyists have a hard time on the whole; I think they have a hard time in any administration or process like the Commission, because they so obviously have an axe to grind. You immediately start off by feeling, "Well, they would say that, wouldn't they?" and so they have to work harder to prove a point and be persuasive. In my experience, much more weight is given to consultees. When you have something which you want to put up and you really want to know "Is this going to run or is it not going to run?", you are more likely to be influenced by the arguments put forward. Also, even if you are not actually persuaded by the arguments and all the world and his wife say that they do not like it—and, however much you explain it, they still do not like it—there is not much point in proceeding further.

Q69 ***Lord Jay of Ewelme:*** So a clever lobbyist would wait to be consulted?
Lord Brittan of Spennithorne: No, I think that a clever lobbyist would feel that he was not doing his job unless he put his oar in first. He could not be sure that he was going to be consulted or that there would be anything on which he was going to be consulted, so he could not risk that. However, I think he would realise that the consultation process was likely to be more fruitful than just the lobbying. Although sometimes, of course, particularly if it is something very technical—in telecommunications or something—I literally would not have a clue what to do, but people who were in the business and knew about it would put forward proposals which one had to try and understand and take a view on, and judge the extent to which they were self-interested and the extent to which they were in the general interest.

Q70 ***Lord Jay of Ewelme:*** One final question on consultation. Would it be the case that there would be a pretty formal process of consultation on every Commission proposal, do you think?
Lord Brittan of Spennithorne: I cannot think of any where there was not. Unless—and I could just about imagine it—say, within the Council there was an overwhelming request for something that was really urgent and that had to have legislation, then I could imagine that there might just be, not a formal consultative process, or a very abbreviated and simplified one.

Q71 ***Lord Tomlinson:*** I want to pursue this question about stakeholder consultation because, with a body like the European Commission, you have an enormous number of stakeholders. I want to ask you a question about one experience I had during the Convention on the Future of Europe, where the Commission in particular wanted the Convention to consult civil society. NGOs were invited and they responded by the thousand and, in order to make it manageable consultation, they decided to consult only NGOs that operated at a European level. We wound up consulting only the NGOs that received a subvention from the European Commission. Is there not a danger in this sort of process, where there are so many who want to be consulted that you consult those who organise at the European level and, in the case of bodies like NGOs, they are actually the recipients of your—I do not say it derogatorily, but they are in fact the recipients of your largesse?
Lord Brittan of Spennithorne: I cannot say how common an experience that is; all I can say is that if that happened and I was aware of it, and I was the responsible Commissioner, I would be profoundly unhappy about that outcome.
Lord Tomlinson: As I was, but to ill effect in the Convention.

Q72 ***Lord Burnett:*** This follows on the point made by Lord Tomlinson. It is tangential perhaps but nevertheless interesting. Lobbyists are important people but they are very powerful sometimes. What rules of conduct are there in the EU in respect of EU officials like Commissioners and so forth, who have enormous powers, in restraining the activities of lobbyists and in restraint of the processes and their activities—and perhaps the inducements they could offer?
Lord Brittan of Spennithorne: I think that I am a little bit out of date on that, because there have been important developments since I left the Commission, which was after all at the end of 1999. There were obviously rules then relating to transparency and

relating to preventing corruption, at the very worst. They were perfectly sound rules but they were fairly simple ones. I understand that since then it has been extended and formalised very much more, obviously in the direction of transparency and everybody knowing who the people are who are making the lobbying efforts, everybody else being allowed to know that they are doing it; and obviously to avoid any kind of impropriety—but I could not give you details of that.

Q73 ***Lord Burnett:*** The next question is provoked by the Law Society, who believe that, in the absence of more co-ordinated thinking in the Commission, matters such as the preparation of legislation are developed in what they describe as "policy silos" and that there is not enough co-ordinated activity in the preparation of policy and legislation.
Lord Brittan of Spennithorne: We are talking about the preparation of policy, not the technicalities of the legislation.

Q74 ***Lord Burnett:*** Correct.
Lord Brittan of Spennithorne: It is always easy to talk about joined-up government, and we know that that has become a mantra in certain quarters in this country. I am not always sure what it means. Who is to do the co-ordination? If it means that there should be a central power in the institution which has greater control, I am not sure that I would be terribly happy about that. If it means that there should be a coherence of the programme and that we should not be putting forward mutually inconsistent things, then I would agree with that very much. I am therefore open to the idea that there should be more co-ordination, but I would be chary of buying it just like that, without knowing what the people who want more co-ordination would actually like to see happen. I can see at least as many dangers as benefits in things that could be done in the name of co-ordination, *i.e.* centralised diktat.

Q75 ***Lord Burnett:*** And as regards legislation? What about the co-ordination of legislation after the policy?
Lord Brittan of Spennithorne: The preparation, which is the technical side which perhaps the Law Society might be concerned about, obviously is done largely by the legal people, and I think is done quite well. In my experience, it is done quite well. Usually, when legislation is subsequently found to be bad—in the sense that there is ambiguity of an unnecessary or unacceptable kind—it has usually come about because of compromises forced on the Commission in the course of going through the Council, when, in order to get the necessary degree of support, you may be tempted to accept *this* proposal for an amendment and *that* proposal for an amendment, and then the thing starts losing coherence, or becomes excessively bulky. That is where the defects, in the technical sense, of the legislation come about.

Q76 ***Lord Burnett:*** Are there sufficient members of staff in the EU or is there an abundance of them, and do they consult widely among national professional bodies, for example?
Lord Brittan of Spennithorne: Yes. I certainly would not be in favour of increasing the size of the Commission; I think that it is quite big enough. On the other hand, as a commonplace, it is really very small compared with the size of a national administration. It is a thin red line. When I was Home Secretary here, I did not conceal it but people were pretty astonished at how few people there were dealing with important matters; and I suspect that is true of most administrations anywhere. Can I give you a very vivid example? When I was first a Commissioner I was dealing with financial services and we were trying to get through the Investment Services Directive, which was meant to produce a single passport for investment services. We were completely stuck. We were stuck because, essentially, of British-led suspicions on the one hand and French-led suspicions in the opposite direction. I eventually said, "Let's send out a sort of grid, which says 'What is it that you want us to do and what is it that you are afraid of in its present form that it might do?'." We got the responses from the Member States and we were able to make changes which, hopefully, would achieve the objectives that people wanted—the common objectives—and would allay the fears of those who were worried about 'X' or were worried about the opposite of 'X'. The result was that the directive was four times as long as the original draft, and I am not sure that it was any better. It did not do the trick and has had to be supplemented since. That is the kind of thing that can happen, therefore.

Q77 ***Lord Wright of Richmond:*** Lord Brittan, can you tell us what role the College of Commissioners plays in both the initiation and development of EU proposals?
Lord Brittan of Spennithorne: The College of Commissioners typically might have—and of course it will vary from President to President as to the way he organises it—an initial debate early in the stage of the process as to what the priorities are, where people would in very general terms say they should be. They would come up with their own, if you like, pet ideas; then it would be up to the President and his team to try and weld those into what they thought was a coherent and acceptable package, work it up, and then come up with the finished goods to the College of Commissioners, who would accept it, further amend it, or whatever. That, very roughly, is the process.

Q78 ***Lord Blackwell:*** As the Commission and the College of Commissioners look at these proposals, is there any formal challenge built into the system around proportionality and subsidiarity? In other words, is there any group or body in the Commission that takes these proposals and says, "Hang on, this sounds a very good idea and we'd love to do it but, for the following reasons, it offends . . . "?
Lord Brittan of Spennithorne: In my early days it was not very formalised and I had to say, for example, "This is a bit of a sledgehammer to crack a nut"—in the hope that the translators would be able to translate that expression into the various languages—or "Isn't this overdoing it?" or "Does it need to be done at European level?" or whatever.

Q79 ***Lord Blackwell:*** You would issue that challenge as a Commissioner?
Lord Brittan of Spennithorne: Yes. Every Commissioner had to decide to what extent he wished to raise issues of proportionality or subsidiarity with any given proposal. As time went on and the ideas became more prevalent, the thing was more formalised and there was a formal system whereby a view had to be expressed on that. It had to be considered before it was put forward and a view expressed on it, and then the College of Commissioners would have to decide whether they agreed it. Obviously, there would be proposals which the directorate-general itself would have to concede were disproportionate or did not need to be done Europe-wide, and would never get beyond first base.

Q80 ***Lord Blackwell:*** Was that seen as a serious challenge, a serious scrutiny, or was it effectively just a tick-box on the front of the legislation that says—
Lord Brittan of Spennithorne: I would say that, as time went on, it got more and more serious. It had to be formalised but, as you say, if it is formalised it could just be a box-ticking thing. Then it depended very much on the individual people concerned, how seriously they took it; because these considerations are inherently not quantifiable; they are judgemental and to an extent subjective, and so it very much depended on, if you like, the political philosophy of the individual Commissioners. However, I would say that generally these considerations increased in the degree of real seriousness with which they were applied during my time with the Commission.

Q81 ***Lord Burnett:*** This is just a quick supplementary on the sifting process. Do the Commission consider the divergences and the levels of implementation of legislation, if and when they are considering it? Some states might find implementation very expensive or very difficult. I recall when milk quotas came in, we implemented the regulations pretty quickly in the early 1980s, and I am not sure whether the Italians have yet to implement the milk quota regime. That is just one example. Do these things get considered?
Lord Brittan of Spennithorne: Yes, it would be quite a common and wholly relevant consideration to say, "Look, it's a lovely idea but it's fantastically bureaucratic. It would require enormous numbers of people and enormous expenditure. Very few states could or would do it properly", and therefore we would not propose it at all. That was not uncommon. People would give their experience from different countries. Just as people, quite legitimately, without taking instructions from national governments, would say that there might be a particular proposal which would have disproportionate benefit for their country, as well as others which might have a disproportionate disadvantage. Those kinds of discussions, both as to the practicalities and as to the positive merits, would absolutely take place.

Q82 ***Baroness O'Cathain:*** I am going into the process area now. How influential are the other institutions other than the Commission? In your answer to the first question you said that there were three main areas: lobbying the Commission, then the Member States and then the European Parliament. Was that in an order of importance? In other words, do you think that the European Parliament has a large role to play in the initiation or development of legislation?
Lord Brittan of Spennithorne: I will not say that mine was an ill-considered answer, but it was not meant to be in order of importance; still less was it exclusive because, since then, questioners have mentioned lots of other sources, which I would readily concede are at least as important. As to the European Parliament, the important point to make is this. Just as its legislative role increased over the period that I was there and has increased a lot since then, similarly its role in every other sense increased. The extent to which ideas coming from the European Parliament, even if not part of a formal legislative process, would have an impact on the Commission in considering the matters put forward as proposals has certainly increased.

Q83 ***Baroness O'Cathain:*** The next part of the question is how far do the conclusions of meetings of the European Council set the agenda for the legislative proposals? Has the European Council's emerging role as a high-level decision-maker weakened the Commission's role?
Lord Brittan of Spennithorne: The short answer is I think that the European Council has had an increasingly important role, as is reflected by the fact that it is only now becoming a European Union institution. It was quite an informal thing. It is difficult to quantify, but I would say that over the

period I was there that role increased and, since then, it has increased still more. Frankly, at the very beginning of the period when I went there in 1989, more important than the European Council was the meeting between the French and German heads of government who would get together and concoct something. That was very, very powerful. That became less and less powerful, I am glad to say—exercising the freedom that I now have to say things like that—and the European Council became more influential in that respect.

Q84 ***Baroness O'Cathain:*** Was that in direct relationship to the enlargement?
Lord Brittan of Spennithorne: I think that happened before enlargement even, yes. I think that it certainly happened before enlargement.

Q85 ***Lord Rosser:*** May I pursue the question that is being asked, and I am probably putting this in a very simplistic way? If I am an organisation, a lobby group, that wants to see proposals initiated and become legislation in a particular area, let us say transport or something like that, and I am therefore faced with the European Council, the Commission and the Parliament, which of those three is the key one to get on board? Who should I go to first? Is one more influential than the other? Is it imperative to get the support of the Commission? Is it imperative to get the support of the Parliament primarily? Is it imperative to get the support of the Council? In other words, which has more influence than the others in actually determining whether one would be successful?
Lord Brittan of Spennithorne: There is not a single answer to that, because it would depend on what the proposal is. It would depend on its degree of novelty, and so on. If you have something which really no one has thought about at all, the question is how controversial it is as well. I have had to deal with this in a practical sense because, since leaving the Commission, I have had innumerable people coming up to me and saying, "I want this. Who should I go to?"—to which my response is, "If you can afford it, go to everybody. If it is that important to you and you have got the money, go to everybody". If they say, "We don't have the money" or "We don't wish to spend that amount of money. Which should we focus on?" I would then have to ask them, "What is this proposal?" and the answer would vary according to how novel it was and how controversial it was. I think that in most cases I would say, "Go to the Commission first". However, I would also say, "For God's sake, even if you are a frightfully important person and the head of an enormous company, don't say, 'I want to see *the* Commissioner. Start by talking to much more junior levels; try to enlist their support, find out what they think about it, and then work your way up". However, it would depend very much on what the proposal was.

Q86 ***Lord Tomlinson:*** I would like to pursue the role of the European Council, not in the formal legislative process but the process that distorted somewhat the other process of decision-making. As somebody who believes that the European budget is a legislative act, I can recall a number of times when the European Council came to informal agreement that on some occasions was little short of lunatic. For example, I can remember when there was pressure from President Mitterand to get an agreement to 50 million ecu being placed in the budget to underpin democratic forces in Algeria. By the time the process had happened, the undemocratic forces that President Mitterand was seeking to overcome were in fact in power. You then had to determine how to prevent them becoming the recipients of the 50 million. You can find other examples like that. Was that a big problem in the Commission?
Lord Brittan of Spennithorne: Folly does not have a unique source. That kind of thing could happen. After all, let us face it, we are talking about a political process and sometimes you have to accommodate folly in order to achieve the larger objective of something which is very important. Dare I say it to Lord Tomlinson specifically, it was not unknown for the European Parliament to make a condition of their acceptance of something the inclusion of a penny-pocket of something that met somebody's pet interest. Sometimes one had to gulp and, in the interests of the larger whole, say, "Okay, we will spend 10 million on supporting *pelota*" or whatever it might be.
Lord Tomlinson: Beekeepers!

Q87 ***Lord Jay of Ewelme:*** I want to ask a question about the relationship between the sources of legislation and the quality of legislation. We have heard that legislation may come forward from within the Commission; it may come forward or be initiated by a Member State; it may be initiated in some instances by the Parliament. Do you think that the nature of the proposal, or the quality of the final proposal that then emerges and goes to the Council, is any different if it comes from within the Commission or comes from a Member State or comes from the Parliament, or does the process inside the Commission ensure that there is enough quality control and what comes out at the end is in all respects satisfactory?
Lord Brittan of Spennithorne: I would say the latter. By the time the proposal is actually put forward it will have gone through the internal procedures, principally the legal service obviously, and the draughtsmen and so on. I do not think you could, if you were looking at it as a technician and looking at

the quality of the legislation, jog back and say, "That obviously comes from 'X', because it is better than that". I do not think that you could do that.

Q88 ***Chairman:*** The Work Programme drawn up by each presidency—what involvement does the Commission have with that, albeit informally? What effect does it have on the legislative programme?
Lord Brittan of Spennithorne: I think quite a lot. It would vary from country to country, but in most cases, again, there would be a lot of discussion between the Commission and the Member State concerned about that. They did not have to listen to the Commission but they would know that, particularly if it was a question of legislation where the Commission *had* the unique right of initiative, there was not much point in coming up with a programme which would not get through the Member States and would not be accepted by the Commission; so there is quite a lot of discussion.

Q89 ***Baroness O'Cathain:*** I know that this is in the area of speculation but, in view of the changes which are proposed in the Treaty of Lisbon, the fact that the presidency will be semi-permanent for a period of time, how will that affect the ability of Member States to get their bit through—knowing that they do not have a president for the next 20 years or so?
Lord Brittan of Spennithorne: I do not think that it will make it any worse. If they had to rely on the presidency and they had a presidency only every 20 years, their chances would not be very high; so they might be better off having a presidency which is not, as it were, the representative of another country but is in some sense meant to be acting in the common interest and is, to that extent, more professional. I do not think the Member States would be any worse off.

Q90 ***Lord Tomlinson:*** In the question before last Lord Brittan referred to the Commission's sole right of initiative. That triggered a question in my mind. In the light of what you have told us and how amenable the Commission is to all the pressures to which it is subjected, do you think that that sole right of initiative, for which the Commission fights so hard, is a useful formulation of words for the Commission to cling to?
Lord Brittan of Spennithorne: I can quite see that it might irritate people who resent it or do not like it, but it is a correct statement of the legal position.

Q91 ***Lord Tomlinson:*** The sole right of presenters or proposers of legislation, but the idea that it is the sole source—a single source?
Lord Brittan of Spennithorne: I do not think that anybody has ever said that it is the sole source.

Q92 ***Lord Tomlinson:*** They have not said it but it is the impression that so many Eurosceptics, who want to castigate the Commission as being this bureaucratic, unelected group—
Lord Brittan of Spennithorne: I think that Lord Tomlinson has a greater faith in the rationality of the Eurosceptics than I have, in the sense that I do not believe that, if you substituted for the phrase "sole right of initiative" some milder phrase or, if you like, more accurate phrase, that would dampen the ardour of the Eurosceptics who wish to criticise the Commission and all its works. If it would, that would be a cheap price to pay; but I fear that I could not be as optimistic as that.

Q93 ***Lord Jay of Ewelme:*** It is the sole right of proposal, is it not?
Lord Brittan of Spennithorne: Yes.

Q94 ***Lord Jay of Ewelme:*** Only the Commission can propose but actually others can initiate.
Lord Brittan of Spennithorne: Yes.

Q95 ***Chairman:*** Do you consider it to be a good thing that that formal position is maintained?
Lord Brittan of Spennithorne: Yes. I think that does raise a very fundamental question about the nature of the European Union. I will start by giving a straight answer, because I think the Committee is entitled to one. I do favour a continuation of that. I think that you have to look back historically. The whole thing is a great bargain of some genius, initiated by the founders of the European Union, in the sense that they did not want to create a federation—or maybe they did but they knew that that was premature and would not ever get support. (It would have been easy to have devised institutions of a more federal character). On the other hand, they wanted to have continuity and momentum, so the ingenious idea was to create a body which was not a government, in the sense that it could command a majority or could get its way through, was elected, but which would have continuity and give that body the unique right of proposal—which is a more accurate way of putting it—but leaving it to the Member States to decide whether or not to accept the proposals. In a sense, it was an anti-federal balance, reflecting the Member States' primacy while, at the same time, creating an engine which would push things forward. I do not think that anything has happened since then which means that that fundamental balance is the wrong one. To move away from that would mean either inertia or moving more in a federal direction, which I personally do not happen to favour and which would be contrary to the temper of the times.
Chairman: Lord Tomlinson, did you want anything else on your question?

Q96 ***Lord Tomlinson:*** No, it was really asking Lord Brittan to reflect on whether the position has been static or whether it has changed much over the years. For example, between the mid-1980s and the work to complete the Single European Act, has the position changed much, or do you see it changing or evolving? I think that you have partly answered it in relation to the increased role of the European Council. Do you have anything else to add on that?
Lord Brittan of Spennithorne: I think that the basic structure remains the same and, as I have said in answer to the last question, I am in favour of that balance remaining; but the sources of the proposals which the Commission uniquely has to put forward have widened and deepened—if I can use that expression as well—and that is a good thing.

Q97 ***Lord Rosser:*** You were speaking earlier about the role of the Commission, in that it was no good putting forward proposals that would not be accepted; there was a lot of consultation and discussion that went on. Has the Commission in reality, over the years, moved rather closer to being a civil service? It may have the right to propose but, in reality, it is only putting forward what it knows, almost in advance, will prove to be acceptable.
Lord Brittan of Spennithorne: I think that is not right, because very often the Commission, because of its continuity and having a five-year spell, and because it cannot be sacked—short of grave crisis—can persist with things which at first have very little support. Take, for example, the liberalisation of telecommunications. I remember going forward with ideas of that kind. To start with, I thought that we would have a dinner, in Luxembourg as it happened, of ministers. Only three ministers turned up and the rest of the countries sent either permanent secretaries or, worse still, directors-general of telecommunications, out of politeness. One had no traction at all, if I can put it that way. If you had just said, "Does this fly?" the answer is, "It does not fly". Although this was extremely disappointing, it was not astonishing and one knew that that was roughly where things were—but you start. Then the Commission has various instruments which it can apply, as well as those of persuasion—most particularly, for example, the use of competition policy—as a way of levering things, which is exactly what we did do, or the threat of its use. You would never have guessed from that meeting, or from the analysis which you had to give before the meeting took place, that within a very short time there would be a degree of liberalisation of telecommunications that went far in excess of what the Commission would have actually put forward if it had put forward a proposal at that particular time—so there is hope.

Q98 ***Lord Burnett:*** We are carrying out our current inquiry on the initiation of EU legislation. Do you think that we or another body might be wise, as the next logical step, to look into the different levels of how that legislation is implemented in the different nation states?
Lord Brittan of Spennithorne: It is not for me to suggest the programme, but I think the answer is that if you think you can get realistic answers, it would be interesting. I think it would be a formidable task, but good luck!

Q99 ***Chairman:*** Thank you, Lord Brittan. Is there anything you want to say to us before we conclude?
Lord Brittan of Spennithorne: I wanted to have the opportunity of making the broad point about the right of initiative or right of proposal but that arose, as I suspected it would do. Otherwise, I feel that the field has been covered to the best of my ability.
Chairman: Thank you very much indeed.

WEDNESDAY 30 APRIL 2008

Present:	Blackwell, L	O'Cathain, B
	Bowness, L (in the Chair)	Rosser, L
	Burnett, L	Tomlinson, L
	Jay of Ewelme, L	Wright of Richmond, L

Examination of Witness

Witness: LORD KINNOCK, a Member of the House, examined.

Q100 ***Chairman:*** Lord Kinnock, thank you very much for coming to this meeting of the Law and Institutions Sub-Committee. As you know, we are carrying out an inquiry into the initiation of EU legislation. This is a broadcast session and, as I said at the beginning of the last evidence session, all members' interests are as set out in the register of interests. Is there anything that you want to say to us in opening, or are you content that we go to questions?

Lord Kinnock: I am grateful for that opportunity, simply because, if I make a very short statement at the beginning, it could abbreviate proceedings without actually losing anything. Regarding the generation of future legislation, I thought it worthwhile to go back to what, as far as I know, is the only real study undertaken about the origin of Commission work, both legislative and non-legislative. That material appeared in a report produced by the Santer cabinet back in 1998. I have no reason to believe that there are substantial differences now, although I did urge at various times in the Prodi Commission that the figures should be updated, simply as a matter of public information. The paper appeared as a Commission report to the European Council in 1998 under the heading *Better Lawmaking*. The percentages given relating to the origination of Commission work are obviously approximate to within one or two per cent. The origins of Commission proposals are, first, in response to international agreements. The proposals are either for enacting arrangements between the Community and third countries or for enacting the Community's international commitments for implementation within the Union. That accounted in 1987–88—probably about the same now—for 35 per cent of the policy output of the Commission. Secondly, another major area of activity is the amendment of existing Community law to update and also to take account of any significant scientific or economic innovations or new data. That accounts for 25 to 30 per cent of the legislative and policy output. A further 20 per cent is accounted for by proposals for legislation presented to the Commission at the express request of other Community institutions, notably the Council and also, increasingly, the Parliament—I would be happy to go into greater detail on that later on—or express requests from Member States, individually or collectively, or from economic operators, which are also requests that are frequently science or technology-based. Another part of that 20 per cent component is taken up by responses to requests to take new initiatives which come from the Parliament or the Council, in particular exercising their statutory powers: in the case of the Parliament under what used to be Article 192 of the Treaty and, in the case of the Council, what used to be Article 208 of the Treaty and which, in the Lisbon Treaty, become respectively Articles 225 and 241. You see that I have not lost my bureaucratic habits quite yet! A final around 10 per cent of output is proposals for legislation from the Commission that are either required by the Treaty and required by secondary legislation—for instance, the annual fixing of agricultural prices or the adoption of multi-annual expenditure on research programmes—or initiatives which the Commission considers to be in the interests of the Union and will almost invariably follow Green and White Papers and impact assessments, and will be very thoroughly prepared. The point to make, therefore, is that in terms of the origins of Commission legislative activity only a minor proportion—indeed, in some years you could call it a minuscule proportion—of total output relates to pure Commission original initiative; the rest is responsive and directly in the service mainly of other institutions but also a wider spectrum of interests within the European Union or internationally.

Q101 ***Chairman:*** A minor point arising from that, is this. Do you believe that the culture of the Commission encourages those who work for it to bring forward ideas for legislation? How does the Commission develop those ideas or any other ideas that have come from the various sources?

Lord Kinnock: The development of ideas—if I can deal with that first—comes with the assistance, or sometimes at the prompting, of a wide network of contacts that from time to time centre themselves on the Commission. They can include the Permanent Representations, the ministers in Council, the expert groups and committees of various kinds, the Parliament and its committees, lobbyists occasionally, NGO networks and, very substantially, professional and recognised business interests and academic bodies. They will prompt and subsequently assist in the refinement and development of proposals.

Chairman: We will have to suspend the Committee at this point.

The Committee suspended from 5.25 pm to 5.32 pm for a division in the House

Q102 ***Chairman:*** Could you continue, Lord Kinnock?

Lord Kinnock: I was going to say in answer to the second part of your question—before we were rudely interrupted!—that the degree to which members of staff, or at least the policy grade of the European Commission, are encouraged to come up with bright ideas and try to pursue those ideas to the point of legislation varies from directorate-general to directorate-general. I can give you instances from what was my own Directorate-General of Transport in the late 1990s, where one very big initiative was taken because an expert and enthusiast in the directorate-general came up with an idea for what became the PACT programme—Project Action for Combined Transport—to facilitate movement of freight from road to rail. From his point of conception, which occurred before I got to the Commission, it took us another three years to get it adopted, and it has proved to be an immensely helpful way of trying to secure what, in the jargon, was called modal shift. The Committee may be even more interested in an initiative that was embarked upon by Claude Chêne, who is now the Director-General in Administration for the Commission. When he was a much more junior member of staff, he noticed people getting bumped off a full aeroplane despite the fact that they had tickets which were perfectly in order. Because the plane was overbooked they were denied boarding. Back in 1994, Claude started to draft legislation, which I pursued throughout my time as a Commissioner and which, eventually, was enacted by the first Council attended by my successor in 2000—Loyola de Palacio, who became the Transport Commissioner after me. In total, therefore, conception to EU law took about six years; but on the wall of every airport in the European Union now you will see a notice giving the definition of passenger rights. It includes mandatory compensation by airlines for anybody bumped from an aircraft. In that directorate-general, therefore, under the leadership of Sir Robert Coleman—he was not a knight at the time—people were encouraged to come up with good ideas, as long as practical and as long as they did not involve any money, or very little money. We pursued several of them, and they are just two examples.

Q103 ***Lord Tomlinson:*** Lord Kinnock, how helpful do you think it is to describe what you have described to us as being a Commission's sole right of initiative? There is perhaps a Commission sole right to introduce legislative proposals, but the "sole right of initiative" is not a very good description and is very often used to heap criticism upon the Commission. Do you think that it is a help or a hindrance to use that phrase?

Lord Kinnock: I think it is conceivable that the original use of the French term misleads more than it informs: first of all because that right of initiative in the First Pillar stops the moment a policy is produced or legislation is drafted. It then becomes, not the property of, but certainly the focus of the legislatures. The right of initiative only lasts that long, therefore. In any case, and increasingly in the last 20 years—but I would say particularly in the last ten years—the Commission welcomes the engagement of other parties, including other institutions, in the inauguration and development, often in great detail, of policy. It would therefore be useful to find an alternative term, but summing it up in a single word would be difficult. What the Commission has is the monopoly right of pulling things together, trying to present them in a coherent form, initially consulting exhaustively about them, and then eventually putting them in the form either of a policy draft or into draft legislation, which then quite rightly can be kicked around by Council and the Parliament—the democratic bodies—until eventually it may emerge, with the blessing of successive presidencies, as the legislation of the European Union. It would be very good to have a single term that more accurately reflected the right that is necessarily and generally exerted, rather than giving the impression that there is this great spider at the centre of the EU cobweb with the monopoly of doing everything—which of course is very far from the truth.

Q104 ***Lord Jay of Ewelme:*** I want to go back for a moment to the statistics, Lord Kinnock, if I may. I wondered where in that categorisation would come the proposals which came forward under the Single Market programme. They are presumably not the pure Commission proposal ones.

Lord Kinnock: No, they are certainly not pure Commission proposals, but they take a variety of forms. For instance, in the area I knew best in specialist terms, transport, much of the legislation that I was able to advocate, and often secure, between 1995 and 2000 was implementation of Single Market practices and measures in respect of road freight, rail freight, aviation, maritime transport, whatever. Consequently, therefore, those activities would—and I can provide the paper with the definitions by the Santer Commission—fall into updating of established legislation or measures to enable the implementation of the existing body of law.

Q105 ***Lord Jay of Ewelme:*** What I am trying to get at is that there are certain proposals which really do emerge from the Commission itself.

Lord Kinnock: Yes.

Q106 ***Lord Jay of Ewelme:*** There are others which emerge as a broad framework, which means that the Commission says, "We need a proposal on this, that and the other" but the Commission will still have a great deal of authority in deciding exactly what sort of proposal to come forward, when it should come forward. There is therefore quite a lot of, as it were, Commission initiative even in some of them which are not in the full 10 per cent.
Lord Kinnock: Yes, that is certainly the case. However, in the presentation of legal proposals—as in sport and politics more widely—timing is all. An ill-judged proposal, either in terms of its quality, in terms of its refinement or in terms of its timing, will probably find its way into the sand, if not into dust itself, as efforts are made to pursue the legislative process. The Commission therefore understands that it is vital to exercise thoroughness and care in discharging this duty and right of making initial proposals.

Q107 ***Lord Burnett:*** During the sifting process—it is a question I asked of Lord Brittan—is there consideration given to the divergences of the quality of implementation in different countries? Some Member States will not be able to afford to do things; some Member States might find it difficult or impossible to implement them. I gave the example of dairy quotas, which you may remember, which came in in the early 1980s. We introduced them and it was done thoroughly and efficiently—very thoroughly and very efficiently—whereas I do not believe that they are yet introduced in Italy. I may be wrong, but they certainly were not for the first 15 or 20 years anyway.
Lord Kinnock: It is quite possible that they have not been implemented in Italy, and maybe some other states that were Member States at the time. There is unevenness about both the implementation of laws, to which every Member State has agreed, and also the transposition of laws, to which every Member State has agreed. We have figures for transposition, and it would be worth the Committee referring to the latest figures because, while the greatest offenders, the feeblest transposers as it were, are still Italy and France, the British record is not as good as I assumed it would be. It is fairly good but it is no better than average. I was suffering from the delusion for many years that while we fastidiously transposed, it was others that did not; and, of course, in the popular press there is still a momentum behind that illusion. It is worth having a look at those figures. Unfortunately, there are not comparably dependable figures—league tables, if you like—for the actual implementation; because even where the law has been transposed, even where the means of implementing the law has been set up, it can be implemented with diverse standards of energy and enthusiasm. Short of having some kind of European Commission inspectorate to charge round the Member States, seeing how well laws are implemented, it is difficult to see how sovereign democracies can be subject to assertiveness, unless the failure to implement is so gross as evidently to fall foul of the law, and then produce proceedings in the European Court of Justice—which, of course, occasionally, and quite rightly, does occur.

Q108 ***Lord Rosser:*** We always seem to be in the situation of the Commission—and you have referred to the figures—perhaps seeking to tell everybody that maybe it does not have as much influence as they think. On the other hand, certainly in at least one document I have seen, an interpretation I would put on it from a member of the European Parliament seemed to say how much influence they have nowadays, and the European Parliament is a very interesting scenario to be in. What would your reaction be to this view: that since information is power and since surely the Commission has more information on things from a Europe-wide perspective than either the European Parliament, the European Council, or any individual Member State—bearing in mind it also has the right of initiation of legislation or proposals—does that not mean, in reality as opposed to theory, that it is more influential than either the Council or the Parliament?
Lord Kinnock: It is in certain circumstances rightly influential, but that rarely derives from the stock of information available to the Commission—mainly because the Commission is a cornucopia of information and produces it readily and spontaneously in most respects. Where it does not, the Commission is subject to the questioning of the permanent representations, of Council and particularly, increasingly and unerringly, the Parliament. Even if the Commission is reluctant to disclose information that could be of real influence on the quality, quantity or effectiveness of proposals, including legislative proposals, it knows very well that it will not get away with it for long, and the offer of information might as well be readily undertaken from the outset. I therefore do not think that it would be possible to demonstrate the cunning deployment of superior stocks of information in order to exert influence. That is not how it works.

Q109 ***Lord Blackwell:*** Whether one describes it as right of initiation or right of proposal or presentation, the Commission at the end of the day is the body that, out of all these proposals, puts together the Annual Legislative Programme.
Lord Kinnock: Yes, but with some codicils there—especially now. I will come back to it.

Q110 ***Lord Blackwell:*** Could you describe how that process works? There must be more proposals than there is legislative time or capacity. How does the Commission go about deciding what is in the annual programme?

Lord Kinnock: First of all, the decision process means setting out the Annual Policy Strategy, which was a reform we introduced in the Prodi Commission. People working with me were substantially responsible for compiling it and putting it forward. The proposal was easily adopted. It means that not only does the Commission have the obligation to be economical with time and proposals for resources in the compilation of that Strategy, but the Commission also submits it to the Parliament and the Council. Even after that Strategy is adopted by the Commission, therefore, it is subject to thorough examination. Secondly, it is important to see that when the Commission adopts not just the APS, the Annual Policy Strategy, but also the Work Programme, it intentionally ties in with what is now, since 2002, the Council's multi-annual work programme and the annual operation programme that comes from the Council. Consequently, the APS and Work Programme are—not isolated acts of genius by the Commission they have reasonably to take into account the understanding that the Council will produce its operation programme within the context of the Work Programme. The Commission also knows that, in submitting the Work Programme annually to the Parliament, it will get a shower of criticisms and proposals, which if fully accommodated would mean they had to do ten years' work in one year's work. I can give you a copy of the summary of the Parliament decisions of last month on the 2009 Work Programme. Our hair would fall out on looking at this long set of alternative proposals coming from the Parliament! The important thing therefore is that, in working up the programme, there are some external realities that must properly be taken account of. Secondly, there are internal priorities and there is a process of internal argumentation, not to see whether something should be in the Work Programme—though that is a consideration—but where it should appear in the priority list of the Work Programme. The most influential part of the Commission in determining that is the President and the President's cabinet. That was the case, rightly in my view, with Romano Prodi; it is more the case with the present President Barroso. From what I understand, the operation of the College of Commissioners and the Commission as an institution is now more firmly, I will use the word "co-ordinated", by the President's cabinet than was the case in the Prodi years, when there was a democratic approach and a degree of permissiveness that accommodated really good ideas, that addressed the priorities, whether the President's people had thought of it first or not.

Q111 ***Lord Blackwell:*** In practice, how well does that top-down, strategic view, if you like, dominate? There must be an inevitable tendency for individual directorates or individual Commissioners to fight to get their bit of legislation in the programme. Are there examples where a Commissioner has seen something that they saw as very important totally excluded because it did not fit with the priorities?

Lord Kinnock: That would be unusual and I cannot think of a prominent instance, because of the way in which the Work Programme is developed. It does not start out with a thousand flowers blooming. Obviously there are streams of particular work being undertaken by the Commission, by the Commissioners, and it is from those sets of activities that the one or two that they think ripe for consideration in that coming year, as part of the Work Programme, should be pursued. That is the first thing. Then of course there are inter-service consultations between all of the affected directorates-general within the Commission and there is a degree of contest between cabinets. Sometimes it can grow very heated. Therefore, by the time there is a draft Work Programme, which is considered by Commissioners fastidiously, a lot of the arguments have been had and a lot of the proposals have been winnowed out. The stage between the draft and the document that eventually appears before the College of Commissioners for discussion, sometimes disagreement, is the period in which the Work Programme is finalised, with very substantial influence, rightly in my view—but not, in the case of Romano Prodi, overweaning influence—from the office and person of the President. By the time that document comes before the College of Commissioners there is concensus, unless somebody is truly resentful and furious about the fact either that their pet subject has not achieved the desired priority or because it has been left out altogether. The argument then can be fairly tense; not often, but it did crop up a couple of times, entertainingly I may say, in the Prodi Commission.

Q112 ***Lord Tomlinson:*** That is a very interesting description of the internal dynamics inside the Commission. I can remember one occasion quite well when, for example, the European Parliament made an offer to the Commission that they could not readily refuse. They were looking for a lot of support in relation to Single Market legislation and the European Parliament decided there was to be no Single Market regulation in relation to freedom of movement of food across boundaries unless there was a pan-European public health directive.

Lord Kinnock: Yes, that is right.

Q113 ***Lord Tomlinson:*** Two British members of the European Parliament, using the Institute of Public Health Inspectors, drafted a draft directive, topped and tailed it, and called it a Parliament resolution. It is very difficult in those circumstances, whatever the President thinks, for the Commission to refuse it, when they have to deal with the same Parliament on budgetary matters.

Lord Kinnock: Yes. In fact, though I do not think that enough attention is given to it, the Parliament does have that precise power to adopt a resolution which, especially if adopted by a large majority, says the Treaty, must be taken account of sensibly by the European Commission. That is why I refer to the former Article 192, now Article 225; and equally one could refer in the case of the Council, for which there is similar provision, to what used to be Article 208 and is now Article 241. That is healthy. I have brought, and it may be of interest to the Committee, a list of 17 pieces of legislation between April 1994 and February 2007, which appears in a book—and this will not surprise Lord Tomlinson—compiled by the MEP Richard Corbett, showing where the Parliament had taken an initiative and it ended up as a legislative proposal. Anyone examining this list would acknowledge that they are really useful initiatives that were pursued to the point of legislation. I will happily provide that to the Committee.

Chairman: That would be very helpful.

Q114 ***Lord Jay of Ewelme:*** I want to ask a question about the Commission's engagement with stakeholders, in two senses really. I imagine that when you were a Commissioner you were assailed fairly regularly by lobbyists demanding this, that and the other. I imagine also that when preparing legislation you were, of your own initiative, consulting stakeholders. I wonder if you could say something about the balance between those who are getting at you and those from whom you are trying to learn, and whether overall that improves or distorts legislation.

Lord Kinnock: That is a very good question, because it is critically important that a strong distinction is made between the professional bodies with recognised expertise that are prepared to donate advice, information and ideas, or to argue about information and ideas, and professional lobbying firms that may be brilliant at what they do but nevertheless are not the originators of the ideas, and have not done service in the particular industry or area of activity that is seeking to bring influence to bear. I coined a maxim a few years ago, a very simple one, that lobbying can be a good servant but it is always a bad master. As long as that distinction is drawn and Commissioners and Commission officials understand what the lobbyist is doing, why they are doing it and for whom they do it, then it is fairly easy to tread the necessary straight-and-narrow. Indeed, the Commissioner has been trying for some time—it began with the Prodi Commission and it is continuing now, not concluded—to draw up effective general guidelines and rules of the game that lobbyists are willing to be governed by. Of course, there are reputable, established lobbying firms in Brussels who would be very happy to have that body of rules; there are others that are not quite as willing. The contributions to policy development, drafting of law, assessment of effectiveness, made by professional bodies of repute and expertise is invaluable. I used to find it so in Transport but it certainly applies in other spheres; especially since the submissions they make are often balanced by other submissions and are grounded in real experience. It is that reality which makes the introduction of mandatory impact assessments by the Prodi Commission in 2002 particularly valuable. The impact assessing has always taken place, more in some spheres of activity than in others, but the reality now is that any proposal must be subject to forms of thorough consultation which satisfy the requirements of impact assessments—with a capital 'I' and a capital 'A'. That is entirely healthy, and it means that at least the initial proposal coming from the Commission is better-informed and more pragmatic and usable than would be the case otherwise.

Q115 ***Lord Burnett:*** You drew a distinction with recognised bodies and professional lobbyists, and perhaps lobbyists generally. I think you mentioned, Lord Kinnock, that the Commission are trying to draw up guidance. I raised this precise matter with Lord Brittan earlier. He explained to the Committee that he thought that there were now more thorough, far-reaching rules for controlling corrupt practices in lobbyists, for example. Are there now stricter rules and stringent rules to control the activities of lobbyists generally, and are they rigorously enforced?

Lord Kinnock: It is over three years since I was in the Commission. We did not have those rules at that time. It is conceivable that there have been notable developments since, but I have to say that they have not come to my notice. I would simply repeat in order to emphasise that there are well-established, reputable lobbying firms in Brussels that recognise they have a very strong interest in having strict and effective rules. They would be very co-operative, not only in accepting a body of agreed rules but also in implementing them. The difficulty is that if you have nominal rules that can enjoy very widespread endorsement from every firm, including one set up a week last Thursday, then the rules are unlikely to be effective. The rules must therefore be narrowed down and given authority by the professionalism of the

lobbyists: a form of self-regulation which can be very healthy. I think that it has still proved to be difficult to reach the necessary standards that would be practical but also rigorous.

Q116 ***Lord Burnett:*** It has been suggested to us by the Law Society that there is an absence of what I would call controlled development of policy, and particularly legislation. They also have stressed that they believe that particularly legislation is developed within silos. Do you agree with them and do you believe that there is a lack of co-ordination, not only in policy but also particularly in drawing up legislation?
Lord Kinnock: There is some silo problem, and I do not think that the European Commission is alone amongst drafting bodies in experiencing that. Who knows? It may affect the Law Society. I have yet to come across an organisation that cannot, if it really searches itself, find a silo problem. All I can say is that, particularly over recent years, the Commission has put a great deal of effort into recognising and trying to resolve this problem. It is now much more the case than it used to be, even in the Santer Commission, that there are working groups of Commissioners and their cabinets and directorates-general who try, when there is an obvious community of interest in an issue being addressed, to work together in a systematic way. Of course there has always been inter-service consultation, and that is a necessary and required part of the development of proposals coming from the Commission; but that does not necessarily prove to be wholly satisfactory and often depends upon a sort of arbitrage between DGs. Understandably, "You support us on this and then we will agree with you on that". That is bound to occur in many organisations, actually in a very transparent way, including the Commission. How do they seek to overcome a silo problem? I can give a couple of instances in which I was involved and where it worked out satisfactorily. I was the Commissioner responsible for the development of the Trans-European Networks Policy between 1995 and 2000. I was appointed chairman of a group of Commissioners, which included the Budget Commissioner as well as External Affairs, Environment, Regional Development—in other words, the relevant Commissioners. We met once every two months—the Energy Commissioner and Industry Commissioner were also involved—and discussed the updating of the policy profile. I found it very helpful and I know that DG Budget found it very helpful, because they were able to monitor all the time, which was entirely healthy. The result of it was that it was not only, so far as the Commission or the Member States were concerned, the effective implementation of the Trans-European Networks Policy, which had been adopted by the Council, but also, and more successfully, the further projection into linking up the applicant states with the Trans-European Network. That would not have been achievable if there had not been genuine co-ordination between the Commissioners.
Chairman: We will have to suspend the Committee at this point.

The Committee suspended from 6.06 pm to 6.14 pm for a division in the House

Q117 ***Chairman:*** I am sorry to ask you to come back for such a very short time, but it would be very helpful if you could let the Clerk have your notes and that would cover the points that we have perhaps left uncovered in our questions. However, can I ask you this? I think that you dealt with this partly in an answer to Lord Tomlinson, but could you tell us whether you think that the Commission's monopoly, or virtual monopoly, on the right to initiate legislation is a good thing? We have dealt with whether it was a good thing that it was described as such, but do you believe it to be a good thing?
Lord Kinnock: I do, not only because it gives substance to the Commission's necessary role as the guardian of the Treaty and the enforcer of the law, but also because it means that there is a responsible body that has to follow through the policies adopted by the Union—Council, Parliament, Commission—and therefore the Member States. What happens if that does not occur is that initiatives that are not the subject of Commission responsibility come to pieces. Tragically, the 2000 Lisbon strategy for competitiveness and employment is a case in point. It is an orphan. To try to compensate for the lack of coherence and cohesion, the Council invented something called "the open method of co-ordination". It still exists. It is the most dyslexic political process anybody has ever thought of. All it does is to invite a Christmas tree of added "objectives" at every Council meeting and it is rendered meaningless. I therefore think that it is necessary, not only in very straightforward legal obligation terms and policy coherence terms but also in terms of ownership and pursuit of a policy, that the Commission has the right of initiative in the first place.
Chairman: Are there any other questions that members would like to ask Lord Kinnock?

Q118 ***Lord Blackwell:*** I have just one short question. Lord Kinnock, do you think that there ought to be any more focus within the Commission, in the process of developing legislation, on challenging it for subsidiarity?
Lord Kinnock: Yes. In latter years, there is quite a strong consciousness of the need to examine proposals—certainly for new policy and new law—on the basis of whether the European Union is the

appropriate level for activity. That goes alongside the increasing, and I think healthy, tendency of the Commission since the late Santerre years, very much so in the Prodi years and also now, to take the attitude that "less is better". Alongside the conscious search for an answer to the question, "Is this the level at which this policy is best developed and implemented?" is the question, "Does this policy really need legislation in order to make it effective?" and a stronger emphasis—which, as I say, I think is healthy—on self-regulation; an alternative means of getting effective and coherent results without going through a legislative process. The nature of the Commission and its engagement is therefore changing. I do not think that the Commission is weakened by it. I think that what is happening is that the Commission, in the discharge of these obligations, is maturing as the Parliament matures and Council matures—a much bigger Council, of course—and a better equilibrium is being developed.

Q119 ***Lord Rosser:*** This flows from the question about the virtual monopoly and the initiation of legislation and whether that is a good thing, to which you have made it very clear that you think it is. We know what the Council and the Parliament can do if they do not think very much of proposals that are put forward by the Commission; but are you also satisfied that, bearing in mind the Commission does have the virtual monopoly in the initiation of legislation, the checks and balances are there so that the Commission, through having that virtual monopoly, cannot deny the clear wishes of the Parliament and Council as far as the legislation proposals are concerned?

Lord Kinnock: To some extent the honest answer to that involves timing. Ideas may come from the Parliament or from the Council. Of themselves, they may be entirely valid ideas; but, of themselves too, they are unlikely to have been costed and any consultation that has taken place about them has been fairly narrow. Therefore, if the Commission is to follow through those proposals and turn them into legislative proposals or developed policy, it has to take account of the economic, the environmental, the labour market, the Single Market, and many other implications of that policy. It has to take account of cost and it has to make an assessment of the balance of opinion across the Member States in favour of this particular kind of policy. The Commission could therefore seize upon the proposal and do its damnedest to turn it quickly into workable proposals for law, or it could be a little more circumspect. Some time, some considerable time, could then pass before that idea saw the light of day as a formal proposal for law or even for a Green Paper, let alone a White Paper. This is not a jealous protection of the right of initiative; this is a pragmatic view of what is and is not likely to work and a pragmatic view of what priority should be given, in view of the extensive set of demands made on the Commission in any event, and particularly its policy goals.

Q120 ***Chairman:*** Is there anything you wanted to add that we have not covered or that is not in your notes?

Lord Kinnock: No, I have the luxury of being able to submit them! There was one issue that was raised, however, and it is a very valid issue, about legitimacy. While not everyone may believe it, it is the truth that conscientious Commissioners certainly, and large numbers of people in the EU civil service, exercise their minds about the question of legitimacy. In recent years, of course, there has been a search for a definition of democratic legitimacy for the Commission. As it happens, that is a bit nearer than it used to be, because of the new levels of accountability that the Commission recognises and in any case has to discharge to the Council and to the Parliament. That is entirely healthy. However, the legitimacy of the Commission is not really definable in democratic terms; it has to be an operational legitimacy. The Commission must be efficient in what it does; it must be relevant in what it does; it has to be prudent in the way that it performs its duties; and it must be accountable. If it is those things—if it is efficient, relevant, prudent and accountable—then it has legitimacy as a policy-developing, law-enforcing, administrative executive for this unequalled and unprecedented edifice called the European Union. I think that [uses up time and energy unnecessarily to try to search round for a means of giving the Commission a classic democratic accountability]. That is why I think it is folly, for instance, for the Parliament to elect the President and consequently politicise the office. It is one of the serious deficits in the Lisbon Treaty as far as I am concerned, because I think that it will end in tears. It is much better that the powers-that-be in the Council, in the Parliament, indeed in the press and widely in politics, put the maximum pressure on the Commission to fulfil at least those four requirements of legitimacy; and when the Commission manifestly does—as it does most of the time, and certainly most of the people working for the Commission, overwhelmingly the majority, seek to fulfil those objectives—then it will justifiably enjoy legitimacy in the public eye. However, it must not be distracted from trying to fulfil those demanding obligations, which are absolutely justifiable obligations.

Chairman: That is perhaps a good note on which to close. Thank you very much, Lord Kinnock, for giving your time and answering our questions. We are most grateful.

Supplementary memorandum by the Rt Hon the Lord Kinnock

How are the Commission's ideas of future legislation generated within the Commission itself? How does the Commission develop those ideas? Does the culture of the Commission encourage officials to generate ideas for legislation?

Generation of draft legislation depends on the nature of the legislation and, in particular, whether it initiates new policy or recasts or amends or updates existing law and policy. (NB attached summary of 1998 Commission report to Council com 98715.pdf.) In any event, the Commission is at the centre of an extensive plexus of what could be called "constant consultative networks" and draws heavily on ideas fed from those sources. Those networks cover just about every conceivable speciality and they range from the Council's working parties and expert groups, to the Member State Permanent Representatives, to the European Parliament's Committees, to the Commission's own "comitology" Committees, to countless NGOs, representative business, social and local government organisations, to lobbyists (of varying status and dependability), to the Commission's consultative data bases (stakeholders in particular areas of interest and concern), to the Consultative Institutions (Committee of the Regions and EU Economic and Social Committee). For all major policy initiatives the Commission has (since the 2002 decision of the Prodi Commission) launched formal Impact Assessments [detail in Com (2002) 276] and Green Papers, White Papers and consultation exercises (including on line) are the norm. Nothing that ends up as a proposal, in short, comes "out of the blue" and it is rare for any proposal to originate solely from within the Commission.

It is worth noting that the "culture" of the Commission has changed greatly since the days of Delors and—more precisely—the presentation and passage of the avalanche of Single Market related legislation. Increasingly, the Commission tends to look for dependable alternatives to legislation to fulfil agreed policy objectives, and self-regulation and co-regulation are, consequently, more commonplace.

In addition to all of the above, of course, every proposal for legislation and policy is subjected to very demanding examination inside and between the Commission's Directorates General and *cabinets.*

How are the Annual Policy Strategy and the Annual Legislative and Work Programme prepared? How is it decided what should be included?

The Annual Policy Strategy (APS) and the Annual Legislative and Work Programme (ALWP) are, of course, submitted to the European Parliament as well as the Council and on the big policy themes preparation of both involves political brokerage. The major priorities have obviously become regular fixtures—global warming and sustainable development, management of immigration, better legislation and simplification, external relations and so on are rarely missing. Within the Commission a process best described as policy and administrative arbitrage boils the legislative and work programmes down to those proposals which are considered to be consistent with the major political priorities and essentials. Arguments—sometimes highly combative—between *cabinets* and between Commissioners are a natural and vital part of these rendering activities and the influence and preferences of the Commission President (and his *cabinet*) are crucial. Since 2001, as a result of the Administrative Reform of the Commission, Activity Based Budgeting (ABB) is also a significant consideration in determining how the Commission uses its human and material resources in the period covered by the APS and ALWP.

What arrangements are there for quality control—both in terms of knocking out inappropriate ideas, and assuring the technical quality of emerging draft legislation?

Apart from the legislative process itself, quality control is provided by the internal (inter-DG and inter-*cabinet*) argumentation, by the consultations, informal discussions in Council Working Parties and with Parliamentary Committees (particularly expert Members), pilot projects (where appropriate) and the mixture of Green and White Papers, Evaluations and Audits. ABB also makes a contribution because it obliges Directorates General and Commissioners to prioritise proposals and thereby give more deliberate attention to quality.

It has been suggested by the Law Society that there is an absence of joined-up thinking in the Commission as regards the preparation of legislation and that ideas are developed in "policy silos". Would you agree?

There is some "silo" problem—it is to do with the sociology of policy organisations in this and other cases—but several efforts are made in the Commission to keep it to a minimum. Among those efforts the Annual Policy Strategy and the Annual Legislative and Work Programme processes are deliberately designed to achieve greater coherence between policies. Inter-Service (ie inter-DG) consultation and *cabinet* and *cabinet chefs'* meetings are essential sources of coherence and co-operation (as well as disputation). Commissioner Working Groups are consciously used to ensure cross-portfolio consistency. Having chaired such groups on Trans European Networks (1995–99) and various aspects of Commission Reform (1999–2004) I can testify to the effectiveness of this instrument. The current Barroso Commission, for instance, established such a multi-portfolio Working Group at the outset in order to produce the promised comprehensive Maritime Policy Green Paper which is now providing the basis for further refinements and developments in commercial and market initiatives, shipping and port safety, quality and innovation, maritime environment protection, fishing conservation and so on.

What is the role of the College of Commissioners in the initiation and development of EU legislation?

The College of Commissioners undertakes and (below and reflecting that) the meetings of specialised members of Commissioners' *cabinets* conduct discussions and arguments (sometimes over a prolonged period) to try to ensure that a proposal has the broadest attainable backing. The College provides, in that context, overall political guidance more than policy initiation; it has the final word on the launching of proposals; and fastidious Commissioners, individually or collectively, recognise their duty to be thorough and to maintain or impede the momentum of proposals—often according to sensible political considerations.

How effective is the Commission's engagement with stake-holders? Is lobbying a help or a hindrance to good policy-making?

Responsible lobbying by reputable bodies can be a help and, recognising that, the Commission has been trying to establish general guidelines and rules of conduct for some time—so far without success. I summarise my personal view by saying that lobbying can be a useful servant but it is always a bad master and Commissioners, *cabinets* and Directorates General are best advised to act on that basis.

How influential are the other institutions? In particular, what influence does the European Parliament have in the initiation or development of legislation?

The European Parliament (EP) has increasing direct (Article 192—in new Treaty A225) and indirect (APS, ALWP) influence to some extent on initiation and to a greater extent on development of legislation (reference to the 1998 Commission report to the Council (ibid) is relevant to any answer to this question. I also attach a page from Richard Corbett MEP's recent book which gives a list of instances [Corbett, Jacobs and Shackleton, "The European Parliament", p 239—*not printed*]).

How far do the conclusions of meetings of the European Council set the agenda for legislative proposals? Has the European Council's emerging role as a high-level decision-maker weakened the Commission's role?

Terms like "weakening" or "strengthening" in this context can be misleading. In reality, the Commission has been settling down to what it needs to be and should be in the enlarged and maturing Union:

> a unique policy developing, law enforcing, administrative executive with the right of initiative and accountable to Council and Parliament, both of which (as a matter of political reality) have become additional stimulators—prompters—of policy and law. No democrat could argue that this evolution is harmful or objectionable overall as long as the Commission is pragmatically responsive but not deferential. [As an aside: I have long been opposed to the election of the Commission President by the EP simply because it could quickly, in the nature of the metabolism of politics, produce deference. This electoral process will be superficially democratic but if deference (especially to the factions in the EP which have voted for the President) is the consequence of the change, the Commission will lose independence, the essential balance in the legislative machinery will be fundamentally disturbed, and the public interest will suffer.

Are individual Member States able to influence the initiation of legislation? In other words, can a Member State set the ball rolling?

Yes to both questions. Obviously, the continuity provided by succeeding Presidencies (in the current system) is crucial to maintaining the progress of a policy objective nominated by a "ball-rolling" Member State.

Often, of course, the Commission agrees with (indeed, may have played a part in stimulating) the EU policy objective emphasised by a Presidency and will consequently—and openly—assist with the advance of the idea towards legislation. Two further comments: (i) the new "semi permanent" Presidency of the Union and the revolving Ministers' Councils' Presidencies will clearly provide new conditions. I am sure that PhD theses will be written (thankfully by others) on the anticipated results of the change . . . (ii) The relatively new so-called "Open Method of Consultation" as an alternative to Commission initiative and follow through is a shambles. An idea, ambition, "Strategy" (like the 2000 Lisbon Strategy for employment, competitiveness and sustainability) that is subject to the "Open Method of Consultation" might have great worth and attract enthusiasts. But it won't have any owners, nobody will have explicit responsibility for development and fruition and successive Presidencies simply add hazy "Policy Objectives". A worthwhile initiative then ends us as an over-decorated but disappointing political Christmas tree.

Does the work programme drawn up by each Presidency for its term of office influence the setting of the legislative agenda?

It can—see above—as long as continuity and propulsion is provided by successive Presidencies. Presidencies inherit a rolling process and inserting a truly fresh idea into that process is, by definition, done—but not frequently.

Has the position on all this changed over the years, eg since the mid-1980s and the work to complete the Single Market?

Definitely yes—as the evolution of the Council, Parliament and Commission, in the last 13–20 years (see above) shows. In addition there are identifiable political reasons for the change—the most important ones being (i) very substantial enlargement after 1995 (ii) the presence—and then absence—of Delors, Kohl and Mitterand. In their time there was a complicit symbiosis between the Commission and the European Council. The Council, driven as a Franco-German tandem, would ask the Commission to do things that the Commission had (more subtly) suggested to the Council that it could and should do . . . The close alliance between Delors, Kohl and Mitterand (and the voluntary occupation of the sidelines on many issues by Mrs Thatcher) meant that such complicity was possible and—often—productive. No existing or likely future set of relationships has any resemblance to those associations. In any case, the Union is an older, bigger, more complex, more disparate place and it hasn't a leadership "cadre" that has the motivation or the ambition of Delors, Kohl and Mitterand. Theirs was not a Golden Era (despite the claims of nostalgic sentimentalists) but it was a different era.

The Treaties give the Commission a virtual monopoly in the initiation of legislation, at least in the First Pillar. Do you think this has been a good thing? Is there a problem with legitimacy or accountability?

Yes, the right of initiative is certainly a good thing for Europe because no other body or actor can (or should) fulfil the essential roles (in this unequalled international Community of Law) of "honest broker", guardian of the Community interest, and source of sustained attention to policy and of coherence in its development and application. It should be recognised, of course, (but it often isn't) that the Commission only has the "virtual monopoly of initiative" up to the moment that a legislative proposal is tabled. Thereafter, through the co-decision procedure, accountability is very much in evidence and that is always a major component of legitimacy.

Apart from that, I would emphasise (as I have on several occasions inside and outside the Commission) that the legitimacy of the Commission substantially depends upon its efficiciency in working (with specific significance for good management), the relevance of its proposals, the prudence of its conduct and of the financial and economic implications of its proposals, the utility of its activity for the peoples of the Union, and (as implied above) the accountability which it guarantees to Council and Parliament and, through both, to the Member States and their citizens. The European Commission is a policy proposing executive with legal powers given by the Member States. It is not a Parliament or an elected Board. It must, therefore, manifest legitimacy in what it does and how it performs.

30 April 2008

Summary of pp 4 & 5 of 1998 Commission Report to the Council (Com 98715.pdf)

ORIGIN OF COMMISSION PROPOSALS (LEG. AND NON-LEG.)

1. International agreements—either enacting arrangements between the Community and third countries or enacting the Community's international commitments for implementation within the Union.

c 35% of Commission proposals from these sources.

2. Amendment of existing Community law to update/take account of new scientific or economic innovations and/or data.

c 25% to 30% of Commission proposals from these sources.

3. (i) Proposals for legislation presented by the Commission at the express request of other Community Institutions (especially Council and Parliament), the Member States (individually or collectively), and economic operators (often science and technology based).

(ii) Responses to requests to take new initiatives which come from Parliament or Council, especially when the request has been supported in the course of legislative process by a large majority in Parliament and/or by unanimous or near unanimous opinions from Member States.

(iii) Responses to Council requests for new studies or initiatives (about 25 a year on average).

Roughly 20% of Commission proposals from these sources.

4. (i) Proposals for legislation from Commission that are required by the Treaty and secondary legislation (eg fixing agricultural prices or support annually, adopting multinational research funding programmes).

(ii) Initiatives which the Commission considers to be in the interest of the Union and follow Green and White Papers and other consultation. Examples include proposals for legislation on intellectual property, electronic commerce, harmonising technology at rail border crossings.

About 10% of Commission proposals from these sources.

30 April 2008

WEDNESDAY 7 MAY 2008

Present	Bowness, L	O'Cathain, B
	Burnett, L	Rosser, L
	Jay of Ewelme, L	Wright of Richmond, L
	Mance, L (Chairman)	

Examination of Witness

Witness: Mr Tony Long, Director, World Wide Fund for Nature, European Policy Office, examined.

Q121 ***Chairman:*** Thank you very much indeed, Mr Long, for coming and giving evidence. This is on air. You will be given a copy of the transcript afterwards and will obviously have the opportunity of making any corrections to that and any supplementary points. The purpose, as you know, of the Sub-Committee's present inquiry is to consider the way in which European legislation is initiated. Today we are hearing evidence from you and then from the Freight Transport Association, and I think it is fair to summarise that you are both effectively organisations which will be keen to promote particular policies, and it may be those policies went in opposite directions sometimes and we would be interested to know what happens in that sort of situation. Let me start with some of the specific questions. The first is the general context for environment-related proposals. The Commission has told us that the general framework in the area you are involved in, EC action in the field of the environment, is provided by the 6th Environment Action Programme and we would be interested to know from you the sources of inspiration for this programme and how rigidly it delineates the Commission's activity and European activity once such a programme has been devised.
Mr Long: Thank you, my Lord Chairman, for inviting me today to appear before your Committee and I hope I can help you in your deliberations. My time in Brussels has been now 20 years, so I think I have watched four Commissions come and go and possibly four European Parliaments. I do have to say, though, by way of an introductory remark, that I do see the Brussels process through one particular window and that is as a civil society organisation. Whilst that window is getting somewhat larger, and somewhat more important, I believe still that my observations have to be partial. I am not privy to some of the processes that go on in Brussels, for instance between, let us say, some of the Member States and some of the institutions. These I would not be able to comment upon. If you will permit me, my Lord Chairman, I would just like to make two other very brief introductory remarks. One is that I think it is very difficult for anybody to ignore the informal ways in which Brussels works. I know that makes it somewhat difficult for your Committee because it is not always easy to penetrate these informal networks and even, in some cases, what I would call networks based on friendships and knowledge of people over some time. So that is something that I want to alert the Committee to. It is what I sometimes call the network of policy communities in Brussels. There are very, very many of them on very many subjects, some of them quite specialised. The other point I want to make by way of introduction is to get quite clear at the outset that my organisation, or my office, does receive funding from the European Commission. I get an annual operating grant from the European Commission and whilst I do not think that influences my evidence in any way, I would rather that it come out at the front rather than through questioning. I just tell you that now.

Q122 ***Chairman:*** Can I just interpose? Am I right in supposing that that is an indication of the priority which the Commission gives to the environmental field as one of the European objectives?
Mr Long: Yes, you are right to assume that. In fact, my office has been receiving grants from the European Commission since 1992, so the programme certainly goes back even before that. I think it was instituted originally by the European Parliament as a way of making sure that environmental voices get heard in the decision-making processes in Brussels. For at least ten or fifteen years there was really no proper legal basis for that budget line. Then that was changed in the late 1990s. There was a proper regulation that authorised the payments to the non-governmental organisations. Now it is even more formalised because the LIFE + Regulation approved last year under the co-decision procedure actually formalises the payment to NGOs through what is called Annexe 1.

Q123 ***Baroness O'Cathain:*** Could I just ask, is every NGO in that budget, that grant, and do you have to fight amongst yourselves for the World Wildlife Fund or for Aid to Africa, or whatever?
Mr Long: The answer to that question, my Lord Chairman, is that the eligibility criteria are for environmental non-governmental organisations operating at a European or certainly more than at a Member State level. There are very strict criteria. At the moment something like 35 environmental NGOs

benefit from a budget line which is at about €7 million per year. I would think, therefore, the average grant is somewhere in the vicinity of €200,000. My organisation gets €600,000. In my case that is about 15 per cent of my total annual expenditure.

Q124 ***Chairman:*** Your total grant was?
Mr Long: The budget line for that is about €7 million to €8 million.

Q125 ***Chairman:*** That is an interesting insight, if I may say so. This means that once the European Union has decided that a particular area should have attention, it can not only promote it itself but get others to promote it to it?
Mr Long: Quite so! I will now turn to the question which you posed to me, which is the 6th Environment Action Programme. There have been the five preceding Action Programmes, starting in 1972 with the very first one at the time of the Stockholm conference. It is clear to me that every Action Programme has built on previous Action Programmes: the 5th Environment Action Programme was called "Towards Sustainability" and it lasted for ten years, 1992 to 2002. In the course of that the EU adopted a Sustainable Development Strategy. That was in June 2001 under the Swedish presidency in Gothenburg. So the 5th Environment Action Programme was the precursor of the EU Sustainable Development Strategy and then the 6th Environment Action Programme from 2002 onwards is seen as the delivery mechanism for the environmental component of the EU Sustainable Development Strategy. It is a little bit convoluted. What I am trying to say is that the 5th Environment Action Programme begat the Sustainable Development Strategy; the Sustainable Development Strategy influenced the shape and nature of the 6th Environment Action Programme. That is a little bit the source of inspiration. Two further things I would comment upon, if I may, my Lord Chairman. One is that the 6th Environment Action Programme, unlike the previous five, had as its legal basis co-decision procedures. So it had two readings in the Council and two readings in the Parliament. That makes the commitments in the plan more important. In other words, it had a different legal basis than the previous action plans. The second point I want to make is that unlike the previous action plans, the 6th Environment Action Programme promised seven thematic strategies. Of those seven thematic strategies, several of them had legislative intentions attached to them. So in that case you can say that the 6th Environment Action Programme with its co-decision procedures actually signalled legislative intent on the part of the EU.

Q126 ***Chairman:*** That is the history of what has happened. What about the more personal sources of inspiration for these programmes? Where did the initiative come from? Partly from your organisation, perhaps, and partly from others?
Mr Long: I would want to draw a distinction, my Lord Chairman, between the Action Programmes and the amount of attention they would receive in, let us say, the day to day, week to week or month to month activity in my office as compared with actual legislation. With only so many resources, I have to think carefully about whether I put them into Action Programmes or whether I put them into policy communications or legislative activity. So I think I would have to be honest and say that the amount of attention I give to the action plan process is perhaps less than you are hinting at in your question.

Q127 ***Chairman:*** Who does devise them then?
Mr Long: I think the process of devising the Action Programmes is pretty much a Commission, and DG Environment particularly, inspired and led process. I think it has changed somewhat now because of this co-decision procedure. I have to say that my organisation and the other nine environmental groups in Brussels which make up what we call the "Green 10" had to come to the rescue of the seven thematic strategies in the middle of 2005. This was only six or so months after the new Commission had taken over. There was very great attention being given at that time to the Lisbon strategy, to economic competitiveness. There were some rather severe questions being asked by the new Commission of these environmental intentions in the seven strategies.

Q128 ***Chairman:*** Who are the Green 10 who came to the rescue of them?
Mr Long: The Green 10 is an informal network of ten environmental non-governmental organisations. We formed ourselves in 1990 as the G4 and then we have grown over the years to become the Green 10.

Q129 ***Chairman:*** Were you successful in coming to the rescue of the thematic strategies?
Mr Long: Yes, we were. If the Committee wants to enquire further when you are in Brussels, I think you will be told that the intervention by the environmental NGOs in a timely way at a Commission college meeting in June 2005 was very important in making sure that the progress on the seven strategies would be secure.

Q130 ***Lord Jay of Ewelme:*** Could I go back to the Green 10 for a moment? Are all the ten subsidised in part by the Commission?
Mr Long: Nine out of the ten are subsidised. Greenpeace does not take subsidy.

Q131 ***Lord Jay of Ewelme:*** Do you feel, and do you think the Commission feels that your approach or your criticism, as it were, is tempered in any way by that?
Mr Long: My Lord Chairman, I can only judge from my interactions with the Commission in its many different forms, well beyond the DG Environment. I do not think anybody would come to the conclusion that our positions are influenced by the fact that we receive EU funds.

Q132 ***Chairman:*** Were there people in the context you have mentioned, rescuing the thematic strategies, lobbying or arguing for a contrary view that there was too much regulation, too many requirements and that there should be relaxation, as perhaps the new Commission was considering?
Mr Long: I think it is absolutely fair to say that—and that is why I put it in the context of the overwhelming competitiveness arguments which were going on at that time. I think the new Commission was susceptible to hearing those arguments. Perhaps it came, as a little bit of a shock to some of the Commissioners that the commitment to the seven strategies had been made under co-decision procedures. So a commitment to proceed with those strategies had already been taken by the Council and the Parliament.

Q133 ***Baroness O'Cathain:*** Just on that last point, do you mean to say that they did not actually know about it, although there had been this decision taken?
Mr Long: I am getting into a place where I cannot really comment because I do not know the deliberations in the College. It is not usual for something of this nature to get such a lot of attention in the College of Commissioners. I think it was unusual that it should have got to that point where the Commissioners were actually talking about it themselves rather than at the Chef du Cabinet level.

Q134 ***Chairman:*** Where was the pressure coming from on the Commission? Was industry speaking? Were cement works and factories objecting to the degree of regulation foreseen by the objectives, or what?
Mr Long: If I may just mention the seven areas which were covered by the thematic strategy, they were air pollution, the marine environment, the sustainable use of resources, waste prevention and recycling, pesticides, soil quality and the urban environment. I think the question marks on each of the seven were of a different nature. I am sure, although I cannot say for certain, that some people had been saying, "What on earth has the Commission got to do with the urban environment? That's a Member State responsibility." So that would surely have been the basis of opposition or concern. Another one would have been soil, with some asking, "What on earth is the Commission doing with soil and how would that relate to agriculture?" I think the really controversial strategies are probably the waste prevention and recycling and the sustainable use of resources. I think there were deep industry interests and concerns about those.

Q135 ***Chairman:*** The reality is that you do not seem to have a very direct contact with those who are lobbying on the other side. This is your assumption?
Mr Long: My Lord Chairman, I have got many contacts with people lobbying on the opposite side, but again that is normally in the context of, for instance, legislation on REACH or legislation on the Mining Waste Directive or legislation on others. That is where I really come into contact.
Chairman: We will come to that then.

Q136 ***Baroness O'Cathain:*** I just wanted to go back to the €600,000 you get from this fund of €7 million. How do you use it? You lobby to try and influence decision-making. Can you give us one or two examples of what you have done with some of that money as the World Wildlife Fund?
Mr Long: My annual operating budget for my office is €4.2 million. €600,000 I think is something like 15%. That money goes into the general budget, so it pays for the office rent, telephones, photocopiers, salaries. I do not allocate it in a particular way. It is called "overhead costs" or core grant subsidies.

Q137 ***Baroness O'Cathain:*** So you are not being paid to lobby then?
Mr Long: No, I am not.
Chairman: I think there is a question from Lord Bowness and then one from Lord Wright.

Q138 ***Lord Bowness:*** Mr Long, one thing I hear a lot of are complaints about Wildlife Directives and the influence you have within the Commission. Do you monitor yourselves as an organisation how respective Member States enforce these directives? Do you think that we as a country are particularly assiduous in the way, for example, Wildlife Directives are interpreted in this country? You will have read lots of articles about newts and ponds for newts costing £150,000, and so forth. Do you think there is a little bit of that in this? Can you comment on that?
Mr Long: My Lord Chairman, the two major pieces of environmental legislation affecting wildlife are the Wild Birds Directive 1979 and the Habitats Directive 1992. Generally speaking those two pieces of legislation are monitored by environmental organisations in the respective Member States. So my organisation at a Brussels level does not particularly get to see how these two pieces of legislation are being implemented in Greece, or in Poland, or in the UK, so I am one step removed from that actual implementation process.

The Committee adjourned from 3.30 pm to 3.39 pm due to a power failure.

Q139 ***Chairman:*** Can I suggest that we leave the question of funding? We have had helpful answers. It is not the primary focus of our inquiry, which is on the initiation of legislation and also the initiation rather than follow-up or implementation, which in the long-term is really a national matter. Is there anything more you want to say about how the Environment Action Programmes are translated into short-term goals? Is that outside your primary focus, how they are translated into Annual Policy Strategies and into Annual Legislative Work Programmes? Is there anything you want to add on that?
Mr Long: My Lord Chairman, perhaps because now time is getting a little bit tight, I would like to point the Committee towards the European Climate Change Programme, which started in 2000 and lasted for two years. It spawned quite a lot of legislation, and indeed created a European Climate Change Programme II, and from those processes came, for instance, the European Emissions Trading Scheme, the Biofuels Directive, and so forth. So in a way the European Climate Change Programme will be interesting for you as a more transparent process of initiation than the Environment Action Programme. That is just my feeling.
Chairman: Thank you. Lord Bowness?

Q140 ***Lord Bowness:*** Mr Long, you said earlier on this afternoon that you thought most of the initiatives came from the Commission and perhaps suggested that lobby groups such as yours did not have much effect, but you have now given us an example of how a number of you saved certain elements of the programme. Could we look at the whole question of new legislation and influencing its scope and its content and really how much influence you believe and how effective those interest groups are in that process?
Mr Long: I would like to correct the impression, if I have given it, that we do not have that much influence. I do think we have influence. I was commenting in particular on the Environment Action Programme. There I think we have less influence. On legislation, I draw a distinction between the agenda-setting process, let us say, the ideas stage, and then the second stage, which would be the more formal process of expert groups, advisory groups and nowadays high level groups which have come into vogue, where the ideas are then translated through a series of green papers and white papers, and so forth, into legislation. Then to your question, "Are you influential as environmental NGOs at the ideas-setting stage?" I think the answer is sometimes I give as an example the work my organisation has been doing to try to get sustainability measurements to become more widespread, what we call environmental accounting. We helped to organise at EU level a conference last year called "Beyond GDP". This is where we are in the ideas phase. Another area where we are in the ideas phase was the need for mining waste legislation after the two disastrous mine spills in southern Spain, near the Doñana National Park, and then the Baia Mare disaster in Romania. My organisation, WWF, had commissioned work to see how far these mining waste sites were spread across the whole European Union and how much of a danger they pose. This was WWF acting at the very beginning, in fact preceding the work from the Commission in that area. Then in the second part of the initiation, the more formal part, as an example, the European Climate Change Programme created six working groups. WWF was active in five of those. We were very influential in the early stages of the Emissions Trading Scheme and so forth. In the high-level groups, WWF has served on three of them. One was on corporate social responsibility. Another was the impact assessment procedures for the REACH legislation, the chemicals legislation. I did not serve myself personally but my organisation was on the Commission's high-level group on competitiveness, energy and the environment, which had four Commissioners and four Ministers. These high-level groups are also a place where the initiation of legislation takes place.

Q141 ***Lord Bowness:*** Bearing in mind the legislative process is quite a long one, if you had not been intimately involved with it on a working group, as you have described, at what point in the legislative programme would you as an interest group think you could be most effective to intervene?
Mr Long: If I take the case of the Mining Waste Directive, I was having discussions with the officials who were drawing up the legislation. That is before it actually goes into inter-service consultation and before it then goes to the Commission and becomes a proposal for legislation. That is a way of being effective at the very early stages. If you were to take REACH legislation on chemicals, my organisation was submitting evidence at the time of the green paper, then again at the time of the white paper. Nowadays we have a system of internet consultations as well. So there are different parts leading up to the legislative proposal itself. We are involved in all of them. When the legislation goes to the Council and the Parliament we become involved again, very often working closely with the rapporteurs in the Parliament.

Q142 ***Lord Bowness:*** If you had to highlight one particular success and one particular failure, what would they be and can you give reasons for either of them?

Mr Long: My own personal interest over more than 20 years has been in the area of the EU's regional development funds, the Structural Funds. When I first got involved in those programmes back in the mid-1980s they were still called the European Regional Development Fund. In 1988, when they were reorganised and called the Structural Funds, there was very, very little environmental awareness or indeed reference at all in the legislation for the need for the environment to be taken into account. When they were reformed in 1993, and then again in 1999, and then again in 2004, the Structural Funds regulations became much clearer on the need to promote sustainable development. This affects a third of the EU budget. This is €30 billion a year. Something like now 30% of the expenditure from the Structural Funds is spent on environmental benefits. I regard that over a 20 year period as a quite remarkable change. If the Committee is interested in the ways in which that happened, I would point to the importance of the interaction with the Commissioners themselves. The personal involvement of the Commissioners in these issues, and I think of Monica Wulf-Mathies and Michel Barnier, was very important. I think the Cabinets of the Commission are also important. I think senior civil servants in some countries are also very important. So there are a number of ways to be influential. They do not just happen, it is a process. Where we have been less successful, I think, is in the area of fisheries management. The 2002 Common Fisheries Policy reform, which is a once every ten year event, promised that there would be a new approach to the EU fisheries policy. After 2002 I did not see the evidence that the TACs (the Total Allowable Catches) and the quota system had really been reformed as much as we would have wanted. I think there are several reasons for that. Partly it is because of the relationship between the fishing industry and what is now called DG MARE (it used to be DG Fisheries but it has just been changed). I think that relationship has in some ways been so strong that it has precluded other interests from having perhaps the say that they should have.

Chairman: I think one answer you gave perhaps leads into a question which I think Lord Rosser wants to ask you.

Q143 ***Lord Rosser:*** Listening to what you have said—and you came back to it just a moment ago, but much earlier on I thought you said that for fairly obvious reasons you did not know too much about the world of friendships and informal contacts which might also influence the Commission. I am sitting here wondering—because you have mentioned some of the Commission's staff and you said some of them were very committed to the ideas which you have—about the extent to which it is actually the Commission which has the ideas and then looks to organisations like yours and the other members of the Green 10 to provide evidence and campaigning to back up the ideas and views of the Commission and make it easier for them to get them through, or whether in fact the ideas are basically yours and other members of the Green 10 and others very sympathetic to the environmental cause, whether the ideas come from them and it is then the Commission that adopts them. I am not quite sure which way round preponderantly it is. I have a feeling that maybe it is the Commission and their staff who have the ideas, perhaps reflecting what they perceive to be public opinion generally, or the drift of public opinion, and they are using organisations like yourself to back up and support campaigns or views they want to see enacted. Which way do you think it goes?

Mr Long: I do not think that it is as simple as it is being put forward here. I do want to clarify what I said about the informal relationships. What I mean by that is that in particular areas of expertise, let us say fishery subsidies or structural fund expenditures, there are not a lot of people in Brussels with that particular set of interests. Some of them may be from the Commission, some of them will be from the Parliament, some will be NGOs, some will be a couple of journalists. So that is what I meant by a sort of policy community. I am part of some of these. As for where the ideas come from, nowadays Brussels is a very dynamic lobbying scene. Ideas are coming thick and fast from everywhere. This more or less dates from the era of the Single Market. This multiplicity of sources of advice and ideas does not any longer belong to the environmental NGOs or the Commission. I would have to say in some of the forums in which I am active it is quite new alliances between environmental NGOs and business interests that are likely to be coming forward. I would not underestimate either the importance of the Member States. In some ways the weakening of the Commission's position vis-à-vis the Members States has come about also with the open method of coordination, and the inter-governmental processes generally. I am just trying to say that your question invites me to say no, but it is much more complex. The idea nowadays is that the lobbying in Brussels, especially towards the Commission, is the lobbying of propositions rather than opposition. The lobbying of propositions means, "Let's do this. Let's solve that." It is a different atmosphere which is taking hold.

Q144 ***Lord Jay of Ewelme:*** I just want to follow up one point in the very interesting answer you have just given. You talked about the weakening role of the Commission vis-à-vis other actors. You said at the beginning you have been in Brussels for 20 years now. Is that a trend which you have seen from 1986, let us say from the beginning, from the Single Market Programme onwards? Would you say there has been,

in your experience, a marked change in the influence of the Commission vis-à-vis the other institutions for whatever reason over that period, and would you say that is continuing?
Mr Long: I think the Commission's position is weakening and I think it is the result of two or perhaps three things. One would be the enlargement process. Everything has just become more complicated with 27 countries. I do not think the staff numbers have kept up with that. The second is that I think the Member States have reigned in some of the influence of the Commission. The third is just that the complexity of the issues the Commission is having to deal with has grown enormously, for instance in areas like climate change and international negotiations. So for those three reasons my perception is that the role of the Commission has weakened.

Q145 ***Lord Jay of Ewelme:*** We have been very interested, I think, in this question of what is the shifting balance of influence on legislation among the institutions and one way, I suppose, of judging that now would be how important you see it to lobby the Member States, to lobby the Parliament in addition to the lobbying of the Commission. When I say "the Member States" I do not just mean you in Brussels, I mean the World Wildlife Fund as well. If there is a big issue coming up, if you are worried about either an opposition or proposition, would you automatically have a strategy which was lobbying all the institutions?
Mr Long: The answer is yes. The strategy—and it is exactly that—does have to embrace all the institutions and it does have to pay as much attention to the national capitals as to Brussels. I sometimes say when I am lecturing that the more effective you are as a lobbying organisation, the more you actually resemble the organisations you are trying to lobby. Therefore, if you are saying the same thing at the same time to broadly the same people in cities as well as in Brussels, then you are more likely to be resembling the processes you are seeking to influence.
Lord Jay of Ewelme: That is a very interesting point.

Q146 ***Chairman:*** Perhaps I can just ask a short follow-up question. What is the most effective type of lobbying? You mentioned at the very outset the importance of informal contacts. No doubt some of this lobbying is done in a relatively objective way in writing, but a lot of it is done by meetings. Which works best, informal contacts, conversations or meetings?
Mr Long: All the different ways that one can possibly do it. Personal meetings, short briefing points and knowing the processes, knowing the timing, knowing the assistants for the Members of Parliament. It is knowledge. It is I am sure the way this House works. So everything that is necessary to be influential. One of the reasons I think WWF has got the standing it has in Brussels is because of the quality of the argumentation and the soundness of the policy propositions that we put forward. I think that is very, very important.

Q147 ***Chairman:*** Does the Commission actively seek views from organisations like yourself?
Mr Long: Very much so, my Lord Chairman. The Commission invites us, as I say, to participate in very many working groups in return for the money that we get, the €600,000. We have to spend a lot of time in various advisory forums, consultative groups, stakeholder meetings. I could list dozens of them. In all of these cases we are being asked for our views in some way to counterbalance the views that will be coming from industry. So we are always being invited for our comments.

Q148 ***Baroness O'Cathain:*** Do you ever initiate those contacts, because it is a huge opportunity if they keep on asking about these things? Can you actually sort of slip things by them, your pet projects, at that stage and manage to get that into the pre-legislative process?
Mr Long: I think in the examples I gave to you earlier, particularly the Mining Waste Directive, we have tried to do that. We did also try to influence the Commission to take a stronger line on a particular category of chemicals, the endocrine-disrupting chemicals. To do that we actually persuaded the European Parliament to have an "Own Initiative Report" on endocrine-disrupting chemicals. Then in the REACH process, because of heavy lobbying from other interests opposed to that, the endocrine-disrupting chemicals provision has temporarily fallen. It will be reviewed again by 2013. So we have sought to influence the legislative agenda and sometimes we get pushed back.

Q149 ***Lord Wright of Richmond:*** Does that mean that you become actively involved in, for instance, scientific surveys or the impact assessment process?
Mr Long: Very much so. Quite often we commission scientific research. We cannot necessarily have all the research on hand ourselves, but we can and do commission studies which we then introduce into the legislative process.

Q150 ***Lord Wright of Richmond:*** Have you had contacts with the independent Impact Assessment Board? You said in your introduction you were not privy to all the processes. Is that a process which has actually involved you?
Mr Long: In fact, my Lord Chairman, another environmental institute called the Institute for European Environmental Policy (IEEP) based here in London has done a lot of work on assessing impact assessments to gauge their quality, to see whether they are improving legislation, and so forth.

Q151 ***Lord Wright of Richmond:*** For the Commission?
Mr Long: Yes, they are. They actually have a retainer from the European Commission. Rather than me answering your question about impact assessments, I would prefer that you go to the independent institute to check their data.

Q152 ***Chairman:*** But they are paid by the Commission?
Mr Long: That is true, and they are also paid by Defra. They act in some senses as a consultant to the Commission.

Q153 ***Chairman:*** Are there any entirely independent bodies which have assessed the efficacy of impact assessments?
Mr Long: I do not know the answer to that.
Lord Wright of Richmond: My Lord Chairman, can I just say that the answer in one of our papers is that the Commission themselves insist on the independent Impact Assessment Board being genuinely independent. Whether it is, I do not know.

Q154 ***Baroness O'Cathain:*** Does the draft legislation process lead to good quality legislation? If not, what are the reasons for the deficiencies? Are there just too many people, too many cooks spoiling the broth? How could the draft legislation phase be modified to improve the quality of legislation?
Mr Long: I think that if the Committee has the interest and finds the time to look deeply into the European Climate Change Programme, and the way that brought many different groups together to draft the legislation, that process will come out with some interesting insights.

Q155 ***Chairman:*** Where is the best way to get into that? Is there a website? Is there published information?
Mr Long: Yes. I researched it before I came here. If you put "European Climate Change Programme" into the search engine, it will lead you to the Europa website of the Commission and you can read ECCP1, ECCP2 and the whole way that it has spawned a legislative trail of work on climate change. Going back to the question, there are two areas which I think may damage the quality of legislation, or two factors which need to be taken into account. One is the political pressure which is sometimes exerted by countries which hold presidencies of the EU and who want to rush legislation through so that they can claim the victory under their presidency. That is one issue. Another is the trialogue process and the conciliation process. This quite often takes place behind closed doors. We really do not know what goes on there, the compromises that may be reached, the language that may be put in to reach compromises, the way that language is then translated into 20 different Community languages. It could well be that the whole pre-legislative process is actually rather good but then this end part of the process may actually leave something to be desired.

Q156 ***Chairman:*** But in your field you have not felt any unhappiness about the Commission drafts? I ask that to some extent against a background where we see quite a lot of Commission drafts in the area of freedom, security and justice and we have been critical of one or two of them, but in your field you have not felt that is a problem?
Mr Long: I cannot point to anything where I see a real problem in the pre-draft legislation. I do want to alert the Committee to the idea now gaining ground of what is called "framework legislation". The Water Framework Directive is a good case in point. The Marine Strategy Directive is another, and the Integrated Pollution Prevention Control another. The idea is that the details of the legislation can actually be filled in later and made more relevant to the individual Member State's interests. This is a way of overcoming some of the difficulties of trying to get everything in at the beginning. If I may say, my Lord Chairman, WWF has been very involved in these stages of the process. They come after the legislative activity in Brussels and involve the implementation stages. My organisation is a member of the Common Implementation Strategy for the Water Framework Directive for example. We are also on the REACH committees looking at the implementation of the annexes. So there is a whole engagement of the non-governmental organisations that we have not spoken about in these post-legislative stages.

Q157 ***Chairman:*** Does that potentially lead to proposals for further harmonisation, the smoothing out of discrepancies which arise when you observe what has happened at the implementation stage?
Mr Long: That is absolutely the case, yes.
Chairman: I can see why that might be necessary, having looked at the regulations which give effect to the Integrated Pollution Prevention Control Directive. Good. Unless there are any further questions, thank you very much indeed. I should have said at the beginning, Mr Long, as a matter of form that if anyone had any relevant interests to disclose they would be disclosed in the House of Lords register. If you have got anything to add in writing, do, when you see the transcript.

WEDNESDAY 7 MAY 2008

Present	Bowness, L	O'Cathain, B
	Burnett, L	Rosser, L
	Jay of Ewelme, L	Wright of Richmond, L
	Mance, L (Chairman)	

Memorandum by the Freight Transport Association

The Freight Transport Association represents the transport needs of UK industry. Its membership is comprised of manufacturers, retailers, logistic companies, hauliers and organisations in the public and private sector. The Association's transport interests are multimodal and in addition to consigning over 90 per cent of freight carried on rail and over 70 per cent of sea and air freight its members operate in excess of 200,000 goods vehicles, approximately half the UK fleet.

The FTA has long recognised the importance of the EU institutions in the development of legislation affecting the freight industry and has maintained a permanent office in Brussels since the late 1990s to manage its relations with all relevant European actors.

1. The European Council, the Heads of State and Governments, sets the main political agenda for the development of legislation in the European Union. The most recent decision would be the Climate Change declaration which has laid down targets and goals to be achieved in policy areas relating to emissions, biofuels etc.

2. The Lisbon Strategy is a good example of a European Council declaration leading to further actions. This declaration is directed at the Single Market and improving the efficiencies of the European economy. This has led to the "better regulation" programme that is designed to update and simplify the Community acquis. The proposals for rewriting the rules governing admission to the occupation of road haulage operator (COM(2007)0263) stem from this initiative.

3. The Commission has many options open to it regarding the generation of legislative proposals. Before any proposals are drafted, the Commission can open a pre-proposal consultation whereby all stakeholders are invited to respond and submit their views on the possible courses of action to be taken. After receiving the submissions the Commission will usually hold a Stakeholder meeting to publicise the results and its initial thoughts on future action. Work on the recently published Green Paper on Urban Mobility is currently following this path.

4. The Commission may appoint an outside Consultancy to gather and analyse information from Stakeholders and make recommendations for future action. This is currently the case with consultants requesting opinions on the possible alteration of Directive 96/53/EC relating to weights and dimensions of vehicles. If this is the case, the Commission always states that the Consultant's Report is not the official views of the Commission.

5. Under certain pieces of legislation, the Commission can establish Consultative Committees and/or Expert Working Groups to discuss technical developments to EU law. Much the same way the British Parliament confers to the Executive the right to draw up Regulations, based on an Act of Parliament. The International Road Transport Union (IRU), the trade association of trade associations in road freight, has a seat in these committees due to its status as an official Social Partner and FTA plays an active role through its membership of the IRU.

6. The Economic and Social Committee and the Committee of the Regions are both official EU Institutions and their views on all matters taken under the co-decision process must be sought and heard. They have the right to advise but not to legislate.

7. Judgements of the Court of Justice are of prime importance as only the Court has the right to interpret EU legislation. Decisions are binding.

8. Member States forming the Troika in the Council of Ministers are in a position to influence the process of initiation. When the Finnish government took over the Presidency of the Council they exerted pressure on the Commission to look at the subject of transport logistics. A public consultation was held and an Action Plan was developed, which is currently the basis of policy development in this area.

9. FTA played a key role in negotiations with the UK government prior to holding of its Presidency on its desire to simplify EU legislation under the Better Regulation programme. We believe this was crucial to a change in policy direction contained within the Mid-Term Review of the Transport White Paper whereby the policy of modal shift was altered to one of co-modality.

10. The Presidency of the Council is an important position in the development of EU legislation; Member States can promote their own agendas during this period. However stakeholders from the Member State holding the Presidency can be at a disadvantage during this time as the Presidency should not be seen to be promoting controversial or extreme positions in legislative negotiations even if it is the position of that Member State.

11. FTA believes that the Commission engages with external stakeholders. In May 2007, the Commission readily contributed to a FTA-IRU pan-European event on road freight enforcement.

12. FTA believes that the quality of proposals varies widely. During final negotiations on Regulation 561 on drivers' hours a specific clause on rest times was removed from the official text. The European Parliament has since conducted a study and has altered its opinion on its removal but has had to use another piece of legislation, Operator Licensing Regulation, as the vehicle to attempt to reinsert the clause.

13. Leading up to the introduction of the digital tachograph into heavy goods vehicles FTA argued that the technology was already outdated and could not be introduced in accordance with the Commission's timings. FTA was ultimately proved to be correct, which left industry in a position of intolerable uncertainty where the Commission refused to act. This was eventually resolved well after the initial introductory date when the Parliament and Council, during the co-decision process, introduced a new date into another piece of legislation to solve the problem.

8 April 2008

Examination of Witnesses

Witnesses: Mr Chris Welsh, Director of Campaigns, Freight Transport Association, and Mr Roberto Ferrigno, Vice-President for Public Affairs, Weber Shandwick, examined.

Q158 ***Chairman:*** Mr Welsh and Mr Ferrigno, thank you very much for coming. Any interests which Members have in the relevant field will be disclosed in the Lords' register. We are on air and you will get a transcript of your questioning and the answers, and of course we will be very pleased if you wish to make any points on that or add to it at that stage. I think you may have an initial statement to make, one or both of you. Please do.

Mr Welsh: Thank you very much, my Lord Chairman, for this opportunity and invitation to give evidence to your inquiry. I am General Manager of Campaigns at the UK Freight Transport Association. Just for some background, the Freight Transport Association is the second largest freight association in the UK with 14,000 member companies. These members include retailers, manufacturers, logistics companies, hauliers, utilities and even local authorities, virtually all organisations and sectors of industry that are involved in the movement of goods and freight. I manage FTA's 20 strong team of policy managers and advise the Association on transport policy. In that capacity I am responsible for FTA's Brussels office and our liaison with the EU institutions and other stakeholders. Between 1995 and 2002, I was based in Brussels as FTA's permanent representative and for a five year period on secondment I was Secretary-General to the European Shippers' Councils, which was a PanEuropean Transport Freight Users Organisation, so during that time I had been involved in quite a bit of European legislation, both the initiation of legislation and framing and influencing legislation.

Q159 ***Chairman:*** Mr Ferrigno, is there something you would like to say too?

Mr Ferrigno: Yes. Thank you very much for inviting Weber Shandwick this afternoon. My name is Roberto Ferrigno. I am Italian and I am the Vice-President for Public Affairs with Weber Shandwick in Brussels. Weber Shandwick is one of the leading consulting agencies in Brussels dealing with the environment, political communication. We work for a wide range of clients, including non-EU governments, business organisations and non-government organisations. In my position I coordinate a group of 20 consultants and we work mainly, I have to say, with the European Parliament representing the interests of our clients towards the European Parliament, and I think that is all from my side and thank you very much again for the invitation.

Q160 ***Chairman:*** Thank you. Let me start with some general questions for both of you. There was a specific point made by the Freight Transport Association in its written material—for which we are grateful—that emphasises the role of the European Council in setting the main political agenda for the

development of legislation. Can you give us an indication as to what scope the Freight Transport Association in your case or a consultancy firm like Weber Shandwick has for influencing the framework for action set by the European Council, or is that done at a political level above your heads?
Mr Welsh: It is very much done at a higher political level well above our heads, but we have very close liaison with our own Government on, in particular, transport and environment policy. In the way that we can try and drive a UK agenda, our policy is to promote a proactive deregulatory approach and to try to persuade the Council of Ministers to take this approach, particularly with UK Permanent Representation. We have regular liaison with the UK Permanent Representation there, but also with the permanent representations of other Member States. For example, in a few weeks' time we are working with other industry stakeholders to organise a meeting with the French permanent representation for the incoming presidency because there are a number of key policy issues which the French will take on during the presidency and we want to have some influence on the way they might take those issues forward. So the influence we try to bring is in getting our point of view across and trying to influence in that way.

Q161 ***Chairman:*** That indicates your role in canvassing national authorities and thereby influencing the European Council, but what about the general framework for action set by the Commission, for example in the environmental sphere, the Environment Action Programmes? How far do you have input into them?
Mr Welsh: Again, we know very well the key Chefs de Cabinets in the main policy areas of concern to the FTA. Similarly, we try to influence and explain what the industry agenda is in those areas. So we are very conscious that we are likely to get European legislation on the introduction of emissions trading for the transport sector and that area is of keen interest for our members, so we would want to ensure that the Emissions Trading Scheme was introduced in a competitive way. I think probably the other main area where in industry we have had some influence, again with other trade associations, is, for example, in promoting the Lisbon Agenda. Several years back the Commission was clearly going in one direction, which was very much a regulatory approach and a lot of legislation we were facing was aimed at regulating the Transport market. We were of the view that this was making Europe uncompetitive compared with other parts of the world. So a good example of influencing key EU institutions was to get firmly behind the Lisbon Agenda and to take every opportunity we had in those areas to try to influence the case for the Lisbon agenda.

Q162 ***Chairman:*** Yes. We understand that under the Sustainable Development Strategy a number of thematic strategies were proposed, seven, and that some of them were controversial, in particular the proposed action in general areas such as urban environment, sustainable resources, waste recycling, probably, I think, for reasons such as you have mentioned. Were you active in suggesting in that context that maybe the strategy should be modified?
Mr Welsh: The urban area is a big area for us. Freight has to move in urban areas, and the European Commission is adopting a green paper at the moment. Our role in influencing Commission initiatives has been to organise a number of workshops in this area. What we are very keen to do is to influence that part of European Commission policy that may be aimed at urban transport, and the European Commission special study group was set up to look at urban transport. There is a framework programme which is being promoted by the Commission to provide funding to promote urban freight or the understanding of freight in the urban environment. So, yes, we have been in at the very, very beginning with the Commission officials and indeed as far up as the Director-General of DG Transport to ensure that we do have some input.

Q163 ***Lord Wright of Richmond:*** Have you been closely involved in measures to try to control the passage of illegal immigrants?
Mr Welsh: No, we have not really got too deeply involved in that, other than four or five years ago when legislation in fact was coming through the House of Lords at the time. The then Government was proposing legislation to fine freight operators for illegal immigrants discovered in vehicles. We tabled amendments in helping to frame that legislation, and indeed codes of conduct giving advice to our members about how to manage that. We have not really got too deeply involved in the broader issues.

Q164 ***Chairman:*** Is it possible to say whether your activities are more directed towards matters of general policy or more directed towards specific pieces of legislation that are being developed?
Mr Welsh: A mix of both, but I would say that in the main it is directed at specific legislation. We have been very active over the last four or five years on a whole welter of legislation covering regulations and directives, including the Working Time Directive, EU drivers' hours rules, the introduction of digital tachographs to commercial vehicles. These have been very technical and very detailed pieces of legislation and we have had to really get involved in the detail of the legislation to ensure that it is workable.

Q165 ***Chairman:*** Just before turning to Mr Ferrigno, can I just ask, your funding comes from where?

Mr Welsh: Purely from our members. We are a not-for-profit trade association.

Q166 ***Chairman:*** You do not get a grant from the European Commission?
Mr Welsh: We do not receive any grants from the European Commission. We are self-funded.

Q167 ***Chairman:*** Mr Ferrigno, I am not sure in my mind to what extent the environment is a prime interest of yours or whether your activities are entirely general, but perhaps you would like to respond on the subject we have been talking about?
Mr Ferrigno: Thank you very much. Actually, Weber Shandwick, Brussels, are on 60 per cent of our public affairs activities.
Chairman: I am afraid we have to suspend this session.

The Committee suspended from 4.24 pm to 4.33 pm for a division in the House

Q168 Chairman: Mr Ferrigno, you were interrupted.
Mr Ferrigno: I was saying that actually more than 60 per cent of our business activities concern energy and environmental issues, so yes, we work on those issues and we do represent the interests of our clients in discussions. You mentioned before the seven thematic strategies. We work particularly on the thematic strategy on recycling and, of course, on one of the most important outcomes of the thematic strategy, the revision of the Waste Framework Directive, which is the major piece of European legislation on waste management, waste prevention and waste generation. So definitely we work on this environmental area, yes.

Q169 ***Chairman:*** We have heard evidence from the World Wildlife Fund. Are you conscious in some of these connections, either of you, Mr Ferrigno first, of their activities perhaps in a different sense from yours in any of these spheres?
Mr Ferrigno: I saw Mr Tony Long leaving the room. We have known each other for 15 years. Also, because I have to say that before joining Weber Shandwick I worked also for some environmental NGOs, notably Greenpeace International in Amsterdam, so yes. Actually, one of the tasks we are assigned by our clients very often is just to create platforms to bring together different stakeholders to discuss new legislation, the revision of the existing legislation and very often those platforms or even coalitions bring together environmental NGOs, business organisations, some local authorities, and we organise room for discussion, for possibly cooperation, or even confrontation sometimes, among the different interests that need to be challenged in the new legislation.

Q170 ***Chairman:*** That sounds, if I may say so, quite a transparent exercise where there is an open exchange of views?
Mr Ferrigno: There is an open exchange of views and I have to stress the point that as a consultancy organisation we mainly work with the European Parliament. This means that we work with the one of the three institutions, the other two being the Council and the Commission, which is traditionally more open and transparent in taking on board the different interests expressed by the different groups.

Q171 ***Chairman:*** If you make written submissions to any of the institutions, are they in fact open for inspection by other lobbying bodies or are they simply for the eyes of the recipient?
Mr Ferrigno: For instance, we can support the Members of the Parliament in writing, discussing amendments to legislation, and this is something which relates to the public office of a Member of the Parliament. So in theory, yes, there is no restriction and we cannot impose any restriction on these kinds of activities.

Q172 ***Chairman:*** But in practice some of the communications, would I be right, would be unknown to other people? Oral communications, discussions with a Member of the Parliament, or indeed with a Commissioner or Director-General, would be something that other people would not know about?
Mr Ferrigno: Yes, of course. If you meet personally a Member of the Parliament or an officer from the Commission, those remain personal and private meetings.

Q173 ***Baroness O'Cathain:*** When you have these discussions in a room where you sometimes have confrontation, do you aim to come out with ideas to initiate legislation so that then in turn there is an agreement of the people within the room that it would be a very good idea to tackle one of these ideas, the energy ideas, in a specific way and then muster the forces in order to draw up a programme to influence—you say the European Parliament first, but the Commission and then the Council? Is that the way it is done?
Mr Ferrigno: Yes. Now there is an established procedure by which the Commission regularly organises those stakeholder meetings.

Q174 ***Baroness O'Cathain:*** I see, it is the Commission then, it is not you?

Mr Ferrigno: No. This is the official level, of course. So this is the starting point. For instance, if the Commission thinks of projects, to initiate a new piece of legislation or to revise an existing piece of legislation now traditionally they call for a stakeholders' consultation. There are, I think, more than 100 stakeholders' consultations ongoing these days on different pieces of new legislation or revision, or adaptation of existing legislation. So this is a formal process which is now very well established. So the Commission initiates this process. We may act within this process of public consultation by focusing maybe on a specific aspect of the Commission's proposal, the Commission's discussion, and we may call for the interests of different stakeholders on specific issues. You mentioned thematic strategies. They are very general. They were controversial, but they are very general. Then the work we do by representing, of course, some interest, is that we identify some issues which can be highlighted during the discussion and which could be brought to the attention of the legislator. So we call different stakeholders to discuss these specific issues and possibly, if an agreement is reached, use this critical mass of stakeholders at the consultation within the official procedure to try to influence then the outcome of legislation, of course.

Q175 ***Lord Bowness:*** Clearly, you are deeply involved in this lobbying process, but can you objectively tell us how effective you think that is in bringing about new legislation or actually altering the shape of what has been proposed by the Commission?

Mr Ferrigno: We look at the new policy-making process as a circular process. This is not a linear process. There is not a real starting point with different lines, this is a circular process. The three institutions, the Commission, the Council and the Parliament, particularly because of the inter-institutional agreements, work all around the clock. It is an ongoing process. You need really to spot the right moment at the right place where you get into the process. Of course, there is always a form of starting point for a new piece of legislation and the closer you are to the starting point and to the Commission, which has the rights of initiating it, the better for trying to influence the process. You may succeed or you may not succeed. It depends also on how much alliance you have in this process because, as you know, the policy-making in Brussels is heavily orientated towards consensus. It is not like in the United States, or other Members of the European Union, but the European Union tends to be leaning towards a consensus for the adoption of new pieces of legislation. So yes, you may be effective in influencing a specific piece of legislation if you are timely, if you are focused and possibly you have allies. We used to say that the most powerful lobby in Brussels is the national governments.

Mr Welsh: I can give you two examples, I think, where we have influenced and initiated legislation. Much of what Roberto said I would confirm, the use increasingly of the European Commission, through stakeholder meetings, to ascertain broad views from a range of stakeholders. But that does not stop maybe a well-established organisation like ourselves from trying to take the initiative. Often that is to help the Council and the European Commission to get a debate going. One way we did this was last June. We were concerned in the UK about the safety and condition of foreign heavy goods vehicles on our roads. In order to promote the better sharing of data about the standards of vehicles coming into this country and to get a more uniform system of enforcement of such vehicles, we organised our own workshop in Brussels where we invited the European Commission, Members of the European Parliament and a number of Member States, including in particular East European countries and the accession countries. We had quite high ranking Commission people come along and prominent MEPs in the relevant committees to participate in the workshop. As a result we were able to get an understanding of the problem and of the need for the sharing of data and getting common standards for safety. The European Commission has taken on board many of the ideas which came out of that workshop and it has assisted the Commission in framing legislation. The second example I can give is when I worked with the European organisation, the European Shippers' Council. We felt that there was a community interest in ensuring that we had an external trade policy which promoted an open markets policy for our overseas exports and the shipping services. We worked closely with the presidency and other Member States in Coreper to organise a Council seminar on this particular issue, and again we invited Member States' representatives and other prominent people from the key EU institutions. I would not necessarily say that they took up our ideas with alacrity, but it was an opportunity for industry to put its view across to all EU governments in the Council, which proved to be a very successful event. So I think that organisations which are well known and respected and recognised by the Commission and the other institutions as being knowledgeable about their subjects, and have something to offer in terms of legislation, it is possible to move outside of the formal frameworks to influence the framing of legislation and to move a process forward.

Q176 ***Lord Rosser:*** This is going to be put in a very simple form and no doubt you will say it is not as simple and straightforward as that, but if you want to initiate new proposals who do you want to get on

board first and most of all? Is it the Commission, is it the Council and national governments, or is it the Parliament, or are they all of equal importance? Secondly, if you do not want to initiate new proposals but you want to amend or alter proposals already made, who do you want to get on board first? Is it the Commission, the Council and national governments, or is it Parliament, or are they all of equal importance?

Mr Welsh: Certainly, if you are initiating legislation you can do it in the way I have just described. However, the European Commission is the main promoter of new legislation, that is the prime body to do this, and it is actually a relatively open organisation. You will find that administrators within the Commission who are responsible for particular policy areas, certainly in the transport area with which I am very familiar, are relatively bright people, often quite young people, have a lot of responsibility very early on in developing legislation. It is a bottom-up organisation as much as a top-down organisation, so often working with a very bright young administrator in the European Commission who wants to move things and get things done is a very good way of promoting legislation, especially if it is obviously consistent with the general thrust of where the Commission is going in that particular area. They are able to often promote policy proposals internally within the Commission right up to heads of units and beyond. Again, I have had experience over the 15 or 20 years I have been dealing with European institutions of sometimes going that route rather than the top-down route, because you can only get in once or twice a year, maybe, to see the European Commissioner, but the administrators responsible for the files are there all the time. In terms of amending legislation as it goes through, if you really think the European Commission has got it wrong and you have got evidence of the way the legislation will work in practice—that is where the power of our members is very important because we can actually take the practical people from the industry along and tell them, "This won't work because of A, B, C"—that is one way where by sheer strength of argument, , you can say, "This is not going to be good legislation." The reality is however that once legislation gets to the first reading or second reading within the European Parliament then the opportunity is taken to make amendments to that legislation by encouraging MEPs to support our amendments to help shape or influence the final outcome.

Q177 ***Lord Rosser:*** If it is a new proposal you would put the Commission as more important than either the Council or the Parliament? Not that the others are not important, but the Commission is where you would go?

Mr Welsh: For me, it is the European Commission, yes.

Q178 ***Chairman:*** Can I, before going to Mr Ferrigno, just ask you to comment on this: you have mentioned the role of bright young individuals within the Commission. How far do such individuals effectively need to put forward proposals in whatever area might seem to them to be likely to attract support in order to justify their existence, to promote their careers? How far is there an internal dynamic?

Mr Welsh: My experience is that the European Commission is a very lean organisation. It does not actually employ very many people and they are more short of resources rather than there is a largesse of officials there to do it. So that generally tends to be the problem rather than there being a vast army of bureaucrats there to pursue legislation.

Mr Ferrigno: If I may add one consideration? The Commission is the only body which has the right of initiative according to the Treaty, but of course experience teaches us that very rarely the Commission initiates new legislation without having ensured political support from the Council because this must be clear in the way the EU policy-making process works, otherwise there would be a major institutional crisis and stalemate. Conflicts may arise, but usually when the Commission starts a new legislative process you can be sure they have already gained the support, if not the unanimity of the Council then at least the great majority of Member States.

Q179 ***Lord Rosser:*** But you would still say that from your point of view the Commission is the one, from your point of view, than either the Parliament or national governments, or the Council?

Mr Ferrigno: The Commission is the only one, yes, which has the right to initiate legislation.

Q180 ***Chairman:*** How far is the efficacy of lobbying and the quality of the final product affected by the de facto tendency to seek unanimity?

Mr Ferrigno: This is going to change, probably, if the Lisbon Treaty will enter into force. It has already changed now. The qualified majority is more and more used within the Council to take a final decision. So, of course, the fact that there is this tendency towards consensus may have affected the effectiveness of some legislation. But historically the European Union is about the internal market. It is an economic issue. It is something to promote peace after the Second World War and the bright idea was to promote an internal market where business operators and then citizens and goods could freely move from one country to another. We should not forget that it is a very strong economic

route of the European Union. So I would say it was quite easy to find unanimity in promoting the internal market for the wellbeing of the Europeans. Then when the European Union started to have also more political implications, and so on, the situation may have changed. So again this is reflected in the changes proposed by the new Lisbon Treaty, so unanimity will not be required any more basically for the great majority of the policy areas where the Community has an interest. This has been recognised, particularly with 27 Members and maybe even more than that in the future. But yes, in some particular areas unanimity may have affected the effectiveness of legislation.

Q181 ***Chairman:*** What about the appointment of external consultants? How far does that affect the role of interest groups and lobbyists? Is it a substitute? Does it mean that the Commission looks to their view as objective or are they simply a supplement? I think you have told us already that you yourselves use consultants, so perhaps you would like to comment on that?
Mr Welsh: Yes. In my experience the European Commission tend to use consultants to do specialist work for them, maybe legal analysis or economic analysis, usually if they do not have the in-house expertise and skills to do that or they just do not have the resources to undertake such a detailed legal or economic analysis. So the consultants tend to come in and do that work for the European Commission and the consultants, again in my experience, will take the trouble and time to meet the major industry stakeholders and other stakeholders to obtain their views. So you often find that you are having to work with these consultants, at least to give them information, knowledge and evidence that you have got. I think the European Commission will often use consultancy reports in much the same way as probably the UK Government may use consultants. If it is thinking of introducing a new taxation system, it might go to some outside consultants to give it advice in that area about how it would do that.

Q182 ***Lord Wright of Richmond:*** Do you get involved in the process of impact assessment? Does the Commission consult you, or do you find any way of involving yourselves in the process?
Mr Welsh: Yes. We get involved to the extent that we are usually urging the European Commission to undertake an impact assessment on its legislation, particularly if it is likely to have an adverse economic impact upon us.

Q183 ***Lord Wright of Richmond:*** Does it ever ask you for help in drawing up that impact assessment?
Mr Welsh: No, but we do regularly contribute to it.

Q184 ***Chairman:*** You mentioned in your written evidence that the Commission establishes consultative committees and/or expert working groups. Have you already covered those in your evidence today? I think you have probably.
Mr Welsh: Yes. Probably the only additional thing is that sometimes the European Commission, maybe even with a piece of legislation that is on the Statute book, may want to review it in the light of experience and often it will then call together experts it thinks can give it some detailed expertise and knowledge. I have one member of my team at the moment who has been specifically asked by the European Commission to assist it in looking at a piece of legislation which came in about 18 months ago. My experience is that the Commission tends to want to go to the people who are expert in that area who can give it that help.

Q185 ***Baroness O'Cathain:*** That is very interesting actually. So is there automatically post-legislative scrutiny on all legislation and these groups which help to influence the formulation of the legislation are called back in to see how it works in practice?
Mr Welsh: It is a bit of a mix. Sometimes legislation clearly has a review period within it, so the Commission will automatically review, for example, the introduction of the Working Time Directive to road transport within a two year period. It will probably convene an expert group to look at that. Sometimes it can be ad hoc. For example, we may have been seeking to influence the European Commission for a long time on an aspect of legislation that has been long defective and that they should get around to dealing with. Very often they approach us to assist them in revising problematic legislation.
Baroness O'Cathain: That is sensible. We could do that here.

Q186 ***Chairman:*** Have either of you got any comment on whether the present system with lobbyists, with the sort of cooperation meetings and input you have described, is a system which you are entirely happy with? Are there any respects in which you would suggest that the way in which legislation is initiated and proposals developed could be improved?
Mr Welsh: No, I have not really. European legislation is quite a complex area and I guess any area where it could be actually simplified would be a great help, but I think one has learned to sort of grow with it over the last 15 years or so. But I have not got any specific proposals for improvements.

Q187 ***Chairman:*** What about you, Mr Ferrigno? Do you think it works well?
Mr Ferrigno: Personally, I think that national parliaments should be more involved and should have more power of scrutiny on what is going on. Again, some provisions of the Lisbon Treaty are going in this direction, but so far (this is not Weber Shandwick but according to my personal experience) I think that this is a gap which should be filled.

Q188 ***Chairman:*** Do you think the lobbying which is received at European level is representative? We have heard from obviously two powerful organisations, the World Wildlife Fund and the Freight Transport Association and one can see where the funding comes from, and we have heard and can see where the impetus comes from, but is there a representative lobbying in Brussels? Are there people whose voices are not heard?
Mr Welsh: In my experience, it is a very competitive arena in terms of getting your voice heard. There are plenty of other stakeholders out there who are equally keen to get their points of view across and the competition means you have just got to be more articulate, better informed and come up with better ideas if you want to be successful in this area.
Mr Ferrigno: I totally agree. It is an extremely competitive environment. It is becoming more and more competitive and complex. The different layers of the interests tend to overlap and sometimes it is difficult really to have a full understanding and above all to have full control of the whole process, if not because many, many actors are coming in and making things a little bit more complicated than, let us say, ten years ago.

Q189 ***Chairman:*** But you and the people who engage you, Mr Ferrigno, believe that on the spot involvement, personal contact, is important. Are there voices which perhaps do not have the financial resources or perhaps do not have the organisation which can communicate no doubt by letter or email but are not going to be heard to the same extent that yours are?
Mr Ferrigno: Yes, but that is the reason I would call for more involvement of the national parliaments because the representational gap can be closed, the different layers at a national level. Honestly, the European institutions, particularly the Parliament and the Commission, have tried recently in the last few years to improve access to the EU policy-making also for those groups which traditionally have had no voice in the past, but of course this is a process which also raised controversy because, as you know, those organisations receive funds, for instance, from the European Commission so their legitimacy also is questioned. So it is a very complicated process, but the European Commission particularly made great efforts in trying to bring in more voices in the EU policy-making and then we will see if this will change things or not.

Q190 ***Baroness O'Cathain:*** The FTA raised concerns regarding the quality of legislation. What do you think is the reason for this and how could the draft legislation phase be improved to avoid this problem?
Mr Welsh: Often the European Commission comes forward with quite rational legislation. The important point about influencing legislation is to influence Commission thinking before a Green Paper is issued. When it gets into the political process, as Roberto has described, then the tendency towards consensus within the Community can have a negative effect, and the negative effect is that legislation often gets amended and changed in quite bizarre ways and for quite bizarre reasons. Sometimes it is simply because things are just done differently in Member States and therefore the impact of legislation will impact differently, or quite frankly it has just been traded for something else and as a result of that process the legislation can change quite dramatically from what was at the outset a rational piece of legislation and ends up being a camel!

Q191 ***Baroness O'Cathain:*** Instead of a racehorse?
Mr Welsh: Instead of a racehorse, yes!
Chairman: Mr Welsh and Mr Ferrigno, unless there is anything more you want to say by way of final comment, thank you very much indeed for coming and giving us some very interesting evidence.

THURSDAY 8 MAY 2008

Present	Bowness, L	Norton of Louth, L
	Burnett, L	O'Cathain, B
	Jay of Ewelme, L	Rosser, L
	Mance, L (Chairman)	Wright of Richmond, L

Memorandum by the Bar Council of England and Wales

1. The subject matter of the inquiry now being carried out by Sub-Committee E is of great interest and may cast a spotlight of transparency on an area not especially well known or understood, namely where the ideas come from for EU legislative proposals and how such ideas are selected, prioritised and developed to the stage of becoming a formal proposal (after which the better-known procedures take over that are not the focus of the present inquiry).

2. This evidence is submitted on behalf of the European Committee of the Bar Council of England and Wales. It is substantially based on the experience of monitoring and influencing the development of EU legislative proposals gained in its Brussels office.[1] Members of the Committee have also passed on their own experiences.

3. In the nature of things, such experiences are somewhat sporadic and may not be representative or typical. We have therefore concentrated our efforts on a few particular points that we wish to draw to the Sub-Committee's attention, and hope that they may contribute to enabling the Sub-Committee to build up a picture from all the evidence submitted.

4. In particular the European Committee is better able as matters stand to provide evidence based on civil justice proposals rather than criminal justice about which the Sub-Committee has specifically asked. It is our expectation that, once the Lisbon Treaty enters into force and competence in the criminal justice field moves to the Union, the Commission's overall policy approach is likely to be similar in both fields. That said, we would be delighted to seek the views of the Criminal Bar Association on specific criminal justice measures to date if the Committee would find that useful. We have no experience in relation to transport matters and very little in connection with environmental pollution and CO_2 emissions.

5. Our overall impression is that the process of deciding what topics should be the subject of a legislative proposal is at best ad hoc. Thus, ideas may emerge from:

(i) Formal Council meetings, such as at Tampere (1999) and the Hague (2004) in the justice field. (We are not aware of any stakeholder consultation with the legal profession by ministries at national level in the run-up to these meetings).

(ii) Informal meetings between Member State delegations, the Council and the Commission, casting around for ideas.[2]

(iii) The Commission commissioning external studies by institutes with which they work closely, which may then form the backbone of Green Papers that are apparently structured in such a way as to elicit responses that support the studies' findings. A topical example of this is the 2005 Green Paper on Wills and Succession, which has paved the way for the Commission proposal, expected later this year.

(iv) An energetic MEP having a particular issue around which he/she builds an own-initiative report encouraging the Commission to legislate, which is then adopted by the EP and carried forward by the Commission; (example—the European Private Company Statute; and probable future proposals in the light of the recent EP reports on limitation periods and the role of national judges).

[1] The Bar Council's Brussels Office has been headed since its opening in 1999 by the (External Consultant), Director of the Brussels Office and Executive Secretary of the European Committee, Evanna Fruithof.

[2] In the interest of completeness, we note that the Commission's DG Justice, Liberty and Security has indicated informally to us that it would always be interested to hear from us if we have ideas for legislative proposals that it might take up, not least as the UK's posture is often negative and critical; if there were something that we should welcome, they would be glad to consider it.

(v) Member States or a powerful lobby within a Member State using (iv) to their own advantage (examples: the Italian notaries' annex to the 2006 EP own-initiative opinion on the Commission Green Paper in Succession; the imminent EP own-initiative report on authentic instruments, behind which lie, apparently, the French notaries).

(vi) Pressure from powerful individual-interest lobbies eg the road traffic insurers hold an annual conference (at Trier) which is used as a brainstorming/discussion forum in which ideas are ventilated, some of which are then incorporated into proposals which become the motor insurance directives.

(vii) In the criminal justice field, under the current Treaty arrangements, from one individual Member State (though this will change to nine once the Lisbon Treaty is ratified, and we are increasingly seeing joint Member States proposals in the field—eg the current in absentia proposal, submitted jointly by six Member States). Single Member States initiatives can raise their own special problems:

— National hobby horses are inflicted on other Member States.

— EU institutions are obliged to carry forward a proposal for which no resources, including time and manpower, were set aside.

— Such initiatives may cut across the Commission's own planning, sometimes muddying the waters. (example: non-custodial supervision, bail and pre-trial detention).

(viii) As anticipated in the call for evidence, the Commission does also draw inspiration from bodies such as the Hague Conference and the Council of Europe, with which it works closely. If the Commission issues a proposal based on a non-EU Convention to which all or some EU Member States are party, its approach is always to raise the bar for the EU legislation, on the grounds that within the EU, mutual trust and cooperation can be expected to be higher (eg the Rome I regulation having its origins in the Rome Convention 1980).

(ix) The Call for evidence asks whether ECJ judgments can be the source of inspiration for legislative proposals. Of course, in cases brought on the issue of legal base (eg ship source pollution C-440/05) what the ECJ says will have a direct impact on legislative proposals, either to amend the instrument in question or in the future—witness the recent proposal on sanctions for breach of environmental law. However, in such cases, the idea for the legislation itself was already manifest by the Commission's issuing the original proposal. Likewise where there are questions eg in a preliminary reference on the compatibility of a legislative provision with the fundamental freedoms of the Treaty. That said, it may be that ECJ rulings, say on the application of the fundamental freedoms, would inspire new legislative activity.

6. Looking specifically at current work and considering where the ideas for it originated in the civil justice field, the Commission is to issue a proposal on jurisdiction and applicable law in the Succession field later this year. Work is also continuing on the Rome III proposal, on maintenance obligations and on an eventual proposal in the field of matrimonial property. With the imminent adoption of the Rome I regulation (with or without the participation of the UK); the relatively recent adoption of Rome II; and the recent Council conclusions intended to set the parameters, for the time being, for the Commission's work on the Common Frame of Reference, the Council and the Commission are beginning to talk in terms of completing their work on private civil law in the EU in the coming decade.

7. The origins of such proposals can be traced back to the introduction of the relevant treaty base, Articles 61–67, into the TEC by the Treaty of Amsterdam in 1999.

8. Since 1999, there have been two major legislative work programmes covering all activities in the Justice and Home affairs area. The first, adopted by the European Council in Tampere in September 1999 (together with the earlier Vienna Action Plan) set out an ambitious programme of measures and a detailed timetable for their achievement over a four year period. The second, adopted by the European Council in November 2004, was then implemented by a five year Action Plan, adopted by the Commission in May 2005. Work under this Action Plan is almost complete, and the Council and Commission are currently devising its successor.

9. In the civil justice field, the legislative proposals under these two work programmes can be slotted into a predictable model, based on the Treaty wording. The Council has devised a list of categories of measures in this field according to the nature of the cross-border rules they lay down, including: jurisdiction, applicable law; recognition and enforceability; and enforcement. In setting down programmes of measures to be implemented in the field, the Council, in close consultation with the Commission, effectively draws up a table with the categories of proposal on the y axis, and the areas of activity in the civil justice field (family law, sub-divided into divorce and legal separation; ancillary relief; matrimonial property, child custody issues; Succession; civil and commercial contracts and judgments thereon, etc) on the x axis. Each subsequent work

programme fills in the boxes of what has not yet been achieved. Beyond that, additional proposals are added, which will facilitate the effectiveness of these measures eg rules on evidence, legal aid, service of documents; alternative dispute resolution. It would be reasonable to expect the institutions to take a similar approach to legislating in the criminal justice field once the EU has competence to do so under the Lisbon Treaty.

10. Before the civil justice programme is declared complete, however, we may expect to see some form of consolidation of the existing civil justice acquis, much as we are seeing in the consumer law field where the Commission's DG Consumer Protection is currently working on a horizontal framework directive to consolidate and improve the existing acquis; and as in the Internal Market field for services two years ago with the adoption of the framework Services Directive.

11. If one looks at current and imminent proposals in the civil justice field through the lens of expectation that one day all of the rules on jurisdiction, applicable law, enforcement etc will be laid down in one framework instrument, then it becomes clear that the Commission and Council will, as a matter of course, aim for the most complete package in each proposal. Viewed this way, it is hard to see, for example, what a Member State such as the UK or Sweden can really do to exclude applicable law provisions from the future Succession proposal, or the current Rome III proposal, respectively, given that the grand design requires that they be included.

12. It is further possible to predict that, having achieved the consolidation of private law through the use of private international law and other instruments developed on the parameters mentioned above, the Council and the Commission are likely to try to go further, seeking approximation of civil law rules where that is permitted under the provisions of the new Treaty. For example, the Commission is already now looking at a possible proposal on the application of foreign law by national courts.

13. We would make the following rather general criticisms of the unsystematic nature of the emergence of legislative proposals:

(i) There is little homogeneity built into the system.

(ii) It is open to manipulation by powerful interests.

(iii) Most significantly, there is no systematic, thorough consultation of stakeholders (by which we include both judges and practitioners) guaranteed to take place at the earliest possible stage in the life of an idea for a proposal.

14. We consider that stakeholders should be consulted at the beginning of the process, on both the need for EU action in the particular field, and the form that that should take.

15. Particular attention should be paid not only to the principle of subsidiarity, but also to that of proportionality. For example, it is our view that many of the problems in the civil justice field, arguably correctly identified to date by the Commission as justifying EU action, could have been adequately dealt with by basing instruments on the principle of mutual recognition, rather than the more far-reaching measures that the Commission proposed. The Commission would of course argue that it is obliged to carry out studies and impact assessments before embarking on a legislative proposal, and therefore that the safeguard we seek is already built into the system. However, since we are not aware of the views of the judiciary or practitioners in the Member States being systematically sought or incorporated into those assessments, in our view they do not cure the ill.

16. Again in the Justice field, the Commission is currently engaged in creating a body which it might claim should deal with some of the concerns expressed above. This is to be known as the Justice Forum, due to meet for the first time on 30 May 2008. But we are not alone in our concerns that this could be used by the Commission as a fig leaf. There must be a risk that the Commission will present legislative ideas to the Forum, which, especially sitting in Plenary, will be an extremely disparate group of interests. It is likely to have difficulty to agree on anything other than rather bland comments on proposals. The Commission may nevertheless try to make a virtue of having "consulted" the Forum or claim that its idea was "approved" when in fact the Forum was not able to reach a clear position. Moreover, since the Commission is adamantly refusing to allow seats on the Forum for stakeholders from national bodies (including the Bar of England and Wales), but instead relying on pan-European associations (in our case the Council of the Bars of Europe ("CCBE"), the European Criminal Bar Association ("ECBA") and the Pan European Organisation of Personal Injury Lawyers ("PEOPIL"), the risk must be considerable that the voice of the Common Law will be drowned out, if it is heard at all. To be clear, whilst the Bar welcomes the Commission's intention to consult more widely with stakeholders on policy and legislative initiatives, as manifested in the creation of this Forum, we are concerned that, as presently constituted, its practical value will be limited and perhaps even abused.

17. The Commission departments, again especially in the justice field, are understaffed, and rarely have common law lawyers within them, much less in all key areas. Accordingly, Commission consultations (eg the 2005 Succession Green Paper; the 2006 Matrimonial Property Green Paper) and proposals are often drafted by someone with little knowledge of the subject matter, and likely no knowledge at all of the implications for the common law of what they are suggesting.

18. Nor do such inadequacies in our view necessarily become ironed out in the legislative process itself.

19. While there can be no doubt that the introduction of the co-decision procedure in the civil justice field (except for family law) in 2001, and its imminent extension to the criminal justice field when the Lisbon Treaty is ratified, have improved the situation in terms of providing greater democratic input and more opportunity to influence the debate and right wrongs in Commission proposals, there are systemic flaws which prevent the co-decision procedure from providing the checks and balances needed to weed out unnecessary or inappropriate Commission initiatives.[3]

20. Once a proposal is adopted by the Commission, no matter how flawed it may be, it inevitably becomes the template for the eventual instrument, even if extensively amended during the legislative process. A Commission proposal is thus a very powerful tool, and the right of initiative is understandably prized by the Commission and envied by others.

21. Even at first reading, where there are no time limits, there is often woefully little real substantive debate in the European Parliament on the substance of the issues.

22. Again, responding to a particular point raised in the call for evidence, the other EU bodies, including the Economic and Social Committee ("ESC"), not being co-legislators, do not in our experience have much influence on the ground in Brussels, whatever may be said officially.

18 April 2008

Memorandum by the Law Society of England and Wales

Introduction

1. The Law Society of England and Wales ("the Society") welcomes the opportunity to contribute to the Sub-Committee E (Law and Institutions) inquiry on the initiation of EU legislation. The Society is the representative body of over 125,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and lobbies regulators and government in both the domestic and European arena.

2. The Society's EU Committee previously undertook a "Better Law Making" campaign which examined some of the issues addressed in this inquiry.[4] A number of the points set out here have also been raised in evidence previously submitted to the House of Lords Select Committee inquiry on the European Commission's Annual Work Programme.

3. The Society is not in a position to respond to all the questions posed but will comment on the roles of the Institutions and certain other parties and will seek to highlight a number of key concerns relating to the initiation and development of legislation, particularly in the area of police and judicial cooperation in criminal matters. Where possible examples will be given to illustrate the points being made, including addition subjects over an above the three areas identified as being of special interest to the Committee.

European Commission

(a) *Transparency*

4. The Society agrees that the European Commission ("the Commission") operates to a great extent in an open and transparent way as regards development and initiation of legislation. This has been the result of a number of developments since the publication of the European Commission's White Paper on European Governance in July 2001[5]. It is not always possible, however, to pinpoint from where an idea originated. Despite the steps it has made towards transparency, this does not extend to the Commission disclosing with

[3] The European Parliament's 2005 rejection of the Commission's 2002 ill-judged proposal on the patentability of computer-implemented inventions being a notable rare exception to this assertion.

[4] http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=258501

[5] These include the Commission's Communication on better law-making, the adoption of minimum standards for consultation by the Commission, initiatives on simplification and impact assessment and initiatives by successive EU Presidencies such as the Six Presidency Better Regulation agenda. An interinstitutional agreement on better law-making between the Commission, European Parliament and Council of Ministers (the Council) was signed in 2003. Recent work on Better Regulation and simplification has also been welcome.

whom it has had contacts, other than through public consultation. The Society takes this opportunity to welcome and encourage the practice of the Commission in publishing the responses to its consultation exercises.

(b) *Setting the agenda*

5. The Commission's Annual Work Programme is an effective tool for setting the agenda for the creation of legislative proposals as it clearly sets out the overarching strategic themes that will govern the Commission's work—such as "prosperity; solidarity; security and freedom, and a stronger Europe in the world". In addition it is clear that the political decisions taken by the European Council or the sector-specific Councils, such as the Justice and Home Affairs Council, do set the future legislative and political agenda and can determine priorities in terms of on-going legislation.

6. The Society considers that the Commission's Work Programme does offer relevant information as to the key proposals that will be brought forward and the time-line foreseen. However it falls short of the effective instrument that it could be. Whilst it should stand as the overall strategy document for the work of the European Commission in particular, and the EU legislature collectively, by the time it is published many of the deadlines and indicative dates that are given are already out of date. This undermines its usefulness. Often, dates set by the Commission for specific proposals are only aspirational or indicative, but equally they are often overly ambitious and as a result are frequently not met.

7. Moreover, the Work Programme suffers from not being one single, coherent document. The information in these different documents is sometimes contradictory and it is not always clear which should be regarded as the definitive source. For example, some of the information contained in the "roadmap" is neither reproduced nor referred to in the indicative list of legislative and non-legislative proposals. It is often more effective to rely on sector specific action plans such as: the Financial Services Action Plan series, the Company Law Action Plan and the Hague Programme Action Plan in the area of freedom, security and justice.

8. Although recognising the need to balance adequate information with a manageable amount of information, we consider that there is insufficient detail about what is proposed so it is impossible for those potentially affected to judge the significance of any individual proposal or even what the proposal may be about. The Work Programme itself also gives no real indication of specific legislative priorities beyond broad political and policy statements. Again the information dealt with in sector-specific information has to supplement the Work Programme itself.

(c) *Coherency in policy making and definition*

9. The coherence of policies is sometimes an issue of concern but is also indicative of a possible lack of strategic overview of the Commission's work. A current issue, collective redress ("class actions"), provides a good example. At least two Commission Directorates General are working on proposals—both DG Competition (DG COMP) and DG Health and Consumer Affairs (DG SANCO) are active in the matter. While the Society is supportive of both streams of work, that of DG COMP is, much further advanced (a White Paper was published in April 2008), compared to that of SANCO, which is conducting in-depth research. Commissioner Meglena Kuneva took office in 2007 when Bulgaria acceded to the EU, and it appeared that she gave a lot of political impetus and profile to the work of DG SANCO.

10. While the Society has not taken a position on the need for EU-wide and/or national class actions systems and what form they might take, it is nonetheless suggested that there could be greater consistency across the Commission / EU policy here. The basic policy objective is the better enforcement of Community law rights and access to justice. This objective might not be best served if, as appears to be the case, ideas are being developed in "policy silos". One explanation for the present position could be to do with the stakeholder contacts and audiences the different Directorate Generals have. For example, DG SANCO will have greater contact with consumer affairs organisations and be sensitised to their issues. Indeed, the availability of collective redress could also be an issue of relevance in relation to other subject areas, for instance, employment law, environment law, securities law. It clearly seems to be an issue where joined-up thinking is needed.

(d) *Fulfilling the remit*

11. The Society also has concerns regarding the situation where the Commission is delayed in bringing forward legislation identified in the annual Work Programme or the equivalent sector specific action plan. This is particularly the case in the area of police and judicial cooperation where a number of proposals indicated in the Hague Programme Action Plan have not as yet been brought forward and it is not clear that they ever

will be. For example, neither the Green Paper on handling of evidence, scheduled in the Hague Programme Action Plan for 2006, and the Green Paper on default (in absentia) judgments again scheduled in the Hague Programme for 2006, were presented in 2006 or indeed 2007. There was no public explanation for this and no obvious means by which to hold the Commission, or the Member States, to account for failing to follow the actions set out. However the Slovenian Presidency, in conjunction with a number of other Member States including the United Kingdom, brought forward a Member State initiative on in absentia judgments in January of this year.[6]

12. A key example of the failure to fulfil the remit of the Hague Programme Action Plan—the fault for which should be levelled at the Member States in the Council not the Commission—is in relation to procedural safeguards and the rights of the individual. The Hague Programme stated that: "the objective of the Hague programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice" and: "the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings".[7] Since then no legislation has been adopted that reflects this objective and the focus has been on police and prosecution authority cooperation and on legislation that has been introduced by Member State initiative outside of the Hague Programme. An example of which would be the Prüm Treaty, an initiative by seven Member States for common action for improving cooperation in combating terrorism and serious cross-border crime. This is now in the process of being incorporated into the European Union framework yet it has not been subject to impact assessment or stakeholder consultation and there has been limited democratic scrutiny.[8]

The Council—the Member States

13. While the Commission generally has the right of initiative under the EC Treaty it would, we believe, be naïve to imagine that they did not take into the account the known or anticipated views of the Member States when formulating policies and proposals for legislation. Many opportunities exist for the Member States to make known their views, formally or informally, in general or in precise terms, collectively or individually. This said, there have been cases where on presentation by the Commission the response of the Council (or a sufficient number of Member States) has been radically different.

14. Take, for example, the Framework Decision on certain procedural rights in criminal proceedings, where the original Commission outline and the subsequent proposal were substantially different in scope and ambition in order to take into account the Member States' views. As mentioned above, still no measure has been adopted. On the other hand it could be argued that the Commission should take more heed of the likely outcome in the Council before producing a piece of legislation. The "Rome III" proposal, the draft Regulation on jurisdiction and applicable law in matrimonial matters is a clear example of a piece of legislation that inevitably would face political and technical difficulties.[9] In an area of unanimity voting, significant legal and cultural difficulties and one Member State (Malta) having no domestic divorce regime at all the outlook for this proposal was gloomy at best.

15. We comment in more detail below on the key area within freedom, security and justice, namely the Third Pillar, where the Member States have the right of initiative.

The European Parliament

16. As regards the European Parliament it is clear that its role has been significantly enhanced due to the expansion of co-decision in a number of areas—civil judicial cooperation under the Treaty of Nice for example—and due to take place following the entry into force of the Treaty of Lisbon. The Commission and the Council have a greater awareness and sensitivity to the role of the Parliament in terms of initiating legislation and the legislative process as a whole. However, what is not certain is the Parliament's influence when it takes an own initiative report to call on the Commission and Council to take action. For example, the European Parliament resolution on cross-border limitation periods, the Wallis report that contained a draft legislative proposals.[10] It is not clear what action the Commission or Council since then. The European

[6] Draft Council Framework Decision on the enforcement of judgments in absentia http://register.consilium.europa.eu/pdf/en/08/st05/st05213.en08.pdf
[7] http://ec.europa.eu/justice_home/doc_centre/criminal/procedural/doc_criminal_procedural_en.htm
[8] The House of Lords European Union Committee report on "Prüm Treaty: weapon against terrorism and crime? http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/90/90.pdf
[9] Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters http://register.consilium.europa.eu/pdf/en/06/st11/st11818.en06.pdf
[10] http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2006-0405&language=EN&mode=XML#title1

Private Company Statute, mentioned above, however, was subject to calls for legislation from the European Parliament and lobbying from business, including threats of litigations from certain MEPs, should the Commission decide not to take any action. This undoubtedly contributed to the priority given to this proposal.

17. Equally when the European Parliament responds to pre-legislative consultations, such as a Commission Green or White Paper, through an own-initiative resolution, this is of influence in shaping the future ambitions of the Commission. Such initiatives are often indicative of what legislative proposals Parliament could or could not accept, should they be proposed.

18. The Society considers that the likely reactions of the European Parliament are also a significant factor in triggering work or determining the scope and extent of proposed EU legislation during the development of proposals. There is clearly an awareness that there is a higher level of scrutiny and nervousness about having to withdraw and totally revise legislation because of failure to consider it properly in advance.

19. In the company law field for instance, pressure from the European Parliament seems to have led the Commission to announce that it would bring forward a proposal for a European Private Company Statute, while the public consultation on the desirability of such a measure had not ended. Similarly the Commission had been working to produce a proposal on the transfer of a company's registered seat from one Member State to another. This was felt to be a useful initiative but the Commission has now decided not to bring it forward. It would appear that the measure took account of the likely outcome of negotiations in the European Parliament and Council. It was concluded that it was likely that the measure would be diluted to such an extent that it was not worth bringing forward a proposal at all.

The European Court of Justice

20. As regards the European Court of Justice the Society considers that judgments of the Court do have an impact in terms of the initiation of legislation, particularly as regards the proper legal basis and the division of competence between the first and third pillar. The prime example here would be case *C-176/03 European Commission v Council of the European Union*[11] where the Framework Decision on 2003/80/JHA on the protection of the environment through criminal law was annulled as the provisions of the Framework Decision encroached on the powers conferred by the EC Treaty in relation to first pillar environmental law policy. The Commission then followed up with a Communication which highlighted a number of existing legislative instruments and outstanding proposals that it would review in light of the Court's decision.

21. The European Court judgments clearly also play a role in the making of legislation. Take for example the Alcatel[12] case (C-81/98) which was a case on the interpretation of Directive 89/665/EEC relating to public procurement and review procedures and the revised Directive amending Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

22. The Court's judgments also play a role in the creation of soft law instruments such as Commission communications and guidelines, examples of which can be found in the Competition, Procurement and State Aid field. In the Procurement area see the new IPPP Notice on procurement law which is based primarily on the interpretation of the Stadt Halle[13] case (C-26/03) and those that followed. In addition the "Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives" which is based on the Commission's interpretation of ECJ judgments concerning the application of the free movement provisions of the Treaty in procurement not covered by the Directives.

23. Similarly ongoing litigation in the field of Article 82 (abuse of dominant positions) has had a significant impact on the Commission's work to produce guidelines on exclusionary abuses. The fact, however, that cases such as the judgment in the Microsoft[14] case (T-201/04) were still pending did seem to cause the Commission to pause these initiatives.

[11] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo& affint=affint&affclose=affclose&numaff=176%2F03&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100

[12] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&numaff=c-81/98

[13] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&numaff=c-26/03

[14] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom& docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo& affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=Microsoft+&domaine=&mots=&resmax=100

24. The Commission has also ended up bringing forward initiatives where it might not otherwise have done so as a result of ECJ case law. Although there is very limited EC Treaty competence to adopt EC legislation in the field of taxation, and competence lies primarily with the Member States, national tax rules must comply with the general principles of Community law and the rules on free movement. A series of ECJ case law has condemned national tax measures, such as the Marks & Spencers[15] case (-309/06) and as a result the Commission published a series of communication in 2006, trying to clarify these judgments as well as encourage greater coordination between Member States of their tax systems. Ironically, in certain circumstances, the Commission may find its hands tied, where the Court has been able to apply general principles to issues not falling within the Treaty's competence.

25. It could also be argued that a line of cases, including *Crehan*[16] (C-453/99), has given impetus and direction to the Commission's work on private enforcement in relation to antitrust breaches. While the ECJ already had established case law on the direct effect of Community law and the entitlement to damages, *Crehan* was the first time that the ECJ had expressly noted the right to seek damages in civil actions for breaches of Articles 81 and 82. This ruling was given in 2001, the Commission commissioned research in 2003, which was completed in 2004, and the Green Paper was published in 2005[17].

Stakeholder Input and External Influence

(a) *Stakeholders*

26. A wide variety of factors may influence the preparation, proposal, negotiation and ultimate content of EC legislation. Certainly it is the Society's experience that legislation can be influenced in the drafting and preparatory stages. This is the stage at which views of interested parties such as non-governmental organisations, professional bodies and pressure groups can have an impact and can influence the shape of the proposal. In terms of the influence of the general public it appears that the Commission often relies on surveys such as the Euro barometer in expressing the opinion of the public at large.[18]

27. In terms of consultation and the ability for external stakeholders to feed into the development of legislation in a particular field, the Society is positive about the Commission's action in this area. The Commission is effective in seeking out ideas and expertise and systematically issues consultations during the preparatory stages of legislation. These are often followed up by public hearings or experts meeting which allow for further deliberation and input from stakeholders.

28. In some cases, the stakeholders involved with certain policies or pieces of legislation might be from a limited group who are in regular contact. For instance, there are many competition law practitioners and industry lobbies in Brussels. Commission officials decide on legislation on policy, as well as enforce and apply it. This happens in few other areas of Community law, where Member States normally implement and enforce the law. It might be of interest to look in further detail at the interaction of stakeholders and officials in this field.

(b) *Lobbyists*

29. The Commission is currently putting in place a register for lobbyists, which would require them to abide by a code of conduct and disclose clients, the interests represented, and certain financial information.[19] It would cover a range of bodies include public affairs consultancies, trade associations, NGOs and also lawyers. Discussions in the European Parliament, however, have seen support for the idea of a legislative "footprint"[20]. As such, the European Parliament's legislative reports would list those who had lobbied in relation to the proposal at hand. Rather than, or as well as, imposing obligations on stakeholders who are outside the Commission, it should consider first the transparency of its own procedures and decision making. Improving the transparency of decision making is the purpose of the initiative and more rigorous reporting or disclosure of the lobbying that influences the Commission seems the most appropriate means of achieving this.

[15] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=Marks&domaine=&mots=&resmax=100

[16] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&numaff=c-453/99

[17] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF

[18] http://ec.europa.eu/public_opinion/index_en.htm

[19] The European Transparency Initiative http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm

[20] Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (2007/2115(INI)), 2 April 2008.

(c) *Other actors*

30. Often the international dimension plays an important role. In many fields, including the environment, transport, telecommunications, securities and competition law, there are forums where governments, regulators and policy makers meet to discuss common problems. In relation to antitrust in particular, the global nature of companies and certain anti-competitive behaviour necessitates effective cooperation. The European Competition Network, for instance, has played an important role in the adoption of similar leniency policies at EU and Member State level. The role of organisations such as the OECD and the International Competition Network should be also recognised in this context.

31. Finally, as regards national parliaments it is clear that under the Treaty of Lisbon national parliaments will have an enhanced role as regards proposals for legislation particularly from the perspective of subsidiarity. Although in terms of the Council deliberations there is mechanism of the parliamentary scrutiny reserve, to date however it is not clear whether national parliaments have had an impact in terms of the initiation of legislation.

Initiation of Legislation under the Third Pillar—Police and Judicial Cooperation in Criminal Matters

32. It is the Society's view that proposals for Framework Decisions brought forward by Member States may undermine the overall coherence and consistency of approach in the area of police and judicial cooperation. For example, the Tampere Conclusions 1999 and the Mutual Recognition Programme of 2000 had already foreseen action in the area of conflict of jurisdictions and *ne bis in idem*. However during the Greek Presidency 2003 a proposal was brought forward by Greece specifically on the question of *ne bis in idem* or "double jeopardy"[21]. The draft framework decision was never adopted and the general consensus appeared to be that it would be better to wait for the Commission to take action in this area, despite the fact that a significant amount of negotiation had taken place in the Council, and the European Parliament had completed the First Reading process.

33. Experience would suggest that individual Member State proposals are often designed to address pressing domestic political issues rather than a collective European interest. For example, the Spanish Presidency in 2002 proposed a European network for the protection of public figures which consisted of the national police services and other services responsible for the protection of public figures[22]. A second Spanish proposal was for a Framework Decision on suppression by customs administrations of illicit trafficking on the high seas[23]. Neither objective had appeared in the Tampere Conclusion 1999 or the subsequent Mutual Recognition Programme of 2000. In addition the Belgian government proposed an initiative on combating the sexual exploitation of children and child pornography relating to the recognition and enforcement of prohibitions arising from convictions for sexual offences[24]. Although this proposal did meet a Hague Programme objective it was driven by the domestic political considerations of the day. This latter text has not yet been adopted and negotiations have stalled.

34. Moreover, proposals that are presented during a Presidency "jump the queue", suddenly becoming a legislative and political priority. The Presidency's goal of adoption of the text within its six month term may cause other longer-term proposals to be put on hold or to be severely delayed. For example, the joint French and German initiative on recognition, supervision and execution of suspended sentences and alternative sanctions the so-called "probation proposal"[25] immediately took precedence over other proposals on the table such as the European Supervision Order which was a Commission proposal[26].

35. Significantly, Member State proposals are not subject to any prior study or analysis or consultation process at European level and there is little room for external stakeholder participation. Explanatory memoranda are frequently short and impact assessment non-existent. By contrast, a Commission proposal would be normally subject to detailed preparatory work and inter-service consultation to allow for input from different Directorates General. Proposals are published with explanatory memoranda and impact statements. No such process relates to Member States' initiatives.[27] Moreover there is little control over the drafting of Member States' texts, which on occasion may leave much to be desired.

[21] http://register.consilium.europa.eu/pdf/en/04/st14/st14207.en04.pdf
[22] http://register.consilium.europa.eu/servlet/driver?page=Result&lang=EN&typ=Advanced&cmsid=639&ff_COTE_DOCUMENT=5361%2F02&fc=REGAISEN&srm=25&md=100
[23] http://register.consilium.europa.eu/pdf/en/02/st05/05382en2.pdf
[24] http://register.consilium.europa.eu/pdf/en/04/st14/st14207.en04.pdf
[25] http://register.consilium.europa.eu/pdf/en/07/st05/st05325.en07.pdf
[26] http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0468en01.pdf
[27] Although it should be noted that the recent proposal on *in absentia* judgments stemming from the Slovenian Presidency and others, including the UK, has been put out to consultation by the UK Government.

36. The Society hopes that these comments offer some useful examples for the Committee's consideration.

April 2008

Examination of Witnesses

Witnesses: Ms Evanna Fruithof, Director of the Bar Council Brussels Office, and Ms Helen Malcolm QC; Ms Julia Bateman, Head of the Law Society Brussels Office, and Mr Andrew Laidlaw, Deputy Head of the Brussels Office, examined.

Q192 ***Chairman:*** We are grateful to you for your evidence and for coming. This session will be recorded and a transcript will be made available. If there are points which arise on the transcript, please let us know, and if there are any supplementary thoughts we would be delighted if you let them reach us in writing. We are here in the course of an inquiry into the initiation of European legislation. Any interests which members have will have been disclosed in the Lords' Register. With that, I think I can proceed to questions, unless there is any initial statement that any of you wishes to make. No. We have taken a certain amount of evidence so far and some of the questions may be derived from that. Can we just ask each of your respective bodies what role they might have in influencing the content of the Commission's Annual Policy Strategy and the Annual Legislative Work Programme? Let us start with the Law Society.

Mr Laidlaw: Thank you, my Lord Chairman. I think we would say in brief that we do not have an actual role in influencing the Work Programme or the Policy Strategy in itself. I am not sure if there is any official process, such as a consultation, that actually takes place in terms of the content of the Work Programme or the Policy Strategy, but I think that reflects our view that the Work Programme is more of a compilation of the different strands of work that the Commission is undertaking and it is a way of presenting in a more consolidated form the different priorities that the Commission has. As such, I think we view it as more important to influence policy at possibly an earlier stage where the Commission Directorates-General are developing their thinking in relation to more specific issues, such as the Hague Programme or other action plans. We tend to focus our efforts on responding to consultations on more specific issues such as that, making sure the Law Society is also represented at conferences and is present at expert groups and other forums which the Commission organises to discuss its priorities and proposals, and also responding to White Papers and Green Papers and consultations on legislation before that is proposed. I think that is a more effective way of feeding our views into the Commission as to what we think is important. At that earlier stage the Commission will also be seeking views on the relative importance that should be attached to specific proposals which are then fed into the broader strategy of the Commission.

Q193 ***Chairman:*** Can you just give an example of that sort of situation in actual terms, perhaps relating to current proposals or themes?

Mr Laidlaw: Yes, of course. I tend to work in the internal market issues whereas my colleague, Julia, works in justice and home affairs. From one of the areas that I have worked on, the Company Law Action Plan is a strategy document where the Commission has consulted a number of times on a range of measures to do with company law. 2003 was when the Action Plan was originally proposed and there were consultations prior to that, which we responded to, to try and suggest which issues we thought should be given priority. Again, the Commission reviewed its priorities in 2006 and we fed into that to try and say which proposals we thought were worth pursuing and also to give ideas where the Commission should focus attention.

Q194 ***Chairman:*** Taking it one level down, company law is not my field, but you might suggest the Commission, for example, focus on directors' duties or shareholders' remedies, something like that, rather than yet more publication of detailed statistics in accounts.

Mr Laidlaw: Exactly. In our response we said that one issue we wanted the Commission to look at more was the arrangements for capital maintenance for companies whereas there is a proposal going through at the moment on creating a statute for European Private Companies and in our response we said we had no objections to this in principle, but we think they still need to demonstrate evidence of need for this proposal.

Q195 ***Chairman:*** Have they responded to that? Have they done any sort of investigation with other people, any sort of impact assessment as a response?

Mr Laidlaw: On both issues they have conducted work. Maybe the private company is an interesting example because although they were conducting studies and a public consultation on whether people were supportive of the idea of a European Private Company there was a lot of pressure in the European Parliament to bring forward a proposal, so halfway through the consultation period the Commissioner came out and announced publicly that he would be making a proposal this year before the summer even though the consultation was still ongoing. That is an

interesting example in terms of who is exerting influence on the Commission.

Q196 ***Chairman:*** Different pressures, yes. What about the Bar, would you like to make a comment on this area?
Ms Fruithof: I would have very little to add, my Lord, to what has just been said. I think we would agree completely that it is very difficult to influence the Annual Policy Strategy or the Annual Legislative Work Programme.

Q197 ***Lord Burnett:*** Did you say very difficult?
Ms Fruithof: The discussions really take place within the Council and between the presidencies.

Q198 ***Lord Burnett:*** So you have got to get it before then?
Ms Fruithof: Yes. What is prioritised for any given year or any given six month period, for example, will be a matter of debate between the incoming presidency of the Council, which will preside for the next six months, and then the one after that, together with the Commission. The incoming Council presidency will have its views on what its priorities are and the Commission will have its views on what its priorities are which will be related to what it has already achieved in its wider, longer term programme and what it wants to accelerate. They will be the two players that really influence what is in the Work Programme for the short period of one year.

Q199 ***Chairman:*** I get the impression from the Law Society that what matters is what gets into the Work Programme over a longer period and you try and work on that. Is that the situation?
Ms Fruithof: Yes. One is trying to influence what is in the longer term planning but, even more than that, I think, we find the most effective work we can do is on individual files.

Q200 ***Chairman:*** Then when the individual proposals actually do reach the table you seek to influence them.
Ms Fruithof: Or the consultations that come before the proposals ideally. In a sense, if there is a proposal on the table it is already a little bit late.

Q201 ***Lord Wright of Richmond:*** I assume your contacts are primarily with the Commission. To what extent are you able to develop and maintain contacts with the presidency of the day, which at the moment, of course, still rotates? It must be more difficult.
Ms Fruithof: It is more difficult because you have rather a short period and everybody wants to do the same thing. A little bit depends on the topic. For example, when the Rome I Regulation was going through last year, at the very end of the negotiations the Portuguese Presidency staff here in Brussels, so the equivalent of UKRep but for the Portuguese, who were actively negotiating the final terms of the Rome I regulation, were quite open to hearing from us because they were quite keen that the UK should come on board and, as you know, Her Majesty's Government was very active in negotiating in Council. On that file I had direct contact, but that would be relatively exceptional. Normally I would expect to have more contact with the Secretariat in the Council, which is a permanent staff, and from them find out what is happening and through them perhaps feed in our views.

Q202 ***Lord Wright of Richmond:*** Are you already developing a relationship with the French Presidency?
Ms Fruithof: Specifically, no. That is the other problem, it rather depends on what the particular issue is that we might be concerned about during their presidency. There are a couple of files that we are hearing about that the French Presidency is likely to be interested in, such as one on the authentication of instruments which is being pushed, I gather, by the French notaries. That is the sort of thing where we may well want to talk to the French Presidency.

Q203 ***Chairman:*** That perhaps links up with one or two comments in the Bar Council's paper prepared by James Flynn. I understand that your committee criticised the lack of homogeneity built into the system and suggested it was open to manipulation by powerful interests and was not very systematic in its consultation of stakeholders. That seems fairly blunt, I do not know whether it can be amplified. It is certainly something which interests us, who gets the ear of either the Commission or the presidencies.
Ms Malcolm: You appear to be directing your question at me?

Q204 ***Chairman:*** Since it came from the Bar Council . . .
Ms Malcolm: Yes, which is the committee that Evanna is also very much involved with. As a criminal practitioner, albeit international criminal law, I am very much three stages removed from what is going on, on the ground in Brussels. In terms of influencing things, I have a slight discomfort that the Bar should be involved in any event with originally feeding in ideas for legislation at EU level. That is perhaps an entirely personal view. I can well understand that there is very useful work that we can do in terms of attempting to feed in the common law perspective once proposals have been made. In relation to the particular comments that you have pulled out of the Bar Council's evidence to you,

certainly within the criminal justice field I am not aware, and it may be my ignorance on this, that the judiciary, for instance, in the UK was consulted prior to the European Arrest Warrant coming into force. I know that two QCs did apparently come to Brussels in 2001 prior to the EAW coming in, but that was at a very, very early stage in the proceedings and that was before 9/11 which was what caused an enormous upturn in the priorities, or a complete reversal of the priorities that were then being considered at the Brussels stage. I am not aware, again, of the CBA—Criminal Bar Association—being approached directly by anybody saying, "What do you feel about this? What do you feel about safeguards? What about bail?" I have attended an experts' meeting on trans-border bail, for instance, at the stage that was being considered. I think the comment that was made in the paper was perhaps because of the old system of single Member States having initiative and, therefore, being able to push something forward in the programme. There have been two occasions, I think, when that cut across issues that the Commission was already considering and, therefore, caused confusion. Both of them, in fact, have died a death, but whether as a result of that or other issues I am not in a position to say.

Q205 ***Chairman:*** I think what you have raised includes a very interesting point which I also drew from the Bar Council paper about the Justice Forum which has been proposed which you fear may be just a fig leaf, certainly intended to embrace a number of stakeholders but apparently it involves the Commission adamantly refusing to allow seats on the Forum for national stakeholders and insisting, for example, the Bar be represented only by a European Council of the Bars. I can see your concern about that.
Ms Fruithof: Yes.
Chairman: It is a point we might focus on. Thank you very much.

Q206 ***Lord Burnett:*** You have talked a bit about consultation with stakeholders and you gave an example of company law, Mr Laidlaw. If I might pursue that a little bit? The Law Society listens to the views of your Company Law Committee, which is an eminent committee with some very experienced people, and perhaps the Bar have a similar arrangement.
Ms Fruithof: We work together, in fact.

Q207 ***Lord Burnett:*** That was what I was going to ask. You work together but what about the Confederation of British Industry? I am just taking it one step back. What about the CBI, the Institute of Directors, these sort of people, do you work with them? Do they give you their views? Do you act in a co-ordinated way to get your views over right at the most inchoate stages of this?
Mr Laidlaw: Again, it depends sometimes on the issue. Sometimes there will be an interest in making sure that you present a UK plc front in terms of co-ordinating what you do with business and other stakeholders. I know there is a lot of crossover in membership between our bodies. I think some of the Law Society's Company Law Committee members are also involved in the CBI.

Q208 ***Lord Burnett:*** For sure.
Mr Laidlaw: They also feed into the BERR stakeholder groups. From that point of view, through some of the Government initiatives and through the way the memberships of the different organisations work, you do tend to find that naturally there is a degree of consistency.

Q209 ***Chairman:*** It would be right to say, would it not, that quite a lot of co-ordination is done by the Ministry of Justice. Is that something you have come across in stakeholder meetings? Equally, there are ad hoc reactions to particular proposals, and I am thinking of Rome I where you had the Bank of England Financial Law Panel heavily involved. Maybe we could think in the United Kingdom about how we react to European proposals. This Committee has as its function to react, but it requires a very considerable amount of back-up to do so. Both of your organisations do it on a pretty systematic basic.
Mr Laidlaw: Yes, but your point is correct, apart from some of the forums that individual ministries set up. I know from my experience that BERR seems to be quite effective at co-ordinating the various stakeholders. I am not sure how it works with other ministries. I am not sure it is systematic across Government in terms of how UK bodies present themselves in Brussels. It is done on a more ad hoc basis through informal contacts that we have here with other Brussels offices of UK bodies.
Ms Fruithof: My Lord, referring back to a point you made before and bringing that into what you have just been asking, the concern that the Bar has is not that we are never consulted but rather that it is not systematic consultation. The earlier in the life of an idea that one can be involved, of course, the better that is. The Commission is now obliged to conduct impact assessments when it is considering legislation in the fields that we are all interested in but we, as far as I know, are not necessarily consulted during the course of those impact assessments. One of the things that I wanted to bring to your attention today, and it is very relevant to your Committee, is that we see the new Lisbon Treaty provision, that will require the

Commission to send new proposals to national parliaments at the same time as it sends them to the Council and European Parliament, as a very key opportunity for the Member States and the organisations behind them to actually really look at proposals and take these ideas forward and be very proactive. The problem is you will only have eight weeks.

Q210 ***Chairman:*** The problem is that unless there is some mechanism for actually starting the process of thought before the eight weeks it is going to be extraordinarily difficult for even one parliament to react, let alone to get sufficient parliaments to have any real influence?
Ms Fruithof: That is right.

Q211 ***Lord Burnett:*** Once you get the information at the start of the eight week period, what effect will representations from Parliament have?
Ms Fruithof: Again, that will vary from one file to another. If we are talking to you, say, and we are also talking here in Brussels to our opposite numbers in other Member States' Bars and Law Societies, and it emerges from our discussions that we have the same sorts of concerns, we can tell our national parliament that the Germans have that concern or the French have that concern and at government level those governments can then talk to each other and you can get a groundswell of opinion flowing at that very early stage in the proposal. Going back to a point that I have made before, it is already late in the day for influencing policy when there is a proposal on the table but, nevertheless, it is still useful to do that and it is an opportunity. I would hope that some sort of mechanism would be put into place to try to systematically use that eight week period and for proper consultation to take place during it.
Ms Bateman: May I just add to that, my Lord Chairman. The difference with the Treaty of Lisbon will be the so-called yellow card or orange card system where if there is sufficient concern within a number of national parliaments you can wave the yellow card and send the proposal back to the European Commission. Again, the Lord Chairman has made the point about the eight week turn-around time, but there is an institutional systematic process by which national parliaments can make their views known and have an impact on whether the proposal is withdrawn, reviewed or what have you, and that is a significant development if it can be done within the timeframe. As Evanna has mentioned, in terms of our counterparts and other stakeholder bodies to be co-ordinated with the national parliaments in Europe to try and exert that influence and see if that process can—

Q212 ***Lord Burnett:*** It is a message we have got throughout our inquiry that it is pretty well too late when the proposal is made. It is getting there right at the start, at the embryonic stage. You do that by presumably—I loathe the word "network"—networking. You all live here and you all network like crazy in the end.
Ms Bateman: Yes.

Q213 ***Lord Bowness:*** This really follows exactly on from this conversation. I think whatever fields we are interested in we all accept that the earlier we are involved the better our chances. If I can just turn to the Law Society paper and their paragraph on transparency. You say there it is not always possible to pinpoint where an idea originated: "Despite the steps that have been made towards transparency, this does not extend to the Commission disclosing with whom it has had contacts, other than through public consultation." I understand what you are saying but how practical would it be and how on earth could the Commission in a town full of networkers, consultants, lobbyists, to say nothing of Member States, possibly indicate with whom it had contact on something?
Mr Laidlaw: This is one of the issues on the European Parliament's agenda for today. They are talking about transparency of lobbying. Indeed, one of the ideas is that proposals should have what is called a legislative footprint. The idea is that along with the proposal there would be a list or summary of the contacts that have been had prior to the proposal coming out. Obviously the Commission is not going to write in its proposal "X official had this idea one day when he was having an informal meeting with such and such an organisation", but as a first step an idea like that might be useful in terms of demonstrating where ideas originate. If we come back to the example of the European Private Company, which was discussed earlier, this obviously is not official but the French and German business organisations have been very active in lobbying for this proposal to come forward and, indeed, proposed their own draft statutes a few years ago. It is possible to identify through knowing how things in Brussels work where certain proposals come from, but that is just through your informal contacts and not through a systematic process.

Q214 ***Lord Bowness:*** I am all in favour of transparency and openness, but the more you formalise, as it were, the informal contact before the formal consultation, are you not just pushing everything back a stage to the stage of who had coffee with whom on a Thursday morning?

Mr Laidlaw: Exactly, but the point we were simply trying to make was in terms of where the Commission proposals come from it is not always easy to pinpoint that.

Chairman: If I draw on personal experience, if someone were to identify the legislative footprint of the Common Frame of Reference and the vicissitudes which that piece of research has had and the way in which direction has changed and whatever emerges will emerge, it would be very interesting, and I am sure it does go back to quite informal contacts. I do not know whether that is within any of your experiences. That is a personal comment, but it would certainly indicate whether something was coming from within a particular national perspective, like your French notaries' proposal, which might lead one to ask is this sectional or of general European interest.

Q215 ***Lord Jay of Ewelme:*** I wanted to go back to what you were saying about the Private Company statute for a moment. As I understand it, what you were saying was you were not sure yourselves whether a proper case had been made but there was a lot of pressure from the Parliament, and you have now said also from the French and the Germans, for it. What I would be interested to know is whether in circumstances like that the impact assessment which the Commission has to make could lead to the conclusion that, "In fact, we do not think this is the right thing to do", or, on the contrary, when there is a lot of political pressure from the Parliament or Member States the impact assessment effectively will not have any real impact.

Mr Laidlaw: That is a very good question and I do not think there is an easy answer. Obviously in terms of that specific proposal there was an impact assessment which did suggest a need and political pressure. In terms of other proposals that have been worked on by the same Directorate-General in the Commission, there have been impact assessments and then decisions taken afterwards not to proceed (even when there were a number of voices calling for proposals to be made) on the basis of the impact assessment decisions that had been taken.

Q216 ***Lord Jay of Ewelme:*** Can you give us a particular example of a proposal which was, as it were, in the offing and then the impact assessment said that it should not go ahead and, therefore, it did not?

Mr Laidlaw: The proposal on the Second Company Directive, capital maintenance, but also there was another proposal on the transfer of companies' registered seats. That is another interesting example because it has been suggested that not only did the Commission conduct its impact assessment but it also tried to predict what would be the outcome if it were to go through the European Parliament and the Council, and it was felt possibly by the time the proposal actually became legislation it would have been watered down to an extent such that it was not useful to bring it forward in the first place.

Chairman: Did the same apply to the protection of witnesses proposal that I saw was floated and then dropped? No, perhaps you do not know.

Q217 ***Lord Jay of Ewelme:*** The conclusion I draw from that is the impact assessment process does have an effect in ensuring that proposals do not come forward which are likely to have an adverse impact or are not necessary.

Ms Fruithof: Unfortunately, there is no black and white answer even to that question.

Q218 ***Lord Jay of Ewelme:*** It is not a useless introduction to that?

Ms Fruithof: No, it is certainly not useless. I would make two points on that. One is, who do they actually talk to when they do their impact assessment because that is not always clear. To my knowledge, we have never been consulted in the context of an impact assessment. Secondly, on something like the succession proposal, which we are now expecting in about a year's time, what you will hear the Commission saying by way of a justification statistically you might not regard as justifying it. I think in that particular file at a hearing at the European Parliament about two years ago now they were talking in terms of a couple of hundred thousand people altogether per year potentially in Europe being involved in a cross-border succession type scenario. Yes, that is 200,000 people, but you could equally argue that in the great scheme of the population of the European Union there are probably other legislative proposals that are more urgent and more useful. Sadly, it is a little bit of a "how long is a piece of string" type discussion.

Q219 ***Chairman:*** I am very surprised to hear that you are not consulted on impact assessments. Can we get some picture as to who is consulted?

Ms Bateman: Just to back up what Evanna has said, on things like divorce with the Rome III regulation, sometimes impact assessments are used after the event to justify an initiative, a Green Paper or a legislative proposal. There is a lot of broad statistical information to say it appears that there are a number of international marriages every year, therefore we believe there could be a number of international divorces every year. In terms of the impact assessment there are universities, think-tanks, there is a tender from the Commission, they secure the tender and undertake the study, but it is never clear who the

national rapporteur or the organisation is. Sometimes we do proactively contact the Commission and say, "Could we have the contact? Who is co-ordinating, who is running the study?" and it is very difficult to get. I think that is certainly a lack of transparency in the impact assessment process which is heavily relied upon to bring forward legislation. Another example is the conveyancing study of conveyancing practice throughout the European Union where it was very difficult from our side to find out who was doing the England and Wales report and where we could get in contact. We did in the end but it took a lot of literally heavy lobbying to get the contact name from the Commission and then make contact with that person at home. That is one of the big flaws in the process.

Q220 ***Lord Wright of Richmond:*** Our papers show us that there is something called the independent Impact Assessment Board.
Ms Fruithof: Yes.

Q221 ***Lord Wright of Richmond:*** From your evidence, and all the evidence we have received, you have got a hideously complicated networking problem. Have any of you identified anyone on the independent Impact Assessment Board?
Ms Fruithof: No, it is within the Commission.

Q222 ***Lord Jay of Ewelme:*** Curious definition of "independent".
Ms Fruithof: Yes, exactly.
Ms Bateman: Independent and inaccessible.

Q223 ***Chairman:*** Is it in any way transparent? It produces for the Commission some assessment of the validity and value of particular impact assessments. Does it publish that assessment?
Ms Bateman: I am afraid I do not know the answer to that.
Mr Laidlaw: I do understand in the example I gave earlier of the transfer of companies' registered seats, it was at that stage of the independent impact assessment that questions were raised about the value of bringing forward the proposal.

Q224 ***Chairman:*** Let us revert to the questions. Is there anything any of you wishes to add on the Law Society's suggestion that one problem with Commission proposals was that they were developed in "policy silos", in other words that different DGs, as I understand it, have different and sometimes conflicting interests and there may not be an entirely coherent attitude. Is that something you want to amplify?
Mr Laidlaw: For the sake of time, I can make a couple of quick comments. It is useful in this context to look at the Commission DGs as similar to government ministries in terms of certain ones will be looking after business interests, others looking after workers. The key difference with government is that you have a political strategy, a political coherence at the top which sets the strategic framework, whereas with the Commission you have Commissioners from mixed political backgrounds who may have their own priorities and may want to make their own mark in terms of the mandate of the Commission. I think that is one of the key reasons why there is not the same strategic coherence to the Commission's work. If you would like examples of legislation that has come out where there have been inconsistencies then I am happy to give you that in writing.
Chairman: That would be helpful. Lord Wright?

Q225 ***Lord Wright of Richmond:*** Can I take you back to the Hague Programme? Mr Laidlaw said that your focus is very largely on the Hague Programme. I do not know to what extent any of you or your predecessors were involved in the process leading up to the adoption of the Hague Programme four years ago, but is there anything you can tell us about how that was germinated? How did the ideas in the Hague Programme come about and to what extent were you or your predecessors involved in the formation of that legislation?
Ms Fruithof: I will start on this one. The Hague Programme, in my view at least, has to be seen in a wider historical context. I think it is the key, certainly in the justice area, to how the Commission works, certainly on the civil side and, in my opinion, in the future also on the criminal justice side. If you go back to the Tampere European Conclusions, to the Vienna Action Plan that came just before that, and then, very importantly, to the two mutual recognition programmes on the civil and criminal sides that were issued by the Commission at the end of 2001, you will find there are detailed programmes of measures on the mutual recognition side which, according to the Tampere European Council, was supposed to be the cornerstone of judicial co-operation on the civil and criminal sides. If you go to that and then look forward you will see that, for example, on the criminal justice side the programme of 2001 set out 24 measures that were intended to be achieved on mutual recognition over the following years without specifying when and how but just giving them priority. At the end of each five year period what the Commission does, in consultation, in particular with the Council, is to say, "Look, this is what we said we were going to do. This is what the Treaty allows us to do. How much of what we said we were going to do have we achieved? Has the political scene changed?

Has something new come up that becomes more important?" Therefore, at least in my view, the Hague Programme is basically a revisiting of the existing programmes with just a re-jigging of priorities according to what had changed in the interim, what they had already achieved and what they wanted to bring forward in the next five years. This also refers, my Lord Chairman, to the evidence we gave about the table that the Commission and the Council work to. In the civil justice side what they do is look at the terms of the Treaty thus, "The Treaty provisions say that we need to legislate for recognition, enforcement, applicable law enforceability, et cetera, and these are the areas in civil justice that we are looking at, so succession, family law, custody of children, contract and so on" and then they effectively set up a table with those two axes and fill in the boxes. So the Hague Programme, the Son of Hague Programme next year, and so on, should not have too many surprises because you should be able to look at what they said they wanted to achieve from the beginning, what the Treaty allows them to say they can achieve and what they have not yet done.

Q226 ***Lord Wright of Richmond:*** To what extent are proposals coming now that were not foreshadowed in the Hague Programme?
Ms Fruithof: Yes, of course, there are good examples of proposals being adopted where content or timing has changed from that planned. We already mentioned briefly the European Arrest Warrant which, although it was foreshadowed by the original Tampere Conclusions and then the 2001 Programme of Measures, nevertheless its priority changed quite dramatically as a result of 11 September. Then there are things like the Michel Fournier case in France and Belgium in 2004, which was a case of a paedophile who was active in Belgium, had a criminal record in France but because there was no exchange of that information, Belgian authorities knew nothing about him and he then committed several very serious offences here. That prompted the Commission directly to accelerate a proposal that they had had in mind. Indeed, if you look at these Programmes of Measures, they are so widely drafted that, frankly, anything they do probably was foreseen in one way, shape or form. Another example is the Prestige oil tanker disaster in 2002 which prompted several different measures by different departments of the European Commission: the Ship Pollution Framework Directive, which subsequently has been annulled; but also DG Transport brought out legislation on single-hulled ships, and so on. You can see external events will prompt action, but certainly in the justice field the programmes as they already were perceived were so wide that it would be disingenuous for me to say it is completely unforeseen that they would do that.

Q227 ***Lord Wright of Richmond:*** Can you just give us a general picture of the extent to which your views have been adequately put forward and accepted, or at least listened to, in this programme?
Ms Bateman: If I may comment on that. It is worth recording that as the Tampere Conclusions were coming to an end in 2004 the Commission launched a consultation and an assessment of Tampere in future orientations and that was an opportunity for a public debate and stakeholder debate on the next stage, if you like. From our perspective at the Law Society we used that as an opportunity to say, "We think there has been progress here but there needs to be a lot more focus on defence rights and procedural rights" which were deemed to be part of judicial co-operation in the Tampere Conclusions but were then specifically referred to in the Hague Programme. I am not saying we take credit for that because one of the problems with lobbying is it is quite hard to actually mark or measure success in this field, but that was an opportunity for public debate and input. Similarly, the Hague Programme Mid-Term Review that the Finnish Presidency had in 2006 with a special Justice and Home Affairs Council. Certainly at that stage the Department for Constitutional Affairs and Baroness Ashton hosted a stakeholder round-table to say, "We are going to this Council to look at the review of the Hague Programme, what are your views as stakeholders and practitioners?" That was a very helpful opportunity at which to say, "These are our concerns. This is where we think there is progress. This is where we think there should perhaps be a re-shifting of priorities". It is very hard to quantify where the influence may be but those are opportunities we have had to feed into the debate.

Q228 ***Lord Wright of Richmond:*** You have given an admirable example of where the British Government is taking an initiative. To what extent do you similarly get approaches from the Commission to ask for your views as opposed to the one-way process of lobbying your views into the Commission?
Ms Fruithof: Helen has previously referred to an opportunity that came up several years ago, (but it has happened since) in the context of the work that the Commission was doing on the European Arrest Warrant. It was not called the European Arrest Warrant in the early part of 2001, they were just looking at extradition in general, but they did directly invite us to provide expertise and we brought over two senior counsel. That does happen. To be honest, and I am sure the Law Society's experience would be similar, these things are becoming a little bit more systematic now, so there are more lists of experts and

panels of experts. It is less likely you would have an ad hoc approach along those lines. We are always on the lists of experts and we do go to these expert groups. The mediation proposal was another example, this time on the civil justice side, where the Bar was directly involved in the drafting of the Code of Conduct on Mediation and also, in fact, had very early sight of the draft proposal, even before it went anywhere close to getting to adoption at Commission level. We were able to comment on the drafting of that and consequently have been quite influential all the way through and very supportive of it. There are examples of legislation, and I know the Law Society has them too, where we can genuinely point to them and say, "Yes, we have actively influenced that instrument".

Lord Wright of Richmond: Can I just ask one quick supplementary. Can you give us any sort of picture as to what extent the other 26 Members of the European Union have people like you operating in the lobbying process? I do not want a list of all the other 26!

Q229 ***Chairman:*** Are you typical or are you exceptional?

Ms Bateman: We currently share our premises, and the Bar Council will be joining us shortly so it is a good representation, with the German Federal Bar, the Austrian Federal Bar and the international arm of the French-speaking Belgian Bar who have a very similar function to what we do. We are representing the national interests but we co-ordinate and work collectively on some issues. You do not want a list, and I hesitate to use the term big Member States, but there is Bar Association representation from our counterparts in those Member States.

Q230 ***Lord Jay of Ewelme:*** Would you normally consult with your equivalents from, let us say, the other major Member States before responding to a request from the Commission for advice or before lobbying?

Ms Bateman: We would not systematically consult, but you know where people are working on similar issues. Certainly from the Law Society and the Bar Council's perspective there is very much the common law agenda, the common law perspective, that we want to promote that would not be an issue for the other Bar Associations. We are all members of the European Council of Bars and Law Societies, the CCBE, so within that forum we get to know who is working on what issue and what the ideas are. I think it is more of an informal working together and we speak to each other rather than it being systematic, if I can put it that way.

Q231 ***Chairman:*** I cannot resist following that up. You say the other Bars would not wish to promote the common law, and I can understand that, but is there a degree of understanding of the common law's needs and could the European understanding of the significance of the common law and its needs be in any way improved?

Ms Bateman: I will make a very short comment and then I might pass on to Evanna to talk about contract law. Certainly within the forum of the CCBE, our umbrella organisation, there is an awareness of respect for national legal systems, and in our case it would be the common law perspective, and in others people have their own agenda or—

Q232 ***Chairman:*** Legal culture.

Ms Bateman: --- legal culture that they wish to promote rather than protect, shall we say. Within the Common Frame of Reference, Evanna is more involved in that and I do not know whether there is anything you want to say, without putting you on the spot.

Ms Fruithof: My Lord Chairman knows from your experience in the CFR network that over the time that we have all been working on this, and the Bar has been very active on this since 2001, certain countries have emerged as being more sympathetic, shall we say, to the common law's views on this than others. We find this also at Bar level, that there are certain countries that have a less aggressive policy vis-à-vis the contract law profile. It has emerged more and more over the years I have been doing this, which is now nine, that there are countries you have a natural affinity with, regularly, on quite a broad range of different issues.

Q233 ***Chairman:*** How good is the Commission at taking account of that sort of consideration, the need to respect national cultures in its proposals?

Ms Fruithof: Jumping ahead to something I wanted to say in answer to a different question, that brings me to a very sensitive topic right now specifically on the civil justice side and, again, it was a concern that was raised in our paper and I will take the opportunity to comment now that you have asked that question. I can give you a specific example now in the context of Rome I, the Rome III proposal on matrimonial law and so on, on maintenance, and the fact that the UK has not opted in. There are rumoured to be desk officers in DG Justice and Home Affairs who these days are more or less saying, "Look, we know whenever there is a civil justice proposal with applicable law in it that the UK will almost certainly not opt in and, therefore, we are not interested in bothering to find out what UK stakeholders' views are on those laws because there is no point because in any event they are not going to

opt-in". That is a risk that I have heard is materialising now in some of the departments.

Q234 ***Chairman:*** Is it not appreciated that the purpose of not opting in may be to demonstrate that the proposal is not acceptable as it stands but, nonetheless, in the hope that it can be made so, as with Rome I, by negotiation?
Ms Fruithof: Of course.

Q235 ***Chairman:*** It would be surprising if that was not appreciated within the Commission.
Ms Fruithof: My Lord, you might be right, that is what one would hope would be the reaction but, nevertheless, there is an element of human frailty in all this. At the end of the day green papers and proposals are drafted by one or two individuals. Once something is on paper it has a life of its own, which again is why we are all saying you have to get in there right at the very beginning. Those individuals have an awful lot of clout on what goes in and what goes out. I am hearing that these concerns are arising now, that there is this slight knee-jerk reaction which may, sadly, have a knock-on effect on the criminal justice side in the future and, therefore, we need to be quite careful of that.

Q236 ***Lord Rosser:*** I come back to this issue of just how influential the Commission is in initiating proposals in the area of civil and criminal justice, and I think I have got a flavour of that already from what you have been saying. Sitting here, I get the impression that you see your role as reacting to the Commission's ideas and agenda as much as feeling that you can influence what goes in in the first place. It seems to me the Commission is in a very strong position if people feel that their role is primarily in reacting to what the Commission are suggesting rather than being able to influence in a very direct way what the Commission come up with in the first place. Do the Council and the European Parliament have any great influence in initiating ideas in this field of civil and criminal justice? Have they made formal requests for legislative proposals from the Commission? We have heard also from at least one Member of the European Parliament about the own-initiative reports who suggested that they could be pretty influential, but that may be a view of a Member of the European Parliament who may be deluded in that sense. My question is do the Council and the European Parliament have much influence in initiating ideas in this area? Do they make formal requests for legislative proposals? Do those own-initiative reports have any real influence or is it a scenario where the power when it comes to initiating ideas in this field very much rests with the Commission? You have referred to papers being drawn up by specific individuals. In a specific context earlier on, and it was in a specific context, you made the comment that the Commission were then able to bring forward proposals they had in mind, that something had happened in a particular area and that enabled them to do it, which paints a scenario of the Commission having a very clear idea of what their ideas are and looking for the opportunities to promote them. There must be so much lobbying going on by different groups that the Commission could say in regard to anything they brought forward that it does represent somebody else's idea but just by happy coincidence it also happens to represent what the Commission want to do. In our paper where we asked you for evidence we referred to the Commission as the main actor in initiating proposals. Is that very much your view?
Ms Fruithof: Yes. I would say that although obviously the European Council's Conclusions are the beginning of the story in relation to the civil and criminal justice portfolio, the Parliament certainly does use, and increasingly uses, this own-initiative possibility, in two different ways. One, to suggest the possibility of legislation, and at least in one scenario recently on succession, they have gone a bit further and activated the power under Article 192 of the Treaty to say that the Commission should pursue something. However, since that was already in the wake of a Green Paper, the idea was already out there. Another example is limitation periods, where last year there was an own-initiative report which was put forward by the Legal Affairs Committee of the European Parliament and subsequently adopted, suggesting that there should be some sort of proposal harmonising limitation periods in personal injury litigation throughout the European Union. The idea for that came from the Pan-European Organisation of Personal Injury Lawyers and the drafting of their idea was done by a member of the Bar and an Italian professor. Between the two of them they tried to find a compromise that would suit both jurisdictions, regarding them as being relatively representative of the interests there might be, and put this forward and then the Parliament ran with it. The Commission's reaction was decidedly lukewarm. One can discuss why that might be. In the context of what we are discussing here I would say there were probably two reasons, and one sees this quite often. One is although the Commission was talking about doing something along those lines, they possibly did not have quite what was being put forward in mind. You have to slot your idea into what the Commission is broadly-speaking planning on doing. Secondly, you also have to get your timing right. It has to be more or less at

the time that the Commission is proposing to do something. In the criminal justice field, because the Member States have had the right of initiative, the Commission has not been able to ignore it when an idea like that comes forward from a Member State, but on the civil justice side there has not been a national right of initiative for several years now and, therefore, when ideas like that come forward the Commission is able to say, "Yes, that does fit in with our broad plans and we will go with it", or, alternatively, "No, it does not and, therefore, we will put it on the backburner or we will ignore it completely". There is another own-initiative report on the role of national judges that is emerging now, one element of which is on the application of foreign law in national courts. It has not been adopted but is going through the process of being adopted. That was foreseen in the review clause that was negotiated between the Parliament and the Council in the context of the Rome II Regulation and that review clause was critical to the conciliation agreement that took place in Rome II and how the result came out. The Parliament made it, as it were, a condition of its agreement to the final version of Rome II that there would be this review clause and it would have in it the possibility of legislation on defamation, on road traffic accidents and also on this question of the application of national law. That is another way that the Parliament tries to get its ideas in but, again, it is a question of whether or not the Commission will pick it up.

Q237 ***Chairman:*** We must cut it a little bit short.
Ms Fruithof: In summary, yes, the Parliament does put forward ideas, often very pro-actively, but the Commission at the end of the day can say "yes" or "no".

Q238 ***Chairman:*** Just taking the Common Frame of Reference again, sometimes the Parliament's idea may go far further than the European competence.
Ms Fruithof: Yes.

Q239 ***Chairman:*** A recommendation for harmonisation of civil law is certainly not, at least uncontentiously, within the competence of the Union or the Community.
Ms Bateman: My Lord Chairman, can I make one very brief follow-up to that. One of the things that should be borne in mind in terms of a Member of the European Parliament's own-initiative report is if a piece of legislation is put in as an annex to that report there is absolutely no scope for any Member of the European Parliament to amend that actual legislation, so it is basically a fait accompli that is then presented to the Commission. At that stage there is no impact assessment, no external influence or other discussions. To some extent, whilst I think the influence of that own-initiative report is quite limited, there is still quite a dangerous angle to that that should the Commission wish to take on that proposal they take the proposal lock, stock and barrel and can run with it. In terms of accountability I think that is a slight concern.

Q240 ***Lord Bowness:*** Where legislation has been proposed, at what stage do our witnesses think their intervention is most effective and where? On questions of co-decision in the Parliament, the Council or the Commission, once it has been proposed, where do you think you can bring the most pressure?
Ms Bateman: I think certainly in a co-decision proposal, the co-decision file will be within the European Parliament and certainly on mediation, small claims and the European Payment Order, the Parliament only recently had co-decision in that field and I think they were quite active and strong in that and we had a number of amendments on those proposals, particularly to do with cross-border scope only, and felt that was quite an effective way to influence. Certainly in criminal justice, although the Parliament will offer a forum for political debate, there is relatively little influence. We had amendments tabled on the European Evidence Warrant that were adopted at the plenary session as far as defence rights were concerned, but they never saw the light of day in terms of the Council because it was only consultation with the European Parliament. As you suggested, the power sharing between institutions is different.
Chairman: Lord Burnett?

Q241 ***Lord Burnett:*** Could I just ask about the proposed legislation in the area of criminal law following the entry into force of the Lisbon Treaty which will result in the need to take into account the views of the European Parliament. That will gain a co-decision role presumably?
Ms Fruithof: Yes, it does. It is expected to change things in one sense quite dramatically, or hopefully it will. The way it is seen at the moment is that the Council is likely to take a fairly prosecution-oriented stance because states bring prosecutions. That is the perception also in the Parliament, and the collective view in the Parliament is expected to be quite defence-oriented. Therefore, the fact that they will become co-legislators on the criminal justice side will, in the expectation of the Commission, mean that their more pro defence-oriented proposals are likely to get a

much smoother ride through the rest of the EU legislative process. In expectation of this and the new legal basis for proposals like safeguards for defendants, and the fact that the national veto will go, the Commission is planning on revitalising its safeguards proposal, to name but one.

Q242 ***Chairman:*** Criminal procedural safeguards.
Ms Fruithof: Yes.

Q243 ***Chairman:*** That is very interesting. That is the main change which you foresee?
Ms Fruithof: Yes.

Q244 ***Lord Bowness:*** Do you think that the shared right of initiative in the Third Pillar is a good thing? Do you think the proposals to change it within the Lisbon Treaty to a minimum number of Member States will improve the situation if, indeed, you think it needs improving?
Ms Bateman: To date, and we have elaborated further in our written evidence, the right of initiative for Member States whilst protecting the Member States' role in this area has caused a number of problems in terms of coherence of legislation and co-ordination of wider policy. Equally, a Member State initiative gets top billing, if you like, it gets priority in terms of the six month agenda, so longer term Commission proposals are put on hold whilst a presidency initiative, usually a presidency initiative, is dealt with. It also means the Commission will have to allocate resources to a draft piece of legislation that it had not foreseen. Referring to accountability and influence, there is usually no impact assessment or consultation on a Member State initiative. In terms of the changes, as you have suggested, with nine as the minimum number of Member States being able to bring an initiative under the Treaty, this will mean a particular Member State who wishes to take an initiative will consult and liaise with their counterparts earlier on in the procedure of bringing forward legislation and will probably have to address a number of the political issues prior to producing that legislation. I am not sure how much of a change this will be because we have already seen this happen in terms of the trio presidencies and the in absentia initiative has five other co-sponsors in terms of bringing that forward. It may control the more domestic-focused knee-jerk reaction, if I can put it that way, of the proposals, but I think it is foreshadowed already by the realities of the way it is being done at the moment.
Ms Malcolm: If I could just add one brief comment on that. As much as the question of where these ideas come from in the first place, one of the things that I find very frustrating as a practitioner who gives up a fair amount of time back in England in terms of the criminal proposals, is how ideas die a death at a fairly early stage. Two of the ones that I was particularly interested in and involved with were the question of trans-national bail, and the question of the appropriate forum in which to prosecute trans-national crime; and that goes hand-in-hand with *ne bis in idem* which, as you will appreciate, particularly in England within the extradition field is enormously important. The differing definitions of when you have in fact been "dealt" with, in the broadest sense of that word, for a particular offence vary across Europe. It causes huge problems with extradition. There was a Green Paper that was published on that by the Commission and it was out for consultation, at which stage I think it was the Greeks who proposed their Member State own-initiative on this, and it kyboshed the entire thing and it has all but disappeared from public view for the time being. Whether it will be resurrected we do not know. Another problem that has been caused within the extradition field, but also elsewhere, is the question of the definition of an "in absentia" judgment in a criminal context. As far as I could see that should have been a relatively uncontroversial amendment and, indeed, I drafted a couple of sentences, which was all that was required, and as I understand it that went forward and the Commission more or less adopted it. It was by no means just me, there were all sorts of other stakeholders who had precisely the same idea. There was a huge body of enthusiasm for this and six Member States proposing it and that, again, has been kyboshed. I have heard two different versions as to why: one because a state was concerned to increase the level of safeguards and one because a state was concerned in the opposite direction not to have the level of safeguards that were being proposed. I do not know which of those two is correct. The fact that something so simple and apparently uncontroversial with the support of six Member States managed to be killed off does not necessarily suggest just because you get seven Member States who have to support a proposal behind you that you are going to get home, so to speak.

Q245 ***Chairman:*** Does this come back to the question as to the setting of annual or, indeed, presidency programmes as to what gets pushed ahead? Does it relate to the fact that, for example, the bail proposal has not recently progressed? Does it come back to that?
Ms Fruithof: There is certainly more coherence now between the presidencies. We have now this concept of troika presidencies and the three will talk to each

other. If the troika presidencies get together behind a proposal then the fact that they are sitting as chairmen of the meetings in the working groups in the Council over that 18 month period will speed things up much more.

Q246 ***Chairman:*** That will continue under the Lisbon Treaty?

Ms Fruithof: That will continue, yes.

Q247 ***Chairman:*** Thank you very much, unless there are any other points you want to add. We would be grateful if you did put in writing the examples that you mentioned.
Mr Laidlaw: Of course.
Chairman: Thank you very much indeed.

Supplementary memorandum by The Law Society of England and Wales

During its oral evidence session of Thursday 8 May the Society undertook to provide in writing examples of how the development of Commission proposals in so-called "policy silos" affects the development of draft legislation. The following summarises a few examples of this, but the Society would be happy to provide more detailed information on request. It is hoped that the following examples prove to be useful to their Lordships.

Collective Redress

As we stated in our initial written evidence, initiatives on collective redress ("class actions") provide a good example. At least two Commission Directorates General are working actively on initiatives—both DG Competition (DG COMP) and DG Health and Consumer Affairs (DG SANCO). While the Society is supportive of both streams of work, that of DG COMP is much further advanced (a White Paper with recommendations was published in April 2008[i]), compared to that of DG SANCO, which is still conducting in-depth research[ii]. Both streams of work touch on developing mechanisms for collective or representative actions as a means of redress for consumer of competition violations.

While the Society has not taken a position on the need for EU-wide and/or national class-action systems and what form they might take, it has nonetheless been suggested that there could be greater consistency across the Commission policy here. The basic policy objective is the better enforcement of Community law rights and access to justice. This objective might not be best served if, as appears to be the case, ideas are being developed in "policy silos". The Commission's White Paper makes reference to the work in the consumer policy field but seems to reserve the right to take competition-law specific measures in the future. It has also been suggested that already inconsistencies can be seen in the approach taken to some of the substantive issues at hand.

The arrival of Commissioner Meglena Kuneva in 2007 did seem to give great political impetus to the work of DG SANCO but at that stage DG COMP was already planning to publish a White Paper early in 2008. The relevant Commissioners and Commission officials have been keen to emphasise that the departments are working closely on this issue.

In a broader context, in relation to the better enforcement of Community law rights and access to justice, it could be argued that the issue of providing collective redress could equally be considered in other fields of law for which the EU has competence. The Commission's thinking on this, however, does not seem to have extended beyond the areas at hand. DG JLS, which is responsible for civil justice, does not seem to have played a significant role in discussions and other DGs do not seem to have considered the issue of collective redress at all.

Applicable Law and Jurisdiction

Criticism has also been levelled in the past at the incoherence of various legislative proposals or finalised legislation. For instance, measures concerning applicable law, such as the Rome Convention[iii] and the soon-to-be-adopted Rome I Regulation[iv], which apply the law of the consumers' residence in consumer contracts, did not seem to fit well with proposals, such as the Services Directive[v], which contained a country-of-origin principle, whereby traders could operate throughout the EU on the basis of their home country law.

Similarly the interplay between the e-commerce Directive[vi] and the Brussels I Regulation[vii] has also created confusion. The e-commerce Directive was intended to facilitate on-line trading and create legal certainty. The concept of "directing activities" in the Brussels I Regulation, however, with its consequences for which jurisdiction hears consumer disputes, has created confusion amongst on-line businesses and probably inhibited attempts by some to offer their goods and services cross border.

Financial Services

It has been noted by practitioners that in the field of consumer financial services, overlapping, cumulative and sometimes inconsistent requirements are imposed by the following directives: Markets in Financial Instruments Directive[viii], the e-commerce Directive, the Distance Marketing of Financial Services Directive[ix] and the Unfair Commercial Practices Directive[x]. It is expensive for businesses to work out how to comply and then to do so and it is unlikely to contribute in the most efficient and effective way to consumer protection.

While the measures cited above originated from different Commission Directorates General, it is worth bearing in mind that this might not be the only source of divergent or conflicting legislation. Indeed inconsistencies may appear as a result of amendments tabled during the legislative process and even pieces of legislation that have originated in the same Directorate General might be inconsistent when finally adopted.

Although forming a package, the Financial Services Action Plan measures contain major inconsistencies of regulatory approach and overlapping provisions. For example, the approach to who is the appropriate regulator is inconsistent—sometimes it is home state, sometimes it is country of origin (which is not the same thing) and sometimes it is host state. This increases the risk of practical difficulties for businesses in seeking to comply.

For instance, a company with multiple listings has to comply with the insider list requirements of each Member State—see Article 6(3) of the Market Abuse Directive[xi]—while the home state notion used in the Prospectus Directive[xii] and the Transparency Obligations Directive[xiii] could arguably have been used instead. Also, an example of overlapping provisions is in relation to analysts' research, which is covered by the Market Abuse Directive and by Market in Financial Instruments Directive.

There is no consistent approach to the treatment of third country firms. Indeed, one might get the impression from some directives that third country firms have no or little presence in the single market—that the market is literally "internal" to the EEA. Nothing could be further from the truth, and it is important for legal certainty and fair competition that the issue is properly addressed.

It is disappointing that the fact that the FSAP was introduced as a package has not resulted in consistency of approach to core regulatory concepts and definitions across the piece. A consistency of approach should be adopted across directives.

May 2008

End Notes

i http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html

ii http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm

iii Convention on the law applicable to contractual obligations (80/934/EEC), OJ L 266, 09/10/1980 p. 0001–0019

iv http://register.consilium.europa.eu/pdf/en/07/st03/st03691.en07.pdf

v Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68

vi Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16

vii Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16/01/2001 P. 0001–0023

viii Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, p. 1–44

ix Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 09/10/2002 P. 0016–0024

x Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22–39

xi Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16–25

xii Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, p. 64–89

xiii Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38–57

THURSDAY 8 MAY 2008

Present	Bowness, L	Norton of Louth, L
	Burnett, L	O'Cathain, B
	Jay of Ewelme, L	Rosser, L
	Mance, L (Chairman)	Wright of Richmond, L

Examination of Witnesses

Witnesses: Mr Kim Darroch,[1] UK Permanent Representative, Mr Vijay Rangarajan, JHA Counsellor, Ms Sally Langrish, Legal Counsellor, Mr Paul Heardman, Head, European Parliament Section, Ms Clelia Uhart, First Secretary, Single Market, and Mr Gian Marco Currado, First Secretary, Environment, UK Permanent Representation, examined.

Q248 ***Chairman:*** Thank you for coming. Thank you for housing us and, indeed, prospectively entertaining us.
Mr Darroch: It is a pleasure.

Q249 ***Chairman:*** Whether that affects our objectivity, I hope is—
Mr Darroch: We hope so!

Q250 ***Chairman:*** --- not open to question! We are very grateful. This will be recorded and there will be a transcript. If there any points which arise on it, please let us know, and if there are any supplementary points I am sure you will too. I should perhaps also say if there are any interests which any members have they have been disclosed in the Lords' Register. The Council of Ministers has a power to request the Commission to submit proposals under Article 208 at the moment. Is this right much exercised? If so, could we have any examples. What happens to such requests, in practice are they coercive or do they produce results at all?
Mr Darroch: My Lord, first of all welcome, and thank you for your interest in all of this and for coming here. Would you like me to introduce my team?

Q251 ***Chairman:*** I should have said if there are any preliminaries, please do.
Mr Darroch: We are slightly different from those who may have been billed. Sally Langrish is the Legal Counsellor. Paul Heardman is Head of our European Parliament Section. Clelia Uhart is First Secretary, Single Market. Gian Marco Currado is First Secretary, Environment. On this side, Vijay Rangarajan is a Counsellor, JHA.

Q252 ***Chairman:*** Thank you. If there are any preliminary remarks you want to make, please do.
Mr Darroch: I should say while I like to think I have got a general grasp of all of this stuff I will turn to the experts at various points, or they may interrupt me and add to what I say. The short answer to your question is that the Council frequently requests the Commission to submit proposals to use Article 208. This usually comes through Council Conclusions and the requests usually produce results. We looked through the records and could only find one example which actually quotes Article 208, which is a Council decision of 22 September 1997 based on Article 152, which is the old 208, which called for the Commission to table proposals for a Single Programme for Culture. This led the Commission to produce what was called the Culture 2000 Programme which acknowledges the 1997 decision in its recital. That is specifically quoting 208, or what was 208 but 152. Actually, even when not specifically cited, 208 is the underlying Treaty base for a whole range of methods of calling for the Commission to bring forward legislative proposals, so there are lots of Council Conclusions which have had this intention. To give you some examples: in 1998 EU Ministers called for the REACH Regulation, which is the Registration, Evaluation and Authorisation of Chemicals, a very big piece of legislation, and that eventually emerged as a Commission proposal in 2003, it was agreed in the British Presidency in 2005 and we are now in the process of setting up the REACH Agency and it is going to have a big impact. There was a whole package of proposals brought forward when requested in Council Conclusions as the EU follow-up to the events of 9/11. The most famous bit of that package was the European Arrest Warrant, but there were lots of other bits and pieces to it. A third example, the Transport Council Conclusions of June 2006, called for legislative proposals on road safety and in response to that the Commission published in March 2008 a Directive on cross-border enforcement of road safety offences. Two other points, if I may. The Commission rather strictly and jealously, if that is the right word, guards its sole right of initiative, so although the Council can, and frequently does, request legislation the Commission will always say that they are not under the Treaty mandated to respond. They do not have to respond. Usually they do, but they are not absolutely required to. They

[1] Now Sir Kim Darroch.

would always avoid any commitment which required them to respond to such a Council request. However, there is a 2003 Inter-Institutional Agreement on better law making in which the Commission undertakes to, and I quote: "take account of Article 208 requests from the Council" and "will reply rapidly and appropriately to the Council's preparatory bodies". Our interpretation of that is while the Commission is still preserving its right occasionally to say "no", it is basically promising that it will always (a) consider the Council request seriously, and (b) will find a way of explaining itself if it chooses not to respond.

Q253 ***Chairman:*** Has there been an example you can quote of the Commission saying "no", and, if so, would it be a reasoned "no"?
Ms Langrish: It would have to be a reasoned "no". We could not lay our hands immediately on an example. Impressionistically, I would say that sometimes the issue would be a matter of timing—the time that the Commission takes to respond to a Council request.

Q254 ***Baroness O'Cathain:*** My Lord Chairman, can I just ask, when they do not respond would it be timing because they have too much work or they just want to delay it?
Mr Darroch: It can be either. It can be that inside the Commission there is a body of opinion that the request is not a good idea.

Q255 ***Baroness O'Cathain:*** But they would not say that.
Mr Darroch: More usually I would guess it is because, as we will discuss later, in the JHA area they have a big programme of legislative proposals which they are required under previous Council Conclusions to work through and the basic message would be, "Look, we can't do two things at once. What is your priority? At the last European Council you said this was a priority and now you say this". It can be either.

Q256 ***Chairman:*** A request under Article 208 by the Council is in practice, even if not necessarily in law, going to be a unanimous request, is it?
Ms Langrish: I believe it is by simple majority, which is the default rule in the Treaty at the moment.

Q257 ***Chairman:*** In practice, would a request be made? I think this was the gist of my question. Would it in practice be made without a pretty unanimous view?
Ms Langrish: In practice, given that most requests come through the form of Council Conclusions, which are traditionally adopted by unanimity or consensus, then, yes, it would be a view representing all Member States.

Q258 ***Chairman:*** So would it be right to view it as a pretty powerful instrument when the Commission receives it, one which sends a strong message?
Ms Langrish: Absolutely.

Q259 ***Lord Norton of Louth:*** Related to that, I got the impression from the examples you were giving that they possibly were close to exhaustive. Would that be a fair impression or more frequent than that?
Mr Darroch: No, there are lots more examples. It is really quite frequent, I think. It is not in every set of European Council Conclusions, but it is quite common in European Council Conclusions to have an initiative, often described in rather general terms, from which inevitably legislation occurs. We quoted you the response to 9/11 but there is also, for example, going through at the moment a big package on climate change and renewable energy which you can track back to a Commission report, a discussion at the European Council in March 2007 and eventually Commission proposals which came out on 23 January 2008, and then a further European Council endorsement of the principle in March 2008. Also the Tampere and Hague JHA Programmes, one from the European Council 1999 and then the 2004 Hague Programme, the Sixth Environment Action Programme, a decision of the Council and European Parliament of 2002. I think we could have found a lot more examples.

Q260 ***Chairman:*** Qualitatively it is clearly important that it comes from the Council, but I am just wondering whether it is something that interrupts the normal agenda that the Commission is working to.
Mr Darroch: Sometimes it is filling a gap. Sometimes, obviously as with 9/11, it is responding to a cataclysmic international event from which some immediate change of gear and European response is required. Sometimes it is putting a framework and an overall strategic direction, as with JHA, around policy that is going forward anyway and adding elements to it, but including some of the existing ideas. It can be all of those things.

Q261 ***Lord Rosser:*** Would it not be fair to say though that the Commission is still in a very strong position because if the Council is requesting and saying they want legislation in particular general areas, different Members of the Council may have very different views of what they mean by saying, "We want legislation in certain areas". The Commission is still in a very strong position, surely, in initiating the proposals because it determines first

of all how it would interpret what has been said in general terms.
Mr Darroch: It is true to say that the Commission is *de facto* in a strong position as the sole initiator of legislator and, of course, in initiating legislation it is able to interpret. However, in a way it is in the Council's hands how clear it is in directing the Commission on what it is looking for and if it is very general and very vague you are giving much more scope to the Commission to interpret it in its own way. If you are relatively specific about what you are looking for and what direction it is supposed to be going in, then the Commission has less room for manoeuvre. It is up to us to say what we mean in European Council Conclusions if we want the Commission to follow rather a narrow remit. Sometimes the Council does not really know much beyond a general concept what it wants and in that case the Commission will.

Q262 ***Lord Rosser:*** The Commission is in a very strong position if within the Council there are different views about what they mean by asking for legislation in a particular area because the Commission, to some extent, can decide which horse it wants to back.
Mr Darroch: Yes, but then I would say it is our job in the Council to try and find a consensus which gives a clear direction to the Commission and if we fail to do that then it is understandable the Commission exercises its own authority in interpreting what direction it should go in.

Q263 ***Lord Jay of Ewelme:*** Would you draw a distinction within the Council between the specialist councils and the European Council in this context, that is to say if the Single Market Council or the Culture Council ask the Commission to do something, is the Commission more likely to get all sniffy and say, "We are not obliged to do so but we will think about it", whereas if it comes from the European Council in effect the Commission is going to have to?
Mr Darroch: It is not written down anywhere, but that is probably broadly true, not least because the President of the Commission will play a big role, often the leading role, in the European Council discussions. If you take, for example, the climate change package, it was a Barroso presentation at the beginning of the European Council which was followed up by Heads of Government discussion and then it all emerged in the Commission. Often there is quite a big Commission role in those European Council Conclusions. It is usually something that is quite strategic or that is responding to a big international need for a response and in the European Council, which has a particular role in European affairs, greater authority than the other limbs of the Council, it is going to be seen as more of a priority. That said, we could not find any examples of a Council Conclusion that clearly called for legislation which had been explicitly rejected or ignored. The Commissioner is always around when the Council makes that decision and if he thinks it is a really bad idea he will say so. Usually, if the Commission is really against something they will find a few natural allies around the table, that is just the way things are.

Q264 ***Lord Jay of Ewelme:*** There is a stage before the Council says, "We would like the Commission to do this" and the Commission responds and there is presumably a debate in which the Commission will take part.
Mr Darroch: Exactly.

Q265 ***Lord Jay of Ewelme:*** At that point the Commissioner might say, "Look, I do not really think this is a good idea". Does that happen? Does the Council sometimes say, "We take that point, we will not push it" either formally or informally?
Mr Darroch: I have heard it many times and it is in the discussion phase before Council Conclusions are agreed. The arguments you hear most often from the Commission are, "You have set us a set of objectives which we are working through now and we cannot do two things at once, so surely that is the priority rather than this", and that is often quite a powerful argument, or they will have specific arguments why legislation in that area is not a good idea and they will usually find some around the table who will agree with them.
Mr Rangarajan: There are a couple of examples where the Commission can get pushed quite a long way. Take the Hague Programme, European Council Conclusions which asked for a Green Paper on trials in absence. Mostly for reasons of workload and because of the 9/11 workload on the criminal side, the Commission did not do anything for a long time, they never even brought forward their Green Paper. I do not think they disliked it but they did not have the resources to work it through in a very complex area and in the end a Member State initiative came forward, really with the support of the Commission, and that is pretty close to being agreed now. The difference of rights of initiative also puts some pressure on the Commission. In some ways they knew they did not have to, that if it was a real problem Member States would do it, and in some ways they had neither the resources nor at that point felt they had all the expertise to do it. A second example is Europol where we had exactly that discussion, where the Commission did not want to bring forward a proposal to change the staff

regulations on the immunities of police officers and in the end the Council, effectively by unanimity, said to the Commission, "You really need to bring forward this proposal or we will not agree the change of Europol to a Community Instrument" and the Commission then reluctantly accepted it and unblocked a large negotiation. There is quite a lot of pressure partly by linkage to other dossiers which can be brought.

Q266 ***Lord Wright of Richmond:*** I do not want to pre-empt a later question about Member States' contributions, but surely ideas that emerge from a Council meeting have previously been rehearsed in Coreper, have they not?
Mr Darroch: That is normally the case, but it is not unknown for ministers to come to the Council with an idea that has not previously been ventilated.

Q267 ***Lord Wright of Richmond:*** Which they had on the train!
Mr Darroch: It is not a common occurrence, but it does happen. Usually it is something that has been worked through the system before it pops up in the Council, but not always.

Q268 ***Chairman:*** You have been describing strategic policies which derive from Council Conclusions, climate change, Tampere, Hague, and the Sixth Environment Action Programme, and you have indicated the influence that they have on the Commission. I just wondered to what extent it would be open to the Commission itself to actually set such general policies? In other words, to what extent are the two bodies really alternative approaches or are complementary and fulfil different roles in this respect?
Mr Darroch: There are not any hard and fast rules, so this is an opinion. It works best if the Commission and the Council, especially the Commission and European Council, are working together. If, as President of the Commission, you have a strategic idea which you think needs to be taken forward, the right way to do it is to talk to the presidency of the day, to get it on the European Council agenda, to get your presentation made at the beginning of the European Council and to contribute to the draft Conclusions which provide the follow-up. That is the best way of working and it is the way, for example, the climate change package went through. Every Commission tends to set right at the beginning of its term its own independent objectives and the Barroso Commission, I think from memory, set European competitiveness and responding to the challenges of globalisation as its big tasks at the beginning of this term, the term which ends next summer, 2009. There is that and that can then, I suppose, be translated into a Commission Work Programme. But if you are sitting in the Commission and you want to make these things work you would not try and push that through in isolation, you would take it to the European Council and get Member State, Head of Government, endorsement for it and take it through like that. Given their right of initiative it is possible for them to just bring stuff forward, but it would not be the most sensible way of doing business.
Ms Langrish: Could I just add to that, that under the Lisbon Treaty there is more emphasis on programming between the Commission, the Council and the European Council. For example, under the Lisbon Treaty you will get the formalisation of the three Member State team presidency which will still chair a lot of the sectoral Councils. They will have to draw up presidency Programmes, and also the General Affairs Council will have the obligation to draw up a multi-annual programme in consultation with the Commission. To a large extent this reflects practice already, but there is more emphasis on strategic direction and co-operation between the institutions.

Q269 ***Lord Jay of Ewelme:*** Just a question about the presidency and how far presidencies actually influence legislative agenda? My own experience is that presidencies always exaggerate the extent to which they can actually influence the agenda and they can affect the timing rather more than the substance of things that come forward. Can you think of examples in which a presidency really has had a big impact on the legislative proposals which have come forward then or afterwards?
Mr Darroch: I think that your overall impression of the presidencies is right. Presidencies tend to have an inherited legislative agenda which is part of the longer-term Work Programme which it is their responsibility to take through as efficiently as possible and that is the main legislative workload of the six month term. The small country presidencies tend not to set on top of that a series of national tasks or objectives. The current presidency, which is doing a good job, is very much focused on what they inherited, what the Work Programme is and that is it, there is not a huge batch of Slovenian national objectives on top of that. The larger countries do tend to set, as well as the inherited Work Programme, some objectives of their own. The French, for example, for the next six months have highlighted things like ESDP and migration and the future of the CAP and the Health Check, and there are a couple of others. How much of that actually ends up as legislative proposals I am not sure, probably not very much. Probably it will mostly be European Council discussions and sometimes European Council Conclusions, but will not end up as legislation. There

is the possibility for presidencies to add to the legislative agenda and to use their position to push through ideas for legislation. They need to get the support of the Council for that to happen. It is comparatively infrequent and if it happens at all it tends to be with big country presidencies rather than smaller ones.

Q270 ***Lord Jay of Ewelme:*** Can any of you think of any legislative proposal which has come forward which would not have come forward if it had not been pushed by a presidency?
Ms Langrish: We have an example which covers two UK Presidencies and that is a regulation on cross-border small claims in the civil justice field. This was first called for during the UK Presidency in 1998. Obviously it took a while for it to come through as a legislative proposal. What happened next was that it was included in the Tampere Work Programme and then a Green Paper was brought forward by the Commission in 2002. Eventually we had a proposal for a regulation in 2005 which was pursued by the UK in its next Presidency in 2005 and, finally, we had the regulation in 2007. It takes a long time sometimes.

Q271 ***Lord Jay of Ewelme:*** Which rather makes the point it is quite difficult to do because of the timing of the six month presidencies.
Mr Rangarajan: Just to add one other one that you know well, the Prüm Treaty. It was no coincidence that this proposal appeared just before the German Presidency. There are two answers. One is that big presidencies do a lot of forward planning. If you think three or four years in advance then it is possible for the system to produce in time. Secondly, it is never quite a unilateral thing, the Presidency had to get buy-in many times over from all Member States for that all to happen, but they achieved that and in the end the Germans, having constructed the original Prüm Treaty, managed to see it through into European legislation very successfully.

Q272 ***Chairman:*** Is this going to change under the Treaty of Lisbon or will this continue with that Treaty and the troika arrangement? Are the presidencies going to have the same role in that respect?
Mr Darroch: Not really, because the troika presidency will be just another voice around the European Council table and will not be the first to speak, will not set the agenda and will not chair the discussion. That takes away a fair amount of the role at that level. Of course, in the sectoral Councils the rotating presidency still will chair them: the Competitiveness Council, the JHA Council, Ecofin or whatever. There will be a Foreign Affairs Council which will be chaired by the High Representative, so that will also be taken away from the rotating presidency. In the General Affairs Council his role is still to be discussed and decided, we are not sure who is going to chair that. It will diminish the potential for the rotating presidency to initiate or prompt new legislation. It will not eliminate it completely but it will have less opportunity to do so.

Q273 ***Chairman:*** They will be able to do it in the sectional Councils?
Mr Darroch: In theory, yes.

Q274 ***Baroness O'Cathain:*** Will that speed up the process or delay it still further because it does seem an inordinate amount of delay from the time when a germ of an idea comes to fruition?
Ms Langrish: I think against that you could argue that the delay actually allows for greater consultation of stakeholders and of interested parties. The Commission has got a lot better in recent years at consulting more widely and it does allow people to have their say as to whether the legislation is a good idea and is properly thought through.
Mr Darroch: One of the things we have insisted on as part of our Better Regulation Initiative is that the Commission do proper impact assessments on legislation which they are proposing. You cannot tell them to do this properly and consult properly and then tell them they are taking far too long over things. Well, maybe you can.

Q275 ***Chairman:*** Just deviating slightly from the main theme, are you happy with the way impact assessments are being improved and could they be further improved?
Mr Darroch: They are improving and more of them have been done and they are of better quality but, yes, they could be further improved. We talk a lot to the Commission about how that could happen. I am not an expert on it. We also think that we can improve impact assessments nationally as well sometimes, so it is a learning process everywhere. They are genuinely committed to making them better and there is a perceptible improvement.
Lord Wright of Richmond: Can I just say it was clear from our last evidence session with the Law Society and Bar Council that they are finding it extremely difficult to get in on the impact assessment process. They did not actually seem to be aware of the existence of the independent Impact Assessment Board, their response was, "That is all the Commission". They presented a formidably difficult networking process of trying to get at the right people, but getting into the impact assessment process they are finding virtually impossible.

Q276 ***Lord Burnett:*** Do you know who the independent Impact Assessment Board are and how they can be got at?
Ms Uhart: Yes.
Lord Burnett: Perhaps you could ring the Law Society and the Bar Council!

Q277 ***Chairman:*** Tell us about them.
Ms Uhart: They operate under the Secretariat-General and the idea is they scrutinise all the main impact assessments to make sure they are properly following the guidance, the Commission's own impact assessment guidance. They then write a report on these impact assessments and call the Director-General of the department in to tell him or her what they think of the proposals. The idea is that there is real accountability at Director-General level and the reports are sometimes negative.

Q278 ***Lord Wright of Richmond:*** Is it also a subsidiarity check?
Ms Uhart: They follow all of the guidelines that are set out in the Commission's impact assessment guidance, so there is a whole range of things they have to cover.

Q279 ***Lord Burnett:*** Including cost and how it will be implemented in nation states?
Ms Uhart: There is a very wide range. They have to look at impacts on competitiveness very widely. They have to look at environmental impacts, social impacts. One of the things they do not do at the moment sufficiently in our view is quantitative costing, and that is something we are lobbying for. There will be a review of the impact assessment guidance later this year and we are hoping they will be looking at more quantification as part of that.

Q280 ***Lord Wright of Richmond:*** Who are the Board? What sort of people are they? Where are they from?
Ms Uhart: They come from within the Commission, they are Commission officials.
Baroness O'Cathain: So they are not independent then, are they?
Lord Burnett: Lord Jay made that point to the Law Society very well.
Baroness O'Cathain: I am sorry, I was not here then.

Q281 ***Chairman:*** Are their reports ever published?
Ms Uhart: There is a webpage where you can go and see a number of reports of the IAB. You can consult the impact assessment and the IAB report.

Q282 ***Chairman:*** You said that they do not do sufficient quantitative costing and one of the points that was made in the last session was they do not look at the impact in a sufficiently objective quantitative way, so they tend to be satisfied, I think was the suggestion, by general statements such as there are 200,000 cross-border marriages in the EU and, therefore, there must be lots of problems. Presumably that is exactly the sort of possible weakness of reasoning that the Impact Assessment Board is intended to detect.
Ms Uhart: Yes, absolutely, it is there to improve the quality across the board of the impact assessments.
Chairman: It is an important process.

Q283 ***Lord Norton of Louth:*** The point about quantification is not particular to that because in Britain regulators are accused as well of not doing enough in terms of quantification of impact assessments. When you say the Board assess the assessments, is that in terms of the substance or the actual process to make sure that they have carried out the assessment in the way that meets the template?
Ms Uhart: Obviously the two are linked, but their primary remit is to make sure that the guidance has been properly followed.
Chairman: Primary process, in other words.

Q284 ***Lord Burnett:*** They go to individual organisations and universities in different countries. Do they advertise as to who they are going to go to for assistance?
Ms Uhart: In many cases they do, yes.

Q285 ***Lord Burnett:*** Is that an open process?
Ms Uhart: When they are using outside consultants they will go through a public tendering process.

Q286 ***Lord Burnett:*** Do they advertise the fact that they are doing that?
Ms Uhart: They would have to. They would be bound by rules on tendering.

Q287 ***Chairman:*** I do not want there to be any misunderstanding out of my last rather leading question. I suggested a primary process but perhaps you could indicate in your own words what the primary focus of the Impact Assessment Board is. You said it was to following the guidelines for impact assessments, which are what? Are they published?
Ms Uhart: Yes, they are. There is a Commission paper which sets out the guidelines that officials must follow and how they must carry out the impact assessments.

Q288 ***Chairman:*** How far does the Board, as you understand it, actually look at the viability of the logic and the conclusions which result from the process?

Ms Uhart: It is not just a box ticking exercise. The aim here is very much to improve the quality of the impact assessments. That is the idea behind bringing the Directors-General in and having a conversation about these impact assessments to improve the quality across the board.

Q289 ***Lord Wright of Richmond:*** We have covered fairly fully the impact of presidencies, past, present and future, in influencing the initiation of legislation. What about other Member States? How does a Member State, and clearly it would be interesting to hear from you about HMG, affect the initiation of legislation? Is this done in Coreper, in the Council? What have you got to say about that?
Mr Darroch: First of all, there is, of course, in the Third Pillar a formal legal right of Member States alongside the Commission to call for legislation and, when I have spoken, Vijay will tell you a bit more about that, which gives him two minutes to prepare!

Q290 ***Lord Wright of Richmond:*** This is why the Commission's role is described as "virtually unique", is it?
Mr Darroch: Described where?

Q291 ***Lord Wright of Richmond:*** In the Treaty on the right of the Commission to initiate legislation.
Mr Darroch: Yes. This is the one area where they share the right of initiative with the Member States.

Q292 ***Lord Wright of Richmond:*** That is right.
Mr Darroch: Second, across the rest of the field, of course it is open to any Member State to propose a new piece of legislation in any body, whether it is the Council or Coreper or a Working Group, but that, I think, would be a rather stupid way to proceed and unless you have got 20 other Member States to agree with you in advance you would not get very far. If you were serious about trying to get a new piece of legislation out what you would do is you would go in and talk to the Commission informally at both working level and more senior level and make a reasoned case for your legislative idea. You would do it through UKRep officials to the Director or someone a bit higher. You might have a team from London come over to talk at senior level to the Commission and you might have a minister come over and talk to the Commissioner about it. It is not going to work unless in the end they have ownership of the idea and they feel it is their idea and they have some credit for producing it. If you try to keep a British flag on it, it is not going to work, but if it is a case of getting the Commission to buy into your idea and adopt it as their own, that is basically how I would do it. I certainly would not try and spring it on a meeting of Coreper or the Council because I think that would be a recipe for failure.

Q293 ***Lord Wright of Richmond:*** Can I ask a rather introvert question about parliamentary influence. Have you ever known a House of Lords report influence the initiation of legislation?
Mr Darroch: If I say no, my Lord, it does not mean that it has not happened, it just means that I cannot remember off-the-cuff!

Q294 ***Lord Wright of Richmond:*** Yet!
Mr Darroch: Vijay, do you want to talk about the Third Pillar?
Mr Rangarajan: Even when the Commission does its own proposals it is worth looking back as to where the roots of those come from and why they are proposing them. One of the reasons, and this is increasingly the case in the Third Pillar as well as others, is there is a community of policy officials, policy thinking and it can be quite a wide community. To take a migration example, there is tremendously strong policy input from people like the UNHCR or the Institute of Migration, or Member States' border agencies and their migration officials. There are often shared challenges that come up and there is a whole informal process that goes on in advance of that. You can trace back, quite often a long way, some of the actual legislative instruments which have been brought forward to, for example, the conclusions of UNHCR reports going back a long way or the developing policy consensus that something must be done. One example of that is work to share information from criminal records. It became clear quite a long time ago that many Member States were having problems with this and it came out in judicial co-operation discussions between Member States. In the end it was a Commission initiative but it stemmed from a growing and wide recognition of a problem.

Q295 ***Lord Rosser:*** Can I just follow up on that. We have had evidence, and you will have seen these figures, on exercising the Commission's right of initiative in 1998, which show that just 5% of proposals were new initiatives from the Commission. You can argue that in the current climate the Commission has an incentive for trying to pretend or give people the impression that it is just there to do what other people tell it to do. You could take the view that when it says that it is responding to express requests from other EU bodies that it must get so much lobbying on all sorts of issues that virtually anything it puts forward it can say is somebody's point of view. Where does the influence then lie? You have sought to say that if the Commission does put things forward you have got to look back to where it might have originated from and it might have

originated from other bodies. Is that scenario of the Commission saying that really it is only 5% of own-initiatives an indication of where influence and ideas originate from, that they are not coming from the Commission, they are coming from everybody but the Commission?
Mr Darroch: It is very hard to answer that. Where does the idea first come from? If they interpret the question very strictly it does not seem improbable at all that only five or whatever per cent of the ideas were a Commission official having a flash of inspiration completely in a vacuum thinking, "What we need is a new piece of legislation on this", because there is a huge amount of discussion, lobbying and interaction that goes on in this town. It can come from Member States, it can come from the business community or the trade unions, it can come from NGOs, it can come from consumers. If you take the very high profile piece of legislation on mobile roaming charges that went through last year, I think the Commissioner, Mrs Reding, probably was prompted to do that by complaints from consumer organisations, I think that is where that come from, it certainly did not come from the mobile companies. I am sure they would classify that as not part of the 5% but part of the 95%. In a comparatively open environment where there is a huge amount of contacts, lobbying and discussion that goes on it is very hard to sensibly quantify where all this comes from. It is from any number of sources.

Q296 ***Lord Rosser:*** Are the Commission working to quantify it?
Mr Darroch: I am sure they would have seen it as in their interests to present themselves as primarily the responder to requests from others rather than as an initiator of legislation.

Q297 ***Baroness O'Cathain:*** The listening Commission!
Mr Darroch: Yes, but you would expect them to say that. I do not think they are necessarily wrong. They still have to take decisions issue-by-issue on whether the case for legislation is there or not. How often they have the idea for legislation completely in a vacuum would be rather rare, I would think, someone would have talked to them about it.

Q298 ***Chairman:*** Just going back on a question put by Lord Wright who asked you about the House of Lords reports, without, I hope, being too self-defensive can I return to the subject. I think the question and your answer related to the initiation of legislation. It would be right, would it, that in relation to the development of proposals where this Committee or the European Union Committee produces a report as, for example, on the European Supervision Order proposal, that is the point at which a body like ourselves might hope to have some influence?
Mr Darroch: Yes is the short answer. Just to enlarge on that a bit, I am sure you do not underestimate but we do a huge amount of talking to the Commission as pieces of legislation emerge from that machinery. Before it ever gets to the Council, to do the UKRep job properly you have to talk to them an awful lot because it is much more effective to get a clause changed or a new clause put in when the desk officer in the Commission is writing the thing than when you have to argue the case with 26 others around the table with different views. We always regard it as almost the most important thing we do, trying to influence legislation as it emerges from the Commission. On the climate change package there was a massive amount of contact between Whitehall and the Commission in the 12 months between that Spring European Council and the call for this package to come out and the package coming out on 23 January. There was a huge amount of contact, meetings and whatever. That goes on on every bit of legislation that we hear about. There is one at the moment on mobility of health services on which there will be any number of visits all the way up to and including the Secretary of State for Health to talk to the Commission as they produce this legislation to try and make it come out right. I hope that is the case across the board on all significant pieces of legislation where we know what is going on.

Q299 ***Chairman:*** Do you ever use our reports in that process?
Mr Darroch: Of course. There is always a Government response to your reports and they pick up ideas and views from the reports and that becomes part of British policy and part of the instructions that we take into the Commission saying legislation should appear like this or like that.

Q300 ***Chairman:*** Indeed, we get very polite letters and have recently had one on the Supervision Order proposal from the Commission saying that account has been taken of our views.
Mr Rangarajan: I was going to mention that one, and Prüm and PNR, all of which they read quite attentively what you had written and I think it had a material effect.
Mr Heardman: One place where they are read very avidly in Brussels, of course, is in the European Parliament where they have a very high reputation and with this growing network of links between national parliamentarians and MEPs, that is a trend that will only increase in the future.
Chairman: That is helpful, if only to encourage us!

Q301 ***Lord Wright of Richmond:*** A very quick question which arose from our previous evidence session with the lawyers. Are you aware of occasions when there has been an assumption that the British Government might opt out and that, therefore, we are no longer worth consulting? I am shorthanding what they said.
Chairman: I think perhaps the evidence was no longer worth taking account of in the proposals produced because if the common law was not going to be involved you did not have to cater for it. We were concerned and interested by that answer.

Lord Wright of Richmond: ***Is this a real problem?***
Mr Rangarajan: I am not aware of any specific case where that has happened. It is clear on the development of Frontex they expected us initially to be in and then it became clearer once the legal development was underway that we probably would not be, and that was one of the reasons why we challenged our participation in the passport case. Obviously when it comes to the more purely Schengen-related areas, and there is a grey area at the edge of that, sometimes the Commission thinks, "Well, the UK will not be in it". I am thinking particularly of issues like the development of some of the biometric documentation. There is a counterbalance to that which is the expertise which parts of the UK machine have developed. Although we may not be bound by the final legislation or be barred from participating in it if it is purely Schengen building, there is still quite a lot of policy dialogue on how you do these biometrics in the first place and we need to make it interoperable. It is not quite, "We will not talk to the UK" because quite often, and pretty well across the board in the JHA area, we at least have expertise and experience in these areas which they would anyway find useful.

Q302 ***Lord Wright of Richmond:*** And in the case of Frontex, membership of the board?
Mr Rangarajan: Yes, a place on that as an observer. Where I think it is a little bit complicated is in some of the issues to do with the common law where we have examples of proposals which do not take sufficient account of common law interests. There are two reasons for that. One is we feel there is a lack of expertise on the common law in some parts of the Commission, and we are trying to help them and to remedy that. The other is partly I think there is a sense of, "The chances of the UK being in this are small and we do not really understand their system either".

Q303 ***Chairman:*** Can you help us on how you are trying to help them?
Mr Rangarajan: For example, we have been trying to get the civil law part of the Commission to the UK to do a joint set of training with the Irish on the common law system, take them in to see a case and have a series of eminent speakers. I think you were on our hit list at one point, my Lord Chairman, to come and describe why this is different, how we see things, how we interpret legislation in a very different way and explain that the problems we have, for example on applicable law in family courts, are not made up but are part of the intrinsic nature of having an adversarial system.

Q304 ***Chairman:*** What about the personnel? Recently there has been discussion about the number of common lawyers in the Commission. Is that a problem which has been resolved or is it a potential ongoing problem?
Mr Rangarajan: That one is a potential ongoing problem.

Q305 ***Chairman:*** Is there something that we should say in this area? What is the problem and how does it arise?
Mr Rangarajan: I think it arises partly because you can get a concentration of policy officials, and to take the example of family law again, who come from a predominant background and in this case the predominant background of quite a lot of the Family Unit is a French legal background, which makes it quite difficult to understand our system. The Ministry of Justice are quite seized of this and are trying to increase their secondment budget and trying to increase slightly more strategically where they put people. One of our wishes is to put someone who is a good common lawyer particularly to work inside DG JLS.

Q306 ***Chairman:*** So there is no unwillingness on the part of the British Government to second or send people to the Commission?
Mr Rangarajan: No, we are trying quite hard to do that.

Q307 ***Chairman:*** They are positively trying to do that?
Mr Rangarajan: Yes.

Q308 ***Lord Norton of Louth:*** You mentioned the Annual Work Programme of the Commission and my question is how effective that and the Strategy Policy is in influencing the legislative agenda. You made the point earlier the Work Programme itself is not created in a vacuum so I assume that has quite an impact in developing the agenda.

Mr Darroch: That is one of the pleasures of crawling through this every year. It is not really a vehicle for initiating new ideas. You do not go through it and think, "My goodness, they are going to do this or that", it is about primarily the prioritisation of stuff that is in the pipeline already. It is a significant document, but not one that you are going to find usually will surprise you.

Q309 ***Lord Norton of Louth:*** As you say it draws together something that is in a coherent shape for the year, so does that then influence, if you like, non-agenda setting in terms of what is then kept out once that has been drawn together?
Mr Darroch: If there is something not on the Work Programme that you expected to be there it is an indication that it is not a priority for the Commission and they have put it on the backburner. If it matters to you, you have to go to them and say, "Why is this not there? Could you put it back?"

Q310 ***Lord Bowness:*** When we have been talking to other witnesses about the area of Freedom, Security and Justice they have said to us that the legislation there is developed in a somewhat unsystematic way and part of that is because of undue influence by other groups. Do you think that is the case? If it is the case obviously it matters. Does it arise out of the fact that this is the area where there is the shared initiative?
Mr Darroch: My Lord, we do not agree with that assessment is the short answer. For the longer answer, I will pass to Vijay.
Mr Rangarajan: There are three points on that. The first is because of the Tampere Programme and the Hague Programme, in a way the work on this is quite heavily structured and has a certain focus. But I can see why it gives the impression of being unsystematic. I think that is partly because the number of proposals going on and the length of time they take to negotiate means that it can appear from the outside as if there are just individual little things being picked off one-by-one and even though the legislation may have started at one point it ends up at very different times, so people will wonder why on earth did you do the European Arrest Warrant first and then procedural rights several years later. It is partly negotiating and partly resource constraints in the Commission and partly the political priorities at the time. In the end, is it unsystematic, and I would add a question, if I may, is that a bad thing? The danger of a purely systematic approach seen from where we sit is that it rather implies the EU is going to legislate progressively over everything and I do not think that is what we would like to see. What we would prefer to see is where there are particular issues, where there are problems, an impact assessment. Where there is an identified problem where EU action will help, then a piece of legislation should be brought forward. There is a strong counterview, particularly on the civil law side, and contract law side. Some people have been calling for something which is much more systematic on the civil law side, a complete codification and a wide-ranging piece of legislation covering the whole of civil law. Sometimes people have brought forward quite ambitious proposals which cover a tremendously wide area and have not had very much success. The premise that it is a scattergun approach and does not have any focus, I would say the Hague Programme at least sets quite a clear set of directions. The successor to that is being negotiated now—these "future groups" are working up a series of ideas for what is going to be the successor to the Hague Programme and that is going to be even more focused, I think. They are setting themselves three or four particular directions to go in, one on data sharing and one on police co-operation. The scattergun nature of the proposals themselves is inevitable given the process, but I am not quite sure it is necessarily bad that we do not cover everything in the fullness of time.
Mr Darroch: Just a word in support of being unsystematic. You want a basic structure and a basic programme, but you need some flexibility in the system so that you can respond quickly to new events and new circumstances, especially in this area of new threats. You need to be able to put through legislation quickly but, as it were, leapfrog over the stuff in the pipeline and do something if you are to be effective in this area. It is a new area of policy and the priorities in 2004 do not always look the same in 2007. An obvious example is 9/11 changed everything and initiated a whole new set of measures and issues which inevitably overtook the established agenda.

Q311 ***Lord Bowness:*** Can we just touch on the shared right of initiative. Does the shared right of initiative cause any difficulties and do you think the revised proposals under Lisbon will improve the situation, if indeed you think it needs improving?
Mr Rangarajan: Yes. The right of initiative by individual Member States has not caused enormous difficulties but it has wasted quite a lot of time and political effort. There have been several examples of initiatives which have been drawn up by an individual Member State, largely to do with a particular event or their domestic politics, which have not really got very much resonance with the rest of the EU but, nevertheless, because they were the Presidency, say, have taken quite a lot of negotiating time. In general, Member State initiatives which have

got significant backing, and if we take the Eurojust proposal which has just come out, that had seven or eight Member States backing it, or trials in absence where a large group of Member States were co-sponsoring, tend to be much better thought through, having been through a kind of internal negotiation and testing process first, and they do not cause anything like as many difficulties. That is except in one respect, which is they almost always lack a proper impact assessment and that really is a major lacuna because sometimes we are getting a major piece of legislation and it has been drawn up by a group of Member States' experts thinking, "This is okay in my country", but they have not taken into account what the Commission does at least do, which is a wider view as to how it interfaces with other legislation. I think that was a point made in your Prüm report, for example.

Q312 ***Baroness O'Cathain:*** Can I just ask a question on that, my Lord Chairman. How come that actually occurs? If the people who are dealing with this legislation are promoting ideas, having initiatives, and do not realise that an impact assessment is fairly fundamental to anything proposed, surely there must be a set of guidelines somewhere which say, "If you are going to initiate something you make sure you have got an impact assessment".
Mr Rangarajan: I think there is a set of JHA Council Conclusions that requests Member States who make their own initiatives to draw up impact assessments.

Q313 ***Baroness O'Cathain:*** But they ignore them?
Mr Rangarajan: But they have not been followed.

Q314 ***Baroness O'Cathain:*** I see. They ignore them.
Mr Darroch: Dare I say this is a sort of cultural—cultural may be the wrong word—issue. The impact assessments are well-established in the British system but are completely unknown in some Member States, quite a lot of Member States.
Chairman: Lord Burnett?

Q315 ***Lord Burnett:*** I wonder if I could go on a slight frolic of my own. That is, as a Committee, are we being far too parochial? In other words, should we take evidence or try to take evidence from the representatives of another Member State or other Member States and, if so, who do you recommend? I suppose the main question is, is sufficient account taken of national laws and systems, eg the common law tradition, when preparing draft legislation whose effective implementation depends on the national legal framework? Are fundamental rights adequately taken into consideration?
Mr Darroch: I will let Sally answer the second part while I think about the first part.
Ms Langrish: Fundamental rights—yes, they are very much taken into account, at least in theory. As you probably know, there is clear ECJ case law that fundamental rights being observed is part of the validity of an EU Act, so if an EU Act breaches fundamental rights it can be challenged in the Court of Justice. We routinely have recitals in draft EU legislation saying whether relevant fundamental rights have been taken into account. Explanatory Memoranda also should include an assessment of compatibility of a proposal with fundamental rights. We now have the Fundamental Rights Agency of the European Union which monitors EU legislation for fundamental rights compliance and, of course, the Charter of Fundamental Rights has given greater prominence to those rights which are already observed in the European Union. Certainly, in theory, fundamental rights are observed and are part of the system.

Q316 ***Chairman:*** Can I just ask whether, in practice, there may have been a greater focus on measures to counter things like terrorism? I am thinking of the terrorist legislation, money laundering legislation, the European Arrest Warrant and so on, all of which have given rise to some concerns, I think, as to whether it would not have been better to accompany them with some counterbalancing legislation, such as the procedural protection, and possibly things like the in absentia proposal which are now still in the pipeline. Can you comment on that general possibility?
Mr Rangarajan: I think you are right. The timing at this juncture between the various proposals has not made life at all easy, partly procedural rights, partly the political priorities which made the European Arrest Warrant very urgent after 9/11 and then a much slower working out of some of the rights legislation. I think the picture is not quite as bad as it looks on that because all EU Member States are in the ECHR and in practice it has been difficult to identify what value some of the EU legislation can add in terms of fundamental rights, given the extensive case law and the working out of the ECHR. Yes, in some cases it is possible. But it has just taken quite a long time to ensure something which is both useful and does not duplicate entirely what already exists. One of the problems that we do have, of course, and I think this was a point that Lord Lester made last time, is that the ECHR with 47 Member States is not as good as the EU at making sure that all of the procedures which it sets down are actually followed in Member States. Increasingly, we are

seeing a process where the EU gets involved in making sure, for example, on procedural rights, the ECHR procedures are much more strictly observed and in a level of detail which the ECHR itself does not get into.
Mr Darroch: Two comments on your first question. First of all, you would always find it interesting and educative to talk to representatives of other Member States about their approaches and their views on the sorts of issues you have covered with us today, or anything else European for that matter. On legislation, in particular, if you were to go and talk to the Germans you would see two things, probably neither of which would surprise you but they would be quite marked differences with us. One, they have a much less questioning attitude than the UK as a whole as to whether regulation and legislation is the right route. We have a wider mix of approaches, non-legislative approaches, and we do not always believe that legislation and regulation is the right route, and they tend to, so they do not bring any, or little, of the questioning to it that we do. Second, of course, life is much more complicated for them because of the difference between the länders, the regional governments and the national government, and that does complicate things for them quite a lot in the way that it does not yet for the UK. That would show quite a difference of approach. You would find the northern Scandinavian European Member States much closer to our approach. As you go further south, they believe much more in regulation. Yes, you would find it interesting and useful.

Q317 ***Lord Burnett:*** Who should we approach, through you probably?
Mr Darroch: My other point is you could get quite an interesting snapshot of the differences, of course, by talking to a range of MEPs of different nationalities who are probably quite representative of the Member States' views. As to who you would approach, if you are thinking of visits to Berlin or Paris or wherever, then you would do it through the normal channels and the embassies there would take care of you. If you wanted to see Permanent Representatives here you do it through us, but you might find it better to talk to the capitals.

Q318 ***Lord Burnett:*** It would be interesting to see how powerful the Germans are as initiators.
Mr Darroch: Yes.

Q319 ***Lord Bowness:*** With respect, my Lord Chairman, it is a question that we could ask Mr Darroch.
Mr Darroch: I do not know. I do not think anyone, apart from our neighbours immediately across the Channel, does as much interaction with the Commission about the shaping of legislation as we do. We like to believe that we are one of the more effective operations in Brussels.

Q320 ***Baroness O'Cathain:*** Is that seriously so when we are always told we are semi-detached, not involved and all the rest of it? That seems an extraordinary statement. Nobody does as much as we do, I think that is great!
Mr Darroch: You can be both semi-detached—not my words—in a special position in terms of Schengen, the euro and all sorts of other things, and still care more or try and influence more about shaping emerging legislation than others do.

Q321 ***Lord Bowness:*** Before we leave this, presumably you are able to say to us whatever one's view about the process, the process is effectively the same for everybody, is it not?
Mr Darroch: In the Member State, in the Permanent Representation, I would expect to be able to get in to see whoever is writing a piece of paper and a piece of legislation in the Commission. Anyone can speak up in Coreper or the Working Group or the Council to set their views. Yes, there is a level playing field, it just depends how much you are prepared to run around on it.

Q322 ***Lord Rosser:*** Do we put in more effort because we have a harder job trying to get what we want? It is not about how much effort you put in, it is how much success you have that counts.
Mr Darroch: In some areas, like Vijay's area with the common law system, there are particular issues that we have. In some areas we are much more likely to think a non-legislative route than others for reasons I have touched on. I am not sure that across the board our life is harder though. In some areas, like the whole liberalisation agenda, energy liberalisation, telecoms liberalisation, climate change, we have a much less hard time than the French and Germans do. It is different in different areas.
Ms Uhart: Can I give an example on that of the Single Market Review, where the Commission had similar views to our own. We and the French were very much on the same track and the most influential in that process and, despite the fact that the Commission was on board, we continued to stay close.
Chairman: I am conscious that time is passing and we have an invitation which we do not want to miss. Perhaps we should wind this up.

Q323 ***Baroness O'Cathain:*** The only thing I was going to ask is how effective is the Inter-Institutional Agreement on Better Law Making?

Ms Langrish: I think the overall picture is that the institutions are trying hard and things are generally improving. The Inter-Institutional Agreement is part of a long process which I think you could date back to the Edinburgh European Council in 1992, when ideas of subsidiarity and proportionality, which include Better Law Making and choosing the right legislative instruments and so on, began to be discussed seriously. That has been an ongoing process with the Amsterdam Treaty and more recently there have been three or four Inter-Institutional Agreements on this sort of subject, including codification, recasting of legislation and quality of drafting. One of the best documents that I have seen on this is the Annual Report on Better Law Making which is freely available on the Commission's website. In fact, the 2006 Report has a very good Commission staff paper which details a whole range of initiatives and internal arrangements that they have put in place on this subject, including the way they organise their Legal Service.

Q324 ***Baroness O'Cathain:*** Thank you for pointing us in that direction.
Ms Langrish: It is an extremely good guide. They are trying hard and progress in terms of results is—

Q325 ***Baroness O'Cathain:*** Mixed?
Ms Langrish: --- mixed, but it is getting better.
Lord Wright of Richmond: My Lord Chairman, it would be very interesting to see that paper.

Q326 ***Chairman:*** One of the curious features we discovered at some earlier stage was that, in fact, the drafting of proposals is not necessarily done by a specialist draftsman's department within the Commission.
Ms Langrish: Not at all.

Q327 ***Chairman:*** It is done by the particular DG, and I suspect that has certainly led to some of the difficulties we have identified in our reports. It has occurred to me that Europe ought to have something in the nature of a parliamentary draftsman's department or a Law Commission.
Mr Darroch: Staffed by British lawyers!

Q328 ***Chairman:*** Has that idea been floated?
Mr Darroch: We will work on it.
Lord Jay of Ewelme: Staffed by common lawyers.
Baroness O'Cathain: Uncommon common lawyers.

Q329 ***Chairman:*** Has the idea been floated?
Mr Darroch: I do not think it has.
Ms Langrish: Not formally. I am sure we have mentioned this in UK papers on things like the quality of legislation over the years. I seem to recall it was an idea that was trawled in 1997 or before that, before the Treaty of Amsterdam. It has not made much traction; it is not part of the legal culture here. Maybe we can expand more informally over lunch.
Chairman: I think that is a very good idea. Thank you very much indeed for your attendance.

THURSDAY 8 MAY 2008

Present	Bowness, L	Norton of Louth, L
	Burnett, L	O'Cathain, B
	Jay of Ewelme, L	Rosser, L
	Mance, L (Chairman)	Wright of Richmond, L

Memorandum by the European Commission

THE ORIGINS OF COMMISSION PROPOSALS

1. The right of initiative of the Commission is one of the cornerstones of how the European Union works. From the first, the founding fathers recognised the importance of having a single, central point with the responsibility to identify the general interest and encapsulate this in proposals for legislation.

The right of initiative therefore makes the Commission ultimately responsible for the initiation of legislation[1]—though there are of course defined cases where the Treaties state that this responsibility is shared with the Member States (as well as with other institutions and bodies in a number of other cases).

However, this does not mean that the political origins of Commission proposals lie exclusively within the walls of the Commission. On the contrary, a system has evolved where legislation results from a complex interplay of different actors, with the goal of ensuring that proposals made by the Commission meet the objectives of the EU as set out in the Treaties in the best way possible.

2. The rationale for legislation comes from many sources. For example, legislation may be the automatic consequence of commitments made in an international agreement. Community law already in force often needs to be updated to reflect changing realities, like scientific and technological change. Such factors reflect the reality that legislation in force will never be static, and will always need renewal.

The views of the other institutions are particularly important. The formal rights of the European Parliament and the Council of Ministers to invite the Commission to submit legislative proposals are set out in Articles 192 and 208 of the Treaty. But in practice, the informal political interplay of the different institutions and political groups is the normal channel to make the Commission aware of a demand for legislation. European Council conclusions have become one way of inviting the Commission to put forward proposals—often following a suggestion made by the Commission, to help build early political momentum for a proposal. Also important is the dialogue with forthcoming Presidencies eager for the Commission to initiate a proposal during the Presidency—though this might often impact more on the timing of proposals than on whether or not proposals are made.

As for proposed new laws suggested by other actors, economic operators have traditionally been an important source of ideas—notably to reflect the desire of operators to have common rules in the internal market. In such cases, care is needed to ensure that such ideas are not motivated solely by a desire for competitive advantage, but could further the objectives of the Union. Other key actors are the social partners, NGOs and civil society in general.

Various studies have been undertaken to try to analyse the origins of different proposals. A study of proposals in 1998 concluded that 35 per cent were motivated by the need to update Community law to changing circumstances. Another 31 per cent was the result of international obligations. 17 per cent flowed from express requests by the institutions, Member States or economic operators.

A study of 2005 sought to use the same classification, and saw updates of existing law at 31 per cent, international obligations rising to 40 per cent, and only 8 per cent classified as requests.

These statistics give a flavour of the importance of different sources in volume terms. They should, however, be treated with care. In the first place, there may be a number of different sources inspiring the same initiative.

[1] See the contribution by Commissioner Barnier and Commissioner Vitorino to the European Convention on "The Commission's right of initiative", CONV 230/02 of 3 September 2002.

In addition, different measures have different degrees of political importance—in 2005, for example, there were 18 proposals appointing the Directors of regulatory agencies, overshadowing in statistical terms the 14 Directives and Regulations adopted as priorities under the Work Programme that year.

3. There are a variety of ways in which the Commission makes it known that it is developing an initiative in a particular area. This can come informally, through speeches or press statements. It can come more formally, through planning and programming documents such as the Annual Policy Strategy and the Commission Legislative and Work Programme. The Annual Policy Strategy sets in train a process of dialogue to feed in the views of the other institutions, and the European Parliament passes a resolution on the Work Programme—though it should not be forgotten that, however useful these documents are as a tool for dialogue, their primary purpose remains internal planning.

Consultations have grown to be particularly important, with over 100 formal consultation exercises now launched each year.[2] The Commission has a clear interest in using consultations to maximise the quality of its proposals, testing out ideas and listening to views and experience from stakeholders. This interest has intensified as enlargement has increased the diversity of the situations for which the EU is seeking to legislate. The Commission also supplements its general public consultations with targeted consultations—either to specialists, through the use of expert groups and stakeholder forums, or to those whose views carry particular weight, as in the case of the arrangements set up in September 2006 for dedicated consultation with national parliaments.

4. An example can help to illustrate the reality of how a proposal is developed for adoption. In January 2008, the Commission put forward a complex and far-reaching package of measures to address climate change and develop renewable energy. This package has fundamental implications for European society and the European economy, which will be felt by every EU citizen. If the origins of the package are analysed, it can be seen that they come from a wide variety of sources, including:

- Positions taken by the European Parliament, the European Council, and the Council of Ministers.
- Stakeholder consultations and meetings.
- The international context, given the knowledge that the arrangements of the Kyoto Protocol would need renegotiation by 2012.
- A wider public and media debate which proved very influential in creating political momentum behind an ambitious approach.

In this case, the Commission decided to complement these different steps with an extra stage of consultation. It organised in depth face-to-face meetings with Member States, explaining the rationale of the proposals and hearing Member States' own experiences and concerns. This allowed the Commission to test out the architecture developed for the package and to refine its proposals in detail.

The most important single contribution to the Commission's ability to make a detailed and ambitious proposal was the agreement of the March 2007 European Council to precise and binding targets, Member State by Member State. But the targets had been proposed by the Commission in January 2007 in the form of policy communications—texts which were in turn the fruit of discussion and interplay between the Commission, the other institutions, and other stakeholders.

5. So the Commission's right of initiative should not be seen as implying that the Commission has a monopoly on ideas. On the contrary, the Commission's role is rather to sift through the ideas, to make a judgement between competing interests, and to apply the test of the common European interest. Then it takes its responsibility to make the final choice on whether to make a legislative initiative, and if so at what point and with what content.

2. Quality Control

1. The process of developing the ideas needed to initiate legislation is closely tied to the process of quality control and Better Regulation.

This Commission adopted its Better Regulation Agenda in 2005. It aims to ensure that all new initiatives are of high quality, as well as to modernise and simplify the existing stock of legislation. By improving the regulatory environment in this way, the Commission also aims to help to stimulate entrepreneurship and innovation, to realise the full potential of the single market, and in turn promote growth and job creation.

[2] All ongoing consultations are gathered together on a single website, "Your Voice in Europe" (http://ec.europa.eulyourvoice/). In 2005, there were 106 internet-based consultations launched on this website, with 129 in 2006 and 112 in 2007. In 2005, there were 14 Green Papers adopted and 2 White Papers. The figures for 2006 were 10 and 2 respectively, with 11 and 4 in 2007.

2. Initiating major legislation therefore means going through a process of impact assessment. The impact assessment system is a tool for helping the EU institutions design better policies and laws. It facilitates better-informed decision making whilst the Commission is considering whether and how to make a proposal, but also at later stages of the legislative process. It requires proposals to have been tested against the principles of subsidiarity and proportionality. It is also a way for the Commission to ensure coherence amongst a wide range of proposals with knock-on effects in different policy sectors. Finally, it helps the Commission to communicate better about its proposals.

The quality of these assessments is overseen by an independent Impact Assessment Board. This functions under the authority of the President, and is composed of high-level Commission officials who operate independently of the "home" departments they come from. It provides advice and control on methodology and quality, and draws on external expertise when necessary. The Board's opinions are used when the Commission is making its final decision, and are made public once the initiative has been adopted.

In 2008 the Commission will carry out approximately 200 impact assessments, up from 130 in 2007. These assessments are public, as are the opinions of the Impact Assessment Board, and since 2007 a summary is made available in all official languages.

Impact assessment is now embedded in the working practices and decision making of the Commission. It has changed how policy is shaped and proposals are initiated. Proposals have to be based on transparent evidence, stakeholder input and thorough analysis of options. Impact assessments are conducted early in the policy development process, so that alternative courses of action can be thoroughly examined before a proposal is tabled.

This process is having a real impact on the initiation of legislation. In 2007, the Commission stopped work on three areas after concluding that EU action would not add sufficient value added, in the areas of capital rights in listed companies, cross-border transfer of registered offices, and the protection of witnesses. In other cases, such as road safety, the scope of action was reduced.

3. There is also a particular category of new legislation worthy of mention: legislation introduced to simplify or codify the existing stock of law and cut its administrative burden. For example, over 100 of the initiatives put forward by the Commission since 2005 have been part of a simplification programme. This shows how it is important to look carefully at the origins of "new" legislation, and not assume that this necessarily represents a fresh direction in EU policy or aims at EU action in a new area.

Examination of Witnesses

Witnesses: Ms Catherine Day, Secretary General of the Commission Secretariat, and Mr William Sleath, Assistant, Office of the Secretariat-General, examined.

Q330 ***Chairman:*** Thank you very much indeed for coming. As you know, we are pursuing an inquiry into the initiation of European legislation. We are particularly grateful that you have come from the core body. This is going to be recorded and there will be a transcript, and if there are any points which arise on the transcript I am sure you will let us know, and if there are any supplementary thoughts, please let us know also. Any interests which members have are recorded in the Lords' Register. With that, I think we can go straight into the questioning unless you would like to introduce your colleague or say anything in preliminary?
Ms Day: My colleague is William Sleath, one of my assistants. I do not know if you want to say something about your antecedence relating to this particular Committee.
Mr Sleath: In a former life I was a Lords' Clerk, so at different times I have been on the other side of the table.

Q331 ***Chairman:*** Did you have anything to do with the European Union?
Mr Sleath: Yes, I did.

Q332 ***Chairman:*** You are very well-informed.
Mr Sleath: I served this Committee for several years.

Q333 ***Chairman:*** We might even repeat the questions we asked in the previous session relating to the work of the Lords, but let us leave that for the moment. Are there any preliminary remarks you want to make?
Ms Day: No, I am keen to use the time as effectively as you wish. Please start wherever you would like to.

Q334 ***Chairman:*** Thank you very much for your paper. Can I just start with the first point which you make, which is the Commission's right of initiative which you explain in terms of the founding of the Community and you explain it as one of the cornerstones of how the Union works. Can you amplify a little on the rationale? I think it is pretty clear from the first paragraph of your paper, but in particular can you tell us whether the rationale still holds good today? Some might see it as not mirroring, and it certainly does not mirror, the

procedure in national institutions. Is it still a good idea?

Ms Day: Yes, I think it is. It has evolved over the years. It is one of the things that explains why the European Union is not just an intergovernmental body, and why it is different from the way that the Member States are organised. There are a lot of reasons why it still makes sense today, but I want to underline at the outset when we say that the Commission has a sole right of initiative, it does not mean that we live in an ivory tower and dream up initiatives all on our own. This was one of the points that I wanted to make in my note. This is a good mechanism when you have a body like the Commission which is full-time thinking and working on realising the European interest. It helps to make sure that proposals that come forward reflect a balanced interest across the Union, not just the interests of the bigger Member States or groups of Member States, but search all the time to try and find a way to identify what is the real common interest. Now that we are 27, I think the Commission's right of initiative serves another purpose: lots of Member States have lots of bright ideas all the time but they do not all necessarily merit being put forward at EU level. If Member States had the right of initiative, I think we would have a much bigger job in trying to sort out which initiatives are worthy or would provide an added value. So the right of initiative is still relevant today. The way in which the Commission exercises its right of initiative today is very different. First, we now have a culture of consultation. Second, over the years institutions like the European Council, which did not even exist at the beginning of the Union, and if the Treaty of Lisbon is ratified will become an institution in its own right, have developed a technique of inviting the Commission to come forward with proposals. This is a diplomatic way of respecting our right of initiative but, on the other hand, making plain that the Heads of State and Government expect the Commission to come forward with an initiative. The situation is even more complex than that, in that very often the Commission starts the process by suggesting that the Council might be interested in having a proposal. It is a very sophisticated process of consultation, testing, refinement, and then coming forward with formal proposals, for which one has tested the temperature and the "market". The hope is that when we do come forward with proposals they will be well-received and agreed.

Chairman: Are there any points which arise out of that?

Q335 ***Lord Rosser:*** You have made the point about the role of the European Council and making their views clear. I appreciate in asking this question that things are not as black and white as this question suggests, but I am asking you which category you are nearer. In relation to the Council and the Parliament, is the Commission a servant or a master?

Ms Day: We are not a master at all. The Commission has the power to propose, it is an important right but, except in very rare cases, like in competition policy, we never take decisions, so we are always in the position of inviting others to decide. We would like to think that because we have researched the ground, because we try to only come forward with well thought-out proposals, because we back these up with a lot of argumentation, a high percentage of our proposals will get through, perhaps in modified form, and I think we have a fairly good track record. We are certainly not masters. What we have seen over the years is more of a balance coming into the picture between the Council and the Parliament. The Parliament has been given progressively more powers and in terms of the budget, for example, the Parliament uses those powers fairly effectively. It is the Parliament and not the Council that has the right to sack the Commission, so the Commission is very conscious of being the servant in this respect, and part of that can mean showing that it is not just there to do the bidding of the Member States. This is also a dynamic process: because the Commission has this role of thinking about the common interest all the time it would be very rare for the Commission to come forward with a proposal knowing that all Member States were against it, but it is quite often the case that we start out thinking something is a good idea without having all 27 already signed up, so it is a question of debate and persuasion. We always know that we can initiate the process but we can never conclude it on our own.

Q336 ***Lord Rosser:*** Would it be fair to say that where you are in a situation where the Council has a point of view or the Parliament has a point of view, perhaps they have passed one of these own-initiative resolutions, the power or the influence of the Commission is that much less, but if you are in a situation where there are different views on an issue coming from the Council and it is clear that the Parliament is divided then the Commission is in a position to pick whichever line it feels is most appropriate and, therefore, does have greater influence in that kind of scenario, or is that not a realistic statement?

Ms Day: I do not think that is very realistic. Apart from making the initial proposal, the advantage the Commission has is we are the only institution that knows what is really going on in the other two, because we spend a lot of time with the Council and the Parliament. They tend not to interact together in anything like the same way. What that enables the Commission to do is to be the honest broker. Of course, we want to defend our proposals, but once we

have made them and the negotiating moves to the Council and the Parliament, then the role of the Commission is to try to see how can we preserve the integrity of our proposals but also accommodate the wishes of Council and the Parliament. What you have seen in the current legislature of this Parliament has been a greater ability on the part of the Parliament to rise to the challenge of some big political initiatives. If I give the example of the Services Directive where the Member States were completely blocked, it was actually the Parliament that came up with the political compromise that broke the logjam and that was adopted. Similarly, on the REACH Regulation on chemicals the Parliament played a very political cross-party role. They do not do it every time but they have increasingly shown an ability to rise to the occasion. It is in areas like that where the Commission has to respect the political authority of Parliament and Council as legislators, while trying to act as something of a go-between between both institutions in the interest of bringing everybody to as consensual an outcome as possible.

Q337 ***Lord Wright of Richmond:*** Can I ask you to speculate a little on the extent to which that balance of proposal versus decision is likely to change under the terms of the Lisbon Treaty?

Ms Day: I think it will change subtly rather than massively. It is obvious that the Lisbon Treaty, if it is ratified, will move a significant number of decisions to qualified majority and away from unanimity. The question is the real impact of this. We do periodically have a look and see what is happening in terms of voting patterns. The influence of Qualified Majority Voting is more to produce the circumstances in which a compromise is likely to emerge, but the Council still tends to favour consensus as much as possible. There is a sound political logic to that, I think, which is that we are taking real decisions which have to be implemented afterwards and if they are taken by consensus you have a higher degree of ownership than if Member States are outvoted. We, as the Commission, would always try to support the move towards consensus. Qualified majority voting does help in terms of time or in avoiding relatively minor logjams: if one delegation is holding out on a rather small point if the Presidency can say, "We can see that we have a qualified majority here so, Delegation X, would you please go back and take another look at whether you really want to hold out". It has a subtle effect rather than a major effect.

Q338 ***Lord Bowness:*** Could I just ask the Secretary General to expand upon something which is set out in the paper that we had from former Commissioners Barnier and Vitorino which is actually quite clear but quite important when we are looking at the Commission's sole right of initiative. They say in their paper: "The Commission's right of initiative gives an extra guarantee to Member States in the minority, usually but not always the small countries, in that the Council cannot push through a majority decision without the Commission's consent". I think that is a matter of very important principle and perhaps if you could expand upon that I personally would be quite grateful.

Ms Day: It is important in terms of the integrity of our proposals and it is an important guarantee for all of the Member States because sometimes some of the bigger Member States can be on the side of the Commission and some of the smaller Member States can be in favour of some other outcome. Most of the time the Commission is looking for compromise, as I said, but if we feel that one of our proposals would be so diluted in order to reach the minimum compromise, we do not necessarily say, "Okay, we go along with that". In particular, there can be areas where some of the smaller Member States have what might look like a minority interest or something that is not very important when looked at in the scale of the overall Union, but where if the Commission is persuaded that it is important for one or more smaller Member States, then the fact that the Commission can effectively withhold its agreement to a compromise can be important. It means either all the Member States have to be unanimous against the Commission proposal in order to decide something else, or they have to go on looking for a compromise. Withholding our agreement from a compromise is not something that we do very lightly, but we do it on certain occasions if we feel there is a strong enough justification.

Q339 ***Lord Bowness:*** My Lord Chairman, I wonder whether the Secretary General can give us any particular instance, particularly one where it was protecting the interests of smaller states.

Ms Day: Maybe William can think of an example as well. One I can think of goes back a few years when I was working on the accession of the countries of Central and Eastern Europe. We were discussing things called Pre-Accession Partnerships where we were setting out in considerable detail what the then candidate countries needed to do and the Commission made its proposals and there were situations where some of the bigger Member States wanted to insist on things which from the Commission's point of view, and the point of view of some of the future Member States, were unreasonable. We refused to change our proposal to make it, as we would have seen it, unreasonable, excessively demanding and less possible to fulfil, until we came to the end of the discussion process. By the time we came to the end of the discussion process enough balancing factors had come in to bring the Member States which were unreasonable at the

beginning to a much more reasonable part of the landscape. That is a particular example of sometimes it is a question of allowing enough time for discussion for some of the subtleties and complexities to come across to Member States who maybe start with a rather black and white attitude but in the end realise that the situation is perhaps a little bit more complex than they might first have realised.

Mr Sleath: An example of an instance where the Commission uses its power to ensure that a proposal is not emptied of all meaning might be the Services Directive, again, where there was a point in the negotiations when everyone was very much looking to have a deal and almost a deal at any costs. The Commission had to step in and say, "No, even if there is unanimous agreement to have a deal and get this issue off the table, we are not going to agree to something that in the end does not add to the status quo at all in terms of liberalisation". In the end the Commission, as would normally be the case in these instances, did not actually have to use that power, but the very knowledge that the power is there was enough to turn that debate back towards a more meaningful compromise.

Q340 ***Lord Bowness:*** In practical terms, what impact will the absence of a Commissioner from every country following the Treaty of Lisbon, if it is ratified, have on this particular aspect?

Ms Day: I cannot immediately see a link to that aspect. It is unknown territory. We have evolved from having had two Commissioners from the big Member States down to one from each Member State, so we have lived through a change already, but I do not think it will change that particular aspect because the Commission, the President and, for example, my own department will have to put measures in place to make sure that in the case of those Member States that do not have a Commissioner, we know extremely well what their thinking is and how they are reacting. We are already doing things in that direction, not particularly to prepare for the situation when we will not have one Commissioner per Member State but simply because now that we are 27 it is extremely difficult to know intuitively what the situation is in each Member State. We are already beefing up our representation offices in Member States and setting up much clearer lines of reporting on a regular basis to make sure that we have our finger on the pulse of what is happening in the Member States. I think it will be more of a progression than something that will be a dramatic development.

Q341 ***Chairman:*** Can we just move on and ask you to direct your attention to the shared right of initiative under the Third Pillar which means that initiatives can come from a different direction. Does this assist the process of consistent law making? Does it cause any difficulties? Will the position be different under the Lisbon Treaty?

Ms Day: First of all, we have to understand that working in the Third Pillar area in the area of interior and justice policy is relatively new and very sensitive. We have an understanding of the fact that we are coming from different backgrounds and traditions. But, having said that, the experience with the Member States' right of initiative in the Third Pillar, if I can be very blunt about it, is that we have seen some fairly badly prepared proposals coming forward and also proposals which simply do not take into account the need to try to find consensus among 27 Member States. That is understandable in a way. If you work in a ministry for the interior in one Member State you are paid to know what your Member State wants and thinks and does, and it is extremely difficult to design something that will appeal to the other 26, or even to understand their situations. You might find officials who know the situations in two or three Member States but now that we are 27 it is very challenging. It comes back to what I said at the beginning, the Commission is paid all the time to be looking at the situations in Member States across the Union. We have had some not very well prepared proposals in this area. It is also a fact that Member States do not feel bound in the Third Pillar to do the kind of impact assessment that the Commission now does as a matter of routine on initiatives before we come forward with them.

Q342 ***Chairman:*** Do they discuss it with you or do you find proposals coming from Member States at the moment out of the blue?

Ms Day: I think very little comes out of the blue, but it is not always, let us say, thoroughly discussed with us. Sometimes one or more Member States may have an idea or wish to do something and they may approach us and say, "Well, could you make a proposal" and if we are persuaded of the need for the proposal we would do that, but sometimes it is an attempt to re-balance or even get in before the Commission comes up with a proposal which may not be to the liking of whichever Member State is making its own-initiative proposal.

Q343 ***Chairman:*** What happens then? Does the Member State's initiative have priority? Could you put forward a parallel but different proposal in the same area? What happens?

Ms Day: It does not have priority. Some that have not been well prepared in terms of testing the ground with others fall by the wayside. Where we see that the germ of the idea is good and there is political support for something, then we would also try to help Member States improve their proposals to make them more acceptable to others.

Q344 ***Chairman:*** Could you put forward your own proposal, a Council one?
Ms Day: Yes, we could.

Q345 ***Chairman:*** Presumably the requirement of the minimum threshold of a quarter of Member States under the Lisbon Treaty, in practice does that mean seven?
Ms Day: Yes.

Q346 ***Chairman:*** I think my maths is right. That is going to mean either fewer or else more coherent and sensitive proposals, is that the idea?
Ms Day: We hope so, yes.

Q347 ***Chairman:*** Both or either?
Ms Day: Well, I hope in general more reflected, better prepared proposals because having to discuss them already with seven is a good test to determine whether this is something that is likely to be more widely taken up than just cast in the system of one Member State. Secondly, in the last ten years we have had a huge development in terms of legislation in the Third Pillar. I expect that will level off at a certain point because we have not yet completed the basic framework but we are putting steadily a whole new legal architecture in place. Overall, I would expect fewer spontaneous legal initiatives to come in future simply because we will have already reached a level of maturity.

Q348 ***Baroness O'Cathain:*** When you get these proposals from Member States where you said some of them some have not even got an impact assessment, surely there must be some sort of formula whereby they would have to have basic information in any proposal they send to you, like if you were starting up a new business and you needed a business plan to go to the bank in order to try and get funding. Surely you should have a formula which would say, "No proposal will be looked at without some attempt at an impact assessment" because that would cut out a lot and make them feel much more focused in terms of preparing adequately.
Ms Day: That sounds very sensible to me but it is not the situation.

Q349 ***Baroness O'Cathain:*** You are in the driving seat.
Ms Day: Not in the area that we are talking about where Member States have a right to make a proposal. They do not take kindly to the Commission telling them that they should go back and do an impact assessment before they present it.

Q350 ***Baroness O'Cathain:*** It is not quid pro quo, if they want you to look at it and work at it, surely they should have basic work to do.
Ms Day: No, they tell us that we should have impact assessments and we agree, so we do it, but it is not reciprocal.

Q351 ***Baroness O'Cathain:*** That is amazing.
Ms Day: It is indeed. In other words, they do not practise what they preach.
Baroness O'Cathain: Indeed.

Q352 ***Lord Jay of Ewelme:*** If I could ask a rather more general question. It was put to us in evidence yesterday that the Commission's role vis-à-vis that of the other institutions was reducing over time as a result of a combination of enlargement, the sheer complexity of business and institutional change. Is that how you see it sitting in the Commission? I am talking here in terms of the right of initiative. Would you see that continuing over time?
Ms Day: My first answer is, no, I do not see that. I can understand why some people feel that because the role of the Commission has changed enormously since the early days of a much smaller Union. What I actually think is that the role of the Commission is even more important in a Union of 27, but we have to play our role differently. I think the role of the Commission is more and more in terms of dealing with big, long-term issues and issues that the Member States cannot deal with on their own. Governments have a fairly short timeframe within which to deal with such issues, given elections every four years in most Member States, but most of the big challenges that we are facing, whether it is demography, migration, climate change, even social change and mobility, most of these are big, long, generational issues. Where the Commission increasingly can play a real value-added role is to try to analyse and map out strategies for dealing with these big issues which are clear enough to make sure that we move in an agreed direction, but flexible enough to accommodate changes of government over a 20 or 30 year span. That is very different from what we were doing ten, 15, 20 years ago when we were designing the internal market. When people make the kind of comment that you have made I think they are thinking back to a time when the Commission was churning out a lot of detailed proposals. It is a mark of success that we have achieved quite a lot in terms of the overall framework and we do not need to go on doing that and, in fact, what we are trying to do now is to simplify and consolidate that framework. The value of the Commission to the Union today, if I can put it like that, is to have some body that is able to sustain long-term projects at a time of a lot of much shorter term horizons for governments. If you think of the big projects that the Union has successfully done, whether it is the internal market, the single currency or enlargement, these are all 20 year-plus projects.

Q353 ***Lord Jay of Ewelme:*** That is very interesting. When you talk about the right of initiative or the right of proposal, does that just apply in your view to the rather traditional, specific directives and pieces of legislation, or would you see that as also being relevant to the bigger, more strategic, more policy proposals or frameworks? Presumably those will come forward and out of those will stem a series of specific initiatives.
Ms Day: Sometimes. I think when we talk about the Right of Initiative, in capital letters, we are talking about a right to make a proposal for legislation.

Q354 ***Lord Jay of Ewelme:*** Yes.
Ms Day: In practice, the role of the Commission is to be a catalyst and to stimulate Member States to think or change things, and that does not always have a legislative angle. What I see is that with 27 Member States, there is no obvious centre point and it is very difficult for Member States to agree, whereas whenever the Commission puts a well-argued paper on the table, even if they do not all like it, it gives them something to define themselves around. If you look at what has been happening now for most European Council meetings on the big issues the Commission will provide a paper which sets the scene for the Member States to have a debate. Sometimes that leads to proposals, like the example I gave in my paper of the energy and climate package, but on other occasions it will not necessarily lead to an immediate decision but enables the Member States to have a debate, maybe on something that is difficult for them to debate domestically, like migration for example. That is a good example of where, first of all, Member States cannot control the situation with regard to migration entirely on their own and, secondly, if it is something that is politically sensitive for all Member States it does help them to discuss at European Union level. Sometimes they will decide to do something together, but even when they do not sometimes just to have had the discussion is helpful in itself.

Q355 ***Lord Burnett:*** When you are the catalyst to these things, to what extent do you take into account the views of these 27 Member States?
Ms Day: To a very large extent where we know what their views are, and where they know what their views are—and sometimes the fact that we come forward with ideas helps them to crystallise their views because they need to react. We are always trying to help the Union move in the direction it wants to go in, so we try to have a feel for where would be the common ground when we come forward with a proposal. There is no point in us having brilliant ideas if all the Member States are over in this part of the landscape and we are over there. We are always trying to find where is the middle ground around which the Member States can coalesce, so it is very important for us to have a feel for where the Member States' thinking is.

Q356 ***Lord Burnett:*** You find that middle ground practically by consulting with interest groups?
Ms Day: Yes.

Q357 ***Lord Burnett:*** The civil servants and all those others. Any other people you consult?
Ms Day: We talk to a huge range of people, every day, formally and informally. When we are at the beginning of developing a new policy, if we have the feeling that there is an issue which is problematic and where the Union is the right level to try to address it then we would normally start by doing an analysis and putting that analysis out for consultation, so saying to interested parties, "Do you agree that there is a problem and have we correctly defined the problem? Is there a need to do something at EU level?" and then to build over several years in a very iterative process ideas about how we might tackle the issue or what should be done. Depending on the issue, we talk to trades unions, business, civil society, and we also pay attention to what the media are saying, we consult and listen to third countries. It is a very elaborate process.

Q358 ***Chairman:*** If we can just take up one aspect that arises from the session we had yesterday with two lobbying organisations and a professional lobbyist. We heard some lobbying institutions are industry effectively, they pay for themselves, but we also heard of a number of bodies which are effectively funded to promote and develop ideas by the European Commission and that seemed an interesting and perhaps circular, some people might say, process. Does that create a problem? Are you confident you are getting a representative view if you are consulting with people like the World Wide Fund for Nature, who I gather are heavily funded, and there is a group of NGOs all of which are funded, except Greenpeace which on principle refuses to be funded? Is that a subject that you would like to comment on?
Ms Day: It may sound a bit strange, but when you think about it a bit more deeply we feel we need NGOs to exist in different policy areas and they have a hard time if they have to survive only by public subscription. We do fund NGOs in the environment, social and development areas in particular and we do it on the basis of feeling that we need them to be organised and participate in the consultative process. We certainly do not get thanked for our subscriptions, we very often get heavily criticised by them, but, nonetheless, we feel it is a necessary part of the democratic process. They are in no sense tame poodles paid by the Commission; on the contrary, it

is more like biting the hand that feeds you. The fact that it is an uncomfortable relationship keeps all sides on their toes. It is important that we are as representative as possible, and we make big efforts to be representative. If I am allowed a comment, I think the more traditional lobbying industry is having some difficulties in accompanying the Commission on the kind of consultations that we do now. When we made very detailed technical regulations and we said, "Ban this" or "Reduce that by half", they all knew that they were for or against it, or they would immediately lobby for twice that or half that, but now when we say we want to think about where we should be in 20 years' time on anything from passenger rights to second languages in schools or whatever, they find it much more difficult to accompany us on a broad voyage of discovery. We also find the very same people who criticised some of the legislation that we already have, when you say, "Okay, let's just take a blank piece of paper and forget about it and see where we would start again", they then turn out to have a vested interest in keeping things as they are, because they know their way around the existing regulation. It is quite a complex process to make sure that you can find the people with whom you need to brainstorm to check that they are representative and to get them to make the considerable investment that is now needed in modern policy-making to help you really move to where you need to be, as opposed to dealing with just tinkering around the edges of what already exists.

Q359 ***Chairman:*** We did hear some voices which suggested that there might be opinions and expertise which was not reached and maybe there was a role for national parliaments to have greater input in certain areas.
Ms Day: President Barroso two years ago took the decision that we now send all of our proposals and all of our communications to national parliaments inviting them to comment.

Q360 ***Lord Burnett:*** This is at the earliest stages, is it?
Ms Day: Yes, when we make a formal proposal or a formal communication.

Q361 ***Lord Burnett:*** Is that too late? We are sometimes told that when those things happen it is rather too late and it is at the very embryonic stage that people want to get hold of it.
Ms Day: This will include Green Papers and refers to very general communications which maybe only three or four years later will lead to some decision. There is no earlier point at which the Commission adopts a position than the point at which we now send documents to national parliaments. Why did he want to do that? He wanted to do that because he feels it is very important we try to stimulate debate at national level at the early stage when the Commission is making a proposal. What has happened up to now is that most parliaments were only consulted after the Council and the Parliament reached agreement and were asked in the case of legislation to transpose it into national legislation. If they then wanted to have a debate and say "We would like to change this", they were told, "You cannot because it has all been agreed in Brussels". What we want is to give national parliaments the opportunity to come in at the beginning of the process and say, "Well, we think this" or "We think that". It has been a very worthwhile process already because we have had, I can never remember the numbers—
Mr Sleath: Over 200.
Ms Day: We have had over 200 opinions from national parliaments in these two years and it is very interesting to see on what the parliaments choose to comment and which parliaments are most active. What we find is that in a lot of parliamentary systems where there are second chambers, it is the second chamber that is very active.
Baroness O'Cathain: We know that!

Q362 ***Chairman:*** We have seen a very limited number of these. I think we have seen some comments about the Bundestag, or possibly it was the Bundesrat, but not others. It might be of some interest if national parliaments' responses were circulated among all national parliaments.
Ms Day: We want to make them all available on the website, so that we publish them all. I think it should be a question of you having somebody to track them and pull out the ones of interest to you.

Q363 ***Chairman:*** We must advise our legal advisers.
Ms Day: We are very transparent.

Q364 ***Chairman:*** They get put immediately on the website?
Ms Day: Yes.[1] Their position to us and our reply to them, because we comment. Of course, all of this will take on a more formal character if the Lisbon Treaty is ratified and when national parliaments have a right to object on the grounds of subsidiarity to a Commission proposal, but we intend to continue sending all our proposals, not only the legal ones, to national parliaments in the hope that you and others will debate nationally and get rid of this sort of distance between Brussels and the local situation.

Q365 ***Lord Burnett:*** Is what we have been led to believe wrong then, that once as a Commission you produce these initial proposals it is a sort of fait accompli?

[1] *Comment by the witness on reading the transcript*: The best place to put them is on the IPEX website run by the national parliaments, and our responses are now being transferred to IPEX.

Ms Day: Yes, because once we make our proposal that is the end of the first chapter for us but then we go into negotiation with the Council and the Parliament, and almost always our proposals are changed, so everything is still open. What is true is that maybe it will have taken three or four years before we make a proposal and some people would like to be involved at that stage. It is much more difficult for us to involve national parliaments in that because there is not a proposal at that stage, there are ideas which are being batted around and discussed. One year in advance we do always publish our Work Programme in which we say what we will come forward with next year, so if ever you are interested in something on the Work Programme please let us know and we would be happy to make the consultation papers, et cetera, available.

Q366 ***Lord Burnett:*** Everything that comes up as a proposal will have been flagged up the year before in the Work Programme?
Ms Day: Yes, all major new initiatives. Not detailed decisions, fixing the price of eggs or whatever, but all new political proposals—except for the occasional urgency.

Q367 ***Chairman:*** May I just ask at what stage will institutions like the Justice Forum, which has recently been proposed, come into play? Will they be used before a legislative proposal emerges?
Ms Day: I am afraid I do not even know what the Justice Forum is.

Q368 ***Chairman:*** The Bar Council raised the question whether it was a fig leaf.
Ms Day: I am afraid I personally have not encountered it before.

Q369 ***Chairman:*** The idea is to try and find stakeholders who can vet legislative ideas proposed and put forward by the Commission, a disparate group of interests, but you do not know about this.
Mr Sleath: There are a variety of pre-legislative stakeholder opportunities. They tend to vary quite a lot from one policy area to another, but in certain areas it is the case that we have developed over the years quite a close relationship with particular stakeholder groups which could lead to discussing a draft text of one form or another before it is adopted by the College. That is not systematic, it tends to have evolved case-by-case.

Q370 ***Chairman:*** May I perhaps suggest the idea that although in theory it sounds an extremely interesting idea, it is one that might need some care in the selection of stakeholders and actually in trying to work out what the purpose of the Forum us. I say that, I do not know whether you have heard of it, but I was a stakeholder in the CFR process which involved a series of workshops of very stimulating individuals. There is a clear need for structure and to work out in what direction one is going.
Ms Day: You are absolutely right. First of all, we have minimum standards of consultation and we always publish the list of stakeholders who respond and we publish at least a summary of the input that we have received so that people can then say, "Well, that's not representative", or "I don't agree with this", or whatever. It is a challenge also in terms of our own staff profile. In the days when you had somebody who was an expert working quietly in their office, you needed a different kind of expertise from somebody who was capable of chairing a meeting of 200 stakeholders which might be very unruly. For us, it is also a voyage of discovery and we are recruiting a different kind of person now and our officials have to go through a different kind of process in terms of formulating policies. We are constantly trying to assess ourselves and improve. We are getting better at this but, as William says, from one area to another there are longer traditions of working with stakeholders and for some parts of the Commission it is still a relatively recent experience.

Q371 ***Chairman:*** I will not go further into that, but it is a subject on which people have spoken. One point the Bar has made is that in this Justice Forum, which I appreciate you are not familiar with, there is a refusal to allow stakeholders from national bodies, such as the Bar of England and Wales, and an insistence one has only European associations. From a common law viewpoint that might be seen as a problem and I think it is one that you may like to comment on.
Ms Day: I am smiling because I have encountered this in other situations. In our desire to be representative we sometimes insist on only having representatives from organisations that are established in several Member States, which can be a problem in some parts of the Union. In our water discussions we do not have consumer representatives from the UK because they are not represented in the same way as they are in other countries. We have to try not to be too rigid about these things. What is important for us is to be genuinely representative, but if you start to make exceptions then you have to make sure that the exceptions do not become the rule. I will take this away and we will look into it.

Q372 ***Chairman:*** It has certainly been a matter of concern because there is a general concern that common law should be represented at the European level and should play its part.
Ms Day: The British and Irish situations are different and having the opt-outs and not being in Schengen, the others ask why should we then be influencing

what they are going to do if we are not going to be bound by it. It is a more complex debate. What the Commission has insisted on on a number of occasions is where the Schengen countries are going to be getting together to discuss future policy, we try to inject somebody with a common law background, even as an observer, just to make sure that the other school of thought is represented and they do not go too far down a continental route which would make it difficult and at least have the two systems linked together at some point.

Q373 ***Chairman:*** It has been suggested that individual DGs effectively develop their proposals and there is then a very short period of circulation within the Commission, I think ten days, to other DGs and, indeed, to the Legal Service, and then the matter goes upwards through the Commission and is approved at each level. That ten day period is very short and the result is that individual DGs are given very considerable opportunities and freedom to develop legislative proposals without actually a real input from the specialised Legal Service which may be to the detriment of the product and may also mean that the product is not entirely consistent with what other DGs would wish. Have you got a comment on that?
Ms Day: Yes. That used to be the case, but it is less and less the case. We are extremely conscious of just how cross-cutting most modern policy-making is. We have various ways of dealing with that. I mentioned the Work Programme and we used to have a situation where the Work Programme was simply the sum of all the proposals that came out of the system, but that obviously was not very sensible and used to lead to situations of people being surprised at the end of a long process to find out that in another part of the Commission something was going on that they should have known about and might or might not have approved of. We now go through a very intensive process of vetting proposals before they go into the Work Programme. We do this as the Secretariat-General together with the President's *cabinet*. We have sessions with each pairing of *cabinet* and DG to establish what it is they are working on, what degree of maturity it has reached, have they got a good impact assessment under way, have they done their stakeholder consultation, and we only put in the Work Programme things that pass all of those tests. That is already a very good preparatory phase. We are doing a lot of intensive upstream co-ordination now working, under the instruction of the President, with all the major DGs on all the major policy initiatives to make sure that they have involved everybody who needs to be involved and that we do the trade-off between different legitimate policy considerations months before things come for final adoption. This ten day procedure is still there but we are moving it from having been a sort of surprise ambush, as it has been in some cases in the past, to now being a process of just a final checking on something that we will have been working on together. I do not claim that the system is perfect, but I do think the culture of the Commission has moved quite far in the last three or four years, to being an organisation where we prize much more the co-operation between departments rather than the solo ones which we have witnessed in the past.

Q374 ***Chairman:*** What about the drafting point? On this Sub-Committee we have seen some proposals which, frankly, seemed to us to be in need of some rethinking in terms of drafting and, as we understood it, were the product simply of a particular DG without necessarily any real input until the very late ten day stage by the Legal Service. As I understand it, there is no equivalent of the Law Commission or the parliamentary draftsman in the European Union to ensure that you have got a specialist draftsman producing work products. Does that not seem a rather fundamental defect in the system, that it can produce legislative proposals from unqualified people who are not specialist drafters, to use a neutral term?
Ms Day: Yes, it is a problem. Normally speaking, we try to involve the Legal Service as well because if we are drafting complex legal proposals then we need their advice on how to do it long before we get to the final product. Again, the ten days for a complex piece of legislation, the Legal Service can simply refuse to give its agreement and take longer to do the necessary work. Things are not quite as they might seem. We do have a problem even in terms of clarity because most people are drafting not in their mother tongue, so we are now working with our Translation Service to provide an editing service, to put non-mother tongue English into pukka English which can help in terms of clarity of concept. It is quite difficult working in a multi-lingual, multinational organisation, but we are trying to find—

Q375 ***Chairman:*** Does that have to be done for every language?
Ms Day: We need a good master copy because if you start off with a bad original it will get translated in "Chinese whispers" fashion into very different things by the time you get to the 23rd language. The master copy is something that as the number of languages has grown recently we have realised we have to put much more effort into. It is normally in English or French and then it has to go into the other languages. We are trying to improve the quality of the drafting and our Legal Service is working with the Legal Service in the Council to try to promote high standards of legal drafting. We are conscious that this is an area where we need to invest.

Q376 ***Chairman:*** The input of the Legal Services is more by vetting than by initial drafting?
Ms Day: They do not draft the original, that is correct.

Q377 ***Lord Bowness:*** Some witnesses have said to us that it is not clear where proposals come from and they want the Commission to publish the contacts and approaches that you have had rather than the results of formal consultation. Have you any comment on that as to how practical that is?
Ms Day: I do not think it is practical, to be quite honest, because there are a myriad of sources for ideas. Some come out of legal requirements, some come out of bright ideas somebody has, some come out of lobbies. I think it would be impossible. How can you get into a Commissioner's brain and say, "Where did this idea come from"?

Q378 ***Baroness O'Cathain:*** Can I take you back to something you said about water and the UK. Is the situation with water similar to that with other regulated industries in the UK, like communications, Ofgem or any of these, the energy companies, because there are consumer groups under the terms of the regulations of Ofwat so there is great consumer representation and I do not understand why you cannot have the output of that transferred over here to Brussels?
Ms Day: There is something of a particularity in the way the UK has privatised water, for example, which means that it is very heavily driven by financial considerations, which is not the case in most other Member States, they have not privatised in the same way. The way the City drives decisions in a number of your privatised industries is not common on the Continent. That is a separate point from the consumer representation point. On the consumer representation point, we have to go through representative organisations and you cannot always have 27 times everybody in the same room. The water consumer body, as I recall, maybe it has changed, does not have a UK member. We have not been able to find an EU-wide representative body of consumers to include in the water consultations.

Q379 ***Chairman:*** Just to drive this forward a bit, because we are very short of time, can I just ask what is the role of the Commission's Joint Research Centre? Perhaps you could also give us a view as to whether the Impact Assessment Board, which is described as independent but is part of the Commission, is effective.
Ms Day: The Joint Research Centre is a very important source of scientific information for the Commission. We do a lot of technical legislation and regulation if you think about all of the standardisation work that the Enterprise Department does or a lot of the environmental legislation, that has to be based on a sound understanding of science. The Joint Research Centre works on its own Research Work Programme but also does a lot of, if you like, almost sub-contract work for different Commission departments. It is a very important part of giving us the reassurance that our decisions are based on sound science.

Q380 ***Chairman:*** Looking at it in domestic terms, it is a sort of Law Commission function of research into the implications. That is helpful. The Impact Assessment Board?
Ms Day: It is independent of the policy-making departments and I think that is the important thing to say. I feel very strongly that impact assessment has to be done by the Commission departments themselves because it is about a reasoning process, about looking at a problem, looking at options and being able to explain in the end why you recommend one option and not others and demonstrating that you have done a serious and objective job of taking into account different options in order to arrive at the proposal that you make. That has to be done by the departments working in the policy area. Why the President set up the Impact Assessment Board and put it in the Secretariat-General, where it is chaired by one of my deputies, was that he wanted to have a quality control. So when the departments have done their work, and very often they do it not alone but involving four, five or ten other Commission departments, they apply that quality control. I believe that the average quality of our impact assessments has gone up a lot since we introduced this. We have done some excellent ones, and which have been acknowledged as excellent, but I would also be honest enough to say that they do not all yet reach the standard of excellence. This is a way of levelling up the quality. What it also has done is to have the effect of DGs either not pursuing certain things because they know their proposal will not meet the quality standard or of radically revising their proposals, because having to go before an independent board and explain your reasoning and that you have properly consulted and you have properly analysed is having the effect of making the whole process a lot more serious. I think it has had a beneficial effect.

Q381 ***Chairman:*** I can see that is helpful. Can you very briefly tell us why it would not be feasible to have an independent impact assessment? External consultants often advise on the impact of various policies. Is it not an objective matter, in other words?
Ms Day: It is an objective matter, but I think it is a confusion of understanding. You could have an external body to look at the work that the Commission has done and to pronounce on it or you

could have an independent body do a cost-benefit analysis of Commission proposals, but for me impact assessment is about a reasoning process and how do you arrive at making your selection in the first place. I do not see how an outside body can do that. The process we have been talking about this afternoon is one that can last maybe three, four or five years of starting from identifying a problem, consulting, working backwards and forwards and then coming to the moment when you say, "Okay, this is the proposal we are going to make because we have spent four years consulting and we have decided that this road does not work but this is the option that gives the best return on the effort that will be needed taking account of the views of all the Member States, all the stakeholders, et cetera". I do not see how that can be replicated by an independent body, you would have to set up a sort of parallel Commission. I think that people who advocate this are making a big confusion between what is impact assessment, which is about looking at how do you arrive at making your proposal and what would be the impact of the proposals, versus then wanting to look at what is the burden of Commission proposals or what is the cost-benefit of Commission proposals, which is a different proposition. I regret that we have never managed to fully clarify this confusion.

Q382 ***Chairman:*** I think the title is perhaps prone to give rise to confusion because it does suggest an objective assessment of what the impact is going to be and I understand from you that, in fact, impact assessment is more a justification, an explanation of the decisions that have been taken along the road.
Ms Day: No, no, it is an assessment of the economic, social and environmental impacts of different options, so it is a way of helping the Commission to take better informed decisions. A lot of the people who advocate an independent board seem to have in mind that it would act as an automatic filter and weed out Commission proposals that they do not want. It will never do that because it is not designed to say that X is the right answer, it is designed to test and assess whether we should do something or not. There are examples of where having gone through the impact assessment we have come, to our own surprise, to the conclusion that what we started out thinking was a good idea turns out not to be operational or not to be effective or cost-effective. It is about impacts but it does not take away from the fact that the Commission is also a political body and has to make a political choice sometimes between options.

Q383 ***Chairman:*** I think we have got to draw a line, but before we do, we have been told that the Commission does not always regard provisions in EU legislation calling for further legislative proposals as binding. Is that right?
Ms Day: When you put it like that it sounds like we are very naughty and disobedient or something, and I would not like to leave you with that impression. If I go back to the very first thing we talked about, the Commission's right of initiative, it is not possible to instruct the Commission to come forward with a proposal, it is normally more in the form of an invitation and we have the right to say no. If we think that something that was put in legislation ten years ago is no longer relevant and appropriate, and that happens from time to time, it is only responsible of the Commission to say, "No, we have this obligation but we have decided not to do what we were instructed to do because . . . " and then we have to give a very well-justified reason. It is rare but it can happen. It particularly happens since we have a lot of old legislation, so times and techniques change. Yes, it could happen but it is very rare.

Q384 ***Lord Rosser:*** Could I ask for clarification of what has just been said. You rightly said that the Commission is a political body and has to make some political decisions. You were referring them to a decision as to what might prove acceptable as far as Council and the Parliament are concerned rather than the Commission making a political decision of its own but rather trying to assess what might be acceptable or might not.
Ms Day: Yes. I will give you a good example from the field of environment where one can be very, very ambitious. What we use impact assessment for is to try to help the Commission to decide what is the right level of ambition. You can go very far in saying people's health is priceless and, therefore, you must have totally clean air, but that is simply not feasible, so we use impact assessment to set a high, medium and low level of ambition and try to help the Commission to judge what is in the interest of the citizen but also likely to be adopted.

Q385 ***Lord Rosser:*** That is what you mean by political decision?
Ms Day: Yes.

Q386 ***Chairman:*** Thank you very much indeed for coming, it has been a very interesting session. Thank you for your paper too. Are there any points which you would wish to make? Are there any points you would like to make in writing? We were going to ask you whether you prepare figures on the factors prompting legislation annually, and about how effective your Annual Work Programme and Annual Policy Strategy are in setting the legislative agenda.
Ms Day: On the figures I can answer immediately, we do not do these exercises annually, we do them from time to time. On how effective we are with our

policies, we are getting much more effective. For 2007 we had a 93% delivery rate for our strategic initiatives, I am proud to say. By having the process I was talking about of vetting in advance we automatically improve our success rate because we weed out all the ill-prepared or not very well developed, not very mature proposals, so therefore naturally we should have a higher success rate. I think it makes us more credible.

Q387 ***Lord Bowness:*** My Lord Chairman, can we very briefly ask what the opinions of ECOSOC and CoR are and how the Commission view those?
Ms Day: We work in different ways. For example, we use the Committee of the Regions particularly to try to give us a feel for the situation on the ground because they have a lot of local representation. Again, if I go back to some of the environmental issues, when we were working on revising waste management legislation a few years ago we had a very active involvement with the Committee of the Regions because we felt that they represented municipal and local authorities and were able to give us a very good feel for what was and was not working. In terms of getting feedback on implementation, both bodies are very useful. We also have been working with ECOSOC on issues like sustainability and they are keeping a database for us on self and voluntary regulation, which is an interesting area for us to see what works. On our behalf, and together with us, they are keeping track of voluntary codes to see are they effective and do they deliver. We find them very useful bodies because they are plugged into parts we cannot reach.
Chairman: Thank you very much. We really must release you because I know you have got another meeting.

THURSDAY 8 MAY 2008

Present	Bowness, L	Norton of Louth, L
	Burnett, L	O'Cathain, B
	Jay of Ewelme, L	Rosser, L
	Mance, L (Chairman)	Wright of Richmond, L

Examination of Witness

Witness: MR DAVID HARLEY, Deputy Secretary General of the European Parliament, examined.

Q388 ***Chairman:*** Thank you very much for coming. There will be a transcript, we will send you a copy and if there are any points on it I am sure you will let us know. If there are any supplementary thoughts, please let us know too. Any interests which members have are recorded in the Lords' Register. As you know, this is an inquiry into the initiation of legislation and obviously that is a matter of increasing interest for the European Parliament, or will be, as a result of the Lisbon Treaty. In view of the time, can I ask if there are any preliminary statements you want to make otherwise we will go to questions.
Mr Harley: Thank you, Lord Chairman, we can go straight into questions.

Q389 ***Chairman:*** The increase in the application of the co-decision procedure has obviously changed the Parliament's role and increased its influence over the content of legislation once a proposal has formally been made. Has there been any effect on the Parliament's ability to bring about the initiation of proposals? Has there been any effect on the context of Commission proposals, in other words are they tailored in a way which in your experience anticipates the views of the European Parliament?
Mr Harley: Thank you very much indeed for this opportunity to provide you with information about the European Parliament's role and input into the legislative process of the European Union. To set the context somewhat, we have seen in the European Parliament over the last two or three years, roughly since the last European elections in 2004, a considerable increase, as we see it anyway, in the European Parliament's involvement throughout the legislative process of the EU institutions. It is not just about co-decision or the very significant extension of areas to be covered by co-decision that comes with the Lisbon Treaty, it is also the beginning of attempts to improve co-ordination with the Commission and to some extent as well with the Council on legislative programming. It is an increased use, I would say, of initiative reports within the Parliament, often reports on Commission White Papers or Green Papers. Indeed, there is discussion beginning now about a possible role for the European Parliament in transposition and enforcement, in other words at the end of the process. Because of this increasing involvement of the Parliament at the different stages of the process as a whole, I think the answer to the question as to whether the content of Commission proposals have been affected or take account of the Parliament's wishes in the general sense has to be yes, but you will have heard from the distinguished lady who was sitting in this seat before me, the Secretary General of the Commission, that the Commission consults extremely widely, not least with the governments of the Member States and also civil society and other interested parties. The European Parliament certainly feels that the Commission would naturally wish to bring forward a proposal that has a chance of being supported in the European Parliament. I do not know if you wish me at this stage to go into greater detail about the limited but, nevertheless, existing number of specific areas where the Parliament has asked the Commission to initiate proposals.

Q390 ***Chairman:*** Yes. How many times has the European Parliament used its Treaty power to request that the Commission submit proposals?
Mr Harley: The statistics say that, in fact, since the beginning of this legislature, as we call it, since the European elections in 2004 and under Article 192, the Parliament has adopted six legislative initiative reports, which is not a great number. These reports were asking the Commission to propose legislation on a European Private Company statute, on succession and wills, the protection of European healthcare workers from blood-borne infections due to needle stick injuries, for the heating and cooling from renewable sources of energy, cross-border disputes involving injuries and fatal accidents, and access to the institutions' documents, quite a celebrated dossier, Regulation 1049 on public access to documents. I could provide you in writing, if that would be of any assistance, with the details of these six cases and also our reading of what the Commission did to follow up our requests.[1]
Lord Burnett: I would like to see that. That is a very kind offer, thank you.

[1] *Note by Clerk to the Sub-Committee:* The Commission's follow-up reports to Parliament's resolutions were annexed by the witness—see end of transcript.

Q391 ***Chairman:*** Does it in practice happen that they follow-up in almost every case?
Mr Harley: The Commission would always follow-up to some extent in every case, sometimes in a very specific way, as on the issue of public access to documents; in some cases we are still waiting to see. On succession and wills, the Commission proposals are expected next year. It is not that the Commission will jump to attention and immediately change its order of priorities, but in every case the Commission will factor in the European Parliament's request and do its level best to satisfy the Parliament by bringing forward a new piece of legislation that corresponds to the Parliament's wishes but which can also be integrated into the Commission's own priorities.

Q392 ***Chairman:*** We have heard that in relation to the Third Pillar at the moment the national right of proposal does give rise to some problems because it is often viewed from a national perspective and often not accompanied by an impact assessment. Is a parliamentary invitation under Article 192 subject to the same problem? It may be a particular bee in the bonnet of a particular group of parliamentarians and it may not have been accompanied by any impact assessment and the Commission finds itself faced with that. Is that a problem? Does that happen?
Mr Harley: I have not heard of a single case where the Commission has complained that the Parliament has not accompanied its request for new legislation with an impact assessment. I would not wish to suggest that the Commission is applying double standards in this case. The Parliament has not, as yet, to my knowledge and memory, put forward suggestions for further fresh legislation in the Third Pillar in the same way. If we are on to the Third Pillar, the Parliament would have a slightly different reading from what you have just said if what you have just said is to some extent an interpretation of what the Secretary General to the Commission has said. There was an initial knee-jerk reaction from the Parliament when this new process began that this looked like bad news and would harm the fundamental European interest of the legislative process, but we are now in a second stage of reaction in the Parliament where even those who had reservations at the beginning would recognise that in certain areas in this field the Commission, from a parliament's perspective, is not necessarily ideally equipped to act, for example, on police co-operation. There is understanding that Member State governments are often perhaps better equipped to do that and we would not quarrel with that. There should always be some mechanism for factoring in the overall European interest, but with sufficient time and goodwill that can be done.

Q393 ***Chairman:*** Any parliamentary proposal, of course, carries with it a majority that has come as a result of internal debate, but how thorough will the internal debate have been in fact?
Mr Harley: The internal debate will follow the usual procedures, which means that there will be a fairly extensive discussion in parliamentary committees, sometimes in several committees with one lead committee being designated and two or three others being asked to provide an opinion. Then the draft report containing the request to initiate legislation on the part of the Commission will go through the political groups and into plenary session and there will be a full plenary debate and vote. Can I add a tangential point on that, with your permission, and that is I believe in many of the discussions on the legislative procedures in the EU institutions there is rarely reference to the role of the political groups. I would just offer that as another aspect. The European Parliament's standard month is divided into four weeks, and this is a reflection, if you like, of the balance of time that is spent at the different stages of the procedure. You have two weeks of committee meetings, one week of political group meetings and one week of plenary session. It very often happens in almost every case that once a report has come out of the specialised committee it is given a new, slightly different political slant after consideration by the political groups and the amendments in plenary are more likely to come from the political groups than from the committee. It is a dual process coming from the two angles of the specialised committees and the political groups.

Q394 ***Lord Jay of Ewelme:*** Would you expect the European Commission to respond more readily to a request from the European Council for a piece of legislation than to a request from the European Parliament? "Expect" in both senses.
Mr Harley: The natures of the two institutions are very different and the European Council, with all due respect, has a reputation in Brussels of asking a lot of the Commission. I expect you may know yourself from experience that invariably at the end of a European Council meeting and in conclusion it is often convenient even for Heads of State and Government to conclude their deliberations by asking the Commission to come up with a new proposal. The Commission will certainly try, but it is not always feasible for the Commission to give, I would suggest, full satisfaction to the European Council's request, whereas a European Parliament request, first of all there are fewer of them and they are likely to be much more focused and smaller in scale and easier for the Commission to follow up. Politically, the European Council may well be considered to have greater weight and authority by

the Commission than the European Parliament in this area.[2]

Q395 ***Lord Jay of Ewelme:*** Thank you very much for that. When she was here a little while ago, Catherine Day was explaining to us how the role of the Commission has shifted away rather from specific legislative proposals towards the broader strategy documents and frameworks and five, ten year programmes. I wondered how the European Parliament slotted into that rather longer-term approach from the Commission than we have seen sometimes in the past. How do you ensure that the European Parliament's influence is felt in that aspect of the Commission's work?
Mr Harley: We are aware that is the Commission's own reading of it itself, but we do not necessary agree or have seen the figures that bear out the idea that the Commission is producing fewer acts of draft legislation.[3] The European Parliament, in terms of the organisation of its plenary sessions, would discuss and vote on almost as many of its own-initiative reports as items coming from the Commission. In addition, on the plenary agenda there will be other items, such as statements by the Commission and the Council, particularly, for example, on external relations. We have a regular slot on Wednesday afternoon for topical affairs which are usually to do with foreign policy or external relations. There is also the mechanism of oral questions. At the level of the plenary session, if the Commission produces, as it claims to, less legislation that does not have a great influence or result. In the parliamentary committees there is still, as we see it, as much legislation coming through and it would also give us more time to look at the important parts. I would claim the European Parliament, to some extent taking a leaf out of the Commission's book, has also been trying to do too much. By comparison with most national parliaments we go into every monthly plenary session with the aim of taking at least 20 serious legislative decisions[4] and I think it would be in everybody's interests if we were to do less, take more time and produce a better result. The quality of legislation and Better Law Making is a very important aspect of the increase in the European Parliament's competences and the new areas of co-decision that it will deal with under the Lisbon Treaty, and there we have to work as well with the Commission and the Council.

Q396 ***Baroness O'Cathain:*** Can I just clarify that. 20 legislative decisions per plenary session, per month?
Mr Harley: 20 votes on legislative related matters.

Q397 ***Baroness O'Cathain:*** It does not mean 20 separate—
Mr Harley: No. I can see that was misleading and I quickly reined back on that.

Q398 ***Chairman:*** Should the Commission continue to have the sole right of initiative? Have you got a view on that?
Mr Harley: Hopefully, I will not set myself up again on this point! One could say there is a sort of unspoken trade-off between the Parliament and the Commission between the Commission's exclusive right of initiative and the Parliament's right and duty to hold the Commission to account. This has been a balance between the institutions that we believe has worked satisfactorily up to now. There has been, to some extent, a breach in this system with the new provisions and procedure under the Third Pillar, but we do not quarrel with the Commission's right of initiative and it seems to be part of the balance between the institutions which we consider to be very important.

Q399 ***Chairman:*** It is a bit curious, is it not, it is going to be an historical hangover, the division between matters which fall at present within the Third Pillar and other matters? Is it a logical distinction as to where the rights of initiative should be, to have this national right of initiative in the future provided you can get a quarter of Member States together in one area?
Mr Harley: I think it must be considered logical from the perspective of the governments of the Member States.

Q400 ***Chairman:*** In reality it is a compromise, is it not, derived from history?
Mr Harley: You could say that about a lot of things to do with the European Union.

[2] *Supplementary comment by the witness on reading the transcript:* Nevertheless, while acknowledging the political influence of the European Council in the EU process, it is worth noting that, according to Article 15 of the Treaty of Lisbon, the European Council shall not exercise legislative functions. Article 15 of the Treaty on European Union states that: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions."

[3] *Supplementary comment by the witness on reading the transcript:* A comparison between the number of legislative proposals adopted during the period 2000–04 and the current legislature shows that the number of legislative proposals adopted by the Commission has not decreased. The Commission, however, is currently adopting less new legislation in favour of a greater number of legislative proposals within the Better Law-Making Agenda, with a view to updating many existing rules through legislative techniques such as recast, repeal, codification or revision.

[4] *Supplementary comment by the witness on reading the transcript:* A large number of those legislative decisions aim at simplifying and modernising the stock of existing legislation, through its recasting, repeal, codification or revision.

Q401 ***Chairman:*** Or our own.
Mr Harley: There is not a great movement of people out there demonstrating in the streets and saying this should not happen and must be changed if there is ever another Treaty. I think we will have to live with it.

Q402 ***Chairman:*** We have heard about some problems which arise in the area of the Third Pillar at the moment from the haphazard way in which legislation can come through. I think Catherine Day confirmed the intention is that the new system will make that less likely if you have to get a quarter of the Member States together.
Mr Harley: Yes.

Q403 ***Chairman:*** I do not know whether there is anything else you wish to comment on regarding the Third Pillar. Have you seen any problem in the way in which legislation in the area of Freedom, Security and Justice has developed? It has been explained to us as perhaps looking like a patchwork but effectively has been filling in the squares in pre-existing programmes, the Tampere and Hague Programmes in particular.
Mr Harley: There is some logical extension of those decisions. I mentioned earlier that being slightly charitable from our European Parliament perspective, we recognise that areas such as judicial and police co-operation traditionally lie at the heart of national governments' prerogatives but it has happened that certain Member States' proposals in this area constitute initiatives which sometimes overlap with pending legislative procedures. There is certainly a problem in terms of loss of coherence in some cases. I am not an expert in this area, and I am sure others around this table are, but the main criticism I would make on a personal level is that we do not seem to be making very much progress in judicial co-operation despite this rather special extraordinary procedure allowing Member States to take initiatives and weakening the Commission's right of initiative in this area. Apart from the Framework Decision on the European Arrest Warrant, which I think was considered very successful, useful and efficient, particularly in the case of the United Kingdom, there is no major piece of legislation that I am aware of that has been adopted in the field of criminal law. At the moment there would seem to be something of a disconnect between the exceptionality of the procedure and a lack of results, but perhaps in the fullness of time those results will come through. On police co-operation things are working better. That is a sort of interim report from our perspective at the moment.

Q404 ***Chairman:*** You presumably watch the various proposals under the Third Pillar come through, for example minimum procedural rights in the criminal area, provisions relating to bail, serving custody pending trial or return to your home country while pending trial, the Supervision Order, a similar provision in relating to sentencing, and so on, and currently, of course, the proposal on trials in absentia. You are disappointed by the outcome or progress made on these, are you?
Mr Harley: It seems that a lot of these ideas are very justified in a particular national context but there may be difficulties in making them of realistic application in an efficient way across 27 Member States.

Q405 ***Chairman:*** It is certainly our impression that they create practical difficulties.
Mr Harley: Yes.

Q406 ***Chairman:*** As a matter of interest, how far can the Parliament contribute to working out solutions? Presumably it has a very broad representational membership on the committees which look at these things.
Mr Harley: In this area, like in any other I suppose, Members of the European Parliament who sit on the very important Committee of Civil Liberties, as it is currently called in the Parliament, will be guided and inspired by their own governments, their own political parties and by their constituents. There is sometimes a problem, we believe, of relative lack of information for the Parliament as compared with the information received by the Council or in the possession of the Council because this is an area and an agenda that is very much national Member State driven. There again, the balance is slightly out of kilter, I would say, and it is more difficult for the European Parliament to receive all the information. There are also questions of confidentiality, general sensitivity and political relevance. It is a very difficult area.

Q407 ***Chairman:*** I have seen in relation to certain proposals, Rome I sticks in the mind, substantial parliamentary input from the committees which has then been effectively reversed when it has gone through the triage procedure so that very wide-ranging proposals for extensions and amendments have ultimately led to relatively little. Is that a common pattern or does the Parliament have a substantial input into other legislation?
Mr Harley: I think that I would have difficulty in answering that at this stage actually. I have reference here to the visa waiver regime, the passenger name record, as well as another area where the European Parliament did have fairly considerable influence and in a celebrated technical case brought the PNR ruling

to the European Court of Justice. It is difficult for the Parliament to ensure, as we would like to see it, the necessary preparation and quality of the legislation. I am searching. Yes, on the Treaty of Prüm on police co-operation, this was initially drafted without taking into account the pending Commission proposals and then it was submitted for ratification, so I am informed, by national parliaments without any proper explanatory statement. The Lisbon Treaty with the minimum threshold should help and rationalise that kind of initiative.

Q408 ***Lord Wright of Richmond:*** My Lord Chairman, I will just comment on Prüm because it emerged from a meeting of interior ministers of only a few of the Member States. Admittedly the larger States, but nevertheless. Can I just ask if you have got anything to say about the relationship between the European Parliament and national parliaments? Is it changing and, if so, how? In particular, is it likely to change even further under the Lisbon Treaty?
Mr Harley: Thank you very much for putting that question. I think that may be the most important question for the European Parliament at the moment. Certainly the relationship will change under the Lisbon Treaty in many ways. I would suggest there are two levels of relations to be looked at. There are the relations as between the national parliaments themselves and the second level would be relations between national parliaments collectively, when they do operate collectively, and the European Parliament. As you will know, among the other innovations in the Treaty are the early warning system and the system of orange and yellow cards, and COSAC is likely to become even more important, COSAC which has been meeting over the last three days in Ljubljana. It would also appear that the new arrangements under the Lisbon Treaty would permit national parliaments to communicate directly and to benefit from, if they so wish, a direct channel of communication between the national parliaments and the institutions of the European Union without necessarily going through their respective national governments, which is an interesting new development. There are the specific provisions of the Lisbon Treaty referring in particular to subsidiarity and also proportionality, but then there is the general prescription to promote European inter-parliamentary co-operation. This is potentially an extremely interesting new area and I would even venture to suggest that there could be a communications dimension to all this, that if we manage to facilitate knowledge and understanding of how Brussels works and how legislation is processed in national parliaments which do not necessarily always have committees with the same expertise as yourselves, then in turn this would facilitate, if one is optimistic, the job of national parliamentarians to inform and represent their constituents on EU business. I think it is a very exciting and stimulating area, and hopefully with a lot of positive implications. In the European Parliament we welcome this and also the fact that the Commission since September 2006 under the so-called Barroso Initiative has taken the initiative itself to send forward draft legislative proposals to the national parliaments and, as a European Parliament, we would like to work more closely with the Commission on a pre-legislative dialogue. There are many different areas that have to be sorted out here, but with considerable mutual benefit if handled correctly.

Q409 ***Chairman:*** You said you would like to work more closely with the Commission, and do I gather from what you said also with national parliaments?
Mr Harley: Very definitely, yes. There is already growing increasing and considerable contact. Over the last two or three years there has been more and more committee-to-committee contact and I believe that should also be encouraged. There is the IPEX system of exchanging information through a common database. From a more political/institutional point of view, we feel that it is now up to the national parliaments first of all to decide how they wish to adapt, in as much as they have to adapt, to the provisions of the Lisbon Treaty. In the second stage the national parliaments and European Parliament can get together and see where they can work together, identify common interests or even agree to disagree. We feel it is important that the national parliaments themselves should take the initiative of deciding among themselves how this should be done.

Q410 ***Lord Burnett:*** Have you actually precipitated any such discussions within the parliaments of Member States or are you waiting for them to do something?
Mr Harley: The subtext of what I am saying is we do not want to give the impression that we are imposing anything on the national parliaments, and this is an opportunity for the national parliaments to become more involved in the machinery and the legislative business of the EU institutions. We are waiting and seeing, but not from a passive point of view. Where there are cases as there have been, and I am sure there will be more, of other specific national parliaments who wish to have closer relations with the European Parliament, we are delighted to take up their invitation.

Q411 ***Chairman:*** Just focusing on the requirement to submit to national parliaments draft legislative acts, proposals from the Commission initiatives from a group of states, et cetera, that is at a very early stage,

is it not? This is the first time the document emerges as a proposal.
Mr Harley: Yes.

Q412 ***Chairman:*** Even though subsequently it may, in the ordinary course, be revised and changed you have got to make a comment within eight weeks of the proposal.
Mr Harley: And basically only on subsidiarity.

Q413 ***Chairman:*** Which is quite a big issue to analyse.
Mr Harley: Yes.

Q414 ***Lord Rosser:*** But it is just on subsidiarity?
Mr Harley: Yes. I do not know if this is what you are saying, but it may not work.

Q415 ***Chairman:*** It is a question in that direction. It is a very short time and subsidiarity is quite a complex yet narrow issue in a sense.
Mr Harley: We feel it is a kind of foot in the door and an opportunity to do more and to go beyond the relatively narrow confines of subsidiarity, and that is why I mentioned earlier the idea of pre-legislative dialogue if there is a wish to do that.
Lord Burnett: But I can see parliamentary colleagues making quite a big meal of subsidiarity and pinning everything on it. Having been in the other place, it is remarkable how ingenious my colleagues were and are.

Q416 ***Chairman:*** Your point that the comments could, in practice, go further is an interesting one because they would have a value, they would reach you and you would be able to pick up comments on any subject.
Mr Harley: Yes.
Chairman: That is an important additional point.

Q417 ***Lord Rosser:*** Unless it has been changed, as I understand it, the Lisbon Treaty introduces the EU Citizens' Initiative.
Mr Harley: Yes.

Q418 ***Lord Rosser:*** In which citizens can submit proposals and I think there could be rather a large number. That does not seem to have been mentioned very much by people we have been talking to. You have not mentioned it and we have not asked you directly either. Is it a gimmick?
Mr Harley: I would hope not.

Q419 ***Lord Rosser:*** Nobody seems to mention it as some good new initiative.
Mr Harley: I have not mentioned it, first of all, from a rather kind of narrow turf-war perspective because the Citizens' Initiatives under the Treaty are addressed to the Commission, there is no involvement of the European Parliament, and we are slightly kind of sniffy about it because we have our own Petitions Committee and we like the idea of EU citizens being able to address the European Parliament directly. We are not quite sure where this new idea fits into the existing set-up or structure. I would not say it was a gimmick but it will be interesting to see how effective it really is in practice. I think few people would say this is a wonderful idea and guaranteed to be successful.

Q420 ***Lord Rosser:*** One of the things we are looking at is where ideas originate from and what shapes them in reality. Your immediate reaction to it is you do not see this as a great source of new ideas that subsequently become subject to legislative proposals?
Mr Harley: In our existing petitions system in the European Parliament we have quite rigid, strict rules to examine petitions and then to decide if they are admissible. If they are considered admissible there is an opportunity to set up a committee of inquiry and this has been done in at least two cases of particular interest to the United Kingdom, first of all on BSE in 1997 and more recently on Equitable Life. At the end of that process of the committee of inquiry on Equitable Life, the report adopted by the Parliament came forward with a number of fairly specific suggestions for the Commission and were also forwarded to the British Government. We are quite satisfied with that existing process and procedure and, apart from the involvement of great numbers of European citizens and the feeling, therefore, that people may wish to have the right to put their concerns to the institutions in Brussels from a public relations point of view, that is useful, but we have already had an online petition signed by one and a half million about the seat of the European Parliament, not necessarily a subject we wish to get into this afternoon. Under the existing procedures and system, that is also already possible.

Q421 ***Chairman:*** What is it going to mean? All the provision says, Article 11(4) of the TEU, is that not less than a million citizens who are nationals of Member States may take the initiative in inviting the Commission within its powers to submit any appropriate proposal. Unless the European Court is going to say that there is some obligation on the Commission to act, or at least to give reasons for not acting or something like that, this is an invitation in the air which any individual citizen could make.
Mr Harley: Yes. Without wishing to be disrespectful to your Committee, I would not wish to find myself in the position of having to defend this provision.

Q422 ***Chairman:*** It is not for you primarily.
Mr Harley: No. It sounds very similar to what already exists in Italy. I do not know if, by any chance, it was an Italian proposal. If they have a million people who want a referendum in Italy, they have a referendum.

Q423 ***Chairman:*** That is slightly different, that may compel a referendum.
Mr Harley: Yes.

Q424 ***Chairman:*** Can I just change the subject slightly and ask you about the process of engagement by the Parliament with stakeholders and lobbyists. We have heard quite a lot from the Commission side about consultation, lobbying and so on. How relevant is that to the Parliament and how helpful and influential is such engagement with stakeholders and lobbyists?
Mr Harley: I think the fairly conventional views on the usefulness of lobbyists and their role in a pluralistic dialogue and providing information for members hold true. You may have heard that the European Parliament today voted an important report on lobbyists and has asked for a common register and a mandatory system of registration for lobbyists common to all the institutions.

Q425 ***Chairman:*** Of interests?
Mr Harley: Yes. We think that lobbyists properly registered and regulated perform a useful function in the legislative process. We encourage lobbyists.

Q426 ***Chairman:*** Will that cover their activities at least on a general basis, the areas in which they lobby and so on?
Mr Harley: Yes. They will have to declare where they come from and what they do.

Q427 ***Lord Burnett:*** Do they have to declare financial contributions and things like that to political parties, to individuals, campaigns?
Mr Harley: According to the resolution adopted today there should be full financial disclosure.

Q428 ***Baroness O'Cathain:*** There has not been up to now?
Mr Harley: No.

Q429 ***Chairman:*** We have heard that the Commission actually funds some NGOs because it wishes to receive views on certain subjects, such as the environment, and we have heard it funds a lot of NGOs in that area, the World Wildlife Fund and so on. Does the Parliament do anything similar to ensure it gets views reflected at it in certain areas?
Mr Harley: No.

Q430 ***Lord Bowness:*** Just following on from this lobbying point, one of our witnesses told us that the most powerful and successful lobbyists were the Member States. Are they equally engaged? Do you think that some countries' MEPs are more susceptible to pressure from national governments than others? From the point of view of the Parliament, do you see different countries seeking to exercise their influence in different ways? I am tempted to ask you to give examples, but perhaps that might be a step too far.
Mr Harley: Presumably, as also in national politics, the relationship between government and parliament and representatives of the government, ministers and MPs or parliamentarians, is very important. It is legitimate for a government to impress upon MEPs of their nationality how they consider their national interests should be best represented. I think many people in Brussels feel that the British Government is actually particularly effective at providing information and a good service to British Members of the European Parliament. The way that relationship evolves is also perhaps to some extent determined by differences in national political cultures. Some national political cultures provide or result in a relatively more or less corporatist approach than others, whereas other national political cultures put a premium on individuality and division and the concept of a shared national interest across party political lines is more difficult to establish.

Q431 ***Lord Norton of Louth:*** Could I link what you have been saying about lobbyists and come back to the point about national parliaments because, in a sense, national parliaments are lobbyists in a way because they may be trying to put a particular point across, say through the European Parliament, and some lobbying organisations presumably are quite effective in terms of being able to communicate a particular view and, of course, national parliaments have to compete for the ear of the European Parliament. It is a bit difficult to generalise, but how well-resourced are national parliaments in Brussels to make their case to the European Parliament?
Mr Harley: One relatively little known fact is that each parliament of the 27 Member States, indeed each chamber of each national parliament, is provided with an office by the European Parliament here in Brussels with basic infrastructure and office facilities. There is now a system which has grown considerably over the last few years of permanent parliamentary representatives of each Member State. Again, the national political and parliamentary cultures differ so much that it is difficult to generalise on the effectiveness, funding and resources provided

from the capitals for each of these representatives. I think that the presence of national parliaments in Brussels is certainly growing. I feel that it is more a question of obtaining information, exchanging information and pressing a case than overtly and explicitly lobbying, but that may come if we get into this space of more general European inter-parliamentary co-operation going beyond subsidiarity and possibly in terms of pre-legislative contact. In other words, when there are parliaments of some Member States who can see that items going through the legislative process of the European Parliament involve their own national interests then there could be interesting alliances and that could be part of the future.

Q432 ***Lord Wright of Richmond:*** Are these representatives, representatives of the majority party or is it up to each parliament to decide?
Mr Harley: They are civil servants.
Chairman: I remind Members of the Sub-Committee that we recently met Ed Lock, the Lords' Brussels representative.
Lord Wright of Richmond: Each of our chambers has got one person in this Brussels-based department.
Chairman: I have to say, the process of liaison is not so visible probably to Members of the Committee as it is to the Clerks and Legal Advisers, but it is there and no doubt very important. I do not know whether Lady O'Cathain would like to pursue the last question which is within a territory she has looked at previously?

Q433 ***Baroness O'Cathain:*** I would like to know what your views are on the proposal for Better Law Making and did the Parliament get involved in that, and how effective is it?
Mr Harley: The Parliament got involved in Better Law Making from 2003 up until 2005. There was the Inter-Institutional Agreement and there is also reference to Better Law Making in the Framework Agreement that regulates relations between the Parliament and the Commission. My personal view, however, is that the situation has stagnated over the last two years, particularly in terms of relations between the Parliament and the Commission. There are virtually no contacts any longer. There is a High Level Technical Group between the Parliament and the Commission which has not met for at least two years.

Q434 ***Baroness O'Cathain:*** Is there any reason for that? Have you just decided that all the law making is great now and you do not need Better Law Making?
Mr Harley: We feel in the Parliament that the Commission did not wish to continue. Again, if you will pardon the word, there was something of a disconnect, as indeed there often is, between the Commission and the Parliament in that the Commission would send along senior officials and the Parliament felt, despite the important technical dimension of Better Law Making, this was also intrinsically an important political issue, so it was difficult to put senior elected politicians together with senior officials from the Commission, as we saw it, to negotiate at the same level. I would say this issue will definitely be revived in the context of the negotiations between the institutions, and particularly between the Parliament and the Commission, on the implementation of the Lisbon Treaty. It was considered by the Parliament and it is on the shopping list of our ten, if not demands then priority areas that have to be sorted out to make sure that the Lisbon Treaty works in terms of inter-institutional relations. We would also like to involve the Council more, not just the Commission, in this exercise.

Q435 ***Chairman:*** Is one problem that if you are looking to meet very senior Commission personnel, and in particular if you are looking to meet the Commission personnel at the political level, at the Commissioner level, that could only happen, because of the way the Commission takes decisions at a very late stage, in the production of a legislative proposal and by then it would have gone through all the internal vetting process right up to the senior level, so by then there might be no purpose in meeting. Is that a problem?
Mr Harley: That is probably why we seem to have got a bit stuck on this. Useful work was done, as I said, two or three years ago on soft law, on comitology, et cetera. What is missing, if you will permit me to say, from where I work in the Directorate General of the Presidency, which is basically primarily responsible, amongst other things, for the organisation of the plenary sessions, we find it incredibly difficult to co-ordinate legislative planning with the Commission and the Council.[5] I chair a meeting once a month with senior officials from the Commission and the Council, but basically there are three different and dissonant legislative programmes from the Parliament, the Commission and the Council. This means that the decision-making stages in the process are all staggered. The European Parliament takes a decision, sort of, next month in Strasbourg and then the same issue will be the subject of a decision by the Council six months later and then the Commission

[5] *Supplementary comment by the witness on reading the transcript:* In fact, a better cooperation with the Commission has been developed, in particular as regards the Commission's Annual Legislative and Work Programme. However, the cooperation with the Council in this area still needs to improve considerably. The situation may change with the entry into force of the Treaty of Lisbon, which provides the legal base to facilitate the inter-institutional cooperation with regard to legislative planning. Article 17 of the Treaty on European Union states that: "[The Commission] shall initiate the Union's annual and multi-annual programming with a view to achieving inter-institutional agreements."

may revise its proposal. This makes it very difficult for the outside world to understand how the system works when you have finally arrived at decision time. We would like to use Better Law Making and the Lisbon Treaty to improve legislative programming between the three institutions to provide better quality of legislation, a more understandable process and easier access for public opinion to what we are doing and an easier way to communicate the benefits, where there are benefits, to European citizens.

Q436 ***Chairman:*** Does the comitology process not bring all three institutions together at some point?
Mr Harley: But not in a way that is understandable to the rest of the world. If we could move into an area where there could be some degree of shared political priorities between the three institutions that would also be helpful. At the moment we happen to be in a situation where there are four or five key policy proposals going through the system of the three institutions which also coincide, I would guess, with British Government priorities: climate change, energy unbundling, telecommunications, the Small Business Act. All of these are issues where there is a clear majority in the European Parliament and in the other two institutions, but all the decisions are being taken at different times. It is going to be a race against time to get any decision at all on these key issues before the European elections, quite apart from the fact that there are significant Member States who do not want the decisions to be taken anyway, or at least would like to slow them down. That is the area where we really have to fight at technical, political and inter-institutional levels if we want to produce results in a common interest.

Q437 ***Baroness O'Cathain:*** It does seem that there is a lot of tension there. Is there any way that can be resolved?
Mr Harley: It is creative tension.
Chairman: On that extremely tactful note, can we thank you very much indeed for your very interesting evidence.

Supplementary memorandum by Mr David Harley

Commission's follow-up reports to Parliament's resolutions on:

(i) *European Private Company Statute* (Parliament's resolution adopted in February 2007), where the Commission announced in October 2007 before the European Parliament's Committee on Legal Affairs its intention to present a proposal by mid-2008.

(ii) *Succession and wills* (Parliament's resolution adopted in November 2006), where Commission proposals are expected in 2009.

(iii) *Protecting European healthcare workers from blood-borne infections due to needle-stick injuries* (Parliament's resolution adopted in July 2006), where the Commission is currently consulting social partners in accordance with Article 138 of EC Treaty.

(iv) *Heating and cooling from renewable sources of energy* (Parliament's resolution adopted in February 2006), where the current proposal on the promotion of the use of energy from renewable sources which forms part of the climate and energy package, includes several measures to improve the situation of renewable energy from heating and cooling.

(v) *Cross-border disputes involving injuries and fatal accidents* (Parliament's resolution adopted in February 2007), where the Commission undertook to examine whether it was possible to work on this subject.

(vi) *Access to the Institutions' documents* (amending regulation 1049/2001/EC), where the new Commission proposal of 30 April 2008 for a Regulation regarding public access to European Parliament, Council and Commission documents, explicitly refers to the European Parliament's initiative under Article 192 EC Treaty.

WEDNESDAY 4 JUNE 2008

Present	Blackwell, L	Mance, L (Chairman)
	Bowness, L	O'Cathain, B
	Burnett, L	Rosser, L
	Jay of Ewelme, L	Wright of Richmond, L
	Kingsmill, B	

Memorandum by the Foreign and Commonwealth Office (incorporating contributions from BERR, Defra, the Home Office and the Ministry of Justice)

1. *Where do the ideas which trigger work towards EU legislation come from?*

1.1 The **European Commission** enjoys the "right of initiative" and for the most part drafts and formally proposes legislation. However, it is the role of the **European Council** to define "the general political guidelines" *(Article 4 TEU—see Annex A (not printed with this Report))* underpinning EU action. For example, the European Council plays a leading role in Justice and Home Affairs (establishing the five-year programmes at Tampere and The Hague—see JHA box), and this area is a good example of the concerted efforts over the last ten years to improve the functioning of the EU—JHA policy can be said to have been piecemeal up until the introduction of strategic European programmes in 1999. The Government has been strongly supportive of the raft of reforms undertaken by the Barroso Commission across the board, cutting red tape, simplifying and modernising legislation, and—most pertinent to this inquiry—the subjection of EU draft legislation to an impact assessment process.

1.2 Though this aspect of the European Council's role is not reflected in the current Treaties, it will be after entry into force of the Lisbon Treaty (Article 68 TFEU will provide for the European Council to "define the strategic guidelines for legislative and operational planning").

> Conclusions of the meeting of the European Council in Tampere in 1999 (the Tampere Conclusions), led to a five year **Justice and Home Affairs** work programme. The UK fed into this following a series of cross-Whitehall meetings looking at what we did and did not want in the way of EU legislation in this area. A work programme resulted with which the UK Government was generally satisfied. Among other things, it was agreed that the cornerstone of action in the area of judicial co-operation should be mutual recognition. The Commission devised an action plan and scoreboard to ensure delivery of the programme. The UK also secured what we wanted in the successor to Tampere, the Hague Programme, through active participation.
>
> The UK is currently actively engaged in negotiations on the post-Hague Programme, the content and structure of which is being discussed in the Future Group on Home Affairs and the Future Group on Justice.

Multi-annual strategies and annual work plans

1.2 Upon entering into office, the five-year strategic objectives for the Commission are established. These take into account both those European Parliamentary debates in the run up to its nomination and existing multi-annual programmes of upcoming Presidencies, and existing Work Programmes and have to be agreed upon by the Commission, Council and European Parliament.

1.3 The Commission College holds annual orientation debates to define the priorities and strategic objectives of the Commission for the following year. Conclusions are conveyed to the services, which in turn make proposals to convert College orientations into specific proposals and draft legislation or Communications *(See Annex C)*.

1.4 The Commission's rules of procedure[1] provide that the Commission defines annual priorities and adopts a work programme for each year. There is structured dialogue between the Commission, Council and EP on the Commission's annual policy strategy which then determines the work programme for the following year.

[1] 2005/960/EC, Euratom.

Other actors

1.5 The **Council of Ministers** can ask the Commission to undertake studies or propose legislation *(Article 208 TEC—see Annex A (not printed with this Report))*. The increasing number of Council meetings can be said to have increased its influence in this regard, and enables the Union to legislate quickly in reaction to major events (such as 9/11).

1.6 Aside from the influence they can exert through the Council, **Member States** can make proposals in second and third pillar areas and may also have success in influencing Commission policy in first pillar areas, with recent UK successes including Aviation Emissions, Climate Change, and Small Claims.

> The first EU law covering classification and labelling of chemicals was introduced in 1967. In the late 1990s concerns surfaced that this was inadequate, largely because most chamicals on the EU market were not required to be accompanied by basic safety information. EU Ministers, meeting informally in Chester in 1998, encouraged the European Commission to review EU chemicals legislation and, if appropriate, propose a new EU-wide system. This eventually led to a Commission proposal for the **REACH** Regulation (Registration, Evaluation and Authorisation of Chemicals) in 2003 (COM (2003) 644), which was eventually adopted by the Council and the European Parliament in 2006 (regulation 2006/1907).

1.7 The **European Parliament,** though not enjoying a right of initiative, still exerts influence on Commission policy making, and is empowered by Treaty *(Art 192 TEC—see Annex A (not printed with this Report))* to ask the Commission to propose legislation. The Commission will also often undertake studies as proposed by the EP. The EP's "hearings" for new Commissioners-designate may have an important bearing on the policies that Commissioners may pursue in office.

1.8 Under President Barroso the Commission has also tended to ensure it is perceived to take EP requests seriously and strong majorities in the Parliament can force an agenda. One recent example of this has been on toy safety where a large majority of MEPs pressed the Commission, through a joint resolution in September 2007[2] to update existing rules in this area following a number of high profile cases of product recalls. This led to a proposal[3] for a revision of the Toys Directive being presented to the Council and EP by the Commission on 25 January this year.

1.9 The Commission may also be influenced by the judgments of the **European Court of Justice** on existing legislation, for instance the Waste Framework Directive *(See paragraph 9 of Annex C)*.

1.10 Pressure from **other parties** can also bear influence on the conception of legislation. Individuals, or single entities may have little influence, but a critical mass of public opinion (as evidenced by opinion polls and the Eurobarometer), lobbying by NGO coalitions and other interested bodies can be effective in influencing the Commission's work. One recent example of this is the lobbying by national telecom regulators (the European Regulators Group) on the issue of international roaming services, and the Commission's subsequent development of legislation[4] to reduce the high costs of cross-border mobile telephony. The EU Roaming Regulation[5] came in to force on 30 June 2007, requiring mobile operators to make available, and actively offer, a Eurotariff to their customers by 30 July 2007.

2. *From concept to proposals for legislation: How ideas are developed*

2.1 The Commission's annual policy strategies set out the political priorities for the year to come and how these will be taken forward *(A Memorandum of Understanding on the 2009 APS was recently sent to the House, and can be found at Annex D (not printed with this Report)). A Westminster Hall debate on the APS will be held on June 12)*. The institutions engage in a structured dialogue and each Commissioner has a discussion with the relevant parliamentary committee. A stocktaking document is produced and used to translate policy strategy into the Commission work programme: a concrete action plan and set of deliverables.

2.2 The Commission's annual work programme translates the annual policy strategy[6] into policy objectives and an operational programme of decisions to be adopted by the Commission. It sets out major political priorities and identifies legislative initiatives, executive and other acts that the Commission intends to adopt for the realisation of these priorities.

[2] P6_TA(2007)0412.
[3] COM(2008) 9 final, 2008/0018 (COD).
[4] COM(2006) 382 final, 2006/0133 (COD).
[5] Regulation (EC) No 717/2007.
[6] Strategy can be found at: http://ec.europa.eu/atwork/synthesis/index_en.htm.

2.3 For example, the work programme for 2007[7] centres around the four strategic objectives set out by the Barroso Commission at the start of its mandate: prosperity, solidarity, security and external responsibility. In addition, the Commission commits to develop a series of priority initiatives, to be adopted over the next 12 to 18 months depending on the depth and intensity of preparation needed to meet the quality standards of better regulation. Each initiative will be supported by a comprehensive assessment of its likely impacts. The Work programme for 2007 also contains a list of simplification initiatives as well as a number of proposals dating from 2004 that the Commission has the intention to withdraw.

2.4 More detailed programming and monitoring of Commission work takes the form of a "forward programming[8]" document and an execution report[9]. Both contain legislative proposals to other EU institutions, major non-legislative acts and acts, selected by the Commission, that are likely to be of interest to other EU institutions and to the general public. They are Commission working documents and only exist in the original version (part English and part French). Both documents are updated monthly.

2.5 The Commission has a legal obligation (Protocol on the Application of the Principles of Subsidiarity and Proportionality Article 9—*see Annex A (not printed with this Report)*) to consult widely before proposing legislation. This is borne out by the Commission's own minimum standards for consultation *(COM(2002)704—Annex E (not printed with this Report))*, though these do not provide a uniform approach, nor would we necessarily want them to—Directorates General retaining flexibility to vary practices depending on the strength and scope of lobbying and the nature of the policy area in question.

2.6 The 2003 Inter-institutional agreement on better lawmaking[10] also states that:

> "During the period preceding the submission of legislative proposals, the Commission will, having informed the European Parliament and the Council, conduct the widest possible consultations, the results of which will be made public. In certain cases, where the Commission deems it appropriate the Commission may submit a pre-legislative consultation document on which the European Parliament and the Council may choose to deliver an opinion."

2.7 Each Directorate-General develops an annual management plan to describe how departments plan their activities and how they contribute to the priorities set by the Commission. Since the introduction of activity-based management, these plans have to set clear, specific, measurable and verifiable objectives for each activity as well as indicators for the monitoring and reporting on the progress made and the impact of the activities to the EU citizens.

2.8 Where the Commission concludes that EU legislation is needed, it drafts a proposal that it believes will deal with the problem effectively and satisfy the widest possible range of interests. To get the technical details right the Commission consults experts through various committees and groups via open forums, seminars, conferences, expert committees (of national experts), consultative committees (representatives of European associations and national groups), and High-level groups and working parties. *(See Annex B—IPCC case study)*

2.9 The Commission also takes account of the views of NGOs and Member States and the degree of resistance to potential proposals into account. The Commission is in regular contact with a wide range of interest groups and with the Economic and Social Committee and the Committee of the Regions. It also seeks the opinions of national parliaments and governments.

2.10 The Commission formally presents consultation documents to the Council of Ministers in the form of Green Papers, White Papers and other general Communications. Commission Green Papers on specific policy areas are addressed to interested parties—organisations and individuals—who are invited to participate in a process of public discussion, consultation and debate. In some cases they provide an impetus for subsequent legislation.

2.11 White papers launch a consultation process at European level, presenting an official set of proposals in specific policy areas, and are used as vehicles for their development.

2.12 Commission consultation documents are subject to scrutiny in the UK by the Parliamentary scrutiny committees and the Government values their input into the consultation process. For example, regarding the Commission's 2005 Green Paper on "Improving the mental health of the population"[11], The Lords 2007 EU Committee annual report[12] stated that "The Sub-Committee later received indications from the Commission that the Report influenced the way in which the proposals for action, following the Green Paper consultation,

[7] COM(2006) 629 final.
[8] Latest Forward programming document (as of 30 April) can be found at: http://ec.europa.eu/atwork/programmes/docs/forward_programming_2008.pdf
[9] Latest execution report (as of 30 April) can be found at: http://ec.europa.eu/atwork/programmes/docs/execution_report_2008.pdf
[10] (2003/C 321/01)
[11] COM(2005) 484
[12] European Union Thirty-sixth report, HL 181

were drawn up". And in February 2008, during the debate on the Government's proposals for reform of the EU scrutiny process in the House of Commons, the Deputy Leader announced that the Government would alert the Scrutiny Committees of Commission consultation exercises in which it was involved at an early stage. This also covers important consultations in which it is involved that are not being taken forward through documents submitted to the Council of Ministers so that the Committees can decide whether they wish to follow and contribute to the consultations.

3. *The quality of proposals: how can the initiation process be improved?*

3.1 The Commission has introduced several better regulation processes analogous to those used by the UK Government, including impact assessment, consultation, administrative burden measurement and simplification *(see Annex F—A summary of Better Regulation)*. As the European Commission refines the use of these tools, the UK Government expects that the quality of Commission proposals will improve accordingly. Since 2003 all items on its Annual and Legislative Work Programme have been subject to an impact assessment process in which the social, environmental and economic impacts of its proposals should be anticipated. Its guidelines, which were revised in 2005[13], are fairly comprehensive. However, their application has varied across the Commission services and from one proposal to another.

3.2 In November 2006, Commission President Barroso set up an Impact Assessment Board to create greater internal quality control to address this issue. The Board consists of senior Commission officials from different Directorates-General acting in a personal capacity, working directly to the Commission President. Their role is to scrutinise impact assessments and challenge their authors to improve them when they do not meet with the Commission's own guidelines. Their opinions are published on the Commission's website. There is some evidence that the Board's work is making a positive impact—examples of proposals that have been rejected on the basis of cost/benefit analysis include those on EU witness protection and voting rights for share holders (one share one vote). Although the Board has made a good start, it will need to increase its coverage, so that it scrutinises all significant legislative proposals coming from the Commission, not just those which appear on the Annual Work Programme.

3.3 An independent evaluation[14] of the Commission's impact assessment system carried out in 2007 highlighted some of the problems with the existing system. Some of its key findings were that too often Commission impact assessments are started too late in the policy development process for their findings to be taken into account fully; quantification needs to be improved and the scope of what is subject to impact assessment should be expanded to bring in major comitology proposals. The Government agrees with these conclusions. In addition, the Government considers it essential that Commission impact assessments include an ex ante assessment of the anticipated scale of administrative burdens which new proposals are likely to impose. Although the Commission has committed to doing this, it is not being done in many cases. This issue has become increasingly pressing since Heads of State across the EU set a target to reduce administrative burdens stemming from EU legislation by 25 per cent by 2012.[15] In response to the independent evaluation, the Commission is currently redrafting its guidelines and the Government will be actively feeding into this process.

3.4 Effective consultation is a crucial element of good policy-making. It is essential for creating evidence-based, workable proposals. The UK Government believes that the minimum standards for consultation set out in the Commission Communication of December 2002 on "General principles and minimum standards for consultation of interested parties" *(Annex E (not printed with this Report))* have played a useful role. In the majority of circumstances the Commission's services have complied with the standards; new approaches have been pioneered; and the *Your Voice* website has rendered access to Commission consultations much easier for national and regional administrations, industry, non-governmental organisations and EU citizens alike.

3.5 Over the last two years the Commission has made considerable efforts to hear and respond to the views of relevant stakeholders. The Government has received feedback from stakeholders in the financial services and automotive sectors that the Commission has developed and administered consultations very well, seeking views effectively both from regulators and from businesses.

3.6 We welcome the increased use of roadmaps[16] for each item in the Commission's annual Work Programme. These represent a potentially powerful way to inform stakeholders of key policy issues, the options for addressing these issues and the activities to take these forward, including timings for consultations,

[13] SEC(2005) 791
[14] Evaluation can be found at: http://ec.europa.eu/governance/impact/docs/key_docs/tep_eias_final_report.pdf
[15] Presidency Conclusions, 8/9 March 2007 European Council, 7224/1/07
[16] See Index of Strategic and Priority Initiative Roadmaps, 2007/EMPL/001, for the 2007 Workplan at: http://ec.europa.eu/atwork/programmes/docs/clwp2007_roadmap_strategic_initiatives.pdf

allowing stakeholders to engage early. High quality and widely and easily available roadmaps for all entries in the Work Programme[17] will contribute considerably to EU transparency.

3.7 Regarding formal consultations, the UK Government agrees with the European Commission's statement in the Better Lawmaking Report 2005[18] that there is room for improvement in terms of the feedback that the Commission gives to respondents as to how their views have, or indeed have not and why not, affected the final regulatory proposal. Other areas where improvements are required, include awareness of the minimum standards among Commission officials, scope of applicability, the duration of consultation exercises, timing and frequency of consultation, and efforts to engage with a wide and diverse range of stakeholders, in particular Europe's small and medium-sized enterprises (SMEs). The Government believes that business representative organisations need time to assess the relevance of a consultation to their members, consult them, analyse their responses, build alliances and submit views, particularly when potentially trying to contact 23 million businesses in 27 member states. Consideration should be given to extending the minimum consultation period. This is especially important for small businesses which do not have the resources to respond to consultations in such a short timeframe.

3.8 Overall the government's view is that the quality of proposals issuing from the Commission is variable, but has improved significantly in recent years. Some parts of the Commission are better than others in following better regulation principles. For example DG Environment has worked on developing robust impact assessment tools to explore options for tackling air pollution and climate change; and DG Agriculture have set up an expert group on simplification, with Member States and stakeholders meeting to share best practice, and have created a single Common Market Organisation (Single CMO[19]) for agricultural products that has replaced the 21 separate CMOs that existed previously, reducing the volume of EC legislation and improving transparency for producers and processors. We will continue to work closely with the Commission on better regulation, both horizontally and with regard to particular concerns about specific pieces of legislation.

Annex B

CASE STUDY 1—INTEGRATED POLLUTION PREVENTION AND CONTROL

1. Integrated Pollution Prevention and Control (IPPC) applies to about 45,000 industrial installations in the EU (about 4,000 in the UK), ranging from refineries to intensive pig farms. It requires each installation to have a permit containing emission limit values and other conditions based on the application of best available technique (BAT) and set to minimise emissions of pollutants likely to be emitted in significant quantities. Permit conditions also have to address energy efficiency, waste minimisation, prevention of accidental emissions, and site restoration.

2. In November 2005, the Commission adopted its first report on the implementation of the IPPC Directive[20] and this launched a review. However, the possibility of review had been mentioned in a Communication in 2003[21] to which the UK Government responded in September 2003. Defra and EC officials subsequently discussed this response informally. The Commission-chaired IPPC Experts Group had provided a roughly annual forum for discussion of possible revisions, and an EC working group initiated on developing IPPC guidance—with significant UK encouragement and input—provided further impetus. A "better regulation" conference in October 2004 also generated some ideas, as a Dutch initiative commencing in late 2002 in which three EU-wide workshop sessions were held on the theme of "Exploring New Approaches" ("ENAP") to regulation of industrial installations. Indeed, by the time of another EU-wide conference held in Dresden in September 2005 there was already a wealth of views about the need for and form of review, of not only the IPPC Directive itself but also of its relatives on large combustion plants, waste incineration and solvents.

3. But in all of this there was general agreement that the IPPC Directive is fundamentally sound and not in need of major overhaul. That was reflected in the Commission's statement that the general objective of the review was "to evaluate the scope to improve the functioning of the Directive and its interaction with other legislation, in particular related to industrial emissions, while not altering the main underlying principles and the level of ambition set in the Directive".

[17] See List of impact assessments -planned and carried out: http://ec.europa.eu/governance/impact/practice_en.htm
[18] COM(2006)289
[19] See http://ec.europa.eu/agriculture/simplification/cmo/index_en.htm
[20] At http://europa.eu.int/comm/environment/ippc/ippc_report.htm
[21] COM(2003) 354 final, On the Road to Sustainable Production, Progress in implementing Council Directive 96/61/EC concerning integrated pollution prevention and control

4. When it launched the review, the Commission set up and chaired an "IPPC Review Advisory Group", comprising a single representative of each of the Member States (a Defra official was the UK representative) and of several European industry associations. The European Environmental Bureau represented the environmental NGO perspective.

5. A key role of the Advisory Group was to advise on the conduct of several consultancy studies, which the Commission initiated at the end of 2005 and in 2006. Besides commenting upon the general direction of these studies, Advisory Group members were asked to comment upon draft questionnaires prepared by the consultants, to respond themselves to the finalised questionnaires, and to suggest "case study" industrial installations. The Commission conducted a commendably "open" approach to the whole process, placing all the documents these studies generated on its "Circa" web site[22].

6. Within the UK, Defra used the "IPPC Sounding Board" to disseminate information and information requests concerning the Review. The Sounding Board comprises representatives of some 20 UK industry associations, with another 40 or so receiving papers. Representatives of the Environment Agency, BERR and the Devolved Administrations and their regulators also attend the Sounding Board meetings[23]. The Sounding Board had been set up during the negotiation of the current IPPC Directive. It was revivified in 2002 and has provided throughout that time the principal means of disseminating information and seeking views on IPPC issues in the UK.

7. In April 2007 the European Commission opened a two-month internet consultation on various "actions which could be taken at EU level to ensure a high level of environmental protection through the prevention and control of industrial emissions". The UK Government responded, drawing upon views from the IPPC Sounding Board. During the consultation period, the Commission held a "public hearing" in Brussels at which views could be expressed, although this was not an altogether successful event, with too much time being taken in presentations leaving insufficient time for discussions[24]. There was also a discussion at the "Environmental Policy Review Group" meeting in Brussels on 23 April 2007. This was a "Chatham House rule" meeting of environment Directors-General from Member State governments.

8. After the closure of the internet consultation in June 2007, the UK continued to submit ideas on an official to official basis Commission officials as they worked to conclude the review. In October 2007 the inter-service consultation version of the proposed revision circulated around Europe through ENDS. Although the UK did not comment upon this "leaked" document, Defra officials verbally put several points arising to Commission officials and it became clear that the Commission received other representations, any or all of which may have been influential upon the final proposal.

9. The review culminated on 21 December 2007 with the publication of a Commission Communication[25] accompanying the Commission's proposal for a Directive on industrial emissions (integrated pollution prevention and control).

Annex C

CASE STUDY 2—6TH ENVIRONMENT ACTION PROGRAMME AND WASTE FRAMEWORK DIRECTIVE

1. Multi-annual strategies can be very effective at setting the agenda for the creation of legislative proposals, an example of which is the 6th Environment Action Programme (6th EAP). The 6th EAP is a decision of the Council and the European Parliament, adopted in July 2002, which sets out the framework for environmental policy-making in the EU up to 2012, outlining the actions that need to be taken to achieve them.

2. The current revision of the Waste Framework Directive[26] ("the WFD") originates from the Sixth Community Environment Action Programme[27]. The 6th EAP provided that its objectives were to be pursued by means of a series of priority actions including (a) developing measures on waste prevention and management, (b) developing a thematic strategy on waste recycling and (c) developing or revising the legislation on wastes.

3. The European Commission's first step in the fulfilment of these actions was the adoption in May 2003 of a Communication "Towards a thematic strategy on the prevention and recycling of waste" which was the subject of an EU-wide consultation. The Commission subsequently held a series of meetings with Member States and stakeholders; and consulted by means of questionnaires on the development of the Strategy, the

[22] http://forum.europa.eu.int/Public/irc/env/ippc_rev/library
[23] Minutes of the Sounding Board are at http://www.defra.gov.uk/environment/ppc/sounding-board/index.htm.
[24] Papers are at http://circa.europa.eu/Public/irc/env/ippc_rev/library?l=/ippc_stakeholder&vm=detailed&sb=Title
[25] COM(2007) 843—*Towards an improved policy on industrial emissions*
[26] Codified as Directive 2006/12/EC.
[27] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002.

associated legislation and an Impact Assessment. A more detailed explanation of this preparatory work is provided on the Commission's website at http://ec.europa.eu/environment/waste/strategy_prep.htm.

4. In December 2005 the European Commission published (a) A Thematic Strategy on the prevention and recycling of waste ("the Waste Thematic Strategy") and (b) proposals for associated legislation comprising (i) a revision of the WFD, (ii) the repeal of the Waste Oils Directive[28] and (iii) the repeal and integration of the Hazardous Waste Directive[29] into the revised WFD.

5. Explanatory Memoranda on the Waste Thematic Strategy and the revised WFD were submitted to Parliament on 18 January 2006. These confirmed that the UK welcomed the simplification of EU legislation proposed by the Commission but had reservations about several other aspects of the Commission's proposed revision of the WFD. The UK considered that the implications of several of the Commission's proposals had not been fully addressed in their Impact Assessment; and that the Commission had not made an evidence-based case for the proposed imposition of more prescriptive EU-wide standards for waste management.

6. The Minister for Climate Change, Biodiversity and Waste (Joan Ruddock) wrote to the Chairman of the House of Lords Select Committee on the European Union (Lord Grenfell) on 14 July 2007 to inform him that the Environment Council had reached Political Agreement on the dossier on 28 June 2007. In doing so, the Minister confirmed that the text of the revised WFD which was the subject of Political Agreement incorporated a number of changes to the Commission's proposal which were considered to be beneficial to the UK.

7. Judgments by the European Court of Justice (ECJ) on the existing WFD were a factor in relation to some aspects of both the Commission's proposal and the text adopted by the Council in its Common Position (December 2007). For example, ECJ judgments on the distinction between waste disposal and waste recovery operations influenced the Commission's and the Council's proposed definitions of "recovery" and the reclassification from waste disposal operations to waste recovery operations of energy efficient municipal waste incinerators; and ECJ judgments on the definition of waste are reflected in the Council's incorporation of provisions on by-products as non-waste.

Annex F

SUMMARY OF EU BETTER REGULATION

- The UK Government is committed to reducing the unnecessary burdens on business, charities and the voluntary sector arising from EU directives and regulations. We are seeking to enshrine the principles of Better Regulation—ie proportionality, accountability, consistency, transparency and targeting—across the work of the EU institutions.
- Our aim is not to reduce social and environmental protections through deregulation, but to get rid of unnecessary bureaucracy which stifles European business and damages the EU's reputation with the public, and to remove, recast or modify outdated policies and laws that no longer serve their purpose.
- With the strong support of the UK government, the current European Commission has shown real commitment to improve the quality of European regulation. Significant progress has been made:
  - **An EU-wide commitment to cut red tape resulting from EU law was agreed by Heads of Government in March 2007.** This is now been developed into a five year programme aimed at saving businesses across the EU £100 billion by 2012 through rationalising rules that generate paperwork. However, we continue to press for this work to be more ambitious—we believe that the Commission should clarify that the 25 per cent admin burdens target is an ongoing reduction in the stock and flow of EU regulation ie that is a net 25 per cent reduction in administrative burdens and therefore we need an annual scorecard produced by the Commission to monitor progress towards this target.
  - **New EU draft legislation is now subject to an impact assessment process.** Since 2003 284 impact assessments have been completed by the European Commission. Examples of proposals that have been rejected on the basis of cost/benefit analysis include an EU witness protection law and a new law on voting rights for share holders (one share one vote). As welcome as the work on impact assessment is, more can be done to increase the quality and the coverage of impact assessment. All policies with a significant impact on business should be screened by the Impact

[28] Directive 75/439/EEC.
[29] Directive 91/689/EEC.

Assessment Board. Also the Commission should do more to quantify (and ideally monetise) costs and benefits—and also do more to identify costs and benefits at national level.

— **The European Commission now has a Simplification Rolling Programme to simplify and modernise existing EU legislation.** The Commission has already proposed or adopted 92 simplification measures, and will present 45 new measures in 2008. Examples include: simpler packaging rules, as pre-packaging requirements on some 70 consumer products have been repealed; simplified rules to register and sell motor vehicles in the EU while maintaining safety standards; and a more efficient and competitive payments market to make cross-border financial payments as easy, cheap and secure as payments within a Member State. This simplification programme should be accelerated and the Commission should introduce more robust systems to ensure that simplification proposals are radical and boost EU competitiveness.

Our current priorities include getting the best possible results out of all three of these initiatives—and making sure that the other EU institutions play their part:

— One area of concern is the lack of robust impact assessment in the Council of Ministers and European Parliament to carry out impact assessments on their substantive amendments to Commission proposals. European Parliament committees have been allocated budgets to employ consultants to undertake impact assessments on their behalf and are starting to make use of these—however work in the Council is less advanced.

But we also believe more can be done to embed better regulation in other areas. Some concrete proposals including:

— **EU Common Commencement Dates**—the UK has already adopted this idea for domestic regulations and business like it, as it cuts down horizon scanning, provides certainty, saves them money, improves implementation and we think it would work at EU level. There would be clear advantages for business if there could be greater consistency over implementation deadlines—perhaps matching Presidency terms eg 1 January and 1 July.

— **Embedding the "Think Small First Principle" into the Commissions Impact Assessment process—**a small business filter could be built into the policy development process so that all new and amended legislation affecting business is assessed by the Commission. This would help to identify impacts and any unintended consequences on small businesses with a view to introducing exemptions and/or thresholds.

— **Exemptions and/or thresholds**—thought could be given to how a presumption of exemptions and/or thresholds for micro and small businesses in all new and amended legislation could be embedded (eg in the impact assessment). This would require robust evidence to justify their inclusion in a proposal. As a first step, the Commission could consider undertaking a specific screening of the acquis from a small business perspective and to introduce exemptions from administrative requirements wherever possible.

— **Completing Statistical Returns**—this can be time consuming and costly for small businesses. To help alleviate this burden, coverage of Intrastat could be removed as far as possible from as many small businesses as possible within its scope or alternatively, if a small business is sampled, it is exempt from any further requirements for three years.

— **Extending Consultation Periods for business related consultations**—Business representative organisations that are invited by the Commission to submit views on new and amended policy, need time to assess the relevance of a consultation to their members, consult them, analyse their responses, build alliances and submit views to the Commission. The current consultation period of eight weeks is insufficient when you are potentially trying to contact 23 million businesses in 27 member states. Consideration should be given to extending the period to a minimum of 16 weeks to give them adequate time to distribute, collect and analyse members' views.

The UK also actively engages with other European countries to share best practice and learn lessons from abroad, for example, by active participation in the Organisation for Economic Co-operation and Development (OECD). We also work together with other countries with advanced programmes in place for regulatory reform: for examples of this information exchange see http://www.administrative-burdens.com.

As well as looking at the development of EU law in Brussels, the Better Regulation Executive also looks at implementation of EU law in the UK. In 2005 the Chancellor asked Lord Davidson QC to review the stock of EU-sourced legislation in the UK and identify measures where unnecessary regulatory burdens could be reduced or the system simplified. The Government accepted the recommendations in full in December 2006.

The Report identified ten areas of legislation, including consumer sales, financial services, food hygiene training, transport and waste, and made specific recommendations to reduce the unnecessary burdens. All of these are either implemented or subject to more detailed consultation with affected parties. Further generic recommendations to spread best practice in the implementation of European legislation across departments and regulators have been incorporated to guidance for officials on how to implement EU law published in September 2007.

Examination of Witnesses

Witnesses: Mr Jim Murphy, a Member of the House of Commons, Minister for Europe, and Mr Ananda Guha, Deputy Head of Europe Delivery Group, Foreign and Commonwealth Office, examined.

Q438 ***Chairman:*** Minister, thank you very much for coming, and Mr Guha for accompanying the Minister. This is a live public session. There will be a transcript and you will be given a copy, and obviously if there are any points which you wish to make in writing afterwards we would be delighted to have them. The interests, such as they are, which the Members of this Sub-Committee have will have been declared in the Lords' Register in the usual way and I think I can simply ask you at the outset whether there is any statement which either or both of you wishes to make on the subject matter, otherwise we will go to the questions.
Mr Murphy: I would be delighted to go straight to the questions, if that is not considered bad manners.

Q439 ***Chairman:*** No. We have had a considerable amount of evidence, and I think you have seen at least part of it. The theme, as you know, is the initiation of Community legislation and European Union legislation. Could I just ask you first about the Commission's continuing monopoly of the right of initiative, as it has been described, although one of our witnesses said that it was really a right of proposal not initiative. Is that something which the Government is content with?
Mr Murphy: I think generally we are, but if I was to think back roughly a year ago when I became the Minister for Europe the concept that the Commission in some vacuum initiated legislative proposals, at that level you think, is this the right thing to have, but very quickly getting into the detail of the job you understand much more closely the fact that it is not in a vacuum and it is in the context of European Council conclusions, in the dynamics of Member States, interaction with the Presidency, interaction with pressure groups and others to set a framework inside which the Commission has that sole right of initiative. I do not know which previous witness described it in the way it is recorded –

Q440 ***Chairman:*** It was Lord Brittan, but I think he was reflecting perhaps the same spirit of what you were saying. Might it be said that the present situation has grown up a little bit like Topsy, that we are where we are simply as a matter of history and that it might be an area where some re-thinking could be done?
Mr Murphy: I think it would be foolish to say that in a European Union which continues to expand you cannot continue the re-think. Of course we should always be open, but I think from the UK perspective, the Government perspective, we think it is important that the Commission has this right of initiative. Now, there are some changes which perhaps we will have the opportunity to talk about a little later within the Lisbon Treaty about the threshold for the right to make proposals and initiative and everything else for Member States, but generally we are content that the Commission has this right of initiative in the context and within the parameters which Lord Brittan clearly referred to and which I have described as a similar process but in a different way. But we can always look to how these things evolve, of course we can.

Q441 ***Chairman:*** The fact is that at the moment in the Third Pillar area there is an individual Member State right of initiative and, as you have just mentioned, when that comes into the First Pillar there will be a variation in that, but there will still be a Member State right of initiative if you get a quarter of Member States to make a proposal in the area in question, criminal and policing. Is there any particular reason for the difference in that area from the more general areas of the First Pillar?
Mr Murphy: The important thing post-Lisbon Treaty ratification—and I do not think it is bad manners to notice and reflect that your Lordships' House is considering these issues at this very moment, so without trying to impinge on that debate in any sense whatsoever, as justice and home affairs move from Third Pillar to the Community method my Lord Chairman is right to state that that right of initiative by a single Member State will move from a single Member State to a quarter of Member States. I think it is partly based on the sense that if the proposal cannot command the support of a quarter of the Member States it has a very unlikely chance of ever succeeding. I have been to a number of your Lordships' Committee hearings on these related issues and the most common question asked is, "Give us some examples." I will not read them in to the record, but I will happily provide them for your Lordships. The fact is, there is a substantial number of proposals from different governments, the Belgian, the Greek, and not in a particular but

illustrative way I would say the Belgian and the Greek Governments have proposed things which through a lack of preparation and forethought on occasion (not generally but on occasion) have not deserved the full support of other Member States. So that threshold I think is an initial threshold which is a good test. It is a good way of taking the temperature as to whether there is a willingness across a European Union of 27 to actually progress, rather than just one Member State, whether it is the UK, Belgium or Greece, having that right of initiative. I think it is a sensible reform.

Q442 ***Chairman:*** I am just giving you a bit of historical fact which Professor Peers gave us. He observed that if one was to judge by the five year transitional period, I think following the Treaty of Amsterdam, when Member States could propose legislation, or indeed to judge by the Third Pillar, if you had a Member State right of initiative across the board you would have a great many more proposals, but do I gather from what you have said that you would not be too worried about that, you might be a bit concerned?
Mr Murphy: We would certainly have a quantity of proposals and I think we would like to invest our energies and our diplomatic skills in the proposals which have quality and which command support. That is the important change there, I think.

Q443 ***Chairman:*** I think you have mentioned a point which is relevant to my second question, which is whether the shared right of initiative in the Third Pillar has caused any difficulties. I think you have just identified that there have been some difficulties when individual Members have put forward proposals without thinking them through sufficiently. Is there any other problem in that area? The question refers to impact assessments and failure to take account of different practices and legal traditions across the EU. Has that been a problem?
Mr Murphy: I think on impact assessments there has historically been a significant problem. It is improving, but it is nowhere near perfect. It has not improved enough. There are things which still have to be improved and there are other committees which your Lordships' House has—I will not say enjoyed but had to endure, from my reflections as a former better regulation minister on these issues of impact assessment. We only have an hour and a half today! I could speak about impact assessments, whether that is a good thing or a bad thing, for that period. But I think it would be churlish not to acknowledge that there has been progress, but not enough progress on impact assessments.

Q444 ***Chairman:*** Are you talking about Commission initiatives here or Member States' initiatives?
Mr Murphy: I think generally. I think it is both. This is a snapshot in a sense rather than a scientific study that I am going to offer, but I think actually Member State initiatives are more prone to lack impact assessments at the point of initiation, because it comes from an instinct to do something, often well intentioned but not properly thought out, and it certainly lacks an impact assessment.

Q445 ***Chairman:*** Could I just go back to one of the points you were making about the greater guarantee that the requirement of a quarter of Member States subscribing under the Treaty of Lisbon will bring to the viability and good sense of the proposal. Is there any reason why that possibility of a quarter of Member States making a proposal should not have been extended across the whole range of Community legislation? Is it any more than history which has led to it being confined to the Third Pillar, or now to the criminal and policing area?
Mr Murphy: I must say I am not certain as to the dynamic of the conversation which took place at the time as to why it is specifically here.
Mr Guha: I am not aware of any particular reason why it is being pursued just in JHA beyond the fact that we are moving beyond a very specific area, and in a sense whereas we cannot necessarily guarantee that one country like Belgium or Greece will come up with something which will reflect the views of other Member States, having groups do it in the specific field of the JHA provides some surety.

Q446 ***Chairman:*** It may be it is just history and this was an unrestricted right of an individual to do it at the moment at which it was cut back, but I wondered whether there might have been advantages, if only in logic, in having the same possibility across the board, possibly a democratic appearance?
Mr Murphy: On the issues such as common foreign and security policy, where it has in the past required and continues to require unanimity, I am far from certain that that right of initiative, as has been suggested, would be the right way to progress.

Q447 ***Chairman:*** It is civil law. Is there any particular distinction in the justice and home affairs area between criminal and policing on the one hand and civil on the other?
Mr Murphy: As they move from the Third Pillar into the Community method, the exemptions, as I think your Lordships reflect—family law, the European Public Prosecutor and operational policing—will still remain within the scheme of unanimity, and I think that is important. I am not aware of the historical tradition which leads us to the conclusion we have arrived at today.

Q448 ***Baroness O'Cathain:*** I am just wondering, Minister, if there is a chance of it ever becoming easy, in view of the different traditions, the different legal traditions. There are lots of things, for example agriculture, where you can get unanimity, or even foreign policy, but when it comes down to things in the justice and home affairs area, I just wonder, is it going to be possible ever, or will it always be compromised and an uneasy relationship between the Member States?

Mr Murphy: Ultimately, where we move towards a Community method and qualified majority voting processes, that right of veto is not as strong, so we would not always have the lowest common denominator in policy terms. As your Lordships will be aware, the UK and Ireland have set themselves apart. This is not celebrated across the rest of the European Union, but in terms of our opt-in/opt-out arrangements on JHA processes that is an additional—protection is the wrong word, but it is an additional part of the equation. So the question is, will we get unanimity? I am saved by the bell from the question! Ultimately, the intention is to try.

The Committee suspended from 4.32pm to 4.40 pm for a division in the House.

Chairman: Minister, thank you for your patience. I think you were cut off halfway through answering Baroness O'Cathain's question. I do not know whether you want to repeat it again?

Q449 ***Baroness O'Cathain:*** No, I do not think so, necessarily. The essence was, will they ever be able to do anything other than compromise on justice and home affairs, because of the nature of the legal systems being different in effect?

Mr Murphy: All I would add is that as the proposal winds its way through the process, if it is going to command consensus then there does have to be a degree of compromise, if you wish to put it that way. But where we support proposals we try and ensure that the core purpose is retained. We do not always succeed in that, of course we do not, and as the European Union continues to expand in numbers, with Croatia probably being next, this is a dynamic that is always at play.

Chairman: Can we go back to the initiation of legislation?

Q450 ***Lord Bowness:*** Minister, we have heard witnesses tell us that the Commission seeks to anticipate the degree of support which any proposal will have. Is this, do you think, because they can no longer (if they ever could) produce their own proposals and expect to get them through the Council of Ministers? If that is the case, is it because they have become relatively weaker vis-à-vis the other institutions?

Mr Murphy: The power of the European institution is that if it is seen in the context of a contest, then one could perhaps come to that judgment about the relative influence that is going to come to the European Parliament, but I am not sure that we would see it through the prism of a contest. The European Parliament certainly is increasing in power and influence, with the Lisbon Treaty extending co-decision in, I think, 40 separate discrete areas to the European Parliament. So certainly the European Parliament is increasing in power and assertiveness, which I think is an important evolution of its democracy. But the Commission does retain a core central set of powers, which we do not think is under threat and actually we do not believe should be under threat because that set of Commission powers is, we think, of fundamental importance to effective governance of the European Union.

Q451 ***Lord Rosser:*** Minister, you did, I think, write to the Committee recently in April about the inter-institutional agreement for establishing rules for EU regulatory agencies where, as I understand it, the Commission had put forward a proposal some time ago and it has now withdrawn it because it did not have the support of the Member States. First of all, was that a misjudgement by the Commission, because the kind of evidence which I think we have had from the Commission is that it in fact consults very widely, it gets lots of people expressing views and it does not actually put something forward unless it is pretty sure it is going to get supported? So, on the face of it, that would suggest either misjudgement or that the Commission had a view that this is what it wanted and it was just going to push ahead with it and try and get it. It has withdrawn its proposals, but it is not giving up because it is coming back with something else. Is that an indication of a Commission which takes note of what is being said and only brings forward proposals which it knows will have support, or is that an indication of a Commission which has decided what it wants and is going to keep going until it gets something?

Mr Murphy: In response to the first question, I reflected that I think things have improved. They are far from being perfect, but it would be churlish of me not to acknowledge that there have been improvements in recent years. They do make mistakes, of course they do. There are occasional misjudgements. But there is also a situation where perceptions of what Member States wish on occasion shift as a consequence, for example, of elections in different Member States, as a consequence of external events, as a consequence of domestic politics. It is certainly a difficult and complicated task. They try to capture, as your Lordships will be aware, a work plan within their multi-annual set of proposals and generally they manage to stay within

that. That is, again, in the context of that being the parameters of their work plan, but occasionally they do make mistakes and occasionally they misjudge and on occasions, to be frank, what Member States articulate in terms of their wishes does on occasion change.

Q452 ***Chairman:*** I suppose the question which might arise out of that is, do they get a representative fair cross-section of input? You mentioned the influence of pressure groups and the various dynamics which influence the Commission. We have heard from institutions and the Freight Transport Association gave us evidence that working with a bright young administrator in the European Commission who wants to move and get things done is a very good way of promoting legislation. Another of our witnesses, I think Lord Kinnock, gave us instances of individuals in the European Commission who had been able to pursue bright ideas. But are the pressures which lead to these bright ideas in any way distorted? We have heard of lobby groups, pressure groups, and sometimes one has a bold resolution from the European Parliament which sets off an idea such as, perhaps, the idea of the civil code for Europe, which gets picked up. Is there any way of saying whether these ideas are representative of what Europe as a whole needs or wants?
Mr Murphy: There is an awful lot in that question. Notwithstanding the point about the multi-annual strategies, this one about the bright young thing is a really interesting one, as to which part of the European institutions the most talented officials are most attracted to and driven towards. Picking up on an earlier point about impact assessments, the bright young things, or just the bright things, the most articulate, effective civil servants are still attracted to, I think, the pro-activist instincts of European institutions. What I mean by that is that we have not yet seen a culture change within the institutions whereby there is a similar appetite to work within the de-regulatory, the better regulation –

Q453 ***Chairman:*** The Lisbon agenda.
Mr Murphy: I think there is still a task in terms of changing the culture of the institutions where that is seen as an attractive career prospect for personal enhancement. That is a reflection, I think, of the political process. There are very few people who get elected on saying, "Vote for me and I'll do less." It just does not happen very often, and it is difficult, and perhaps the structures reflect that as well. They have got to be recognisant of the Parliament, particularly in areas of co-decision, but generally their work reflects the wishes of the European Council. But again—and I will finish on this because I have spoken too long on this specific point—we have also got to reflect. Do the European decision-making structures give them clear guidance because of the sectoral councils, the General Affairs Council, the European Councils? Is there a rationalisation of the multitude of tasks which we set for the European Commission in particular and a hierarchy of priorities?

Q454 ***Chairman:*** Just picking up one thing you said, is there any European institution which influences the Commission in the "less is better" direction which you mentioned, de-regulation?
Mr Murphy: The greatest influence, I think, is a group of Member States—some individual Commissioners, but a group of Member States. Of course, I would say the UK, because I think that is generally accepted, but the Dutch in particular, who had earlier adopted the better regulation agenda, some of the Baltic States, the Czechs and the Italians increasingly. So Member States, I think, are the most effective lever on better regulation currently, but there is a beginning of a culture change within the Commission.

Q455 ***Lord Rosser:*** Could I just pursue this role of Member States? How, in your view, can an individual Member State influence the initiation of legislation? Have we, the UK, done that, successfully promoting legislation? Should we be doing more?
Mr Murphy: I am sure we could always do more. That gets us away from "less is better". I think we could certainly, of course, do more, but complacence suggests we should not. Where are the most effective examples? On the climate change package we were very effective, but the residual challenge for us on climate change is to maintain that pressure. We can discuss this if your Lordships wish, but as some Member States realise the consequence of the climate change package which has been agreed they seek to unpick it for reasons which are legitimate—national and economic concerns on occasion, but as they seek to unpick particular aspects of the climate change package, that is perhaps the best example of our effectiveness. There are others.

Q456 ***Lord Rosser:*** Does it make any difference? Does a state or a nation have more influence and power if it is holding the Presidency, or is that a bit of a fig leaf as far as this is concerned?
Mr Murphy: It has, but I think what is a false assumption about this argument is that it has an immediate influence. I think its influence is felt months, if not years, in subsequent presidencies down the line. There are examples on better regulation which I think the UK—was our Presidency in 1998?

Q457 ***Chairman:*** We have had a much more recent Presidency, but yes.

Mr Murphy: Yes, the Presidency in 1998, the proposals which we actually gave energy to in 1998 were actually given legislative effect in 2007. So the question would be, as President Sarkozy assumes the Presidency of the European Council on July 1, will he by December 31 see legislative outcomes initiated by French instinct and French politics? It is highly unlikely. So there is not that short-term burst of legislative outcome impact, but I think it is fair to reflect that there is a longer medium term impact of the power of a presidency to put energy into a legislative proposal.

Q458 ***Lord Rosser:*** You have spoken about the time span. Does that then suggest that perhaps national parliaments do not have a great deal of influence as far as the initiation of ideas are concerned, the initiation of proposals are concerned, because they are probably working to rather shorter time-spans than you have been talking about?
Mr Murphy: I think I have come to this assessment about the power of the presidency. On day one as the Minister for Europe, I do not think I would have come to the job with the perception or belief that the presidency would have a short-term legislative impact. It is only as I now reflect on the presidency, the energy, for example the Hampton Court agenda which we did so much to give life to, better regulation. Culturally we still are not there. Procedurally we are getting there, but culturally we are not. As Member States and governments, I am not sure there is a realisation of everything I have been speaking of. In terms of parliaments, I think there is probably a similar timeline in terms of the positive impact of the role of parliaments. The timeline on parliament stopping and amending things I think is much shorter, by necessity, by reports, or votes, or debates. Delaying or amending, I think, is a much shorter timescale, which of course it has to be by nature of the legislative procedures.

Q459 ***Lord Blackwell:*** If you take the view that sometimes there is too much legislation, that less is better, could you answer the question the other way round in terms of what impact a Member State may have, particularly when it is President, in throttling the start of inappropriate legislation and could we in fact do a more effective job on keeping our eye on what was coming out and trying to stop things coming out of the system and getting legs?
Mr Murphy: We and a number of other Member States are active as what, crudely put, some people describe as "budget disciplinarians". It is a crude label, but in a sense it is that the European Union should operate within its means and if there is a new "to do" list, which of course there is if you are going to respond to contemporary challenges, then of course climate change is the easiest. It is the abundantly obvious one, and international terror and migration. As the nature of these challenges changes, the European Union at least has to deal with it, preferably anticipate it but as a minimum mitigate it. Now, to do that you have to stop doing something else. Everything cannot be an add-on; occasionally it has to be an "instead of", and that is certainly the approach we take, along with some others, quite a substantial number of other Member States, the Scandinavians in particular.

Q460 ***Lord Burnett:*** Some Member States must have more influence than others. It would be very interesting to hear from you as a minister. The largest contributor is, of course, the Federal Republic of Germany and, as the largest country in the EU, it is an original member. I would like to hear from you what sort of influence they have within the machinery because it seems that the German Chancellor decided to bring back to life the defeated and defunct Constitution which we are debating in the House today. I would just like to hear about that, the relative strengths.
Mr Murphy: Obviously, in a technical sense size matters. In a technical sense, of course it does, not just because of the voting weights. As an aside, our voting weight, as a consequence of what your Lordships are discussing, will increase. For example, when a Member State assumes the presidency—and Slovenia is doing an excellent job currently with this Presidency—for me it is symbolic of the difficulty that while we are delighted that Slovenia has the presidency and we think they are doing a very good job, there is the capacity issue. We second not a substantial number of civil servants but some to the Slovenian civil service to help guarantee an effective presidency. It is a small thing, but nevertheless I think it is symbolic of the challenge which Slovenia faces that when I go to meet the Ambassadors of all the Member States of the European Union during the Slovenian Presidency I have lunch at the Spanish Ambassador's house as part of the Slovenian Presidency. Again, it is a small thing, but it is about the capacity of a smaller Member State to drive the agenda. On occasion, I think in future with some of the smaller Member States—and I am far from intending to be critical, this is just an assessment of fact—even when we bring to an end the rotating presidency we will see their role as maintaining the momentum on the inherited work rather than the point we were talking about earlier, initiation, because in a relatively small country with a relatively small civil service and government in terms of capacity, all of these things, budgets, population, voting weights and personalities, the politics of personalities, the politics of left and right, the geography, the history, all of this and more impacts on the relative influence of a Member State. What it

boils down to is, are we content with the influence that we have? The answer is, yes. Are we content with the level of influence which the United Kingdom has? Yes, but we are always looking to find additional ways. You asked me about Germany and I answered about the UK. I am not going to get myself in trouble!

Q461 ***Lord Bowness:*** Minister, I am still trying to get to grips with the real mechanics of this rather than the formality of it. In opening you said that you soon came to the conclusion that the idea which is engendered by the "monopoly of the right of initiative" is not actually correct and that there is a lot of interaction, and you referred to presidency conclusions, but presumably presidency conclusions do not drop out of the sky either. So if HMG has got a bright idea, clearly they are going to want to see whether that has got support from other Member States. Is that done on a series of bilateral meetings or discussions in the first place? Is it raised in Coreper? What goes on before it gets to the stage where it appears in that appendix to the presidency conclusions and then everybody turns around and says, "Goodness me, the Commission has produced this"? This is manifestly not the case.
Mr Murphy: It is both bilateral and Coreper, and so much else. For example, I was in Prague two or three weeks ago, hosted by the Deputy Prime Minister of the Czech Republic, again on better regulation, where ourselves, the Italians, the Dutch, the Swedes, signed a declaration on better regulation. Now, we would expect that to have an impact upon the Commission. Ourselves and the French, the state visit of President Sarkozy, and that afternoon it did not get a lot of attention. Other things captured the media's attention about that state visit, but we had ten bilaterals between different ministers of both governments. So I met with my opposite number, the Europe Minister, the Foreign Secretary met with his opposite number, the Secretary of State for Defence, the Secretary of State for Children, and others, and each agreed areas of joint work. Some of that is bilateral but some of it is through the European institutions. The short answer is that there is no science to it. It is a relatively complicated process which with experience you can navigate your way around and through to great effect, which again comes back to this issue of size. But some Member States which are smaller do manage to punch above their weight. I could point to the Dutch, who are very effective in the work they do, and also the Swedes.

Q462 ***Lord Bowness:*** Minister, I would not want to put words in your mouth, but would it be fair to say that it is extremely unlikely that a Commission's proposal ever comes as a surprise to the Government, either of this country or any other Member State?
Mr Murphy: In my time that would be true, yes. If your Lordships wish, I could reflect further back, if you would find that helpful.

Q463 ***Chairman:*** Could I ask about the role of national parliaments in the development of proposals? Could this Parliament in particular have more input into the general direction in which European proposals are moving, into annual or multi-annual work programmes and that sort of thing? We do, of course, see them, but is there scope for significant influence there which could be developed?
Mr Murphy: I think the answer is, most certainly, yes. There are proposals post-ratification for that type of thing to happen with the introduction of the yellow card and the orange cards for national parliaments.

Q464 ***Chairman:*** That is more related to individual proposals, is it not?
Mr Murphy: On subsidiarity, yes. First of all, national parliaments, in the reports which are undertaken and published, do have an effect. When I was in Slovenia in preparation for their Presidency, when I met with the government ministers—and I have told the Chairman of the House of Commons Select Committee this already, so it is not an insult to him or his Committee, or to the House of Commons—the government there and the parliamentarians spoke about the House of Lords' scrutiny of European issues just because of the quality of it. They were not intending to be critical of the House of Commons' process, but they have certainly spoken about the House of Lords, your Lordships' reports.

Q465 ***Chairman:*** Do they have any impact in Brussels?
Mr Murphy: They do. I think the example your Lordships have already reflected on, the Report on the wholesale prices of roaming charges on mobile phones, has certainly had an impact. It is now part of the established orthodoxy that your Lordships' reflections on that had an impact on the Commission, and a really effective impact.

Q466 ***Lord Wright of Richmond:*** Minister, earlier you said that the House of Lords had a tendency to ask for examples. Can I ask for an example? Do you actually know of any case where a House of Lords report by the Select Committee has led to legislation? I asked this question, actually, at UKREP and I got a general reply, but I do not think they were aware of any specific cases.
Mr Murphy: The only specific is the one I shared with you, but that was not in legislation, that was about amending a proposal on mobile phone roaming charges. That is the one which I think is the most

talked of, clearly because it has undoubtedly had an impact, but again if your Lordships wish me to reflect on it further I will happily do so.

Q467 ***Lord Wright of Richmond:*** It is perhaps for us to answer my question!
Mr Murphy: But that is the one which generally is regarded as having had—I am not sure about an immediate, but a substantial impact.
Baroness O'Cathain: That is partly due to the fact that it affects practically every consumer. There are a lot of things which I think we probably have had an impact upon which are more general, particularly in the agricultural area and things like that, going back over the years. I am sure we would be able to find out, actually, just to answer Lord Wright's question.

Q468 ***Chairman:*** The reports you mentioned are reports on individual proposals already made, and I think we would be interested to know whether there is more scope for actually influencing what proposals come forward. That would have to be at the level, I suppose, of the annual or multi-annual work programme?
Mr Murphy: The multi-annual. If your Lordships wish, I will happily reflect on whether there are better ways in which we can share with your Lordships' Committee how we can have an input.

Q469 ***Chairman:*** Yes. It would probably need evidence and discussion. At the moment we simply review them, but perhaps not in that way.
Mr Murphy: On the basis that Europe ministers usually last in their jobs about a year, and I have been in the job about a year, I have no hesitation in agreeing that in future Europe Ministers should give evidence to your Lordships' Committee on the multi-annual review!

Q470 ***Baroness O'Cathain:*** Joking apart, I think it would be an extremely useful thing to do, and it would encourage us, too, because sometimes we think we have spent hours going through this stuff, and where does it all end up?
Mr Murphy: Yes. Let us see if we can work on a way in which both officials and ministers can give evidence to your Lordships' Committee on it.
Baroness O'Cathain: That is a very good idea.

Q471 ***Lord Rosser:*** Would it be correct to say that if any proposal from a committee of this House about future legislation was to have any real impact it would have to have the support of the UK Government of the day, or are you suggesting that we could be so influential that even if the UK Government of the day was less than enamoured with what we had to say the Commission might decide nevertheless to take it on board?
Mr Murphy: With the support of Her Majesty's Government, of course your Lordships' observations would be strengthened, but actually my reading of the Lisbon Treaty would be that actually in future it would not require the support of Her Majesty's Government to block a Commission proposal on the grounds of subsidiarity. In future, a third of the votes of national parliaments can ask the Commission to reflect and reconsider. Half would initiate the orange card, and then on those grounds of subsidiarity the Commission would have to take the proposal to the European Parliament and to the European Council, and if either the European Parliament or the European Council objected, then the proposal would fall. So it is certainly my reading—more than my reading, it is my understanding that in that circumstance where more than half of the votes assigned to national parliaments objected to the proposal and either the European Council or the European Parliament supported the objection, then the proposal would fall. So the short answer is, yes, it could be done in future without the support of Her Majesty's Government.

Q472 ***Lord Rosser:*** Including initiating legislation as opposed to responding to it, because that is the distinction which is being drawn?
Mr Murphy: No, this would be in responding and objecting rather than initiation.

Q473 ***Lord Rosser:*** But what about initiation?
Mr Murphy: On initiation, I think it would be fair to reflect that it would require support. It would be difficult for it to succeed, I think, without the support of Her Majesty's Government. It would not be impossible, because the report could impact upon the dynamics in Brussels in such a way that other Member States would support it and the UK could not gather a qualified majority, a blocking minority, but that is unlikely.

Q474 ***Baroness Kingsmill:*** Do you think the influence of lobbyists in the Commission is sufficiently transparent?
Mr Murphy: Not yet, no.

Q475 ***Baroness Kingsmill:*** How do you think it could be made more transparent? If you would elaborate just a little.
Mr Murphy: It is my understanding that the European Parliament in particular is the second most lobbied organisation in the world after the Hill in the US. In that context, for all sorts of reasons, there needs to be further improvements in the organisation and regulation of lobbyists. What is being proposed I think in principle is sensible, but we will have to look at the detail. With that caveat, I think what is being proposed is sensible, which is a voluntary

registration process but a binding code of conduct. That sounds a little bit contradictory, but the reason why I think it is about right is because in a very short time indeed the first question which would be asked of any organisation of lobbyists is, "Are you a Member of the Association? Are you bound by the code of conduct?" The proposal is that once you are on the register you would be compulsorily bound by the code of conduct.

Q476 ***Baroness Kingsmill:*** Yes. In the US, of course, it is much easier to recognise a lobbyist when you see one, so to speak.
Mr Murphy: Yes, almost every second person.

Q477 ***Baroness Kingsmill:*** Indeed, and they actually are registered lobbyists, so you are able to find out what interests they are actually representing. So politicians and the like do not fall into traps or anything else like that. It is not quite so clear, is it, in Europe?
Mr Murphy: No, it is not. I think that is a very fair observation, which is why there are these proposals. It probably is not the end of the process, but it certainly is an important improvement. Again, we will happily share with your Lordships, as this conversation of the lobbyists evolves, our thinking on it, but I think it would be an improvement. A voluntary register but a compulsory code of conduct, I think, would –

Q478 ***Chairman:*** What would you put on the voluntary register?
Mr Murphy: This would be, "I am a registered lobbyist."

Q479 ***Baroness Kingsmill:*** **"**And these are the interests that I represent"?
Mr Murphy: Yes. As I understand it, the proposal is—but we still have to discuss the detail of it—"My name is Mr Murphy and I am from this lobbying organisation," and because I am on the register you know that I abide by the code of conduct and therefore, if you like, it is like a kite mark of some sort and you know that you may be judged against the code of conduct. For it to mean anything there would have to be the capacity to throw you off the register, to suspend you or expel you from this accepted list of lobbyists. These are the types of things we will have to work through.

Q480 ***Lord Burnett:*** I do not understand why it should be voluntary registration. You still have not really explained why it should be voluntary and not compulsory.
Mr Murphy: These are not our proposals, these are proposals emanating from the Commissioner for Parliament. We have not come to a firm view on it. We still have to hear much more about it. There may be a logic as to why it is voluntary, why the membership is voluntary and the code would be compulsory, but I am happy to share our thinking with your Lordships as this evolves.

Q481 ***Baroness O'Cathain:*** At the risk of sounding extremely cynical, do you see any chance at all of that action materialising?
Mr Murphy: I think it is unavoidable. I actually think it is probably unavoidable.

Q482 ***Baroness O'Cathain:*** What would the sanctions be against people who would not register and who still continue to lobby?
Mr Murphy: I think Members of the European Parliament and the Commissioners would not meet them. I suspect a culture would evolve whereby one Commissioner would say to another, or to a senior official, "Why are you meeting someone who is not a senior official? Why are you meeting someone who is not on the register, who does not abide by the code, who is not transparent, reputationally and culturally?"
Chairman: Maybe the code would be two way. Maybe the code would bind the Commission as well.
Baroness O'Cathain: Yes.

Q483 ***Lord Burnett:*** The sanctions point is interesting.
Mr Murphy: This is my personal reflection, that for an organisation to sign up to the code there would have to be consequences for them not abiding for it, otherwise it is relatively meaningless.

Q484 ***Chairman:*** It is meaningless, yes, and would the register disclose financial interests too? We had some interesting evidence from an entirely laudable source, the World Wide Fund for Nature, about the extent to which NGOs are paid by the Commission, funded by the Commission in order to lobby the Commission, including on subjects dear to the Commission's heart, such as the issue about the extent to which the seven principles in the environmental programme could and should survive in relation to the Lisbon agenda of deregulation. You might like to consider that in relation to your register.
Mr Murphy: Yes, of course.
Baroness O'Cathain: I am sure, my Lord Chairman, we could share that with the Minister!

Q485 ***Chairman:*** It is all public.
Mr Murphy: I am very interested in it, yes.
Baroness O'Cathain: It was fascinating.

Q486 ***Lord Wright of Richmond:*** I think we have actually covered very fully the extent to which the Commission involved Member States in the

initiation of legislation and I really want to move to one particular instance and that is common law countries, including of course the UK. Do we find ourselves at a disadvantage, being the minority, common law countries in the EU, particularly in the area of justice and home affairs?
Mr Murphy: I think that danger always exists, but we mitigate against it by virtue of how active we are, along with others, ourselves, the Cypriots, the Maltese and the Irish. Previously my understanding is that there was something called a common law club. Perhaps recently it has not been as coordinated as it has been in the past. That worry exists, but I think we have mitigated it because of the level of activity and the fact that there are four of us, and between us we have very significant influence and I think there is a genuine understanding of the different legal provisions.

Q487 ***Lord Wright of Richmond:*** Is it a problem you have been personally aware of in your discussions in Brussels and meetings of the Council?
Mr Murphy: On the periphery of the conversation about the Lisbon Treaty there were some issues around the different legal traditions. Even, for example—this is related to but not specific to this point—the legal traditions around the workplace. Without going into too much detail about the Charter of Fundamental Rights and the protocol on the Charter of Fundamental Rights, we come from a different legal tradition in terms of the role of trades unions in collective bargaining in society from some others, so these things complicates it. Of course it complicates, but I think it is managed pretty well.

Q488 ***Chairman:*** What about personnel within the Commission? There is a number of high-ranking civil servants who are of British origin and are legally trained in the Commission, and they play an important part. Is that something which can and will be assured for the future, because there has been concern to the contrary?
Mr Murphy: I think it is important that either seconded or personal staff embed a common law knowledge within the Commission. That is important, and actually contrary to the concern which exists we are currently looking for ways in which to increase the level of permanent or seconded staff that we give that degree of common law knowledge to.

Q489 ***Chairman:*** Is this a change of policy, because there was a lot of publicly expressed concern towards the end of last year?
Mr Murphy: I do not think it is a change of policy, but do I think it will change publicly expressed concern? I do not think it is that either. It is something we are committed to doing and the Ministry of Justice and the Home Office are looking at active ways of—embedding has got terrible connotations, of course, but posting on a permanent basis or the secondment of staff with this knowledge of a high enough quality that would have that effect. We are actively looking at ways in which to do that. Is that a change of policy? I do not believe so. Will it assuage publicly expressed concerns? I hope so.
Chairman: Can we move then to a different subject? I am sorry that Lord Lester is not here, because he has a particular interest in fundamental rights, but Baroness Kingsmill would like to ask a question on the same subject.

Q490 ***Baroness Kingsmill:*** Do you consider that the principle of subsidiarity is adequately taken into consideration? I am quite sure that this could be more elaborately put, but cutting to the chase—Lord Lester, undoubtedly, would make more of this, but I would be interested to hear your views.
Mr Murphy: Cutting straight to the chase, first of all it is something which the UK is one of the principal advocates of, as I think your Lordships will be aware, and as a consequence we are one of the Member States who are most careful about it, going back to the Edinburgh European Council in 1992, and we have been pretty active since. We have certainly been very active across whichever party has been in power and will continue to be so. It is something we have to be mindful of and continually watchful of.

Q491 ***Chairman:*** Is it not right to say that there has been a programme which, following 9/11, has focused on some of the problems revealed, or potential problems revealed, in relation to matters like terrorism, money laundering and other things—the European Arrest Warrant comes in there, too—but there is concern that the Community has not shown itself as active in the countervailing guarantees of civil liberty? Is that a concern which Her Majesty's Government shares?
Mr Murphy: I think on the Charter of Fundamental Rights, and being proactive on the fundamental rights, I would not share the criticism of European institutions on this. I think there is a real substantial programme of work about legislative proposals, the methodology around legislative proposals, ensuring that they do guarantee fundamental rights as a whole. There is a litany of initiatives and protections around that Charter of Fundamental Rights that I do not think could lead a reasonably objective observer to come to the conclusion that the Commission and other institutions are not mindful of civil rights and civil liberties. In fact, in common parlance in the UK—but this is not the best way of judging it—the opposite accusation is made much more regularly.

Q492 ***Baroness Kingsmill:*** Minister, perhaps just to elaborate a little more on that, how would you describe the balance as between the sense of being proactive about human rights and the sense that there must be limitations, perhaps, by reason of external threats? Just give us some sense of your understanding of the balance and the balance the Commission takes into account.
Mr Murphy: I think the Commission and other European institutions see themselves—I think rightly—as defenders and promoters of fundamental human rights within the European Union and beyond, and it must surely be a European value to do that. I have never bought into today and do not share the analysis which says, "We've gone too far. Our citizens' liberties are at threat from those who claim to seek to protect them." I think it is an important role which the European Union, the Commission, have to protect those fundamental human rights. In terms of external threats, issues about counter-terrorism, cooperation, and matters of that nature—and this is a slightly political answer so I hope you do not mind—my sense is that the fundamental civil liberty and human right is to be free from the threat of a terrorist attack. I know that is a slightly political answer, and therefore it is about getting the balance right between the modern European value of human rights but without jeopardising our safety. I think on most occasions certainly the vast majority of Member States get it right. On most occasions the vast majority get it right.

Q493 ***Lord Wright of Richmond:*** Could I please pick up the other end of this question, which is the part about subsidiarity, more generally, how it is taken into account in the development of legislation? I have to confess that when I listen sometimes to Commissioners and Members of the DG talking you do get the impression that subsidiarity is the last check on their list. In other words they start, as you can imagine they would, with saying, "I want to fix it. Here's the answer." I remember listening to one Commissioner talking about why the EU was introducing quite complicated regulations about traffic flows through tunnels and justification of subsidiarity, "Well, you know, we think it's a necessary thing to do. We don't think the countries would do it themselves because they don't see it as important, so it is obviously an important thing for the European Union to do because we should step into this breach," which is a justification you could use for doing anything in effect. I just wonder whether, firstly, you share my perception, and secondly whether there is anything we could do to put the subsidiarity check earlier on in the list of initiation?
Mr Murphy: Again, without pre-empting your Lordships' reflections on the business in your Lordships' House today, tomorrow, and I think next week—and please forgive me if you think I am in any way trying to impinge upon your Lordships' debate, but I think the Treaty does set out new powers for national parliaments, in particular those we have already reflected upon. Those are powers, of course, to block rather than to initiate. The fact that every national parliament has two votes on subsidiarity, the yellow card and orange card process—and perhaps in ten years you will call this assertion naïve, or perhaps in less than ten years—the expectation will be that the fact that every parliament of a Member State has these votes and working together through the networks the national parliaments and scrutiny committees have, I think there is a sense that the scrutiny committees of national parliaments are entirely separate organisations with no networks and no influence and do not share the information, but we know that is anything but the truth. In fact we have active gatherings of the chairs of these scrutiny committees, and the fact that it would only require a third to force the Commission to re-think and a half to potentially completely lead to the proposal being blocked if either the European Parliament or the Council agreed, that should change things in terms of a concern that the Commission may have about the re-balancing of the argument about subsidiarity. You take it up and we welcome it. We think it is an important thing because this is one of the countries which argue passionately about the importance of subsidiarity. We think these new powers for national parliaments in every Member State on subsidiarity grounds are important.

Q494 ***Lord Wright of Richmond:*** So implicitly, or explicitly, you are agreeing that the pendulum does need to swing?
Mr Murphy: I am implicitly and explicitly stating that the pendulum always has to be in the right place!
Baroness O'Cathain: Absolutely!

Q495 ***Chairman:*** This ties in very frequently with the time limit for deciding whether to opt in and there is liaison with the scrutiny committees on this. Does it follow from what you have said that the Government would be, on occasions, actively drawing to the attention of scrutiny committees possible subsidiarity problems?
Mr Murphy: Baroness Ashton has appeared before your Lordships' scrutiny committee, and your Constitution Committee earlier today and I hope gave a good account—I am sure she will have—of what the Government is suggesting in terms of the way in which national parliaments can have an important and significant influence over the opt-in on justice and home affairs issues.

Q496 ***Chairman:*** I think what it really means is that we would ask for explicit and helpful explanatory memoranda in relation to any particular proposals you felt you could possibly give us. There may be considerations which make it difficult to disclose all the reasoning, but the more the better.
Mr Murphy: Baroness Ashton has a package of measures which she shared with your Lordships' scrutiny committee, and certainly an explanatory memorandum was one of the elements of the package.
Chairman: Yes. Baroness O'Cathain has a question.

Q497 ***Baroness O'Cathain:*** How effective is the Commission's policy for better law making? This is right up your street, I think. Are the principles of better regulation observed? You have already said, "Not really." Are the arrangements for impact assessments working satisfactorily? To use your own words, they "need improving," so have you anything to add to all those?
Mr Murphy: I wish we had had this question first, because we could have done this for the whole session!

Q498 ***Baroness O'Cathain:*** It is what they call a "wash-up".
Mr Murphy: Okay. Never let me have this sort of question first, if I ever come back, because we will spend a whole hour and a half on it! The Commission has improved under President Barroso's leadership. I think there has been real improvement.

Q499 ***Chairman:*** How have they achieved the improvement?
Mr Murphy: As Commissioners, first of all they agreed to a 2007 target of a 25% reduction of regulation. That in itself is very, very important, but there is more to be done. There is more to be done on whether it is just on the floor for new regulations or whether it is on the stock of existing regulations. We continue to argue that it is on both, on the floor and on the stock.

Q500 ***Baroness O'Cathain:*** Well done!
Mr Murphy: There are things on this better agenda about better consultation which they have improved again, but we can go further. We all could go further. The UK Government could go further and better, of course we can, on consulting earlier, consulting more widely, consulting in particular the smaller businesses. Sometimes the consultation has only been with large businesses and occasionally it has only been multi-national businesses. There could be post-implementation assessment, whether the impact assessment was a fair prediction of the likely impact, and therefore we would know how to judge the validity of this year's impact assessments by the accuracy of the impact assessment predications three years ago. So all of those things. I think the pace of this change is really very good, but it has to continue.

Q501 ***Baroness O'Cathain:*** Could I ask a very simple question? On a rate of one to ten (one being the worst and ten the best) where would you find each of those, or where would you actually put them at the moment—better law making, better regulation and impact assessments? In other words, looking at the post-implementation of the impact assessments.
Mr Murphy: I think on better law making probably seven. On better regulation observed—but there is so much to that because, for example, Member States demand and the Commission does things. The European Parliament demands and the Commission does things. For effort, I think the Commission has gone in the past five years from three to eight and a half. But the danger is that we always blame the Commission and occasionally we have to look in the mirror and say, "What about us?"

Q502 ***Baroness O'Cathain:*** I was coming on to that, actually.
Mr Murphy: I will give us 10 out of 10! It is a product of the demand to do things. It is an aversion to risk. It is a "something must be done"-ism, and that is the vocabulary and the dynamic of European politics. It is not just in the UK, it is across the Continent. So I give them high marks for effort and I hope that with that effort in three years, perhaps, we will give them high marks for results as well.

Q503 ***Baroness O'Cathain:*** The only one you have left out of that is the impact assessments.
Mr Murphy: I think it is too early to say. I think it is probably too early to say.

Q504 ***Baroness O'Cathain:*** I see. That is a really difficult area?
Mr Murphy: I think what they could do on impact assessments more effectively is to say—and this is not easy, it is difficult—"We think this regulation will cost X amount." That is something across Europe. I think that is something they could get much better at, monetising the likely impact of the regulation. I think they could get much better on that. Again, we all could, but that is certainly something the Commission could get better at.

Q505 ***Lord Wright of Richmond:*** Minister, could I just ask a very quick question, because the evidence we have had revealed to us that there is a body which is supposed to be an independent impact assessment

assessor. I do not think I have got the title right, but we discovered that far from being independent, it is actually within the Commission. Have you come across this at all?
Mr Murphy: Only in preparing for today!

Q506 ***Baroness O'Cathain:*** It is difficult to know who is gamekeeper and poacher now!
Mr Murphy: My view, on the basis that I was the better regulation minister and had not been aware of this board until preparing for today, is that that says something about me! I think Member States are really the important lever on this, I think they really are, which is why it was important that seven or eight of us got together in Prague a fortnight or so ago.

Q507 ***Chairman:*** Minister, on a technical/legal level in relation to better law making, is there a case for some sort of internal but nonetheless separate body of specialists which reviews the quality from a legal viewpoint of proposals as they are drafted, a law commission or a parliamentary draftsman's department at the European Community level, because we have heard that the basic drafting is actually done usually within the Directorate-General? The legal department might cast a quick eye over it at a late stage.
Mr Murphy: I have a relatively open mind about that. If it fixes a genuinely identified problem, then we should listen, but on the condition that they stop doing something else.

Q508 ***Chairman:*** We have seen proposals, obviously, which we have found unsatisfactory in their drafting quality, internally inconsistent or not thought through.
Mr Murphy: Ill-thought through—again, a shared blame, the Commission and on occasion Member States. But poor drafting—if your Lordships have a systematic assessment of that having happened—of course there are instances where it has happened, of course there are, but if it is a systematic failure, certainly I am happy to listen to your Lordships' assessment of that. In fact, on the basis that your Lordships have asked the question, I will additionally reflect from the Foreign Office as to whether that situation is getting better or not, but I would happily listen to any further observations your Lordships have on this. As to whether the solution would be along the lines you suggest, I am not clear, but if you think there is a need for further action and improvement in terms of the quality of the people and the quality of the work, we would be happy to listen.
Chairman: Minister, and Mr Guha, unless there is anything more you would like to say to us—and you have the opportunity for afterthoughts—thank you very much indeed for coming and for your time.

Supplementary letter from Mr Jim Murphy MP, Minister for Europe, to Lord Mance, Chairman of Sub-Committee E (Law and Institutions)

INITIATION OF EU LEGISLATION

Following my evidence session to your Committee on 4 June, I promised to write to you with further details on the Government's position on the current arrangements for initiation of EU legislation, and the changes likely to ensue after implementation of the Lisbon Treaty.

The Committee was interested in exploring some of the reasoning behind the plan to change the right of sole initiative by Member States on JHA issues to require at least a quarter of Member States to put forward proposals, and asked why this was not being extended to other First Pillar issues. The decision to change the current provisions underline the sensitivity of the issues (police and judicial cooperation in criminal matters) concerned, but also reflect the reality of putting together workable proposals from the outset. As I mentioned in my evidence, the best proposals in this field have often been the ones that have been sponsored by a group of Member States. JHA is very much a special case, and will remain so after Lisbon. As far as existing First Pillar policy areas are concerned sole right of initiative rests with the Commission, and the UK supports continuation of this.

I undertook to provide examples of instances where an individual Member State has put forward Justice and Home Affairs initiatives that have not found support from the other Member States. In 2003, a Greek Presidency initiative for a Framework Decision on the application of the principle *"ne bis in idem*" (double jeopardy) did make some progress, but after lengthy discussions it became clear that unanimity could not be achieved.

A 2004 Belgian initiative for a Framework Decision on *recognition and enforcement of prohibitions arising from convictions for sexual offences committed against children* suffered from a lack of proper preparation and co-sponsors. The proposal was eventually dropped when it became clear that unanimity could not be achieved (though some elements were incorporated into a related Commission proposal on the exchange of criminal records).

The Committee explored the issue of how far Commission initiatives could come as a surprise to the Government. The UK works closely with Member States and the Commission on forward work programmes, and we make our views on policy and proposals known through the UK Representation to the European Union and other channels. Moreover, the general timescales on initiatives make it hard for the Commission to bounce the Council on specific issues. But it is sometimes the case that internal Commission discussions can lead to formal proposals that differ from Member State expectations. Ultimately, it is up to the Commission, the Council and, in many cases, the European Parliament to work out reasonable compromises.

The Committee asked me about the level of influence of the House of Lords on European legislation. Through the scrutiny process in particular, the Government takes Parliament's views fully into account when deciding on our stance in European negotiation. The reports of the EU Select Committee can help influence legislation. As well as the success of the Committee's influence on mobile phone telephony, I can also point to the Lords Report on the EU strategy on biofuels "From Field to Fuel" (20 November 2006), which advocated the development of a European wide system of evaluation and certification of the lifecycle environmental performance of both imported and domestically produced biofuels. Shortly after the report's publication the European Commission started to work on such a system, which has now been incorporated into the draft Renewable Energy Directive.

The Committee was interested in exploring the scope for the UK to influence further the Commission's multi-annual work programme. The Government is proactive in working with the Commission and Member States to ensure a coherent work plan, both at the five-year and annual levels (the Commission publishes an annual policy strategy that is the subject of scrutiny by the main Committee), and would welcome further interest in this strategic policy work from the Committee.

At the evidence session, the Committee asked me about Commission and EP proposals on regulating the activities of lobbyists. I should like to draw the Committee's attention to the fact that I have just signed an Explanatory Memorandum on the Commission's recent Communication on the Voluntary Register and Code of Conduct for Interest Representatives. The document will, of course, be subject to Parliamentary scrutiny.

The Committee asked me for my views on whether the quality of drafting of legislative proposals in Brussels is improving. There has been a great deal of reflection over the years on how to improve quality of drafting of Brussels legislation and valuable work has already been done in elaborating common guidelines on the quality of drafting of EU legislation—underpinned by Interinstitutional Agreements. But there is certainly room for improvement here and the Government will continue to make suggestions to the Commission about how to improve policy development and legislation.

During the evidence session, I mentioned that I had recently visited the Czech Republic for a seminar on better regulation. During my visit, I signed a declaration with representatives of the Czech, Swedish, Danish, Estonian, Dutch and German Governments.

June 2008

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Written Evidence

Letter from Mr A M Burchell to Sub-Committee E (Law and Institutions)

After reading David Craig's book "Plundering the Public Sector" I felt the need to promote more openness and honesty whilst protecting taxpayers' money from false or fraudulent claims associated with costly (IT) systems development/management sold to the UK government.

My idea involved adopting a stronger legal framework encompassing The False Claims Act, The Clinger Cohen Act and the financial incentive contained in Qui Tam whistleblower provisions. These measures have proved to be successful in the US.

I believed new legislation might reduce the tax burden of European Citizens and so in 2006 I emailed London MEPs in the hope that elected representatives, empowered to influence lawmaking would take up my proposal and lobby EU Institutions to strengthen whistleblower protection by adding a financial incentive to those who expose wrongdoing.

In a letter sent to London MEPs I suggested that the Commission consider adopting US law, more specifically Qui Tam, The False Claims Act and The Clinger Cohen Act.

I have provided written evidence of my experience for committee members to examine in their inquiry into the Initiation of EU Legislation. All letters and articles are referenced, and can be presented to the committee to support the inquiry.

3 March 2008

Original email sent: 11/9/06

I understand that the Eurojust Joint Supervisory Board are looking at Whistleblowing "hotlines" in relation to changes in US law covering corporate governance. Adoption of The Sarbanes Oxley Act 2002 would strengthen a company's internal checks and balances by ensuring that financial reporting exercises full disclosure.

Are the board also considering adopting the Clinger Cohen Act, which improves the value US government/ citizens get from Information Technology Systems?

I'm no expert but it would seem a good idea to change the excessive behaviour of so-called experts and consultants advising the UK government.

With proven success in the US perhaps a new legal framework should also embody The False Claims Act, which dissuades companies defrauding government of billions. It's been valuable to US citizens because it contains the Qui Tam or whistleblower provision whereby any citizen/whistleblower can be awarded a portion of any funds recovered, usually between 15–25 per cent. Adopting these legislative measures would help expose "wrongdoing" and save taxpayers a lot of money, which could be redirected to front line public services.

Finally, have you considered reading David Craig's book "Plundering the Public Sector" about how so-called experts and consultants have taken £70 billion of UK taxpayers' money?

Memorandum by Tony Burchell

1. Written evidence prepared for the House of Lords European Union Committee inquiry into Law and Institutions for Sub committee E members to examine where ideas triggering work for legislation come from. As an EU citizen, in 2006 I emailed London MEPs about adopting Qui Tam whistleblowing incentives within the Sarbanes Oxley Act (SOX).

2. John Bowis 15/9/06 responded "this is not within the competence of my own committees in the Parliament, which are Environment & Health and Development". He concluded "I will raise this with the Commission and with my colleagues on the relevant Committees".

3. Claude Moraes 21/9/06 "Corporate governance and accountability" said he had contacted the Secretariat of the Eurojust Joint Supervisory Board, but was unaware about Eurojust considering whistleblowing hotlines. He told me about the history and role of Eurojust and concluded by outlining the European Commission aims "to combat corruption through a combination of strategies, including Eurojust and the Anti-Fraud Office (OLAF)", signposted me to the European Union's anti-corruption policy.

4. Baroness Sarah Ludford's 25/10/06 "Whistleblowing Provisions" directed me to article 29 Working Party (EU data protection commissioners) opinion on Sarbanes Oxley and EU data protection legislation. She emphasised that "The UK already has specific whistleblowing legislation". She highlights how the Public Interest Disclosure Act 1998, Act protects most workers (in the public, private and voluntary sector) from detrimental treatment or victimisation from their employer if, in the public interest, they blow the whistle on wrongdoing or make a protected disclosure". She thanked me for recommending the book, saying "I will try to find time to read it".

5. Now the idea was being considered by MEPs, other EU actors and forwarded to European Institutions I wondered what role I had played in initiated EU Legislation.

6. However, Franco Frattini 28/11/06 outlined the process of consideration and negotiation of new EU legislation in the field of corporate malpractice and revealed he was "not aware that the Eurojust Joint Supervisory Body is looking at whistleblowing hotlines". He outlined how legislation is generated inside the Commission and why the Commission adopted the Communication on Preventing Corporate and Financial Malpractice in 2004, "issued after the Enron and Parmalat scandals, outlines a strategy for co-ordinating action in the financial services, company law, accounting, tax, supervision and enforcement areas, with a view to reducing the risk of financial malpractice".

7. John Bowis 28/3/07 response from Klaus Tolksdorf, Joint Supervisory Body noted the letter to Mr Frattini regarding "constituents" question are "Eurojust considering provisions similar to those contained in the US Clinger Cohen Act", and concluded that the Joint Supervisory Body of Eurojust had confirmed that Eurojust was not considering these provisions and disclosed that "Eurojust would not be competent to deal with these issues".

8. Communication from JSB Eurojust, the Vice President of the European Commission and MEPs indicated my proposal lacked the necessary quality to entice other interested parties to support strengthened whistleblowing provisions. Though the idea was not seriously considered for legislation my responses suggested that individual citizens had the right of initiative. Respondents were also open about their limitations and clear about the reasoning behind the decision making process.

9. As a constituent, my assessment is that I learned more about the developmental process and how priorities are determined regarding how legislation is generated inside the Commission.

10. However, the "signposted" documents were huge, and heavy reading which made me aware of the volumes of paper work created by the Commission and the importance of scrutiny and "openness" when considering and responding to ideas from external actors. As a source of information on which the Commission draws, Eurojust willingness to engage with constituents questions, demonstrates the significance of views from other EU Institutions and forwarding of constituent letters by MEPs as the above account illustrates, provide the Union some impetus for an ideas development".

11. All EU actors and Institutions attempted to explain their general political guidelines.

12. Although the proposal failed the letters I received highlight the developmental process of legislative proposals, and how the views of EU bodies and agencies are anticipated and sought informally.

13. The above evidence of my experience illustrates the significance of the views of an individual citizen and the relationship between Member State, Members of the European Parliament in the process of an ideas initiation.

14. Continuing the theme of how ideas are developed the following Media accounts highlights how the creation of proposals associated with Qui Tam and Sarbanes Oxley were interpreted by the Home Office to illustrate how State Institution's, "spins" ideas in the Media.

15. 25/5/07 The UK's Home Office presented the *Daily Mail* with the idea of offering financial incentives to "informers". Citing Qui Tam, Home Affairs Editor James Slack helps lift the veil on how ideas are interpreted and spun. The article reveals how other interested parties, in this case Home Office Minister, Vernon Coaker sees Qui Tam's value.

16. Instead of tackling white collar crime "the informant plan" emphasises the benefits of targeting "benefit cheats, and those who evade VAT by bringing cigarettes and alcohol from abroad for resale".

17. Qui Tam's financial incentive could help people "Shop thy neighbour and make a fortune". This headline by *Daily Mail*, Home Affairs Editor James Slack, goes on to outline Coaker's idea about how "rewards could be paid for exposing VAT fraud" whilst stressing that the "informant plan" was merely a "consultation idea, based on a strikingly successful scheme in the US, known as Qui Tam, which has recovered £5.5billion since 1986 whereby those who 'shop' cheats receive between 15 and 30%". Coaker also indicated that the way officials seize assets raises questions under human rights law.

18. 28/3/08 nine months after *The Daily Mail's* story, Ben Morris, BBC Business reported that the Financial Services Authority (FSA) wanted more aggressive regulation similar to the powers available to their US counterparts the Securities and Exchange Commission (SEC) Tracking insider dealing and other financial crimes, Ben Morris suggested that there is a growing demand for stringer whistleblower proposals.

19. Introduced through legislation, the (FSA) would get "specified prosecutor status" allowing greater protection to whistleblowers. Morris tells how Sarbanes Oxley Act legislation offers better protection to whistleblowers when they approach the authorities about illegal activities and concludes "since white collar criminals are often desperate to avoid jail, they are open to doing deals".

References

(1a) Letter: John Bowis 15/9/06.

(1b) Letter: Claude Moraes Ref: LC/BURC02001/02060331.

(1c) Letter: Baroness Sarah Ludford Ref: EU issues/data protection/Burchell 10.10.06.

(1d) Letter: Franco Frattini Vice President of the European Commission Brussels, 28/11/06 1594.

(5b) *Daily Mail* 25/5/07 "Shop thy neighbour and make a fortune".

(5c) BBC News Business 28/3/08 "Policing the Markets: US vs UK".

3 March 2008

Memorandum by Directorate-General Environment, European Commission

1. The framework for environmental policy-making in the European Union is set out in the Sixth Environment Action Programme (6th EAP). It was adopted in 2002. Adoption was preceded by a wide public consultation which had been launched by the Commission in 1999. The 6th EAP identifies four priority areas (climate change, nature and biodiversity, environment and health, natural resources and waste), defining the objectives and actions to be undertaken. A recent mid-term review the 6th EAP confirmed its validity.

2. Based on medium-term strategic objectives, the Commission sets its goals through a Strategic Planning and Programming (SPP) cycle, culminating in an annual Commission Legislative and Work Programme (CLWP) which is further translated into operational form by Annual Management Plans in each Directorate General, including Environment.

3. In the context of the renewed "Lisbon Strategy", the Commission aims through "better regulation", to reduce administrative burden and ensure clear, understandable and up-to-date legislation. An example is the Directive on Industrial Emissions, adopted by the Commission in December 2007, which draws seven pieces of legislation into a single, simplified form.

4. Impact assessments are required for practically all new legislation. The aim is to assess the economic, social and environmental impact of policy proposals.

5. The Better Regulation strategy reinforces dialogue between stakeholders and regulators both at the EU and national levels. For its part, the Commission consults regularly with businesses, regional and local authorities, NGOs and academics when elaborating its policies. Consultation papers, communications, expert groups, workshops and forums are commonly used. Often, a consultation takes place in several stages during the preparation of a proposal. A current example is a Green Paper on Adaptation to the effects of climate change, published in 2007 to be followed by a White Paper in autumn 2008. The Environment Directorate-General liaises regularly with directors in the national ministries of the Member States in the fields of water, waste and nature protection.

6. Environment policy-making and revision result from the continuous gathering, processing and analysis of new and emerging research and information. Sources typically include data resulting from studies commissioned for specific purposes; statistics and analysis of trends on the state of the environment from the European Environment Agency; information from international bodies in which the Commission plays a role, such as the World Health Organisation, the OECD and other more specialised international negotiations to which the EC and Member States are party.

7. The Conclusions of the European Council and the European Parliament regularly ask for action by the Commission on specific policies. And the Commission subsequently works on developing the appropriate policy response.

8. Individual Member States largely define the agenda-setting and the prioritisation of initiatives, notably during their period in the chair as president of the Environment Council.

9. The Commission formally consults the Economic and Social Committee and the Committee of the Regions on a range of issues defined in the EC Treaty. In certain cases consultation is mandatory while in others it is optional. The views of the Economic and Social Committee are sometimes channelled via exploratory opinions. They reflect, in their areas of competence, interesting contributions on specific environment-related subjects.

10. Judgements by the European Court of Justice are taken fully into account in the (re)definition of proposals.

11. The views, concerns and expectations of the European Parliament (EP) are channelled to the Commission through hearings, oral and written questions to the European Commission and Resolutions which feed into the further development of initiatives and proposals.

12. The views of the Member States, expressed both formally and informally, are taken fully into consideration. Formal dialogue between the Commission and the Council takes place during the co-decision procedure since the Council is one of the co-legislators. Informal dialogue is important throughout the entire legislative process and particularly so in the process of defining policy. Informal contacts can take many forms. High-level officials from the ministries of the Member States are frequent visitors to the Environment Directorate-General. This facilitates a constant flow of information between the Community and national administrations and other groups which then can feed into the proposals of the Commission. Also, the Directorate-General has a significant number of national experts seconded by their national ministries to Brussels for a certain length of time, typically two to three years.

13. Since 2006, national parliaments can transmit their views via opinions sent to the European Commission on policy documents such as green papers or white papers. Recently, the ship dismantling and the climate change adaptation green papers have attracted the keen interest of national parliaments.

14. The Commission is an "open" institution. Ideas are sought and developed with input from a broad range of parties likely to be affected by the policy under development, including expert forums, regional and local government representatives, key business and interest groups, scientific networks and individuals. This complements input from formal bodies such as the European Council, the sectoral Councils and comitology committees. Eurobarometer surveys conducted on behalf of the European Commission serve as a valuable tool for examining public opinion on a large number of issues related to the EU policy-making.

15. Climate policy is a typical example of a current ongoing policy development. It is widely acknowledged as a global issue that requires global leadership. At this time the EU offers such leadership, providing the critical mass necessary to ensure successful promotion of EU policy positions. The climate change policy proposals and strategies developed by the European Commission are those required to reach the objectives already agreed at EU level. It is also important to define fair and viable climate policies which avoid creating distortions in the internal market in the EU. All policy proposals by the Commission are solidly underpinned by intensive impact assessment and economic modelling work that are at the cutting edge of climate science.

18 April 2008

Memorandum by the Committee of the Regions (Unit 3—Networks and Subsidiarity, Directorate for Consultative Work)

The Role of the Committee of the Regions in the Initiation of Legislation

As defined in Article 7 of the Treaty establishing the European Community, the Committee of the Regions (CoR) is a political body of the European Union with advisory status. Its main mission is therefore to assist the Commission, the Council and the European Parliament in the preparation of Community legislation and policies by adopting opinions which provide the other institutions with the regional and local point of view on the matters addressed. Accordingly, the Committee of the Regions does not formally have the power to initiate the legislative process in the European Union.

However, throughout the diverse phases of its activity, the CoR has at its disposal several instruments through which it can exercise an influence in determining the initiation of EU legislation and/or specific aspects of EU legislation.

Some such instruments, whereby the Committee of the Regions can provide input at an early stage in the legislative process, are the following:

— In the framework of inter-institutional cooperation and as established by the **Protocol governing arrangements for cooperation between the European Commission and the Committee of the Regions** (R/CdR 86/ 2007 item 3a), the CoR has regular contacts with the European Commission, through which common priorities can be identified. In particular:

1. After the adoption of the European Commission's Annual Policy Strategy (normally in Spring) but before the establishment of its Annual Work Programme (normally in Autumn), meetings at administrative level between the Committee of the Regions and the European Commission take place. These meetings provide a fruitful occasion to exchange views on the issues at stake and priorities identified.

2. On the basis of the Commission's Annual Work Programme, the Commission's Vice-President responsible for relations with the Committee of the Regions forwards to the CoR a list of proposals for mandatory consultation, along with proposals for possible optional consultation. This list also includes documents of a non-legislative nature such as Communications, White Papers and Green Papers, on which the Commission intends to request the Committee's opinion.

3. In the Communication from the European Commission on *Dialogue with associations of regional and local authorities on the formulation of European Union policy* [COM (2003) 811], the Committee of the Regions was asked to organise **Structured Dialogue meetings** between the European Commission and the associations of local and regional authorities. Within this framework, an annual general Structured Dialogue meeting is held usually against the backdrop of a plenary session of the Committee and is attended by the President of the European Commission or its Vice-President responsible for relations with the Committee. Such a Structured Dialogue meeting aims to examine the work programme of the Commission and also serves as a venue for the exchange of views on topics particularly relevant under a local and regional perspective. Other, more specific, structured dialogue sessions can be held, in agreement with the European Commission, generally coinciding with meetings of the relevant CoR commissions.

In addition, discussions are currently being held on the possibility of organising a meeting with the associations ahead of the publication of the Commission work programme, in order to make them aware of the upcoming issues well in advance and to set the ground work for a constructive debate with the European Commission.

4. In the context of its Annual Work Programme, **the Commission can also ask the CoR, after action has been taken, to take part in studies examining the impact *ex post* of certain Directives on local and regional authorities**.[1] Furthermore, discussions are currently being held on the involvement of the CoR in ***ex ante* impact assessments**, carried out by the European Commission before a legislative proposal is issued. Views expressed in such way by the local and regional authorities concerned can prove to be influential in determining whether a relevant proposal is eventually put forward, as well as in shaping its content.

— Within the framework of its main consultative activity,[2] the CoR expresses its views through its **opinions** at an early stage of the decision-making process, and namely in the pre-legislative phase, so as to provide its input on a particular topic on which legislation can be initiated. In its opinions on Commission legislative proposals the CoR has made a number of suggestions for modifying legislation which often, also thanks to the intensive follow-up given by the CoR to its opinions, have been taken into consideration by the EU (co-)legislator(s) in the final legislative acts, thus resulting in concrete legislative measures. The CoR is intensifying its contacts with the European Parliament (EP), which is co-legislator in the majority of areas, with the effect that its recommendations are often acknowledged by the EP. Intensified cooperation includes mutual invitations to the CoR/EP rapporteurs to attend CoR Commission/ EP Committee meetings, joint events, etc.

In particular, the CoR has the following instruments at its disposal:

1. *Opinions on pre-legislative documents*, such as Communications, White Papers and Green Papers. By offering its opinion at the early stage of the legislative process, the Committee of the Regions can influence the content of subsequent legislation.

2. *Outlook opinions*. The European Commission can ask the CoR to issue "outlook opinions" on future community policies. Such opinions are issued before action is taken at the Community level (ie before the Commission comes up with a concrete policy or legislative proposal) and concern topics exhibiting a particularly important local or regional dimension, where the Committee has appropriate information

[1] See "Protocol governing arrangements for cooperation between the European Commission and the Committee of the Regions", point 8.
[2] Article 265 of the Treaty establishing the European Community.

resources at its disposal. Such opinions are accompanied by a specific mandate, appropriate deadlines and a coherent framework of actions to be drawn up by mutual agreement.[3]

3. *Own-initiative opinions*. Own-initiative opinions can be adopted on matters of particular significance under a regional and local perspective, in line with the political priorities of the Committee of the Regions. According to the Committee of the Regions' Rules of Procedures,[4] applications for own-initiative opinions or reports may be submitted to the Bureau by three of its members, by a commission via its chairman or by 32 members of the Committee. The Bureau shall decide on applications for own-initiative opinions or reports by a majority of three quarters of the votes cast.

4. *Resolutions*. Normally at the end of each year the CoR adopts a resolution stating its political priorities for the following year, in line with the adoption of the European Commission Annual Work Programme. More in general, resolutions can be adopted by the CoR on matters referring to the EU activities, which are of topical interest and deal with important concerns of local and regional authorities.[5] Therefore, they represent an instrument by which the Committee can flesh out relevant themes and contribute to shaping the debate at the EU level. A recent example is constituted by the recent CoR political resolution on the "Strategy for Growth and Jobs- Handling the Lisbon paradox", adopted on the 7th of February, in which it regretted the existence of what is identified as the "Lisbon paradox": cities and regions throughout the EU see the Lisbon goals as their highest political priorities and act accordingly, but a majority of them do not feel that the tools made available under the Lisbon Strategy are helpful in pursuing those goals. In addition, the resolution recalled that increased ownership of the growth and jobs agenda "can be achieved only if different levels of government work together to meet the task". Such conclusions were shared by the Resolution of the European Parliament of 20 February 2008. The European Parliament resolution, together with the European Commission Strategic Report of December 2007, also stressed the monitoring role of the Committee of the Regions in this field. These points were echoed by the Spring European Council held on 13 and 14 March 2008, which, in its Conclusions, "recognises the role of the local and regional level in delivering growth and jobs; increased ownership of the growth and jobs agenda at all levels of government will lead to more coherent and effective policymaking". It has to be mentioned that, in this specific case, the CoR resolution followed a request made by the Spring Council itself in 2006 for a CoR report on local/regional issues linked to the Lisbon Strategy.

— In the framework of the **additional CoR activities**, the following elements can also be regarded as potentially leading to the generation of ideas, which could provide input as regards the future initiation of legislation:

1. *Studies* carried out by the CoR on particularly relevant subjects under a local and regional perspective. The research programme of the CoR, which is established annually by the Bureau, foresees that CoR members can submit, via their commission, specific propositions on studies to be conducted on a theme of interest for the CoR. The final selection of the subjects, on which a study will be carried out, is made by the Bureau. The selected studies are carried by an external contractor through a public tender. A concrete example in this regard is the CoR 2001 study on *Trans-European cooperation between Territorial Authorities* (see below section A par 1).

2. *Formal/informal meetings and events* organised by the CoR as a political forum to call for EU legislation, which then later have been reflected in an EU Commission Proposal or EP/Council call for a Commission legislative proposal. One of the fundamental principles which govern the consultative activity of the Committee is that of proximity, under which all tiers of government must aim to be "close to the public", in particular by organising their work in a transparent way, so that the public can easily identify those responsible and know how to make their voices heard. In this regard, the CoR has the objective of bringing the contribution of local and regional authorities to all phases of the decision-making process, including therefore initiation of EU legislation.

EVIDENCE

A. Recent Examples of the CoR Impact on the Initiation of Legislation Include:

1. *EGTC (European Grouping of Territorial Cooperation)*

The CoR has a specific consultative role in the area of cross-border cooperation (Article 265 of the EC Treaty). Within this remit the Committee of the Regions has been one of the main political promoters of Territorial Cooperation and of the EGTC.

[3] See "Protocol governing arrangements for cooperation between the European Commission and the Committee of the Regions", point 8.
[4] CdR 1/2007, Rule 41.
[5] CdR 1/2007, Rule 42.

During the last few years the CoR has contributed to the development of the proposed EGTC regulation by the use of different means:

— **In 2001**, the CoR published **the study "Trans-European cooperation between territorial authorities"**, carried out by the Association of European Border Regions (AEBR).

— **In 2002**, the CoR adopted **an own-initiative opinion** on strategies for promoting cross-border cooperation at local level, arguing for more legal stability and **recommending that the European Commission "take the initiative in formulating framework legislation** on cross-border, inter-territorial and transnational cooperation, **in the form of a framework regulation** covering areas of European cooperation".

— **In July 2004**, the European Commission **proposed a Regulation** on EGCC—European Grouping for Cross-border Cooperation (later EGTC).

— **In November 2004, the CoR adopted its opinion** on the proposed Regulation.[6]

— In **2005**—the European Parliament and Council negotiated the text of the Regulation.

— In February 2006 the CoR adopted a Political Resolution, backed by the Council Presidency, asking for the prompt adoption of the Regulation.

— **In July 2006, the Regulation was published in the Official Journal of the European Union**.

As requested by the CoR opinion, the scope of the EGTC Regulation, as adopted, was enlarged to cover not only cross-border cooperation but also transnational and interregional cooperation. Furthermore a specific role has been reserved for the CoR in Article 5 of the Regulation, according to which the members of an EGTC shall inform the Member States concerned and the CoR of the convention and the registration and/or publication of the statutes. A database as register on EGTC has accordingly been put in place at the CoR.

2. *European Capital of Culture 2007 to 2019*

The CoR opinion on the Culture 2007 programme[7] called for European Community funding for the European Capital of Culture (ECOC) to be increased in view of the fact that there are likely to be two European Capitals of Culture each year from 2009 reflecting the recent enlargement of the EU. Increased support was requested to help the city authorities and cultural operators to work with partners in other Member States promoting transnational mobility and inter-cultural dialogue. In its Proposal for a Decision of the European Parliament and of the Council establishing a Community action for the European Capital of Culture event for the years 2007 to 2019 [COM (2005) 209 fin] the European Commission added an additional point in the outline of its proposal: "*D) European dimension—selection criteria: The ECOC programme of activities should include events/actions which highlight the European dimension and offer European added value. The following aspects should be emphasised: -a European dimension, which should foster multilateral cooperation between cultural operators at all levels, highlight the richness of cultural diversity and bring the common aspects of European cultures to the fore*".

3. *CoR opinion on the "2006 Enlargement package—candidate countries"*[8]

The CoR called on the European Commission to take the necessary steps in order to provide a legal basis enabling the setting-up of a Joint Consultative Committee between the Committee and the former Yugoslav Republic of Macedonia. Following the adoption of the opinion, the Commission supported the creation of this JCC. The Stabilisation and Association Council endorsed this decision in a joint statement adopted in its meeting in July 2007.

4. *CoR opinion on the European Institute of Technology (EIT)*[9]

In view of the inter-institutional timing, a specific approach was chosen for the drafting process of the CoR opinion, with the CoR draft opinion reflecting on a first consultative document of the European Commission and with amendments tabled at the CoR plenary session that took account of the EIT legislative proposal that had been in the meantime adopted by the European Commission. This innovative strategy enabled the CoR to build up close contacts with the European Commission, influencing the text from an early stage and getting its views across already during the drafting process of the legislative proposal thereby effectively influencing the decision-making process.

[6] CdR 62/2004.
[7] CdR 259/2004.
[8] CdR 384/2006.
[9] CdR 273/2006.

5. *CoR Opinion on the "Annual Report of the Six European TEN-T Coordinators" and "Trans-European Networks: towards an integrated approach extension of the major Trans-European Transport Axes"*[10]

The European Commission will adopt on 17 June 2008 a proposal for a Directive amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures. This will be in line with the CoR recommendation to progress towards the internalisation of external costs (cf points 19 and 20 of the opinion). In points 19 and 20 of the opinion, the CoR considers that "*a medium-term review of the Eurovignette directive seems necessary in order to factor in external costs*;" and "*notes that the completion of the thirty priority axes will slow the rise in transport-related CO_2 emissions by just 4 per cent, a very modest result, and would therefore like to see appropriate consideration being given to external costs during a review of the Eurovignette directive so that measures can be taken to encourage modal shift – specifically but not exclusively in sensitive regions and areas, for which more direct, more targeted measures should also be planned*".

6. *CoR Opinion on the "Mid-term Review of the European Commission's 2001 Transport White Paper"*[11]

In this opinion, the CoR considered it "*particularly necessary to harmonise the conditions governing the rail and land transport sectors, as outlined in the 2001 White Paper*" (point 2.3 of the opinion).

In May 2007 the European Commission adopted a proposal for a Recast of Directives 96/26/EC and 98/76/EC on the conditions on admission to the occupation of road haulage and road passenger transport operators [COM(2007)263 accompanied by SEC(2007)635-636] This proposal seeks to strengthen, clarify and simplify application of three qualitative criteria of good repute, financial standing and professional competence, by which operators gain admission to the occupation. The objective of this recast initiative is to ensure harmonised application of rules, clear understanding of what is required, maintain mutual recognition of qualifications, protect the right of establishment, rationalise the market, improve service quality and road safety.

7. *CoR opinion on Regions for Economic Change*[12]

The European Commission launched in 2006 an initiative on "Regions for Economic Change", a non-legislative proposal aimed at identifying and labelling best practice in regions on implementation of the Lisbon and Gothenburg agendas. The CoR was asked to give an opinion on this initiative. The strong mobilisation of the CoR and in particular of the rapporteur resulted in convincing the European Commission to move in the direction suggested by the CoR, thus ensuring more transparency in the decision-making process, guaranteeing a return to the bottom-up governance structure, ie an approach based to a greater extent on the local and regional authorities and ensuring CoR involvement in the INTERREG IV and URBACT II follow-up committees, with a consultative role.

As requested by the CoR opinion, the Regions for Economic Change initiative has been incorporated in the INTERREG IVC programme, in accordance with operational standards for cooperation programmes financed under the Structural Funds.

8. *CoR opinion on the Communication on "A European Agenda for Culture in a Globalising World"*[13]

The CoR confirmed the importance of the Citizens for Europe programme and its impact on regional and local cultural development, and called for this programme to be broadened. So far the programme has not been broadened but as it runs until 2013, developments are to come later. The CoR called upon the European Commission, without prejudice to the principle of subsidiarity, to take steps to implement the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which entered into force in March 2007. The European Commission is currently working on the implementation of the agreement.

[10] CdR 405/2006.
[11] CdR 119/2006.
[12] CdR 407/2006.
[13] CdR 172/2007.

9. *"Regions of Knowledge" action in the 7th Research Framework Programme*

The CoR has in the past strongly supported the European Parliament's launch of the "Regions of Knowledge" initiative, which was in it initial stages funded outside the Framework Programme. Also as part of the CoR's consultative work and political support, the "Regions of Knowledge" initiative has now become an integral part of the 7th Research Framework Programme.

B. Recent Examples on the CoR Impact on the Modification of EU Legislative Proposals' Content, which has Resulted in the Initiation of Further Concrete Legislative Measures, include:

1. *CoR opinion on the European Institute of Technology (EIT)*[14]

In line with the Committee of the Regions' recommendation to abolish EIT degrees in favour of EIT "branded" degrees, the Regulation establishing the EIT[15] now stipulates that "*the degrees and diplomas awarded through the knowledge and innovation communities (KICs) should be awarded by participating higher education institutions, which should be encouraged to label them also as EIT degrees and diplomas*". Some of the modifications the Committee of the Regions suggested to the selection of KICs were successfully incorporated into the final regulation establishing the EIT: the selection criteria for the KICs now include a reference to the involvement and creation of SMEs [Article 7 (2f)] as well as the "*capacity to ensure sustainable and long-term self-supporting financing including a substantial and increasing contribution from the private sector, industry and services*" [Article 7(2c)]. The Committee of the Regions' call for a specific reference to "*the strength of the partnership including its engagement with its regional and local authorities and bodies*" is now partly reflected by the additional criterion of "*the participation in the partnership of organisations active in the knowledge triangle of higher education, research and innovation*" [Article 7 (2d)].

2. *CoR opinion on the Regulation of the European Parliament and of the Council establishing the European Globalisation Adjustment Fund*[16]

The CoR argued in favour of less restrictive intervention criteria for the Fund, in order to address the needs of small labour markets and also to define "*exceptional and duly justified circumstances*" This is reflected in the final regulation.

3. *CoR opinion on the Proposal for a Directive amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services*[17]

The CoR argued for a full liberalisation of Community postal services, but insisted that such liberalisation should commence on 31 December 2010 instead of 1 January 2009. Furthermore, the CoR also argued that all companies providing postal services, and not just the universal provider, should be obliged to make available transparent, simple and inexpensive procedures for dealing with postal users' complaints. This is reflected in the final regulation.

4. *CoR opinion on the Proposal for an Audiovisual Media Services Directive*[18]

In line with the CoR opinion, the Directive includes in comparison with the initial proposal by the European Commission: (a) a clear identification of product placement also at the end and during the programme; (b) a greater liberalisation of quantitative rules on advertising—while limiting advertisements during certain programmes, being however more flexible on this than the restrictions suggested by the CoR; (c) a prohibition of surreptitious advertising and also of on-demand audiovisual media services; (d) respect for human dignity as a further requirement for audiovisual commercial communication.

16 June 2008

[14] CdR 273/2006.
[15] Regulation (EC) No 294/2008 of the European Parliament and of the Council of 11 March 2008 establishing the European Institute of Innovation and Technology.
[16] CdR 340/2006.
[17] CdR 395/2006.
[18] CdR 106/2006.

Memorandum by Richard Corbett MEP,
Labour Spokesperson on Constitutional Affairs in the European Parliament

The European Parliament's Role in Developing Legislative Proposals

Introduction

1. The right to initiate legislative proposals is one that is traditionally associated with parliaments. In practice, however, it is a role usually taken by the executive. The right to initiate legislative proposals at EU level therefore lies predominantly with the European Commission.

2. Why does the Commission have the right of initiative rather than the governments of the Member States? The idea is that legislative proposals should be drafted by a common body, taking into consideration the interests of all Member States, rather than having competing texts from individual Member States. It is also a reflection of the fact that the Commissioners are politicians, not civil servants, accountable to MEPs in the European Parliament.

3. Thus, under the Community pillar, and more generally if the Lisbon Treaty is ratified, the legislative process normally starts with the Commission, which makes a proposal for EU legislation. The Commission can make a proposal to the Council if it believes that the issue can only be dealt with adequately at the European level. If member states (or indeed local government) can deal with the issue effectively on their own, the legislation should not be proposed. This is the principle of subsidiarity; ie that government should work at the lowest effective level. The Lisbon Treaty, if ratified, will provide a legal mechanism whereby national parliaments could challenge any European law that did not adhere to this principle.

4. Even if the Commission has a monopoly on producing the first formal draft, it does not have a monopoly on ideas. Most Commission proposals are made in response to the desiderata of the European Council, the European Parliament, the ordinary Council of Ministers and individual Member States.

5. When exercising its right of initiative, the Commission has to bear in mind that a draft directive really is a draft—MEPs go through it paragraph by paragraph, amending it and rewriting it. So do the ministers in the Council—and ultimately the positions of the two must be reconciled in what amounts to a bi-cameral legislature at EU level, so there is no value in the Commission submitting proposals that will brook hostility in the Council and Parliament. There is no compliant majority for the executive as exists in most national parliaments.

Mechanisms to influence legislative proposals

6. The Parliament has only a limited formal right under the treaty to initiate legislation: the distribution of seats among the Member States, the regulations concerning the Ombudsman, the provisions governing the exercise of the right of inquiry, the electoral procedure for European elections and the statute for MEPs.

7. Both the Council and Parliament have a formal right to request that the Commission undertake studies and to submit any necessary legislative proposals. Indeed, Article 192 of the Maastricht Treaty gave the Parliament the right to request, by an absolute majority of its members, the Commission "submit any appropriate proposal on matters on which it considers that a Community act is required for the purpose of implementing this Treaty". By the end of 2007, 17 such resolutions have been adopted by the Parliament.

8. In practice, it is through less formal requests that the Parliament (and Council) trigger an initiative from the Commission. In Parliament's case, its main mechanism to influence the legislative agenda is through the "own-initiative" reports of its parliamentary committees. Parliament frequently uses these reports to call on the Commission to take action of some sort, which frequently includes calls for new legislative proposals. Although political groups, parliamentary committees and individual MEPs can make such demands of the Commission, the documents carrying the most weight are own-initiative reports drawn up after due consideration by the responsible committee and adopted after debate in plenary. The Commission first responds to such initiatives in the debate on the report in plenary. It later reports back to Parliament's committee on how it has responded to "own initiative" resolutions and requests for action. Examples of "own initiative" reports leading to legislation include the ban on tobacco advertising (passed in 1998 under the co-decision procedure and traced back to a Parliament initiative in 1990), and the directive on trans-frontier television broadcasts (adopted in 1997).

9. The adoption of Commission legislative proposals does not take place in a vacuum, and the pre and post-legislative phases are also of crucial importance. The Commission always consults interested parties in civil society during the formulation of a proposal. It also produces a range of Communications and Green and

White Papers in the pre-legislative phase, in which it outlines the possible need for legislation and the various available policy options. The relevant parliamentary committees are closely involved in the consultative phase in putting together these documents and often draft their own reports (through own initiative reports on Commission papers that have important policy implications).

10. In some policy areas, pre-legislative proposals by the Commission are of at least equal importance to legislative proposals, not least because Parliament can have a role in shaping the final legislative proposals at this stage.

11. Parliament's scrutiny of legislation does not conclude with its adoption. The Legal Affairs committee is responsible for monitoring the transposition into national law of EU legislation and the effectiveness of adopted legislation, and, indeed, evaluating whether it needs to be amended, abolished or replaced. More specifically, parliamentary committees may draft follow-up reports examining adopted EU legislation, which is particularly relevant for committees such as the Environment committee.

12. Written declarations (WDs) are another way for the Parliament to press the Commission. In some senses WDs are similar to Early Day Motions in the House of Commons; they are required to be short (200 words maximum), can be tabled on any matters falling within the EU sphere of activities and are often ignored by both MEPs and the other institutions. However, those that do receive an absolute majority of Parliament's MEPs become the official position of the Parliament. A topical example is the WD adopted by Parliament in 2006 calling for the Commission to bring forward legislative proposals to ban the import of commercial seal products. In conjunction with animal welfare NGOs, the Parliament has helped generate public opinion and widespread political support for such legislation.

The annual legislative work programme

13. Since the adoption of the Single European Act, Parliament and the Commission have worked together on an annual legislative programme and timetable. Although this is largely exercise in determining a timetable for the presentation of Commission proposals, it offers an opportunity for Parliament to influence the priorities in the Commission's programme and to press for the inclusion of new items (eg following up parliamentary "own initiative" reports) or even the exclusion of some items.

14. The current procedure for organising the Commission's legislative programme starts the preceding year at the spring part-session with the "state of the Union" debate in the Parliament, which focuses on the main political priorities. Between March and May, parliamentary standing committees concerned hold a series of bilateral meetings with the relevant Commissioners, the results of which are then assessed by the Chairs of the parliamentary committees and the Commission Vice-President. At the November part-session, the Commission President formally presents to Parliament the resulting Commission legislative and work programme for the next year.

Will the Lisbon Treaty change much?

15. The Lisbon Treaty should strengthen the voice of national parliaments in developing European legislation. At present, national parliaments have no formal say in the formulation process. Under the Lisbon Treaty, for the first time, national parliaments will be guaranteed the opportunity of a direct say on every Commission legislative proposal. Legislative proposals will be sent first to national parliaments, who are guaranteed an eight week period to examine them before the Council and the European Parliament take a position. This should enhance the ability of national parliaments to shape the position taken by their own government representatives and to scrutinise their actions in Brussels.

16. In this respect, Britain has much to learn from the way that the Nordic countries operate. The example of Denmark and Finland, where any government minister attending Council has to first appear before a national parliamentary committee to go through the agenda and discuss the position to be taken, has many merits and should certainly be considered for Westminster. These procedures could serve as an added "quality control" for EU legislation.

17. It will also strengthen the subsidiarity mechanism through the "yellow" and "orange" card safeguards, which give national parliaments the right to send proposals back to the Commission that, they feel, breach the subsidiarity principle. This is an important safeguard even if, in practice, it will rarely be necessary.

18. Combined with the increased powers for the European Parliament under the Treaty, with co-decision becoming the normal legislative procedure and greater powers of control over delegated legislation, the Lisbon Treaty should create new "quality controls" for European law.

19. Another innovation of the Lisbon Treaty is that it will introduce an EU citizens' initiative which will enable citizens to submit proposals to the European Commission where they consider that legislation is required. This will strengthen citizens' rights of participation in the European political process. It will also give NGOs another method through which they can lobby the Commission and Parliament.

Conclusion

20. The development of EU legislation is by its very nature a slow process, with a bi-cameral legislature and a number of institutions consulted—and rightly so, as we should take the utmost care before adopting legislation that will apply to most of a continent! However, contrary to the myths of eurosceptics, legislative proposals are not decided on in secret by the Commission to be "rubber-stamped" by the Council and Parliament. As far as the European Parliament is concerned, it has demonstrated its ability to initiate new legislation in areas of concern to the public and to rigorously scrutinise the development of legislative proposals from their conception to adoption.

20 April 2008

Memorandum by the Council of Europe Secretariat

The Council of Europe has no institutional role in the initiation of EU legislation (even though in practice Council of Europe activities and instruments may serve as source of inspiration for EU initiatives). The following observations therefore only cover the consultation with the Council of Europe during the process of the creation of EU legislation (point 5 of the issues identified in the Call for Evidence).

Both the Council of Europe and the European Union are seeking to achieve greater unity between the States of Europe through respect for the shared values of pluralist democracy, the rule of law and human rights. Numerous Council of Europe conventions are part of the European Union's *acquis,* on the basis of which closer cooperation within the Union has been developed.[19]

In recent years, cooperation has been intensified following the extension of EU competencies to areas hitherto reserved to intergovernmental cooperation within the Council of Europe (eg justice and home affairs). Following the 1987 Arrangement between the Council of Europe and the European Community and the 2001 Joint Declaration on Cooperation and Partnership, the Council of Europe and the European Union concluded in May 2007 a Memorandum of Understanding ("MoU"). Acknowledging that the Council will remain the benchmark for human rights, the rule of law and democracy in Europe, the MoU contains guidelines and practical arrangements for increased cooperation in many areas, including standard-setting. The text of this MoU is contained in the appendix to this paper (*not printed with this Report*).

The MoU foresees consultations at an early stage in the process of elaborating standards in the areas of human rights and fundamental freedoms, rule of law and legal cooperation (see paragraphs 18 and 25). The aim of such consultations is to ensure coherence between EU and Community law and the relevant Council of Europe standards (paragraphs 19 and 24). In particular, EU legislation should be consistent with the European Convention on Human Rights ("ECHR"), as interpreted by the European Court of Human Rights, which constitutes the Europe-wide minimum standard.

Consultations may take place with the competent services of the Commission before a legislative proposal has been made, or once it has been submitted to the EU Council, with the competent working group. Council of Europe representatives are, however, not entitled to attend EU Council working groups or to participate as observers in the meetings of the Committee of Permanent Representatives (Coreper). This lack of reciprocity (the EU Commission and Council being regularly invited to expert meetings which draft new Council of Europe legal instruments and the EU Commission participating in meetings of the Committee of Ministers) has been deplored by Prime Minister Jean-Claude Juncker in his report on relations between the EU and the Council of Europe.[20] There is, indeed, no reason why the EU should be deprived of the Council of Europe's legal and human rights expertise when it is preparing new legal instruments.

In practice, even before the conclusion of the MoU, the Council of Europe had been consulted occasionally by the Commission alongside non-governmental organisations. Past consultations have included the green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, the green paper on the presumption of innocence, proposals for EU Council framework decisions on certain procedural rights

[19] See Acquis of the European Union, Title IV of the TEC, Part II of the TEC, Title VI of the TEU, update October 2007, at: http://www.ec.europa.eu/justice_home/doc_centre/intro/docs/jha_acquis_1107_en.pdf

[20] "Council of Europe—European Union: 'A sole ambition for the European continent'", report to the attention of the heads of state or government of the member states of the Council of Europe (April 2006).

in criminal proceedings throughout the European Union[21] and, following the entry into force of the MoU, the draft framework decision amending certain sections of several other framework decisions relating to trials *in absentia*[22] *and future legislative work in the area of asylum.*

When the Council of Europe is consulted, we are often told that our comments carry considerable weight, and that they are regarded as very useful for making EU legislation coherent and consistent with the ECHR ("Strasbourg-proof").

From time to time, the European Parliament has invited Council of Europe representatives to hearings organised in the context of the examination of draft legislation.

However, it should be noted that consultations have not systematically covered all new legal instruments concerning matters where the responsibilites of the two organisations coincide or complement one another. It is hoped that this practice will develop, as foreseen in the MoU, in order to take account of the central position of the Council of Europe in the European human rights protection system. The Committee of Ministers, at their forthcoming Ministerial Session on 6–7 May 2008, will evaluate the implementation of the MoU.

31 March 2008

Memorandum by Dr Christina Eckes[23]

1. This submission addresses questions one, three, and five posed by the Committee in relation to a specific area of EC legislation: Community instruments imposing certain specific restrictive measures directed against certain persons and entities (individual sanctions). The submission seeks to describe the origin of Commission proposals to adopt individual sanctions and to identify the specific constraints imposed on the Commission's freedom of initiative by the Council of Ministers and the United Nations in this particular field. As will be shown, as a result of the special link in Article 301 EC between the first (Community) and the second (Common Foreign and Security Policy—CFSP) pillar, the Commission's freedom of initiative is considerably limited when the Community adopts individual sanctions. The Council predetermines under the second pillar *when* legislation is adopted and *what the precise personal scope* of this legal instrument will be.

2. There are in practice two different types of restrictive measures against certain persons and entities:

- those directly based on lists of terrorist suspects drawn up by one of the United Nations (UN) Sanctions Committees,[24] and
- those based on lists of terrorist suspects compiled by the Council under the CFSP.[25]

Proposals by the Commission leading to the adoption of Community instruments implementing these sanctions regimes are predetermined in their timing and in their content either by the relevant UN resolutions, in combination with the UN lists of terrorist suspects, or by a decision adopted by the Council under the second pillar.

Treaty Establishing the European Community

3. At present, both types of restrictive measures directed against certain persons and entities are adopted as regulations made under Articles 301, 60 and 308 EC.[26] The legality of this joint legal basis has been expressly confirmed by the Court of First Instance (CFI).[27] A two-tier adoption procedure is laid down in Article 301 EC. First, the Council takes a "strategic decision" in a CFSP common position that it is necessary to adopt

[21] Observations by the Council of Europe on a new version of the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, EU Council document 13759/06 DROIPEN 62 (2006); see also House of Commons, European Scrutiny Committee, Twenty-second Report of Session 2006–07, 18 et seq.

[22] EU Council document 6706/08 COPEN 34 (2008).

[23] Lecturer at the University of Surrey and member of the Surrey European Law Unit (SELU). The views expressed are personal and do not reflect those of SELU or the University of Surrey.

[24] These UN based sanctions are measures "directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban"; the most recent example would be: Commission Regulation (EC) No 220/2008 of 11 March 2008 amending for the 93rd time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 68, 12.3.2008, p 11–13.

[25] See: Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, 28.12.2001, p 70–75; most recently: 2007/868/EC: Council Decision of 20 December 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/445/EC, OJ L 340, 22.12.2007, p 100–103.

[26] Since EC Council Regulation 881/2002, of 27 May 2002, [2002] OJ L 139/9.

[27] See for the first type of sanctions: T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, [2005] ECR II-3533, para 170; appealed: C-415/05 P, *Al Barakaat*, OJ 2006 C 48/11; T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, [2005] ECR II-3649, para 135; appealed: C-402/05 P, Kadi, OJ 2006 C 36/19; confirmed in: T-49/04, *Hassan v Council and Commission*, [2006] ECR II-52; appealed: C-399/06 P, *Hassan v Council and Commission*, OJ 2006 C 294/30, and T-253/02, *Chafiq Ayadi v Council*, [2006] ECR II-2139; appealed: C-403/06 P, *Ayadi v Council*, OJ 2006 C 294/32; and for the second type: Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council and UK (OMPI)*, [2006] ECR II-4665; Case T-47/03, *Sison*, nyr; Case T-327/03, *al-Aqsa*, nyr.

Community sanctions. This common position is then implemented by a Community regulation, containing the actual operational measures, such as asset freezes and travel bans. By creating this close link between the second and the first pillar Article 301 EC is an exception to the general separation between the Community pillar (first pillar) and the Union pillars (second and third pillar). A Council decision under the CFSP is necessary in order to enable the Commission to initiate the adoption of restrictive measures.[28]

4. As regards the Commission's "exclusive" right to initiate legislation this exceptional link between the second and the first pillar reduces the Community's freedom to initiate legislation considerably in the area or restrictive measures (sanctions). Well before the adoption of individual sanctions scholars pointed out the risk that hybrid measures requiring actions under both the first and the second pillar would reduce the Community institutions' discretion[29] to the point of making them the subordinates of the Member States.[30] Individual sanctions are a new form of cross-pillar measure where this risk is exacerbated. Because individual sanctions are in practice fixed in advance and in great detail by the United Nations and/or by the Council acting under the second pillar, these bodies exercise substantial control over the Community institutions, including the Commission, than ever.

Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida network and the Taliban

5. In the case of implementation of UN lists of terrorist suspects the Community legal instruments, as well as the Union legal instruments are required to adhere strictly to the relevant UN measures. In 2005, in *Kadi*, the CFI found that the Community institutions were not authorised to set up any mechanism of examination or re-examination of these measures.[31] However, a number of appeals are pending before the European Court of Justice (ECJ) challenging the CFI's absolute deference to the United Nations.[32]

Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism

6. With regard to the Union's autonomous sanctions regime the CFI has acknowledged that the Community has discretion. In *Sison*, the Court ruled that "the Community does not act under the powers circumscribed by the will of the Union or by that of its Member States as it may be expressed in a common position adopted in the sphere of the CFSP".[33] The CFI considered the adoption of sanctions "the exercise of the Community's own powers, entailing a discretionary assessment by the Community".[34]

7. However, Article 301 EC restricts the Commission's independence and general right to initiate action in that it may only propose *if* and *to the extent* that it is provided for in a CFSP decision.[35] Even if CFSP instruments are in principle only binding on the Member States,[36] in the adoption procedure laid down in Article 301 EC CFSP decisions are not without legal effects on the European institutions. In *Pupino* the ECJ acknowledged that the principle of sincere cooperation referred to in Article 10 EC is applicable to Union law.[37] The ECJ has further read into Article 10 EC a general obligation of cooperation, which is not only addressed to the Member States but also to the European institutions.[38] As a consequence, even if CFSP instruments are not directly binding on the Community institutions in strict legal terms, they entail certain legal effects when they are used as part of the Article 301 EC adoption mechanism. The Commission is obliged to cooperate loyally and not to obstruct the effects of the common position. There is an additional argument that Article 3 TEU limits the Commission's discretion.[39]

[28] Some of the restrictive measures against persons and entities are adopted by the Community and some by the Member States. Competence depends predominantly on their country of origin. See for more detail: Council doc. 15579/03, Guidelines on the implementation and evaluation of restrictive measures, 3 December 2003.
[29] Osteneck, *Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft*, Springer-Verlag, 2004, p 190.
[30] Rummel and Wiedemann, "Identifying Institutional Paradoxes of CFSP" (1997), EUI Working Paper RSC No 97/67, p 55.
[31] T-315/01, *Kadi, supra* n 4, para 258.
[32] C-402/05 P, *Kadi, supra* n 4; C-415/05 P, *Yusuf, supra* n 4; C-399/06 P, *Hassan, supra* n 4; C-403/06 P, *Ayadi supra* n 4.
[33] T-47/03, *Sison, supra* n 4, para 153.
[34] *Ibid*, para 154.
[35] Zagel, TEC, Article 301 on Economic Sanctions, para 402.04 [4], in: Smit/Herzog, *Law of the European Union—a Commentary*, LexisNexis, 2006.
[36] Eeckhout, *External Relations of the European Union—Legal and Constitutional Foundations*, Oxford University Press, 2004, pp 396 et seq.
[37] Case C-105/03, *Pupino*, para 42.
[38] Herzog, TEC, Article 10, Rel 1-12/05 Pub. 623, para 86–12, in: Smit/Herzog, *Law of the European Union—a Commentary*, LexisNexis, 2006. It was even considered "a constitutional principle within EC external relations law" applying across the pillars as it applies in relation to shared competences (Cremona, "External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law", EUI working papers 2006/22, p 6 and 15).
[39] PhD thesis of the author, to be published in due course.

8. CFSP decisions providing for the adoption of Community sanctions have shifted from being *general* decisions to adopt sanctions against states to become *detailed* prescriptions of those against whom sanctions are to be taken (individual sanctions); these decisions oblige the Community to act as "the Union's servant". In practice this situation is mitigated by the fact CFSP lists of terrorist suspects and EC lists of terrorist suspects are usually drawn up by the same people at the same meeting.[40] The Commission's standing invitation to take part in the Council meetings applies irrespective of the legal basis of the subject matter; and the Commission's representative can make active contributions to the debate.[41]

9. However, the legal constraints remain and there is no reason, why, if individual sanctions are to be adopted as Community measures, it should not also be for the Community to identify those sanctioned. The general political decision to fight terrorism could be taken in a CFSP common position and the list of persons suspected of financing terrorism could be drawn up in the Community pillar. This would reflect the division of competences in the Union reserving foreign policy decisions to the CFSP, while allowing only the Community to immediately change the legal position of individuals.

Treaty of Lisbon

10. The Treaty of Lisbon would introduce two specific legal bases for restrictive measures against private persons and entities as they are currently used to fight terrorism: Articles 75 and 215 of the Treaty on the Functioning of the European Union (TFEU). The sanctioning procedure in Article 215 TFEU is the same as the Article 301 EC procedure, save that it contains an explicit competence for sanctions "against natural or legal persons and groups or non-State entities".[42] It requires a decision pursuant to Article 25 TEU (CFSP decision) that provides for further action by the Union. Article 75 TFEU, on the other hand, differs from Article 60 EC considerably. While Article 60 EC allows for the adoption of "necessary urgent measures on the movement of capital and on payments as regards the third countries concerned" pursuant to the same procedure set out in Article 301 EC, Article 75 TFEU is a legal basis in its own right.[43] Since Articles 75 and 215 TFEU set out very different procedures the choice of the legal basis will be crucial for the competences of the institutions and the Member States respectively. While the concerns for the Commission's right to initiate legislation described above would apply equally to Article 215 TFEU, Article 75 TFEU requires the ordinary legislative procedure; the Commission will consequently be free to exercise its right of initiative.

21 April 2008

Memorandum by the European Automobile Manufacturers Association (ACEA)

1. *Where do the ideas which trigger work towards legislation come from? For example, what are the processes by which legislation is generated inside the Commission? The Commission operates in an open way; does that openness extend to ideas for legislation from external sources? If so, what are the sources of information or ideas on which the Commission draws? Does it actively seek out ideas and views? How effective are multi-annual strategies and annual work plans in setting the agenda for the creation of legislative proposals?*

The Commission draws inspiration from a very wide range of sources including national policy initiatives, scientific studies, opinions of the European Parliament and national governments, demands from non-governmental organisations and trade associations, and complaints from individual consumers.

In many cases, the Commission first publishes a Green Paper, White Paper and/or Communication before issuing a legislative proposal. After having consulted interested parties and carried out an impact assessment, the Commission then adopts a proposal for Directive or Regulation. In most cases, this must be approved by the Council and the European Parliament in order to become law.

The multi-annual strategies and annual work plans established by the Commission are helpful in that they provide advance warning of legislative developments that are to come.

[40] See for example the measures adopted on 27 December 2001: Council Regulation (EC) No 2580/2001, *supra* n 2; Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 2001 L 344/83; Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ 2001 L 344/93; Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism, OJ 2001 L 344/90.

[41] Article 5(2) of the Council Rules of Procedure [2004] OJ L106/22.

[42] Article 215(2) TFEU.

[43] Its objective is to ensure that the Union constitutes an area of freedom, security and justice. Pursuant to Article 75 TFEU the Union institutions first establish a "framework for administrative measures with regard to capital movements and payments" following the ordinary legislative procedure, which the Council then implements by qualified majority following a proposal of the Commission.

In the case of CO_2 emissions from passenger cars, the current legislative proposal actually succeeds the voluntary agreements concluded between the Commission and the associations of European, Japanese and Korean manufacturers in 1999. These voluntary agreements set targets to be achieved in 2008–09. The initial ideas for measures aimed at reducing CO_2 emissions from passenger cars were formulated in a Commission Communication in December 1995 and based on scientific reports concerning the impact of CO_2 emissions on climate change. The Environment Council asked the Commission in June 1996 to undertake the necessary steps to reduce CO_2 emissions from passenger cars. Ultimately, the EU institutions decided that the fastest and most cost-effective manner to do this was through the conclusion of voluntary agreements with the manufacturers' representative associations.

The current legislative proposal was adopted on 19 December 2007. It takes account of various more recent scientific reports such as the conclusions of the Intergovernmental Panel on Climate Change and the Stern Review. It was preceded by the publication of a Communication in February 2007 and the organisation of a stakeholder consultation meeting in July 2007. The European Council also considered this matter in January 2008 as part of its so-called "energy package".

2. *How are the ideas developed? What arrangements are in place for quality control and to determine priorities? What are the arrangements for the drafting of texts?*

Each Commission department initially develops its own ideas and establishes its own priorities. On the basis of these proposals, the college of Commissioners adopts an annual work plan that determines the overall priorities. The ideas are developed further through Green Papers, White Papers and/or Communications and the feedback provided by interested parties.

The drafting is the responsibility of the lead department even though other departments are consulted and can make suggestions for improvement. The Legal Service is always consulted to ensure that the legislative proposal has the correct legal basis and is consistent with other existing legal texts.

An impact assessment is usually carried out to determine the social, economic and environmental implications of the legislative proposal.

3. *How significant are the views of the other EU Institutions? The European Council's role is to "provide the Union with the necessary impetus for its development" and to define its "general political guidelines". How important are the Conclusions of the European Council in the development of legislative proposals? Are the likely reactions of the European Parliament and the Council a significant factor in triggering work or determining the scope and extent of proposed EU legislation during the development of proposals? Are the views of EU bodies and agencies, such as the Economic and Social Committee or the Committee of the Regions anticipated or sought informally? What role do judgements of the European courts play?*

The role of the Council of Ministers and the European Parliament in the legislative process is extremely important in that nearly all proposals for Directive and Regulation must be approved by these institutions before they can become law.

When it comes to the initiation of legislation, it is mainly the European Council that sets the direction for EU policy. In certain cases, the Commission starts preparing legislative proposals only after having been instructed to act by the European Council. It is more common, however, that the Commission prepares ideas and proposals that are then submitted to the Council in the form of preparatory document, usually a Communication. The Council then instructs the Commission to work out more concrete measures. There is therefore often a close cooperation between the Commission and the Council. The same is true for the European Parliament.

Other bodies such as the Economic and Social Committee and the Committee of the Regions are usually consulted only on the basis of a legislative proposal. Their opinions are only advisory and therefore carry much less weight than those of the Council and the Parliament.

Judgements of the European courts only play a role to the extent that they interpret and set the boundaries of Community law. Sometimes, this requires corrective legal action.

4. *How significant are the views of individual Member States in the process of initiation?*

Except where the European Council explicitly instructs the Commission to come forward with a legislative proposal, it is our impression that individual Member States do not ask the Commission to initiate legislation very frequently.

Usually, Member States become involved in the process only at the time when the Commission issues a preparatory document such as a Communication. Since the Council must approve any legislative proposal that the Commission makes, the views of Member States carry considerable weight.

5. *How significant are the views of other interested parties, such as national Parliaments, international bodies such as the Council of Europe, non-governmental organisations, pressure groups, the news media, the general public?*

All these bodies can play a significant role in shaping legislation. With the possible exception of non-governmental organisations and pressure groups, however, these bodies rarely request the Commission to initiate legislation.

6. *What is your assessment of the quality of proposals submitted by the entities which have the right of initiative (Commission, Member State or other)?*

In our view, the quality of the Commission's legislative proposals varies.

We believe the current proposal regarding CO_2 emissions from passenger cars does not adequately take account of the cost impact for car manufacturers and disregards the CO_2 emissions reduction that could be achieved by adapting road infrastructure and changing consumer behaviour in terms of more fuel-efficient driving.

4 April 2008

Letter from European Economic and Social Committee

Thank you for your letter of 10 March 2008 and for your invitation to give evidence concerning Lord Mance's timely inquiry into the Initiation of EU Legislation. With your understanding, I feel it would be inappropriate for me to respond to Questions 1, 2, 4, 5 and 6. On the other hand, Question 3, which mentions the Committee explicitly, is indeed most pertinent.

The European Economic and Social Committee, which I have the honour to serve as Secretary-General, is a 344-member consultative body. It is a venerable institution, established at the same time as the European Parliament, the Council of the European Union, the European Commission and the Court of Justice, in 1957–58. It has "advisory status" (TEC Article 256). Its members represent "the various economic and social components of organised civil society" (idem). Its primary and most longstanding role is to give opinions on legislative proposals to the Commission and the Council. The Committee may also be consulted by the European Parliament, and it can issue opinions on its own initiative (TEC Article 262). In all of these guises, the Committee has limited, though some indirect, effect on the initiation of legislation by the European Commission. Thereafter, it can have considerable, though always (not being a legislature) indirect, impact on draft legislation, as the attached copy of a recently published brochure on the impact of the Committee demonstrates (*not printed with this Report*). However, the Committee has increasingly sought to give its opinion upstream of the legislative process, precisely with a view to influencing the initiation of legislation or, where it is known that the European Commission is considering legislation, to influence the nature of the draft legislation. This can, and is, done through initiative opinions but, since 2001, the Committee has gradually been expanding its use of a new form of opinion, dubbed "exploratory". Initially through a protocol of cooperation with the European Commission,[44] but later extended through customary practice to the rotating Presidencies of the Council of the European Union, the exploratory opinion is designed precisely to enable the Committee to exercise its advisory function upstream of any legislative proposal.

A recent example, of an exploratory opinion on animal welfare labelling, graphically illustrates the way in which the Committee can have influence (*not printed with this Report*). The opinion in question was requested by the 2006 German Presidency. The issue was three-fold: growing public interest, from both the consumer and animal rights angles, in the welfare of animals raised for slaughter; a growth within a number of member states of labelling schemes; and fears that these trends could lead to consumer confusion and market fragmentation. The Committee's opinion, adopted in March 2007 (Rapporteur: Mr Lief Nielsen, a member

[44] "As part of the process of framing the Union's policies and planning its work, the Commission may provide for and call on the Committee to draft exploratory opinions in areas of particular importance to organised civil society, where it takes the view that the Committee has the appropriate competence and expertise" (extract from the protocol of cooperation).

of the Danish Agriculture Council) called for the current mandatory animal welfare standards to be backed up by voluntary labelling rules. The spirit of the recommendations was a sort of gentle harmonisation, based on commonly-recognised scientific principles. In late March the Committee followed up its opinion with a conference in which the German Federal Minister for Food, Agriculture and Consumer Protection, Horst Seehofer, and the European Commissioner for Health, Markos Kyprianou, participated, and during which it became clear that the Committee's recommendations reflected a growing consensus among stakeholders about the need for action. On 7 May, the Agriculture and Fisheries Council conclusions took note of the EESC's exploratory opinion and of the ensuing conference and, considering "that account should be taken of the recommendations made by the EESC in its exploratory opinion", called on the Commission to submit a report which would allow an in-depth debate on the subject. It is clearly too early to see whether some sort of regulatory or legislative approach will be adopted but, just as clearly, the Committee's opinion and its recommendations are bound to lead to some sort of EU-level action in this area.

From the above it can be seen that the Committee's advisory function can, on occasion, extend to influencing the initiation of legislation. I would be happy to explore this growing role—particularly in the context of the concept of participatory democracy, as established by the Lisbon Treaty—in more detail if that were to be felt appropriate. It might also be felt appropriate for the members of the Sub-Committee to meet and discuss this issue with some of the members of the EESC. I and my colleagues are of course at your disposal should that be felt desirable.

7 April 2008

Memorandum by European Regions Airline Association

Background

This response by ERA focuses on the areas of EU legislation which occupy the ERA Directorate on a day-to-day basis, namely proposals for air transport law initiated by the European Commission.

The ERA Directorate has long believed that regulatory development in the EU could be improved, particularly by adopting the types of measures enshrined in the UK through the work of the Better Regulation Task Force, the Better Regulation Commission and the Better Regulation Executive. The ERA Directorate also acknowledges similar achievements in other EU states such as the Netherlands.

The ERA Directorate also acknowledges that the European Commission itself has developed its own policies for improved regulatory development, of which its Communication on Better Lawmaking in 2002 and its two strategic reviews in 2006 and 2008 are a fundamental part.

However, the ERA Directorate continues to be concerned that the concepts in the European Commission's own policies are either not implemented, or are only partially implemented, in practice.

ERA Policy Proposal

In September 2006, ERA published its own policy proposal to improve EU lawmaking: "Better Regulation—A Step-by-Step Guide". This proposal was targeted at the European Commission in particular, but ERA also recommended its adoption by other regulatory bodies responsible for rules affecting air transport. This policy proposal was based fundamentally on the European Commission's own policies and those adopted in the UK.

Mike Ambrose, Director General ERA, presented this policy proposal at a conference on Aviation Regulation organized by the European Commission in Brussels in September 2006.

Adoption by High Level Group for the Future European Aviation Regulatory Framework

Subsequently the High Level Group for the Future European Aviation Regulatory Framework, a body established by European Commission Vice-President Barrot (responsible for transport), adopted the policy proposal in its report published in July 2007.

In its report, its third of 10 recommendations is:

> **Better regulation**: Apply the principles of Better Regulation, avoiding overregulation, and undertaking full impact assessments and consultation. Apply consistent definitions and rationalise existing legislation.

This is amplified further in the report:

Apply principles of Better Regulation.

The High Level Group supports the Better Regulation agenda communicated by the Commission. In particular for aviation, the High Level Group recommends following the seven steps identified at the Brussels Conference [*Better regulation*, a presentation by Mike Ambrose, Director General of European Regions Airline Association, Brussels Aviation Regulation Conference, 20 September 2006]. These should be applied in the development of new aviation regulation and in the rationalization of existing legislation:

— identify the problem and outline the current consequences;
— assess the significance of the problem;
— identify the affected parties;
— outline the objective to be achieved;
— establish whether regulatory action is necessary;
— identify the minimum legislative action necessary; and
— conduct impact assessments.

Continuing Concerns

The ERA Directorate remains very concerned that the ideals expressed by the Commission, espoused by ERA, and enshrined in the report of the High Level Group continue to be largely ignored in the initiation of air transport legislation by the European Commission.

The ERA Directorate wishes to comment specifically on two legislative initiatives by the European Commission in 2006 and 2007 that have not met the required regulatory standards.

1. Proposal for a Regulation of the European Parliament and of the Council on a Code of Conduct for computerised reservation systems COM(2007)709, 15 November 2007

This proposed Regulation will replace an existing Regulation. The proposed Regulation will, in many respects be simpler, and ERA supports this simplification. However, neither the explanatory memorandum nor the impact assessment accompanying this proposal draw attention to all the changes that the European Commission is proposing.

2. Proposal for a Regulation of the European Parliament and of the Council on common rules for the operation of air transport services in the Community COM(2006) 396, 18 July 2006

This proposed Regulation will replace three existing Regulations. The proposed Regulation will, in many respects be simpler, and ERA supports this simplification. However, neither the explanatory memorandum, nor the impact assessment, which accompany this proposal draw attention to all the changes that the European Commission is proposing. The impact assessment contained several major flaws which should not have occurred if the impact assessment itself had been discussed with stakeholders. Furthermore, while the proposal had been open to wide consultation for some years prior to its publication, several major initiatives were included in the proposal that had not previously been discussed with stakeholders.

Conclusions

A model framework for better regulation has been adopted by a High Level Group set up by European Commission Vice-President Barrot. ERA believes that its adoption, **in practice**, by the European Commission in its initiation of legislation would significantly improve European legislation.

April 2008

Memorandum by Maria Kaiafa-Gbandi, Professor, and Athina Giannakoula, Lawyer, LLM (Aristotle University Thessaloniki)

The following statements concern specifically **the field of criminal matters**. Since the Treaty of Amsterdam entered into force and the Conclusions of the European Council were adopted in Tampere, EU legislation in this rather new field has been developing quickly and affecting greatly the freedoms of individuals.

A. **The legislative initiatives of the Commission** regarding the creation of an area of freedom, security and justice (third pillar) mostly come from the following **sources**[45]**:**

[45] One can approach the sources enumerated in the text through the issues regulated by EU legislation as well as the introductory reports of the legal acts adopted so far (mainly the framework decisions).

(a) *The Conclusions of the European Council*: Most of the Commission's legislative initiatives are based on certain Conclusions of the European Council. Although these are documents of political and not legal force, they are considered to be almost as significant as the founding Treaties, due to the fact that they are adopted by the leaders of the Member States. Most characteristically, the Conclusions of the European Council held in Tampere (15–16 October 1999) defined the fields of EU activities broader than article 31§1e TEU does and introduced the principle of mutual recognition into the third pillar; the said principle is currently regarded as the "cornerstone" of judicial cooperation in criminal matters, even though it can't be identified in the TEU.

(b) *The annual and multi-annual programs of the EU*: These are also important sources for the Commission's legislative initiatives, as they set the objectives of the area of freedom, security and justice in a more specific way. Furthermore, the Commission draws up reports concerning the progress of the activities described in the programs.

(c) EU legislation is often triggered by *existing legislative acts of the Union or the Community*. In particular:

— After the amendment of the Treaties in Amsterdam and the introduction of framework decisions into the third pillar, apart from the common actions that were actually replaced with framework decisions, certain others were either supplemented or served as basis for the adoption of framework decisions.[46]

— In other occasions the third pillar is intertwined with the first pillar, as EU legislation is proposed with the sole task to supplement EC legislation.[47]

(d) A number of the framework decisions adopted so far refer to *legal acts of other international organisations*, especially of the Council of Europe and the United Nations, stating the intention of the EU to establish own rules on the subjects of such international acts.

(e) Up till now, the introductory reports of all the framework decisions adopted have never referred to *ECJ case law*. However, in case C-176/03 the Court decided that, although criminal law does not fall within the Community's competence, this does not prevent the Community from taking measures which relate to the criminal law of the Member States, when such an action is necessary in order to ensure the effectiveness of an EC policy. Since then, the Commission has founded a large number of directive proposals on the ECJ judgement in the above case as well as in case C-440/05.[48]

B. In relation to the above mentioned sources of the Commission's legislative initiatives one can make the following **observations:**

(a) The provisions concerning the amendment of the founding Treaties, as cited in the latter, describe the only procedure through which such an amendment can take place. Therefore, no other decision taken by the leaders of the Member States can result in an amendment of the Treaties. Hence, it is acceptable for *the Conclusions of the European Council* to interpret the texts of the Treaties and to set the priorities of the Union for a certain period of time, as long as this is done in line with the provisions of the Treaties. In other words, *the Conclusions themselves must be in accordance with the TEU*; if not, they are by no means binding and they can't serve as a valid legal basis for the establishment of EU legislation. Nevertheless, the Commission evokes the Conclusions of the European Council regardless of the above condition and uses them to such an extent, that one might think that it's not the Treaty but the Conclusions that EU legislation must be based on.

(b) In a similar manner, *programs can define EU fields of action more specifically than the TEU does, but not differently*. Otherwise they also result in an unfounded amendment of the provisions of the Treaty; in such a case the irregularity is in reality even more serious, since the programs are not decided by the leaders of the Member States. In addition, the reports drawn up by the Commission regarding the implementation of the programs exercise an unquestionable pressure on the Council.

(c) *The existing EU and EC legislative acts* that a legislative proposal may allude to *are definitely important*, because they connect the new proposal with the rules that already exist regarding the issue of the proposal and thus illustrate the way that the EU, or the EC, has been dealing with this issue. However, existing legislation doesn't substitute the TEU, which must be the basis of all EU legislation. Besides, existing legislation may trigger new proposals but it is not decisive for the legality

[46] The introductory reports of framework decisions 2001/413/JHA, 2002/475/JHA, 2002/629/JHA, 2004/68/JHA refer to certain common actions that are still in force.

[47] Framework decision 2005/667/JHA prescribed penalties in relation to the behaviours described in directive 2005/30/EC. The above mentioned framework decision was later annulled by the ECJ in case C-440/05, following an application for annulment of the Commission (who had proposed the said act in the first place) on the grounds of infringement of article 47 TEU.

[48] *Vide* Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council)—COM 2005 583 final.

or the quality of the proposals; the conformity of each EU act with the principles set by the TEU (eg the principle of subsidiarity) must be examined individually. Therefore, if, for example, as certain scholars argue,[49] the EU did not have the competence to introduce the european arrest warrant using a framework decision based on the principle of mutual recognition of criminal decisions, the fact that all Member States had signed the EU conventions on extradition and shared the same rules on the issue is not critical for the validity of the relevant framework decision (2002/584/JHA), regardless of what the introductory report of the latter states. On the other hand, *the intertwining of the pillars is by all means problematic*, as it results in the EC forming definitions of crimes, though such competence is not envisaged by the TEC.

(d) The reference to *legal acts adopted by other international organisations*, in which the EU Member States participate, is usually meant to strengthen the arguments supporting the EU legislative proposals. The Commission in fact suggests that, since the Member States have already accepted the regulation of an issue within the framework of an international organisation, there is no reason why they shouldn't also agree to the EU initiative on the same issue. The matters that concern the states in their international affairs are naturally important to the EU; the Union is justified to seek to promote special rules within its borders, since it can act in more effective ways than international organisations do. However, *that is no reason for the TEU to be set aside*, since the provisions of the Treaty are always the crucial criterion for the legality of EU legislation.

(e) *The above mentioned ECJ judgements*[50] are of great importance and they would have already drastically marked the evolution of EU law, if the Reforming Treaty of Lisbon wasn't about to enter into force. The ECJ has never functioned solely as a judicial body, since its judgements have often been of political nature, causing serious legal implications.[51] In some cases, like currently in the third pillar, the ECJ promotes EU interests even more radically than the Commission does. The arguments of the Court concerning the right of the Community to adopt measures of criminal nature when such measures are required to ensure the effectiveness of EC law, despite the fact that the TEC provisions do not grant the relevant necessary competence to the Community and despite the democratic deficit, entail an actual breach of the principle of legality. Furthermore, it is almost certain that a similar judgement could never have been delivered from a national court; the preference of effectiveness over the provisions of the Constitution is impossible. The fact that the Commission evokes the above mentioned case law is not strange, since it was the Commission's own applications that initiated the relevant procedures before the ECJ. Nevertheless, the legislative process in the EU and the EC is defective when the adoption of a legislative act needs to be based on a court judgement (eg in the case of a directive on the protection of the environment through criminal law, the competence to regulate matters concerning the environment comes from article 174 TEC, while the competence to use criminal law can only be derived from the ECJ case law, since the ECJ itself acknowledges that the TEC gives no such power).

C. In addition to the aforementioned observations, one should add the following thoughts regarding **the methods and the criteria used by the Commission as to the configuration of its initiatives** in the field of freedom, security and justice:

— One of the basic attributes of EU legislation in the third pillar is *the unofficial expansion of the area that EU competences cover and thus the disregard towards the framework of rules set by the TEU, resulting in a de facto growth of the Union's powers*. As one can see in the introductory reports of all framework decisions adopted so far, the right to legislate is based on elements not found in the TEU, while the legal bases of the Treaty are regarded as being of similar importance. Moreover, the expansion is not just horizontal; the provisions of the framework decisions are rather explicit and therefore rather restrictive as to the choices left to national legislators. At the same time, one should keep in mind that according to the ECJ "the obligation of the national authorities to interpret their national law as far as possible in the light of the wording and purpose of Community directives applies with the same effects and within the same limits where the act concerned is a framework decision"; due to this statement, it is accepted that framework decisions do develop some kind of direct effect.

[49] *M Kaiafa-Gbandi*, Evropaiko Entalma Syllipsis: oi rithmiseis tou n. 3251/2004 kai i metavasi apo tin ekdosi stin paradosi, CrimJust 2004, 1295–1296, (Ευρωπαϊκό ένταλμα σύλληψης: οι ρυθμίσεις του Ν 3251/2004 και η μετάβαση από την έκδοση στην "παράδοση", Ποινική Δικαιοσύνη 2004) *O. Tsolka*, Evropaiko Entalma Syllipsis—Ena "filodokso" meso gia tin proothisi tis dikastikis synergasias sto plaisio tis Evropaikis Enosis, PChr 2002, 107 (Ευρωπαϊκό Ένταλμα Σύλληψης—Ένα "φιλόδοξο" μέσο για την προώθηση της δικαστικής συνεργασίας στο πλαίσιο της Ευρωπαϊκής Ένωσης, Ποινικά Χρονικά 2002), *B Schünemann*, Fortschritte und Fehltritte in der Strafrechtspflege der EU, GA 2004, 207.

[50] Judgement in case C-105/03 on the interpretation of national legislation in accordance to EU legislation is also very important, as it practically abolished the prohibition of the direct effect of framework decisions.

[51] ECJ case law established the primacy of Community law, the direct effect of Community directives, the requirement for Member States to take all measures necessary to guarantee the effectiveness of Community law (10 TEC), etc.

— *The principle of subsidiarity* (article 5§2 TEC) is also applied in the third pillar, due to the preamble of the TEU and article 2§2 TEU. The said principle regulates the exercise of the competencies that have been conferred on both the Union and the Member States. According to the criteria of subsidiarity, the legislative proposals of the Commission must demonstrate that the EU proposed action is *necessary* (due to an existing requirement for regulation in a field that the Member States can't regulate sufficiently) as well as prove that the Union's measures can be *more effective* than the national ones.[52] The introductory reports of all framework decisions adopted up till now show that the Commission doesn't actually apply the principle of subsidiarity. The few references to subsidiarity limit themselves to the same quotation: "Since the objectives of this Framework Decision . . . cannot be sufficiently achieved by the Member States in view of the international dimension of those offences and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in that Article, this Framework Decision does not go beyond what is necessary in order to achieve those objectives".[53] In some cases, the quotation is even less essential: "It is necessary that the serious criminal offence of . . . be addressed not only through individual action by each Member State but by a comprehensive approach in which the definition of constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, forms an integral part. In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose".[54] It is evident that the above 'justification' also affects the fundamental principle of proportionality and eliminates the significance of proving the necessity for EU legislation; however, the latter is not just a criterion of subsidiarity, but also an explicit requirement of article 29§2 TEU and above all of criminal law itself, which must always function as *ultima ratio*.[55]

— The intergovernmental features of the third pillar require that the Union *respects the legal orders of the Member States* when exercising its legislative powers. Nonetheless, the introduction of EU legislation into national legislations in most cases causes serious problems to the latter. The fact that the prospect of a harmonised integration does not lie among the criteria used by the Commission when developing its legislative proposals doesn't correspond to the above requirement of respect. Furthermore, *it undermines the function of EU legislation itself*. The implementation of EU legal acts in the field of criminal law relies on their incorporation into the national legal systems. As long as there is no independent european legal order nor an autonomous european criminal law nor european courts with full competence in criminal justice, in other words as long as EU rules only operate in the national legal environments, the good function of the latter is actually a precondition for the effectiveness of EU law. Therefore, before submitting a legislative proposal the Commission should be interested in the content of the national legislations in relation to the issue of the proposal. Even more, the Commission should generally have good knowledge of the function, the needs and the particularities of each national legal order and thus exercise its right of initiative from a different starting point. The circumstantial evaluation of EU legislation after it has been adopted is obviously inadequate.

D. More specifically **the attitude of the Commission towards basic principles of criminal law:**

— The fact that the Commission undertakes legislative initiatives in the field of freedom, security and justice is not itself a problem, since the Commission, which has the task to promote the interests of the Union, has the power of initiative in the third pillar as well (article 34§2 TEU). The problems begin when the legislative proposals of the Commission have negative effects on *basic principles of criminal law* that are fundamental for national criminal legislations. The peculiarities of the field that a legislative initiative concerns should by all means be taken under serious consideration. Unfortunately, this is not the case with the Commission's initiatives that become EU legislation in

[52] The Commission has always considered critical for the application of the principle of subsidiarity the assessment of the effectiveness of the Community in comparison with the effectiveness of the Member States in certain issue (Communication from the Commission to the European Parliament and the Council concerning the principle of subsidiarity, 27. 20.1992, Bulletin 10-1992, 124 *et seq*). The Commission's Reports to the European Council ("Better lawmaking—pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality") comment on the application of the principle on the basis of the number of consultation documents and legislative initiatives presented each year. This quantitative approach on the application of the principle is obviously superficial (European Parliament Resolution 25.3.2003, A5-0100/2003 final).

[53] *Vide* framework decisions 2001/413/JHA, 2002/584/JHA, 2005/222/JHA and 2005/667/JHA.

[54] *Vide* framework decisions 2002/629/JHA, 2004/68/JHA.

[55] *Vide I Manoledakis,* Provlimatismoi gia ti sigrotisi enos eniaiou evropaikou poinikou dikastikou chorou, Yperaspisi 1999, 1099 (Προβληματισμοί για τη συγκρότηση ενός ενιαίου ευρωπαϊκού δικαστικού χώρου, Υπεράσπιση 1999): necessity along with proportionality amount to ultima ratio and are classified among the most important principles that are common in all domestic legislations.

the field of criminal matters. First of all, EU legislation in this particular field *has reversed the relationship between substantive and procedural criminal law*. In other words, while procedural law aims at the enforcement of substantive criminal law, which comes first and defines punishable offences against legal interests as well as penalties on the basis of certain principles (proportionality, ultima ratio etc), things happen the other way round in the EU. *The objective of harmonising domestic substantive criminal laws aims at supporting transnational judicial cooperation to combat crime* and thus the basic features of criminal law are affected. Hence, for example, as far as the framework decision on combating trafficking in human beings is concerned, the penalties for the offences under article 1 of the framework decision are prescribed based on *whether they render the offences extraditable*, in order to facilitate judicial cooperation. On the other hand, the Commission *doesn't make any effort to ensure that its proposals in this field abide by the principles of criminal law. The principle of proportionality between the offences committed and the penalties prescribed* is actually "applied" by making an accidental choice of those lower upper limits of sanctions that can be accepted by all Member States, without any concern over the equivalence of those limits to the specific characteristics of the crimes prescribed in the EU legislative acts. This is obvious once again in the framework decision on combating trafficking in human beings, where article 3§1 requires a single penalty for all types of conduct labelled as trafficking, despite the marked differences between them. Similar deficiencies appear regarding the application of basic procedural principles, such as *the equality of arms or the respect for fundamental rights of the defendant*. All one has to do in order to ascertain the above is simply look at the views of the Commission in relation to the Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor, as well as the relevant criticism.[56] In other words, while the advance of the EU in the field of crime suppression is rapid, it is not combined with an equivalent guarantee of due process rights of the defendant.

— The aforementioned arguments illustrate that the Commission's legislative initiatives are not adequately enriched with ideas related to the fundamental principles of criminal law. Although there were cases where the Commission itself called for a public dialogue on some of its proposals (eg Green Paper on the establishment of a European Prosecutor, Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU), it seems that this procedure has little actual effect, since the provisions regarding the European Prosecutor were included in the Treaty establishing a Constitution for Europe and the Reforming Treaty of Lisbon too, without any improvement of the situation concerning due process rights of suspects and defendants, as these are described in the above texts and in relation with the powers of european institutions of penal repression (eg Europol).[57] This means that there is a vital need for the Commission to be open for receiving and working on ideas from *external sources*, eg universities, science associations, non-governmental organisations for fundamental human rights; that is to say sources that don't have a bureaucratic approach on the relevant issues and can enrich the process with the *basic principles* to the EU legislative procedure. In order to be effective, such cooperation must be undertaken in a systematic and organised manner and not just by calling for public discussions over Green Papers.

— Given the situation described above, an important change of the EU criminal legislation towards the basic principles of criminal law could be achieved by assigning the national parliaments with the evaluation of EU legislative *proposals*. However such a measure would require that the problems concerning EU legislation in the field of criminal law are given a higher importance in the domestic legal orders, while also the EU must be ready to acknowledge in practice the significance of the contribution of the Member States.[58]

E. The **characteristics of the legislative initiatives of the Member States** in the area of freedom, security and justice:

Studying the development of EU legislation in the third pillar, one notices that the right of initiative is exercised equally by the Commission and the Member States. What is more, most of the framework decisions that have been adopted so far are based on initiatives undertaken by Member

[56] *Kaiafa-Gbandi*, I protasi tis Epitropis ton Evropaikon Koinotiton gia ti dimiourgia Evropaikis Eisaggelikis Archis kai to schediasmo ton egklimaton kata ton oikonomikon simferonton tis Koinotitas sta plaisia tou A pilona, Crim Just 2002, 569–570, (Η πρόταση της Επιτροπής των Ευρωπαϊκών Κοινοτήτων για τη δημιουργία Ευρωπαϊκής Εισαγγελικής Αρχής και το σχεδιασμό των εγκλημάτων κατά των οικονομικών συμφερόντων της Κοινότητας στα πλαίσια του Α΄ Πυλώνα—Διάλογος με την Πράσινη Βίβλο, Ποινική Δικαιοσύνη 2002) *H Satzger, Gefahren für eine effective Verteidigung im geplanten europäischen Verfahrensrecht, StV 2003, 183 et seq, B Schünemann*, Bürgerrechte ernst nehmen bei der Europäisiserung des Strafverfahrens, StV 2003, 118 *et seq.*

[57] M Kaiafa-Gbandi, Memorandum on the Lisbon Treaty in House of Lords—European Union Committee (10th Report of session 2007–08), The Treaty of Lisbon: an impact assessment, vol 2: Evidence (HL paper 62-II), 2008, E162, *B Schünemann,* The Foundation of Transnational Criminal Proceedings, in Schünemann (Ed) A Programme for European Criminal Justice, 2006, 349–350. See also especially the proposal for an institution supporting the defence-rights (Eurodefensor), in Schünemann (Ed), A Programme for European Criminal Justice, 2006, 301–307, 415 *et seq.*

[58] Protocol on the role of national parliaments in the European Union (1997).

States. At this point, it should be stressed that *the aforesaid observations concern the whole of the legislation adopted in the third pillar, regardless of who undertakes the initiative* (the Commission or a Member State). The Member States get their ideas from the same sources as the Commission,[59] and furthermore some national legislative initiatives were expressly based on provisions of other EU legislative acts instead of the TEU, and therefore lack a valid legal basis.[60] In total, also the initiatives of the Member States consider that the legal bases of the Treaty are not more important than the rest of the other sources of ideas for legislation, especially the Conclusions of the European Council and the Union's programs, thus regarding the principle of legality as less essential than the effectiveness of EU legislation and downgrading the significance of the founding Treaties, which in other occasions are proclaimed as the "Constitution of the Union". At the same time the Member States' initiatives show similar to the Commission's lack of concern for fundamental principles of criminal law and the functional integration of EU legislation into the domestic legal orders.

F. The inquiry is interested in **the role of the citizens in the EU legislative procedure.** The preamble and article 1§2 TEU prescribe *the principle of proximity to the citizens*, which indicates that decisions should be taken as closely as possible to the citizens, and therefore provides the democratic basis of the Union's institutions and of their activities. However, the only link between EU legislation and EU citizens is made when the citizens' security is used as basis to adopt legal acts that harmonise domestic legislation. Generally, the distance between the people of the Union and the legislator of the Union is long and unclear, although EU acts dramatically affect national criminal laws. The Union still can't find the way to be effective in the field of criminal law.[61] EU legislation has yet to find a steady direction and a stable way of function; therefore, it is currently difficult to reach out to the citizens. However, the objectives and the fields of action of the Union constantly increase. This way, the democratic deficit[62] grows, not only because the citizens can't vote directly for the members of the institution that legislates, but also because there are no mechanisms to which people could refer to in order to communicate with the "legislators" (eg european political parties).

A step towards an improvement of this situation would be the amendment of the Treaty's provisions on the role of the European Parliament in the third pillar. *The contribution of the European Parliament*, due to its democratic legitimation, is extremely important for the legislative procedure, which is essential in the field of criminal law. Unfortunately, so far the advisory role of the European Parliament in relation to adopting legislation in the frame of the third pillar does not allow a substantive contribution. Therefore, the restriction of the democratic deficit by the Treaty of Lisbon in the field of criminal matters is expected to improve the situation.

7 April 2008

Memorandum by Dr Eve Sariyiannidou

1. Eve Sariyiannidou is an expert on EU law and policy and works as an independent consultant. Her research on institutional and constitutional developments in the European Union has attracted particular interest from the Council of Europe and the Western European Union. She is a member of the European Commission Working Group on Integrated Border Management, an official observer at the WEU Interparliamentary European Security and Defence Assembly and has been on the panel of experts of the European Commission for the Seventh Framework Programme (2007–13).

2. The legislative proposal is the first stage of the EU's *formal* legislative process and successive constitutional amendments have preserved intact the Commission's exclusive right to initiate legislation (except where the treaties provide otherwise).

[59] In equivalence to the observations on the Commission's initiatives, framework decision 2003/568/JHA is based on existing common actions, while framework decision 2002/946/JHA prescribes penalties in relation to the behaviours described in directive 2002/90/EK. Moreover certain framework decisions are based on other framework decisions related to similar issues (*vide* the connection of framework decisions 2002/212/JHA and 2006/783/JHA on confiscation with framework decision 2001/500/JHA on money laundering and confiscation of instrumentalities and the proceeds of crime).

[60] Framework decision 2000/383/JHA on increasing protection against counterfeiting in connection with the introduction of the euro evokes Regulation 947/98, which prescribed the obligation of the Member States to lay down criminal sanctions. Similarly, framework decision 2002/465/JHA on joint investigation teams evokes article 13 of the convention on mutual assistance in criminal matters, which prescribes the establishment of the investigation teams.

[61] Cooperation in criminal matters went from assimilation to harmonisation, from substantive to procedural law, then to proposals for pure european criminal law provisions (Corpus Juris) and finally the cooperation is communitarised by the Reform Treaty.

[62] For this deficit, its special meaning for criminal law and the ways to overcome it see *M Kaiafa-Gbandi,* The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commencement of the 21st century, European Journal of Crime, Criminal Law and Criminal Justice 2005, 500 *et seq*, 510, *B Schünemann*, Alternativ-Entwurf, "Europäische Strafverfolgung", 2004, 4, 22–23, as well as *B Schünemann*, The Foundations of Trans-national Criminal Proceedings, in Schünemann (Ed), A Programme for European Criminal Justice, 2006, 95.

3. The manner in which legislative proposals are created is not regulated by the treaties. Therefore, the actual process is *ad hoc*, unconstrained by formal rules, and characterised by informal institutional practice and various channels of consultation and cooperation. In this context, to assess how a proposal for legislation is developed under the Commission's "right of initiative", one needs to focus on the internal institutional and administrative practices of the Commission, but also take into account the influence of organised interests at national and subnational levels.

4. As the treaties set out the general competences of the institutions and govern only the basic principles of the operation of the specific legislative procedures, there is much room for interpretation of the different institutional roles. Due to the open-ended nature of the treaties, the Community institutions frequently use all the political and legal means available to defend their prerogatives and increase their impact on the decision-making process. This also applies to the formation of legislative proposals by the Commission. Hence, the second issue is whether the European Parliament and the Council can trigger legislative proposals or determine their scope and extent during their development.

5. A third issue is the proliferation of institutions in the Union's decision-making system who "share" executive functions. In this institutional environment, the European Council often emerges as the *de facto* higher level decision-maker in the EU. There are also elements of hierarchy in planning the overall priorities for legislation.

Forming a Legislative Proposal: An Overview

6. As the defender of the general interests of the Community, the Commission has been given the "right of initiative" which empowers and requires it to make proposals on matters contained in the Treaty, either because the Treaty expressly so provides or because the Commission considers it necessary. The Commission's role is to be cognisant of new challenges in areas of EU policy that require action. It will evaluate whether EU legislation is the best way to deal with these challenges and will propose action at EU level, only if it considers that a problem cannot be solved more efficiently by national, regional or local action (subsidiarity principle).

7. One such area, where action was deemed to be required at EU level, is control of pollution and CO_2 emissions. Work towards legislation was triggered partly by Commission policy, developed internally. The Commission's proposal (COM(2007) 18 final/2, 14.02.2007) to amend the Fuel Quality Directive (Directive 98/70/EC as amended by Directive 2003/17/EC relating to measures against air pollution by vehicle emissions), was inspired by its own "Energy Policy for Europe" (COM(2007) final/1, 10.01.2007) which set minimum targets for biofuels, as well as its "Thematic Strategy on Air Pollution" which set out a number of goals for the reduction of air pollution in the EU (COM(2005) 446, 21.9.2005).

8. In shaping the new proposal, the Commission adopted a consistent approach to the overall environmental policy objectives of the Union, for instance, the Kyoto strategy of the EU as set by the targets and priorities of the European Council and the Council (environment ministers).

9. The review process of the Fuel Quality Directive was accompanied by a consultation exercise on the scope of its review, involving stakeholders and national experts (working groups). The Directive deals with highly technical issues in a range of policy areas. Hence, its review required contributions from a significant number of industrial sectors. In view of these factors, the Commission sought input from organisations with relevant expertise. This input has been provided by the Commission's Joint Research Centre (JRC), which held structured dialogue and meetings with individual stakeholder or groups of stakeholders (working groups).

10. The JRC, which provides administrative support to the Directorates General of the Commission, undertook scientific work in some of the technical areas, in the review work required, with the support of different stakeholders. It contributed to the preparation of meetings with working papers setting out the salient issues, objectives and tasks, reported on progress of the stakeholder meetings (working groups) and responded to questions and comments. As with every consultation practice, the JRC was required to create and host an internet page which should contain an update of progress, input from stakeholders, draft reports etc. The comments of stakeholders on all of the different aspects of the review have been made publicly available on the internet, except in cases where stakeholders requested their comments to be kept confidential.

11. The JRC submitted its report to the Commission (FINAL REPORT Ispra, 28/02/2006 H04-EHU/AK/rp/D(2006)5179). The Commission carried out an Impact Assessment which reported the main views of the stakeholders (see document COM(2007) 18 final, 31.1.2007).

The European Parliament and the Council's Influence in Agenda Setting

12. The Commission's constitutional right to initiate legislation means that it falls on the Commission to decide whether the Community should act and, if so, on what legal basis. It also decides what content and what provisions as regards further implementation the proposal should contain. The Parliament can request the Commission to submit an "appropriate" proposal (Article 192 EC), but this is not equal to the power of initiating legislation. However, it has often proved quite effective. The Commission itself has pointed out that, in many cases, it had been the other institutions that insisted on its presenting a proposal, or who have made its proposals more complex in the course of the legislative procedure (Bulletin EU 5, 1998: 1.8.3).

13. The Commission's institutional right to propose legislation cannot be examined without reference to interinstitutional relations, a key aspect of the EU legislative process, including the "proposal" stage. A legislative proposal constitutes the reference text which can influence the context of the legislative outcome. The opportunity available to the Commission to press amendments through the legislative process (normally under the codecision procedure) often depends on the favourable, or unfavourable, stance of the Parliament and the Council Presidency, as was the case of the original "auto-oil" package (Directives 98/69 EC and 98/70 EC) in 1998. Faced with a British Presidency with plans to make the environment its priority, the Commission's proposed targets for legislation rallied the support of the Council.

14. The Commission's legislative influence, incumbent in the right of initiative, is contingent to a number of institutional factors, including the Council's "sectorised" nature and the different voting rules. The Environment Council has welcomed the Commission's decision to look at further common and coordinated measures to meet the Kyoto Protocol obligations (2684th Environment Council, Luxembourg, 17.10.2005, Press Release Nr 12953/05).The increased use of majority voting in the Council has strengthened the Commission's influence as an agenda setter, as its proposals have to rally the support only of a number of Member States, enough to attain the needed majority.

15. Enhanced by the lacunae character of the treaties, institutional practice relies on personal contacts and, overall, a "deformalisation" of interinstitutional relations. In the interest of better law-making, the three institutions (the EP, the Council and the Commission) have further agreed on the general coordination of their preparatory and legislative work based on dialogue and appropriate procedures, including the provision by the Commission with clear and comprehensive justification for the legal basis used for each proposal (Interinstitutional Agreement on better law-making OJC 321/1, 31.12.2003). The Commission is responsive to the fact that engaging parliamentary committees early in the process could result in the successful pass of its proposals through the legislative process. As a result, MEPs may occasionally be involved in the drafting of a proposal itself.

The European Council's Strategic Leadership in Agenda Setting

16. The European Council's constitutional role, as envisaged in the treaties, is political rather than legal. Its function of setting strategic guidelines and generating political impetus is delineated in Articles 4 and 13 TEU as an initial procedural step. Yet, it often emerges as the *de facto* higher level decision-maker in the EU, as its responsibilities are so comprehensive to be regarded the institution with the highest authority in the Union.

17. By simply reading the presidency conclusions, one may find ample evidence that it is the European Council that determines what the other institutions can or cannot do. It plays a very important role in the political process by taking general policy decisions, but most importantly, by directing the evolution of the Union's policies.

18. The European Council increasingly seeks to assert its leadership role in both the political and institutional development. Having laid the foundations for action on a wide-ranging climate and energy policy (spring 2007 and 2008 summits), the European Council has called on the EU institutions, especially the Commission, to create a comprehensive regulatory framework to meet its ambitious emissions and energy targets. It has further called on the Commission to provide institutional and qualitative reforms to its system of impact assessment in the interests of better regulation.

19. The hijacking of policy generating by the European Council, whose increasing dominance may be seen to take over the Commission's traditional role of legislative initiative, may be further exacerbated by the institutional innovation of the European Council presidency, should the Reform Treaty be ratified. The new role may create an even more complex regime of shared executive power, as the respective responsibilities between the President of the European Council and the President of the Commission could potentially overlap. But there is more to the relationship between the two presidencies than the "sharing" of executive power; there are issues as to the hierarchy—between the Commission and the European Council—in planning the overall priorities for legislation.

Conclusion

20. The way in which legislative proposals are created is not subject to observable rules and processes. The Commission draws ideas for legislation, where required, from the overall objectives and policy commitments of the Union, its own policy instruments and via organised interests. The open-ended character of the treaties has a series of implications. Cognisant of the institutional and legislative significance of the Community institutions, the Commission may involve the Parliament and the Council at the very initial stage of the legislative process; that is, the initiation and drafting of a proposal. Another issue is that the treaties provide the European Council with a strong political, not legislative, role without further elaboration. The European Council seems to have made good use of its "open-ended" political role by increasing its agenda-setting and, in effect, hijacking the Commission's traditional legislative role to initiate legislation.

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