



HOUSE OF LORDS

European Union Committee

35th Report of Session 2006–07

The EU Reform Treaty: work in progress

Report with Evidence

Ordered to be printed 23 October 2007 and published 1 November 2007

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£11.00

HL Paper 180

The European Union Committee

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

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

Our Membership

The Members of the European Union Committee are:

| | |
|-----------------------------------|---------------------------------|
| Lord Blackwell | Lord MacLennan of Rogart |
| Lord Bowness | Lord Marlesford |
| Lord Brown of Eaton-under-Heywood | Lord Powell of Bayswater |
| Baroness Cohen of Pimlico | Lord Roper |
| Lord Freeman | Lord Sewel |
| Lord Geddes | Baroness Symons of Vernham Dean |
| Lord Grenfell (Chairman) | Baroness Thomas of Walliswood |
| Lord Harrison | Lord Tomlinson |
| Lord Kerr of Kinlochard | Lord Wright of Richmond |

Information about the Committee

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

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

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

Members' interests are available at the Register of Interests:

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

Contacts for the European Union Committee

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

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

The telephone number for general enquiries is 020 7219 5791. The Committee's email address is euclords@parliament.uk

CONTENTS

| | <i>Paragraph</i> | <i>Page</i> |
|---|------------------|-------------|
| FOREWORD—what this Report is about | | 4 |
| Chapter 1: Work so far | 1 | 5 |
| Introduction | 1 | 5 |
| The process so far | 7 | 6 |
| COSAC | 17 | 7 |
| The Committee's future plans | 19 | 7 |
| Chapter 2: National Parliaments | 24 | 9 |
| The general role envisaged for national parliaments | 24 | 9 |
| Information | 33 | 10 |
| Taking part in revision procedures as provided for in the Reform Treaty | 36 | 10 |
| Taking part in inter-parliamentary co-operation | 38 | 10 |
| Availability of documents | 40 | 11 |
| COSAC | 43 | 11 |
| The monitoring of subsidiarity and proportionality | 45 | 11 |
| Existing exchanges with the Commission | 54 | 14 |
| Appendix 1: Letter to the Chairman from the Minister | | 15 |
| Appendix 2: List of Witnesses | | 18 |
| Appendix 3: Recent Reports from the Select Committee | | 19 |

Oral Evidence

| | | |
|---|--|----|
| <i>Mr Kim Darroch, Ambassador and United Kingdom Permanent Representative, Ms Alison Blackburne, Political Counsellor, Mrs Sally Langrish, Legal Counsellor, Mr Vijay Rangarajan, Counsellor (Justice and Home Affairs), Mr Edward Smith, Press Spokesman, and Ms Ann Swampillai, First Secretary (Future of Europe), United Kingdom Permanent Representation to the European Union</i> | | |
| Oral Evidence, 19 September 2007 | | 1 |
| Supplementary Evidence | | 7 |
| <i>Mr Christian Leffler, Head of Cabinet to Commission Vice-President Margot Wallström, and Mr Michel Petite, Director-General of the Legal Service of the European Commission</i> | | |
| Oral Evidence, 19 September 2007 | | 9 |
| <i>Mr Andrew Duff, Member of the European Parliament, and Mr Guillaume McLaughlin</i> | | |
| Oral Evidence, 9 October 2007 | | 19 |

NOTE: References in the text of the report are as follows:
(Q) refers to a question in oral evidence

FOREWORD—what this Report is about

This progress report presents to the House evidence taken by the Committee during the summer recess on the draft EU Reform Treaty on which negotiations have been proceeding in the Inter Governmental Conference (IGC). Correspondence raising questions with the Minister is also presented.

The Committee sets out its plan for further in depth analysis of the impact of the reform Treaty on the UK.

In addition, specific questions of the role of national parliaments are addressed in some detail.

The report notes the tight mandate given to the IGC has had the effect that its work has been largely technical. The Government are asked to report to the House on the impact of this procedure.

The EU Reform Treaty: work in progress

CHAPTER 1: WORK SO FAR

Introduction

1. Over the months since the June European Council set out the mandate for the Inter-Governmental Conference (IGC) to prepare an amending Treaty (Reform Treaty) for the European Union, legal and technical experts have worked closely to produce a text which delivers on the mandate.
2. The Committee reported to the House on this matter in July¹, after the European Council meeting. That initial report set out our scrutiny of the Minister for Europe on the Government's position with regard to the mandate given to the IGC.
3. Since the mandate was published, two texts of a draft Reform Treaty have been made publicly available. The official working language of the IGC has been French and so the official documents of the IGC have been in French. But English versions have emerged quickly and the Government have made them available to the House through the Printed Paper Office. They are also available on the internet².
4. The latest text available during preparation of this report is entitled "a Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community"³. This text represents the final output of the working party of legal experts and was reviewed by Ministers during October. Foreign Ministers reviewed the text on 15 October and the Heads of State and Government on 18 October reached political agreement. The text will now be subject to a final legal and linguistic analysis (Q 5) before its formal signature in December. Only at that point will the Reform Treaty be presented for ratification by the Member States.
5. Following our scrutiny of the Minister for Europe soon after the agreement of the mandate, the Committee wrote to the Minister raising a number of further detailed questions for scrutiny. The Minister's reply was received and considered by the Committee during the Parliamentary summer recess and is printed in Appendix 1.
6. The Committee continued its scrutiny of the ongoing process of the preparation of the draft Reform Treaty by travelling to Brussels to take evidence from Kim Darroch, the UK's Permanent Representative to the EU and his officials, and from senior officials and legal advisers at the European Commission. The Committee also heard, in London, from Andrew Duff

¹ "Evidence from the Minister for Europe on the June European Council and the 2007 Inter-Governmental Conference", 28th Report, (2006–07), HL Paper 142.

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/142/14202.htm>

² The latest version of an English Text has been made available on http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317&lang=en&mode=g

³ CIG 4/1/07 REV 1, 5 October 2007.

MEP, one of three representatives of the European Parliament at the IGC. He indicated that his primary role had been to try to ensure that the European Parliament secured the same advances as in the Constitutional Treaty (Q 73).⁴

The process so far

7. The IGC was presented with a clear and tight mandate from the June European Council and thus its work has been mainly technical, to ensure that a text is prepared that delivers on the mandate (QQ 2, 36). Kim Darroch confirmed that the mandate was, as intended by the Portuguese Presidency, by and large being strictly adhered to although the European Council could of course make changes by unanimity (Q 7).
8. Several witnesses commented that the giving of such a precise mandate to an IGC was unusual (QQ 9, 74). **We recommend that the Government report to Parliament, after the December European Council, on the implications, both in terms of scrutiny and transparency and of effectiveness in agreeing policy, of an IGC proceeding on the basis of such a tight mandate. The report should also cover the implications for scrutiny of how the mandate was drawn up and presented to the European Council.**
9. Proceedings in the IGC have followed standard practice whereby discussions are conducted behind closed doors. **The Government have, however, made texts promptly available to Parliament as they have emerged, which we welcome.**
10. On the other hand, the Government have not yet formally presented a text to Parliament for scrutiny. While this is understandable given the process so far, **we recommend that the text agreed at the Informal Summit on 18 October be formally deposited in both Houses of Parliament, together with a full explanatory memorandum by the Government.** This would ensure that something approaching a definitive text is available for scrutiny within Parliament at the earliest opportunity.
11. We note the work done by the House of Commons European Scrutiny Committee to compare a text against the now defunct Constitutional Treaty. **As that comparison was undertaken by that Committee, we do not seek to replicate it here**⁵. A consolidated text of the Treaties by Open Europe was also made available to the Committee.
12. The Government must also have prepared a range of explanatory material for its own use during the IGC as well as in preparation for any bill to ratify the Reform Treaty. The House would particularly benefit from the publication of a comprehensive analysis of the text against existing EU Treaties. Such analysis, presented as an official document by the Government, would considerably inform and enhance scrutiny and debate in Parliament.
13. All Departments must by now be heavily engaged in assessing the impact of proposed Treaty changes on policy in their areas and the Government should

⁴ Full title of Treaty plus refs. To work of the Select Committee on the Constitutional Treaty.

⁵ House of Commons European Scrutiny Committee Report, "European Union Intergovernmental Conference" (35th Report, Session 2006–07, HC Paper 1014).

begin to share the results of this work with Parliament and more widely with the public.

14. The House would also benefit from a clear statement of the extent of any change from the existing Treaties. That statement should include a list of new areas of Union competence (it could usefully distinguish competences that are truly new from those where there has already been some Union activity) and new institutional/procedural measures. Separate lists might show where Union activity and institutional/procedural measures would move from unanimity to QMV.
15. **We accordingly recommend that, as soon as possible, the Government deposit in Parliament a full and thorough analysis of the changes which the Reform Treaty, on the basis of existing texts, would bring about, drawing attention to differences from existing Treaty provisions. This should include both a consolidated version of the Treaties as amended by the Reform Treaty and an in-depth policy analysis of the effect of the changes. We expect that all Departments would be involved in the preparation of this material.**
16. We acknowledge that only the final text, which is expected to be signed in the December European Council, presented for ratification will be the text on which Parliament is asked to give its opinion by way of any ratification bill. However, Parliament can, in the meantime, legitimately expect the formal presentation for scrutiny of the text which has received political agreement.
17. The Committee's work so far has concentrated first on trying to probe some of the details as they have been under discussion. This has been somewhat constrained by the IGC process and by the fact that the mandate given to the IGC by the European Council was so tightly drawn. The Committee's work has also focused on specific questions arising concerning the role of national parliaments, which are considered further in Chapter 2 below. **In the absence of something approaching a final text, the Committee has not at this stage considered it appropriate to seek to present to the House a comprehensive analysis of the impact of the Treaty on the United Kingdom.**
18. This report accordingly presents, for the information of the House, work in progress with some emphasis on issues directly concerning national parliaments on which we hope the House will find an early report to be of assistance.

The Committee's future plans

19. In the Committee's view, the most appropriate service that we can provide for the House is to ensure that the text of the Reform Treaty, when available, is subjected to the most rigorous and detailed analysis by the Committee and all our policy-based Sub-Committees. It is not the Committee's purpose to seek to compare the text of the Reform Treaty against the now defunct Constitutional Treaty. Nor is it the Committee's purpose to seek to indicate whether the Reform Treaty should be presented for a referendum. This would be a matter for the House during debate on any ratification legislation. It is the Committee's intention, however, to ensure that that debate is informed by a thorough and rigorous assessment of the impact of the

proposed Reform Treaty on the United Kingdom. This would provide an authoritative report to the House on the major and significant changes.

20. **The Committee accordingly intends, through its Sub-Committees, to conduct an analysis of how the Reform Treaty, if ratified, would affect the United Kingdom at least in the following policy areas:**
 - Financial and Economic Affairs
 - Internal Market
 - Foreign Affairs and Defence
 - Environment and Agriculture
 - Institutional questions
 - Freedom, Security and Justice (FSJ)
 - Social Policy
21. **In the Committee’s view, such analysis would assist the House were any bill to ratify any such Treaty presented for discussion in the next session of Parliament.**
22. In our future work we will ensure that the following topics, covered in the evidence printed with this report, are subject to more detailed scrutiny and analysis:
 - Charter of Fundamental Rights (QQ 6, 10, 13–14, 22, 45–47, 81, 83)
 - Common Foreign and Security Policy (CFSP), and scrutiny (QQ 12, 15, 24–25, 61–63)
 - Declarations—status of (QQ 20–21, 69–70)
 - Enhanced co-operation European Security and Defence Policy (ESDP) (Q 80)
 - Personal data: jurisdiction of European Court of Justice (ECJ) (QQ 92–3)
 - European Parliament—number of seats (Q 88)
 - External Action Service (QQ 29, 71–72, 79)
 - FSJ opt-ins (QQ 12, 16, 49, 78)
 - Ioannina Compromise (QQ 48, 89)
 - Passerelles (Q 30)
 - Pillar structures—changes to (Q 77, 79)
 - Reform Treaty—aims of (Q 33)
 - Technical working group (QQ 36, 53)
23. The Committee will in particular seek to probe in detail the effectiveness of the Government’s “red lines”. Kim Darroch confirmed that they are “secure” and that the confirmation that national security remains a matter for Member States was “a very important breakthrough” (QQ 11–12). Opt-ins in FSJ matters will be subject to close scrutiny. We will also examine the UK’s position as regards the Charter of Fundamental Rights⁶ as well as any provision made by the Government to implement Parliamentary involvement in *passerelle* provisions.

⁶ We understand that the Charter will be published in the Official Journal of the European Union (Q 81).

CHAPTER 2: NATIONAL PARLIAMENTS

The general role envisaged for national parliaments

24. The Reform Treaty proposes a new Article 8c as part of a new Article 8 of the Treaty of European Union (TEU). For the first time the role of national parliaments is recognised in an article of a Treaty. Previous reference was only in protocols, in particular the Protocol on the Role of National Parliaments in the European Union inserted into the TEU by the Amsterdam Treaty—“the Amsterdam Protocol”.
25. A detailed Protocol (No. 1) on the Role of National Parliaments complements the new Article 8c.
26. The early version of the text of Article 8c begins:

“National parliaments shall contribute actively to the good functioning of the Union”.
27. This wording is different from that in the Amsterdam Protocol which merely states a desire to encourage greater involvement by national parliaments in the activities of the Union.
28. The current definitive French text of the Reform Treaty reads as follows:

“Les parlements nationaux contribuent activement au bon fonctionnement de l’Union.”
29. If that language were purely descriptive that would be wholly appropriate. The Committee noted however a problem with the original English wording. It might imply that the EU could impose obligations on national parliaments. The Committee drew this matter to the attention of the Minister who replied:

“the wording of the new Article on the role of national parliaments is inappropriate. This will be raised during the IGC and we will press for more appropriate language.”⁷
30. Kim Darroch confirmed in evidence (Q 2) that “there is no mandatory sense in the French... so ‘shall’, we think, is not the right English translation”. No compulsion on national parliaments was intended (Q 3). Mr Leffler for the Commission commented that no one involved in the drafting of the mandate “even in their wildest fantasies thought that somehow the Union Treaty could or should instruct national parliaments to contribute”. At the most the phrase was intended to express national parliaments’ willingness to contribute (Q 41).
31. **While we accepted these reassurances, we considered it necessary to ensure that the phraseology was correct while the interests of national parliaments were appropriately presented in the text. If the language were not changed the criticism could be made that the Reform Treaty inappropriately sought to prescribe functions for sovereign national parliaments. We were accordingly pleased to have heard that the word “shall” has been eliminated from the English text.**

⁷ Ref to Minister in previous Report.

32. The rest of Article 8c sets out a number of ways in which it is envisaged that national parliaments contribute to the good functioning of the Union. These are considered in turn.

Information

33. The Treaty provides for national parliaments to be informed of EU legislation forwarded to them in accordance with more detailed provisions in the Protocol (No. 1) on the Role of National Parliaments.
34. The forwarding of draft legislative acts contributes to transparency and allows direct engagement by national parliaments in EU matters. Our Government already forward to Parliament a range of documents along with explanatory memoranda. The Commission has also already set up a system of direct transmission of documents which is working well. While documents are only received shortly before they arrive via the Government (and are thus not usually used in the scrutiny process) they will provide a valuable resource for a future audit, when staff resources permit, of the effectiveness of our current systems. It also should be remembered that the system of direct transmission is extremely valuable to other parliaments whose own national systems differ from ours.
35. **We recommend that the Government explain how the EU institutions covered by the Article other than the Commission (e.g. the Court of Justice) will fulfil their obligations under this Article.**

Taking part in revision procedures as provided for in the Reform Treaty

36. The *passerelle* provisions allow certain changes to the Treaties without formal treaty amendment. Under a new Article 33 of the TEC any national parliament would have a right of veto over any proposed use of the simplified revision procedure. This is in line with earlier recommendations from the Committee to provide appropriate safeguards over the use of *passerelles*. There are, however still uncertainties over the precise extent and operation of the various *passerelle* provisions in the Reform Treaty. In particular it is not clear whether any national parliamentary veto will operate separately for two chambers in a bicameral parliament. The Committee objected⁸ to the Government's previous proposal (in its abortive bill to ratify the Constitutional Treaty) that the parliamentary veto would be a matter for the Commons, with this House given 20 days to express an opinion.
37. **The Government need to explain clearly the role they see for national parliaments under the *passerelle* provisions and how they will be applied in the UK.**

Taking part in inter-parliamentary co-operation

38. Article 9 of the Protocol of the Role of National Parliaments states that "The European Parliament and national parliaments shall together determine the organisation and promotion of effective and regular inter-parliamentary co-operation within the Union". Specific reference is made in Article 10 to COSAC (the Conference of Community and European Affairs Committees of Parliaments of the EU).

⁸ 15th Report (2004–05), HL Paper 102 "Clause 2 of the European Union Bill—the Constitution's Passerelle provisions"

39. **How the European Parliament and national parliaments co-operate is a matter for them. The Conference of Speakers currently performs this role and the Committee has supported them in doing so as that forum ensures an appropriate balance between the interests of national parliaments and the European Parliament.**

Availability of documents

40. The period between documents being made available to national parliaments in the official languages of the EU and their consideration by the Council is extended to eight weeks from the six week period provided for in the Amsterdam Protocol. Exceptions can be made in cases of urgency but reasons will have to be given.
41. This development is to be welcomed as a strengthening of the opportunity for scrutiny by national parliaments compared with existing provisions. The provision that the clock starts when the document is available in “the official languages of the Union” is presumably intended to replicate the provisions in the Amsterdam Protocol for the document to be made available “in all languages”. This will be a matter on which many parliaments will insist, as in several Member States scrutiny of EU documents can only be undertaken in their national languages.
42. **The Committee welcomes the extension of the period from six to eight weeks. The Government should provide clarification that the clock does indeed begin only when a document is available in all languages.**

COSAC

43. The Protocol’s statement of the role of COSAC goes further than the wording of the Amsterdam Protocol in two respects:
- specific mention is made of COSAC’s work in exchanging information and promoting best practice; and
 - it is suggested that COSAC might “organise inter-parliamentary conferences on specific topics” including CFSP and ESDP.
44. The first of these developments is welcome and restates exactly what this Committee considers COSAC should do. The latter, which is in line with ideas from the French Senate, could have the effect of diluting the core work of COSAC. However, it is hard to see how COSAC itself could organise such conferences. The work would in effect be handled by the presidency parliament and thus in practice the text presumably refers to the work already carried out by presidency parliaments in organising such conferences. While there will be an issue about how the COSAC presidency is organised if the European Council moves to a more permanent presidency system these are matters for another day. **The Committee will ensure that this matter is monitored closely in COSAC.**

The monitoring of subsidiarity and proportionality

45. A separate Protocol (No. 2) on the application of the principles of subsidiarity and proportionality is annexed to the Reform Treaty. Existing Treaty provisions set out the principle of subsidiarity in some detail and require the Commission to consult and justify its actions. Except for a steer

to COSAC to look at subsidiarity issues, the existing Treaties are silent on the questions of national parliamentary scrutiny of subsidiarity.

46. **We recommend that the Government explain why the text of Article 8c inserted by the Reform Treaty only mentions respect for subsidiarity and not proportionality: the Protocol covers both.**
47. Protocol (No. 2) provides that:
- EU institutions shall respect subsidiarity.
 - Draft legislative acts shall be forwarded to national parliaments “justified with regard to the principles of subsidiarity and proportionality” including a financial assessment; assessment of implications for national and regional legislation; and qualitative and where possible quantitative indicators; and shall take account of the need for financial and administrative burdens to be “minimised and commensurate with the objective to be achieved”.
 - National parliaments have eight weeks in which they can send a reasoned opinion saying why a draft does not comply with the principle of subsidiarity.
 - If a sufficient number of chambers of national parliaments⁹ raise concerns, the proposal will need to be reviewed and the EU institution concerned (usually the Commission) would have to review its proposal and could decide to maintain, amend or withdraw the draft. “Reasons must be given for this decision”. (This is the so-called “yellow card”.)
 - The European Court of Justice has “jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act ... brought by a Member State or notified by them in accordance with their legal order on behalf of their national parliament or a chamber of it”.
48. Under the Constitutional Treaty the yellow card was played if one third¹⁰ of chambers of national parliaments objected. Under the Reform Treaty, in the case of draft legislative acts subject to the ordinary legislative procedure¹¹ where the reasoned opinions represent a simple majority “of the votes allocated to national parliaments” the Commission must, if it decides to maintain a proposal after review, “justify why it considers that the proposal complies with the principle of subsidiarity”. The Union legislator (i.e. the Council and the European Parliament) shall then take account both of the national parliaments’ opinions and the Commission’s justification before concluding first reading of the proposal. If 55% of the Council members, or a majority of votes cast in the European Parliament, object to the proposal on subsidiarity grounds it must be dropped. This is the so called “orange card”.
49. We probed in evidence whether the orange card procedure in any way allowed the Council or the European Parliament to act on behalf of national parliaments but witnesses were clear that it did not: the provision allowed the views of national parliaments to be taken into account (QQ 23, 27). Andrew Duff as a member of the European Parliament would “greatly welcome”

⁹ The text clearly states that each chamber of a bicameral parliament has one vote.

¹⁰ One quarter is the threshold in certain matters of freedom, security and justice.

¹¹ i.e. co-decision and QMV.

national parliaments taking their scrutiny role more seriously using the new procedure to increase their inputs (Q 84).

50. We see no problem in there being two systems, the yellow and the orange cards, as the orange card is a stronger mechanism triggered at a higher threshold of votes. Certain detailed questions may nevertheless be asked about the orange card:
- Is it appropriate to give national parliaments what is an advisory rather than direct power of veto?
 - Why is it restricted to Commission initiatives and not available for proposals from the other institutions, as the yellow card is?¹²
 - Who is to submit national parliaments' reasoned opinions to the legislator? Will it be the Commission? If so, how will impartiality be seen to be ensured?
 - Why is the threshold for votes in the Council a majority of members rather than of votes cast, as is the case with an vote in the European Parliament? What effect will abstentions in the Council have on this process?
 - How will national parliaments be informed of the outcome of any such votes?
51. **We recommend that the Government establish a mechanism to ensure that the details of the operation of these procedures are discussed and agreed with both Houses of Parliament.**
52. During scrutiny of the now defunct Constitutional Treaty the Committee produced a full report¹³ (with evidence from academics and others) on the parliamentary implications of the yellow card¹⁴, covering issues such as the mechanisms by which the House might wish to exercise its powers; and the complications in the proposal for reference of a matter from national parliaments to the ECJ. Principal features of that report were:
- full analysis of subsidiarity and its history;
 - criticism that the proposed six weeks period was too short;
 - a welcome for the independent yellow card for each House but a commitment to cooperate with both the Commons and regional parliaments and assemblies in coming to a view on an individual legislative proposal;
 - a recommendation that the House should cast the vote under the yellow card, but that it should do so when a report from the Committee triggered such a debate;
 - considerable doubts about the meaning of the provision to allow reference from national parliaments to the ECJ and in particular some hesitancy on

¹² The Commission's view is that this was an oversight (Q 60).

¹³ "Strengthening National Parliamentary Scrutiny of the EU—the Constitution's subsidiarity early warning mechanism", 14th Report (2004–05) HL Paper 101.

¹⁴ The Committee did not support earlier suggestions for a "red card", whereby a majority of national parliaments' votes could block a proposal, which was then dropped.

the part of the Government to accept that this represented an independent power for Parliament.¹⁵

53. **These detailed issues will need to be revisited later in the light of the final Treaty text. The Committee will accordingly wish to review its earlier report in some detail.**

Existing exchanges with the Commission

54. A final issue with regard to this Protocol is that it makes no mention of the system agreed by the Commission and noted in the European Council Conclusions of June 2006 whereby national parliaments are encouraged to correspond with the Commission on any legislative matter, in particular (but not limited to) subsidiarity and proportionality. This is sometimes called “the Barroso initiative”. The Committee attaches great importance to this process, as does COSAC. The Committee asked the Government whether it should be enshrined in the Treaty. The Minister replied that the Barroso initiative was working well and “there is no reason why it should not continue”¹⁶. Andrew Duff MEP hoped there would be more proactive networking by national parliaments (Q 85).
55. **In the light of the Minister’s reply there seems no need for the Barroso initiative to be included in the Treaty but the Committee nevertheless reiterates the value of maintaining it. We are pleased to note that the Commission remains strongly committed to this initiative (QQ 55–57).**

¹⁵ In France, the national constitution was changed to make the power of their parliament clear in this regard.

¹⁶ See Appendix 1.

APPENDIX 1: LETTER TO THE CHAIRMAN FROM THE MINISTER

Thank you for your letter of 17 July 2007, regarding the IGC and the Reform Treaty. You asked for comments on the following points.

The IGC Mandate

The Government believes that the IGC Mandate agreed at the June European Council will provide for a more effective, efficient EU, better able to act where it is in our interests for it to do so, and which protects the UK's red lines. HMG wants to ensure that the Reform Treaty reflects the IGC Mandate in detail and will defend that position as necessary in discussions during the IGC. The Portuguese Presidency has set out an ambitious timetable for agreement of the Reform Treaty, which HMG supports. Other Member States have also made clear their support for this objective. To achieve that, we shall need to follow precisely the terms of the mandate agreed at the June European Council.

Transparency and explanation

FCO officials have worked with your Committee Clerks to create a distribution list so that Presidency papers can be forwarded during the IGC. The first document, the draft Reform Treaty text (French language version) was sent to your Committee, the Libraries of both Houses, the Foreign Affairs Committee and the European Scrutiny Committee on Monday 23 July. We shall forward the English language version as soon as we get it, which we expect to be early next week. The first working documents for the legal experts who will prepare the draft Reform Treaty have also been circulated to the Committee Clerks and my officials will review these arrangements regularly with the Clerks to ensure that they are working effectively.

The White Paper on the British approach to the IGC was published on 23 July and I gave an oral statement to the House of Commons to announce its release. Copies were delivered to the Committee office on the morning of publication, which I trust you found useful. The White Paper is also available at www.europe.gov.uk

The White Paper clearly sets out the various elements of the draft IGC Mandate and the Government's view on each of the proposals. Our website (address above) provides information and references on a range of EU issues and we are currently developing pages on the website addressing common questions about the Reform Treaty. We will look for other opportunities to provide information for the public throughout the IGC process.

As we discussed in the evidence session of 12 July, we do not currently propose to produce a detailed comparative analysis of the Reform Treaty and the current Treaties. It is not usual procedure for the Government to produce such a document. The analysis of the Constitutional Treaty (the Commentary) was an exception due to the nature of the Treaty, which repealed previous Treaties and re-founded the Union on a single Treaty base. However, I take the Committee's views on board and we will review the situation throughout the IGC process.

Devolved administrations

Following a similar request from the European Scrutiny Committee, the Government has agreed to make a positive statement in Explanatory Memoranda

that, where the EM covers an issue where they have an interest, the devolved administrations have been consulted.

Council transparency

The June 2006 European Council agreed an “overall policy on transparency”, the main effect of which was to open up to the public all deliberations on co-decided legislation. This provides for:

- opening to the public of the presentation and final deliberation of legislative acts to be adopted by co-decision and, unless the Council or Coreper decide otherwise, of all other Council deliberations on such acts;
- opening to the public of the first deliberations on important new legislative proposals other than those to be adopted by co-decision, as well as the subsequent deliberations unless the Council or Coreper decide otherwise;
- holding of regular public debates on important issues;
- and holding of public debates on the programming of the Union’s work.

Furthermore since July 2006 Council deliberations and debates and other events such as press conferences have been broadcast live through video-streaming on the website of the Council, and from September 2006, all public debates and deliberations have been retransmitted in all languages. Live-streaming of events has also been accessible from the Finnish, German and current Portuguese Presidency websites.

The Government fully supports these measures and awaits the outcome of the second report on council transparency to assess how well the new practices are functioning. As agreed with the Finns during their Presidency in 2006, the Portuguese Presidency will report back in December 2007.

Ratification

I can confirm that any future amending Treaty will be presented to Parliament and will be handled in line with established practices which allow both Houses to scrutinise the Treaty.

Treaty provisions: Role of national parliaments

As we discussed in the evidence session of 12 July, the wording of the new Article on the role of national parliaments is inappropriate. This will be raised during the IGC and we will press for more appropriate language.

I note your request that the possibility of including in the Protocol the Commission’s commitment to responding to national parliaments on a range of matters, not limited to subsidiarity and proportionality, be raised in the IGC. I appreciate your concern that the current arrangements are protected but I stress, as I did in the evidence session, that we would be reluctant to reopen negotiation on the substance of the IGC mandate.

The Commission’s commitment to considering the comments of national parliaments on new proposals and consultation papers is enshrined in the June 2006 European Council Conclusions. It is a political commitment which is working well, and with the encouragement and participation of COSAC, there is no reason why it should not continue. As the Committee noted when commenting

on the arrangements in the 2006 Annual Report, ‘no changes to the existing treaties of the EU is needed for these exchanges to take place.’

Treaty provisions: the Charter

You raised the issue of the UK-specific Protocol secured for the Charter of Fundamental Rights. The Protocol is drafted in very clear terms and will be interpreted by the courts and Member States in the way I have described. You ask whether the Charter might be used to interpret the extent of ECHR guarantees, which are binding in the UK. The Charter provides (article II-112 in the 2004 version which will be adopted) that rights corresponding to ECHR rights have the same meaning and scope as in the ECHR. The Explanations to the Charter confirm that “to ensure the necessary consistency between the charter and the ECHR ... insofar as the rights in the present Charter also correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR”. It is therefore provided that the ECHR will be used to interpret the Charter and not the other way around.

Treaty provisions: Institutional matter—the Council and the Commission.

The Reform Treaty makes provision for team presidencies in the future.

Joint working between Presidencies is already taking place. The Seville European Council in June 2002 agreed that future Presidencies should periodically publish a joint work programme. Combined work programmes are the result of contacts between three countries which set out an indicative picture of Council business in the coming 18 months. An Explanatory Memorandum (19079/06); which was deposited in Parliament on 2 February 2007, sets out the current work programmes in more detail.

We anticipate that the new arrangements will be an evolution of current practices.

Commission size

The proposals for reducing the size of the Commission are part of the overall IGC Mandate agreement and will contribute to the stated aim, enshrined in the Mandate, of “enhancing the efficiency ... of the enlarged Union”. HMG believes that the IGC Mandate should not be re-opened and we hope that other Member States, the Commission and European Parliament will continue to support that position.

Treaty provisions: Passerelle

All passerelles are subject to unanimity. In addition, use of the three new passerelles in the Reform Treaty that provide for simplified treaty revision procedures in wide-ranging areas would have to be approved by national parliaments. It will be a matter for national parliaments to decide how this approval will be given.

Jim Murphy MP

Minister for Europe

31 July 2007

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave oral evidence:

Ms Alison Blackburne, Political Counsellor, United Kingdom Permanent Representation to the European Union

Mr Kim Darroch, Ambassador and United Kingdom Permanent Representative

Mr Andrew Duff, Member of the European Parliament

Mrs Sally Langrish, Legal Counsellor, United Kingdom Permanent Representation to the European Union

Mr Christian Leffler, Head of Cabinet to Commission Vice-President Margot Wallström, European Commission

Mr Guillaume McLaughlin, European Parliament

Mr Michel Petite, Director-General of the Legal Service of the European Commission

Mr Vijay Rangarajan, Counsellor (Justice and Home Affairs), United Kingdom Permanent Representation to the European Union

Mr Edward Smith, Press Spokesman, United Kingdom Permanent Representation to the European Union

Ms Ann Swampillai, First Secretary (Future of Europe), United Kingdom Permanent Representation to the European Union

APPENDIX 3: RECENT REPORTS FROM THE SELECT COMMITTEE

Session 2005–06

Evidence by Commissioner Franco Frattini, Commissioner for Justice, Freedom and Security on Justice and Home Affairs Matters (1st Report, Session 2005–06, HL Paper 5)

Correspondence with Ministers: June 2004–February 2005 (4th Report, Session 2005–06, HL Paper 16)

Ensuring Effective Regulation in the EU (9th Report, Session 2005–06, HL Paper 33)

Evidence from the Minister for Europe—the European Council and the UK Presidency (10th Report, Session 2005–06, HL Paper 34)

Scrutiny of Subsidiarity: Follow-up Report (15th Report, Session 2005–06, HL Paper 66)

The Work of the European Ombudsman (22nd Report, Session 2005–06, HL Paper 117)

Annual Report 2005 (25th Report, Session 2005–06, HL Paper 123)

Ensuring Effective Regulation in the EU: Follow-up Report (31st Report, Session 2005–06, HL Paper 157)

EU Legislation—Public Awareness of the Scrutiny Role of the House of Lords (32nd bis Report, Session 2005–06, HL Paper 179)

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

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

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

Session 2006–07

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

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

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

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

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

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

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

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

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

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION

WEDNESDAY 19 SEPTEMBER 2007

| | | |
|---------|------------------------|-------------------------|
| Present | Bowness, L | Roper, L |
| | Cohen of Pimlico, B | Thomas of Walliswood, B |
| | Grenfell, L (Chairman) | Wright of Richmond, L |

Examination of Witnesses

MR KIM DARROCH, Ambassador and United Kingdom Permanent Representative, Ms ALISON BLACKBURNE, Political Counsellor, MRS SALLY LANGRISH, Legal Counsellor, MR VIJAY RANGARAJAN, Counsellor (Justice and Home Affairs), MR EDWARD SMITH, Press Spokesman, and Ms ANN SWAMPILLAI, First Secretary (Future of Europe), United Kingdom Permanent Representation to the European Union, examined.

Q1 Chairman: We are on the record; it is as if it were a public meeting. I want to begin by thanking you very much indeed, Ambassador, and your colleagues, for agreeing to meet with us so that we can discuss some of the issues relating to the Reform Treaty that are of particular interest to our Committee. As you know, we have done an analysis of the Treaty as we had it in the English version. Now I am very happy that you have been able to provide us with the French version and we would be particularly interested to see what they say about whether or not the national parliaments *contribuent* is going to be formulated in some other very elegant Gallic manner. We do thank you very much indeed for being with us. We will, of course, send you the transcript of this so that you can check and see that your remarks, and those of your colleagues, have been properly recorded. You are an old hand at appearing before this Committee anyway, but please feel free to call upon any of your colleagues at any point where you wish to do so. I think I will start by asking you whether you would like to make a brief opening statement on the issue or go straight into questions, it is entirely your choice.

Mr Darroch: My Lord, only a very brief one. Thank you for your presence here; it is an honour for us to have you here. Just to say of my team, we have Vijay Rangarajan at the end, who you met over lunch, who is our JHA Counsellor; Sally Langrish is our Legal Counsellor; Alison Blackburne is our Political Counsellor; Ann Swampillai, First Secretary Institutions, and you will see from this huge pile of files here that she is our all-round guru and expert on the Treaty. In the background, Ed Smith is the Press Spokesman in UKREP. We are at your service. Let us go straight to questions.

Q2 Chairman: Good. Thank you very much indeed. I think we will start with a rather general question and we can get into some of the more detailed issues as we go along. Maybe you could just update us on one thing which I need to know, which is whether you

have spotted any real changes in the French text from the English. We all know that any change to the IGC Mandate would be viewed with great alarm by the Lisbon Presidency, and no doubt many other people. I am not assuming that there would be any changes in the French text other than maybe some tidying up of language. Before we go any further, so that we know what basis we are talking on, has anything been spotted in there that suggests there have been any changes?

Mr Darroch: I do not think so. Just on where the process is: the Mandate came out of the June Council and over the summer the Council Legal Service turned that into a draft Treaty text. There was a first reading of that text the week before last amongst 27 legal experts from around the EU. We are now in the course of the second reading. These are not, as it were, negotiations of substance, the negotiations were settled at the June European Council, this is a process of going through the text to check if they are technically correct. A number of technical issues have emerged and translation issues and so on. That is no surprise because the Council Legal Service had to work extremely quickly through the summer to turn this text into a draft Treaty. Emerging from the first reading there were some 50 technical points left outstanding for second reading and those are being worked through now. I could, if you like, give you some examples of them. One of the things we have secured, for example, is to pin down the language about lack of European Court of Justice involvement in Common Foreign and Security Policy where it affects it in two very small areas: it patrols, if you like, the frontier between the first and second pillar, and there is an issue about sanctions against national or legal persons. It is pinned down in the text now and otherwise CFSP is outside the jurisdiction of the ECJ. There are some other technical mistakes that we have spotted. We have pinned down that there is both a yellow card and an orange card procedure for national parliaments. Those are the sorts of things

19 September 2007

Mr Kim Darroch, Ms Alison Blackburne, Mrs Sally Langrish,
Mr Vijay Rangarajan, Mr Edward Smith and Ms Ann Swampillai

that are in there. Since you mentioned translation problems, you may come on to this issue about whether national parliaments “shall” contribute or not, but let me just say that in the French text there is no mandatory sense in the French, so “shall”, we think, is not the right English translation but I do not think we have yet discovered what the right one is.

Q3 Chairman: So it is purely declaratory.

Mr Darroch: The intention of this was never that it should be some sort of compulsion on national parliaments to contribute. That is one of those translation points that is being worked through. I will just turn and see if there are any other points I should mention in this context or whether it is purely translation issues.

Ms Swampillai: No, I do not think so. It is basically as the Ambassador said, that there are a number of technical points, a number of translation issues, and there are some technical points that both we and other Member States raised. Those were resolved to a certain extent during first reading and now we are going back over the points which remain open. We saw the CFSP point as something that we were very keen to pin down, and we have.

Q4 Chairman: So the legal experts did, in fact, meet their deadline of 13 September? They are not going back to this, are they, they have done their job?

Mr Darroch: They have not finished yet. The second reading is still proceeding. I am not sure whether they are meeting this afternoon or not. The second reading had set a deadline of 13 September and it has overrun that. It does not mean that it is coming apart but it has not proceeded to quite the timetable that they had hoped. I think they still intend to finish this week.

Q5 Chairman: Because presumably the next deadline is 15-16 October General Affairs Council?

Mr Darroch: My Lord, that is right. The intention is that the legal experts should finish their work and that should be it. The text is then produced in as many language versions as they can manage before the European Council in October and that European Council should reach political agreement on it. Thereafter, it goes back to Jurists Linguists to check that all the different translations are correct and to have another look just to see that all the language is precisely right, and then it gets signed at the December European Council. There is, of course, a potential if there are outstanding issues of policy still, or problems after the lawyers have finished their work, for either a focal points meeting, which was the senior officials group that met before the June Council, on which I represented us until June and on which Jon Cunliffe, my successor in Number 10, will represent us now, or, of course, there is always the

option of meetings at ministerial level if that should be needed, but we hope none of that will be necessary.

Q6 Chairman: Before handing over to my colleagues and coming on to some of the Government red lines, maybe you could say a few words, if you would, Ambassador, about the Viana do Castelo meeting that was held on 6-7 September, because one understands that this is where the Polish Foreign Minister was raising in particular the issues of the Charter, the idea that they might be associated with the Protocol that we have asked for, and also the inclusion of the Ioannina principle. Could you tell us how that meeting went?

Mr Darroch: It was not an extensive discussion. It certainly did not get into the detail of Treaty language or any of the work that the lawyers are doing. The point that emerged from it, that the Presidency made in its report afterwards, was that they believed that they were still on course to agree a text for the Reform Treaty for the European Council in October. You are right that the Poles have floated two possibilities, both there and in other contexts. They mentioned it, for example, here in Brussels, although the group is not about that. I do not want to go too far in interpreting what the Poles have asked for but, as I understand it, they have raised the possibility, which was in the Mandate, that they would join the Charter Protocol, although they do say that it would not be exactly the Charter Protocol that we have, that they would want some changes to the language. This raises the question, of course, of whether they are actually joining our Protocol or having a new Protocol which is their own, which you could argue would be outside the Mandate. So that is the issue there. It is also the case, I think, that as of now, although we will see if this is a formal position when it comes to the European Council, there is a question in their minds over whether what is in the draft Treaty about how this Ioannina-style mechanism operates is what they understood was agreed at the June European Council. Whether, in the event, they raise that at the European Council, and quite where they finish on the Charter Protocol, it is impossible for me to say; to be honest, I do not know.

Q7 Chairman: But is the impression amongst you and colleagues from the other Member States that the IGC Mandate is, so to speak, inviolate, that the Presidency is not going to accept changes? For example, if Poland wanted an entirely different Protocol, this being outside the Mandate, they are firm in their own minds, and others support them, that it is just not on the cards?

19 September 2007

Mr Kim Darroch, Ms Alison Blackburne, Mrs Sally Langrish,
Mr Vijay Rangarajan, Mr Edward Smith and Ms Ann Swampillai

Mr Darroch: I think so. It has certainly been our position that the Mandate, for us, settles all our issues and provided that it is accurately transposed into the Treaty that is it, and that is certainly the view you get from other Member States when they speak on this, so everyone is sticking very closely to this. It is a matter not absolutely set in stone whether if the Poles were to ask for an amended version of the British Mandate that would be regarded by the rest of the EU as effectively a new Protocol and, therefore, outside or not. Frankly, I think they will cross that bridge when they come to it. I guess it in part depends on how big a change our Polish friends would want. What is clear is they established for themselves in the Mandate the right to join our Protocol, so if that is what they do they will be able to do it. As for the Ioannina stuff, I think that is more difficult because trying to change that mechanism would be outside the Mandate and it is very unlikely that they would get support. Of course, in the end if you agree at the European Council by unanimity to do anything; you can do it. So if everyone decided that in order to get a deal X change or Y change should happen there is nothing to stop that, but people would be very reluctant to do it.

Q8 Chairman: So you will be as tough on the Member States as you are likely to be on the proposals from the European Parliament?

Mr Darroch: Yes, yes. For any change that is not clearly signalled in the Mandate—there are one or two areas on JHA to be settled, for example, in the Mandate which will be settled—you could only get that agreed by unanimity.

Chairman: Thank you very much indeed. Could I open up to my colleagues?

Q9 Lord Roper: Just on the general process of this particular IGC, would you agree that given the tightness of the Mandate this is really an unprecedented IGC because the scope for negotiation within the IGC is significantly less than in most previous IGCs?

Mr Darroch: Yes. This is a different process from those that we have seen before, you are absolutely right. The way this has worked with an extremely tight and detailed Mandate being agreed, including chunks of text for Protocols and Declarations and so on, and then essentially a technical legal process for the European Council, in my experience, and I have done Maastricht, Amsterdam and Nice, is unique. Sorry, can I just read this. The latest version of the text, just to go back to the previous question, includes Poland in our Charter Protocol but there are no changes of substance otherwise.

Q10 Lord Roper: On that particular point, I gather that in the report to the Constitutional Affairs Committee of the European Parliament the three representatives of the European Parliament raised the question that while the UK had been able to argue for its opt-out on the basis that we operated on a common law basis, this did not apply to Poland which did not and, therefore, it was inappropriate for Poland to follow on the same lines. That is clearly not a matter for us but it is an interesting point that was raised.

Mr Darroch: From our point of view, we have got our Charter Protocol and the Poles have the option in the Mandate to join it and that is up to them. Without wishing to try to limit the role of Members of the European Parliament they do not actually have a vote around the table when it finally comes to it, they are not part of the consensus. They would like to be part of it, but they are not required for consensus. Of course, their views are valued and listened to but in the end they cannot actually stop our Polish friends getting the Protocol if the Member States agree to it.

Q11 Chairman: Do any of my other colleagues wish to come in on that? It would be good to get on to some of the red lines now. Does anybody wish to take on one of these? Well, if not, I am going to get the ball rolling on that one, which is to ask you whether you feel that our red lines are secure.

Mr Darroch: You would be astonished if I said anything other than yes, I do think they are secure.

Q12 Chairman: That is what I wanted you to say!

Mr Darroch: I can explain why. I was in Number 10 when they were established, as it were, and I was the focal point negotiator as we took them through. I can go into detail, but basically on the Charter we got the Protocol which in our view nails down for the avoidance of any doubt that the Charter creates no new rights and nor does it extend the ability of courts, UK or European, to strike down UK law. The Declaration that we got on foreign policy issues confirms that none of our existing powers or authority in the foreign policy field while we are in the United Nations is affected. We have got the opt-in on Justice and Home Affairs issues which in particular covers areas of criminal law and police co-operation. I know this because I negotiated it. What was previously an emergency brake on the social security clause has been strengthened, for example, by lowering the threshold. The word “fundamental” in the draft has changed to the word “important” and it is now explicit that should an issue be referred up to the European Council and no deal be made which satisfies the country that referred it, the proposal then falls. In addition to those red lines we also got what we think was a very important breakthrough, which

19 September 2007

Mr Kim Darroch, Ms Alison Blackburne, Mrs Sally Langrish,
Mr Vijay Rangarajan, Mr Edward Smith and Ms Ann Swampillai

was confirmation that national security is the sole responsibility of Member States, which was something that we had been pursuing through various IGC negotiations for about 15 years.

Q13 Chairman: One of the issues that was raised in our Committee, and also in at least one of our sub-committees, if not two, was the question of what happens when there are foreign workers working in the United Kingdom under UK jurisdiction who may wish to claim rights that they have under the Charter. Where do they stand? I do not think we have yet got to the bottom of this.

Mr Darroch: I will give you a quick answer and then I will turn to Sally to see if I have got the law of this right. Our point on this is that the Charter does not create new rights or privileges for individuals whether British or foreign, so there is nothing that a foreign worker working in the UK could claim under the Charter which should be able to change anything in our domestic legislation. I think our argument would be, and Sally will confirm, of course we have to obey all the EU legislation which we are signed up to but there is nothing in this Charter which would allow people to take issues to courts, European or domestic, and change anything in our domestic law.

Mrs Langrish: I think what Mr Darroch has said is right. If you are asking about the applicability of the Charter to foreign workers, if a foreign worker was before our courts then the Charter would be applied with our Protocol applicable by our courts but, as Mr Darroch has said, that should not change the substantive nature of the rights or principles which are being applied.

Q14 Chairman: No, they do not change the substantial rights or principles. The thing I am struggling with a bit is whether there is anything in the Charter which would appear to create a right for a worker working in our country that would be in conflict with what our domestic law is and, therefore, to whom would he appeal. Such as the right to strike in a small or medium-sized enterprise or something like that, whatever it may be.

Mrs Langrish: I think one has to draw a distinction between civil and political rights as set out in the Charter and principles which are to be observed by the EU legislators when framing EU law. That is a distinction which is clearly set out in the explanations which accompanied the Charter and which will be promulgated along with the Charter when it is republished this autumn. To the extent that the right to strike is a principle, it should not create binding rights for UK workers enforceable in the UK courts, nor for foreign workers falling within the purview of UK law as applied in our courts.

Q15 Lord Wright of Richmond: My Lord Chairman, can I ask a supplementary on red lines. Have we reached a satisfactory position on the role of the European Court of Justice vis-à-vis foreign defence policy?

Mr Darroch: Yes. Essentially foreign defence policy is a separate part of the Treaty, second pillar, intergovernmental, without ECJ jurisdiction across any of it except two very carefully defined areas, one of which was in the existing Treaty and the other of which is new but reflecting a real need. The two areas where there is a bit of ECJ action, as it were, is just on the frontier between the first and second pillar business and where individuals are named, for example, as part of sanctions or measures, travel bans or whatever, to give those individuals some potential recourse to a court somewhere. Apart from those two areas there is no ECJ involvement. To the satisfaction of our lawyers the position is protected. Is that correct?

Mrs Langrish: Correct.

Q16 Lord Wright of Richmond: My other question, relates to opt-in and Schengen building measures. I just wonder whether you can tell us how much discussion and controversy there has been in the IGC on this question.

Mr Darroch: It is one of the subjects, as you know, my Lord, that was left open in the Mandate. It is one of the subjects that will be settled, we hope, as part of the legal work and if it is not settled there then in whatever forum the Presidency choose to use for it. Our expectation and intention is that the opt-in should apply in the Schengen area as it does in other areas of JHA, so we would have the right to opt-in to measures case-by-case.

Q17 Lord Wright of Richmond: That is not being seriously contested?

Mr Darroch: Without being in the room when the lawyers sit round I cannot promise you that there is no-one around the table who thinks we are not getting a bit too much there, and it would be a surprise if there was not someone who thought we were getting a bit too much, but we confidently expect this to be part of the Treaty we sign.

Q18 Lord Roper: On the Charter I have two questions. First of all, how is it going to appear? Is it going to appear within the Treaty? Is it going to be a Protocol which will therefore have legal status equivalent to the Treaty or will it be a Declaration which will only have political interventions?

Mr Darroch: Not finally decided is the answer. But what is clear is that it will not be, as it were, part of the Reform Treaty. That is a change from the position of the 2004 constitutional text because it was part of

19 September 2007

Mr Kim Darroch, Ms Alison Blackburne, Mrs Sally Langrish,
Mr Vijay Rangarajan, Mr Edward Smith and Ms Ann Swampillai

that. The Mandate is explicit that it will not be part of this Treaty. It needs, however, to be published somewhere so that everyone can see in one place the rights and principles which the EU is bound to respect when legislating, so it has got to be put somewhere. It is one of the issues which the legal group will look at. I do not know whether they have yet reached it. One option is that it will be published in the EC *Official Journal*. It is not the only option but that is one of the options.

Q19 Lord Roper: The second question is one which has been raised by one of our colleagues who is a Member of the European Parliament, Baroness Ludford, who is on the appropriate committee of the European Parliament. She is rather worried that there will be some sort of West Lothian question as far as future JHA material is concerned, that British MEPs, if there is a risk that the UK is going to opt-out of what is finally decided, will not be able to play any part within the European Parliament in the preparation of such texts. I wonder whether there is any precedent in terms of previous occasions when we already have opt-outs how far MEPs from countries which have opted-out are able to take part in deliberations either in committee or in plenary on those matters? This may be a question which you may need to write to us about.

Mr Darroch: It is funny you should say that! It is a very good question and completely new to me. Just off the cuff, the Danes are opted-out of JHA and unless it is self-denying I do not think there is any formal mechanism which excludes them from anything that happens in the European Parliament on JHA stuff. Mr Rangarajan has got a better answer than I have, I think.

Mr Rangarajan: It is a question that has been raised at times in exactly the same kind of way as the West Lothian question. There is no mechanism for exclusion and to some extent it works slightly opposite. In cases when we have not opted-in at the beginning of a measure we have to work quite hard sometimes during the course of negotiation. And you find MEPs who are very interested in it, sometimes for their own constituents' reasons, sometimes for the business interests that they represent as well, and they are often extremely active. In quite a lot of the JHA area, some of the very active MEPs are UK MEPs, even in areas where they may happen to disagree with the Government's line, they may come from opposition parties, and also they may just hold very different views. Across the board, (the Danes with us in JHA) and in other areas, such as the Schengen area and the euro and so on, there is still significant involvement by our MEPs across all of those issues.

Chairman: Lord Bowness, did you have a question and then I want to move on to the orange card?

Q20 Lord Bowness: It was really a general question arising out of the point about the Declarations having any legal force. There are a number of things which it could be said by the Government are positions safeguarded by Declarations.

Mr Darroch: Yes.

Q21 Lord Bowness: How does one answer critics who say a Declaration has no legal force, that it is always going to be subject to challenge? Why are these things which are so important in red line terms not in either the Treaty or the Protocol?

Mr Darroch: Let me give you my own layman's explanation of this. Let me use the example of the Declaration on foreign policy issues which asserts that none of our foreign policy powers or positions are going to be eroded by this Treaty. If you look at the Declaration, this is a series of things that are not going to happen: it is not going to affect our UN seat; it is not going to affect the role of our Foreign Minister, and so on. When you draft a Treaty what you put into it is stuff that is going to happen. It is legally binding commitments to certain forms of action or structures or whatever. I am told by lawyers that it is simply not appropriate for a Treaty to put a load of stuff in about what is not going to happen because it is not what a Treaty is, it is not what Treaty language is. The fact that the Declaration is, therefore, political and not a legally binding part of the Treaty is I am told authoritatively, and I believe this, because it is a political judgment reflecting the views of all 27 Member States and institutions, that still makes it as effective as it needs to be because if ever things are going in a direction different from that Declaration we can go to everyone and say, "Look, we all signed up to this in 2007, this is the way it is and it is going to go no further". This is helped in the area of foreign policy by the fact that this is done by unanimity anyway. That is my answer.

Q22 Lord Bowness: My Lord Chairman, if I could just go back. Lord Wright has already mentioned the fact that people are concerned that the European Court might get into it, and that is a question of interpretation, not the Member States. Governments can change and, in a sense, on the argument about not having a negative in the Treaty, we are having a negative effectively in the Treaty because the Protocol and the Charter is a negative, is it not, because they are saying, "This will not apply, that will not apply to the United Kingdom"? I am not trying to make a cheap political point, it is just that these are the questions that we are subjected to on a daily basis in the press.

Mr Darroch: The Protocol is intended to nail down for the avoidance of doubt exactly what the Charter is and why it does not extend or allow things to be

19 September 2007

Mr Kim Darroch, Ms Alison Blackburne, Mrs Sally Langrish,
Mr Vijay Rangarajan, Mr Edward Smith and Ms Ann Swampillai

challenged in the courts. It is not quite the same as the Declaration which says that nothing for the UK in terms of its foreign policy powers will change. As for governments changing and views changing, and of course governments do change and there may be governments in the future which would rather that Declaration had not existed, nevertheless everyone would have signed up to it and we would hold people to it. We regard it as sufficient and as politically binding on our partners even if it is not a legal text.

Q23 Chairman: Thank you. We have got about 12 minutes left and I do want to draw out the Ambassador on the orange card procedure. You have already explained to me that both the orange and the yellow one do exist. We would like to know a little bit more about the practicality of the new procedure. Maybe you could include in your response answers to two questions. The first question is, are we in fact giving formal power to the European Parliament to act on behalf of national parliaments? This seems to be quite a constitutional innovation if that is the case. The second question I would be very grateful if you would answer is why is all this restricted just to Commission initiatives and not available for the purposes of other institutions of the Union?

Mr Darroch: On your first question, as a starting point we thought this was a good innovation in this Treaty and we thought it was an advance to give national parliaments the right to challenge Commission proposals on subsidiarity grounds. We think that better recognition of the implementation of the principle of subsidiarity will be of benefit to the EU. We do not think that the text empowers either the EP or the Council to act on behalf of national parliaments. What will happen is that the legislative institutions will consider national parliament views before deciding whether to agree or reject proposed legislation. We think that is a step forward but it does not, as it were, empower the EP to act on behalf on national parliaments. Why is it restricted to Commission initiatives? It is about legislation and the vast bulk of legislative proposals that come forward come from the Commission, so that is what it is designed to do.

Chairman: Okay. I think that is clear enough.

Q24 Lord Roper: But in CFSP the documents come out of Council working parties and, therefore, they do not come from the Commission and there is no opportunity for a parliament to challenge a decision or a proposal for a joint action on the grounds of proportionality or subsidiarity.

Mr Darroch: We have always kept, and are keen to keep and succeed in keeping, the EP out of CFSP.

Q25 Lord Roper: I understand.

Mr Darroch: But there are surely national parliamentary procedures for you to cross-examine or summon ministers or to scrutinise things we are doing in foreign policy as part of CFSP mechanisms. I am not a great expert on parliamentary procedure but surely that is the case.

Lord Roper: There are, in fact, greater opportunities. If, for example, the UK Government is considering using military force within a joint action then that, of course, can be scrutinised and opinion can be given by either House of Parliament in a way which is not already *de jure* the fact as far as national action.

Chairman: Anybody else on the orange card?

Q26 Baroness Thomas of Walliswood: Did I gather from you that this idea that the European Parliament could act on behalf of national parliaments is not, in fact, a correct description of what the Treaty actually says because that does seem to me to be a very peculiar idea? We are used to acting on our own behalf, not having somebody else acting on our behalf.

Mr Darroch: You take a view on a proposal and the legislating bodies, which are initially the Council and then the European Parliament in the normal sequence of events, have to take account of your view. We would not say that was then acting on your behalf, that is them responding to what you as a national parliament collectively think.

Q27 Baroness Thomas of Walliswood: There is no additional role for the European Parliament presenting, as it were, the views which individual parliaments have put down? That is the point I am getting at.

Mr Darroch: It is not an additional role for them, it is an additional source of influence, and a very powerful source of influence, which they should take account of in reaching their view. There are lots of sources, what the Council thinks, the original Commission proposal, what the various stakeholders think, but now there is the national parliament collective view as well.

Q28 Chairman: We have got about five minutes left. There are just two or three other issues we would like to raise with you, if we may. One is the question that Member States are pressing for a reduction in the role of the European external relations services fearing that the Council might dominate the Commission services.

Mr Darroch: It would be a very good thing if they did! I am sorry, I must not be flippant about this.

19 September 2007

Mr Kim Darroch, Ms Alison Blackburne, Mrs Sally Langrish,
Mr Vijay Rangarajan, Mr Edward Smith and Ms Ann Swampillai

Q29 Chairman: No, that is a fair view.

Mr Darroch: As was explained elsewhere earlier, there has not been any collective formal discussion of the External Action Service and, consequently, it is not clear to us where Member States are coming from on this. I suspect that most of them really have not put together a view on it. All the details of how the EAS is formed and how the two bits of Council Secretariat and the Commission external services fit together are all for discussion and decision once we get past this Treaty. Our view is that the advantage of a High Representative representing both the Council and the Commission and this External Action Service is that it does increase the Council's role. It gives us more influence over how the Commission spends its external affairs budget, it gives us the opportunity to put diplomats from Member States into these joint missions overseas and it enhances the role of the Council overall, so we see this as a good thing without wanting to caricature it as a Council takeover.

Chairman: Thank you very much. I am sure that Elmar Brok will read this evidence with interest! We do want to raise the issue of the passerelles, if we may.

Q30 Lord Roper: One of the things that is in the Treaty, and there was initially a certain amount of confusion about it, is that for the first time as well as the passerelle, any movement to Community methods of decision-making having to be taken by unanimity by Member States, certainly there is some evidence of an opportunity for national parliaments also to intervene at some stage. The slightly obscure point on which there has been a certain amount of lack of clarity is as to whether this merely applies to certain issues of family law, for which it is made explicit about the change, or whether this is a general power of national parliaments also to have an opportunity retrospectively to raise issues if there is a problem about the use of the passerelle.

Mr Darroch: I have to be honest and say I do not know the answer to that question. I know that there have been some governments that either intend or have promised that when the Treaty comes into force as governments they will not sanction the use of the passerelle without consulting Parliament. I believe if you look back to the 2004 Constitutional Treaty

parliamentary process, that also occurred in the British parliamentary debate. I do not know about anything in the Treaty but I look to Sally.

Q31 Lord Roper: Just on that point, the last time round it was only open to one chamber of the British Parliament and obviously that is a matter which does concern us.

Mr Darroch: Yes. Can I ask Sally just to add to that.

Mrs Langrish: Just to confirm, the provisions that we would have in this Treaty on the passerelles are identical to those which were in the Constitutional Treaty. You will notice that the two passerelles provide for slightly different involvement of national parliaments in that one allows for the national parliaments to communicate a negative view within six months, while the other subjects the decision to national constitutional requirements, which in our case normally means a positive approval by Parliament. The modalities of that and how it works will obviously have to be worked out in the way that we implement this Treaty once it is signed. You are right, in the context of the Constitutional Treaty that in the Bill that was put forward there were different arrangements for the way that the two would have been implemented in our national law.

Q32 Chairman: We are looking forward to hearing from the Government about whether or not we have got our red card in the Lords! I think that is as far as we can go, thank you. Once again, may I thank you and your colleagues very warmly indeed for answering our questions so fully and so frankly, and in such a friendly manner. I sound like I am giving a communiqué after a summit meeting! It has been a pleasure to be with you. We wish you well in your post here. It is going to be very exciting times you will be living through. We thank you and all of your colleagues again. We will be sending you the transcript.

Mr Darroch: Thank you very much. It is a great pleasure and honour to have you here. What you are doing is extremely important and we hope that you will come back regularly. We will always be available to give you every help.

Chairman: That is very kind of you, thank you. We will take you up on that, I am sure.

Supplementary memorandum from Mr Kim Darroch, Ambassador and United Kingdom Permanent Representative

I do hope that the Committee found its recent visit to Brussels informative and helpful. I was pleased to be able to be of assistance and look forward to working with you in the future.

Further to the corrections to the transcript, which have been sent on to the Committee Clerk, I am writing to provide you with additional information on the issue of equality between Members of the European Parliament.

19 September 2007

THE EQUAL STATUS OF MEPs

Lord Roper raised the issue of whether UK MEPs might be excluded from voting on EU issues on which the UK did not participate, such as elements of JHA. This issue was, I understand, also raised with the Minister for Europe during his evidence session before the Foreign Affairs Committee on 12 September. As the Minister said before Committee we believe that there should only be one class of MEP, with full rights to participate in all debates and discussions in the European Parliament. This is in fact the position at the moment. Various national opt-outs have existed since 1993—in no case have they affected the equal status of MEPs from those countries. For example, UK, Danish and Swedish MEPs sit on and participate fully in all aspects of the work of the EP's Economic and Monetary Affairs Committee, although the UK, Denmark and Sweden are not members of the Eurozone.

16 October 2007

WEDNESDAY 19 SEPTEMBER 2007

| | | |
|---------|---|--|
| Present | Bowness, L Cohen of Pimlico, B Grenfell, L (Chairman) | Roper, L Thomas of Walliswood, B Wright of Richmond, L |
|---------|---|--|

Examination of Witnesses

MR CHRISTIAN LEFFLER, Head of Cabinet to Commission Vice-President Margot Wallström, and MR MICHEL PETITE, Director-General of the Legal Service of the European Commission, examined.

Q33 Chairman: Could I begin by thanking you both very much indeed for taking time out of your extremely busy schedules to come and spend a little time with us, the House of Lords EU Committee. We are on the record. You will be sent a transcript of the conversation so that you can check and see that your views have been properly reflected and we will then publish this as part of our report. We are doing a progressive series of comments on the Reform Treaty. It was very important for us to be able to get the views from the Commission on the progress being made at this fairly critical stage in the process. My colleagues, who are with us today, have kindly made themselves available during our British Parliamentary recess and I thank them very much for being available. We have shown you, I think, a list of some of the topics that we want to take up with you. I hope it will be a nice, free flowing discussion. I hope that both of you will come in whenever you feel you want to say something. Let us begin, if we may, by asking whether either of you have any opening remarks you would like to make by way of preface to our conversation or whether you would like to go straight into questions.

Mr Leffler: If you would allow me, maybe I can say a few general words about how the Commission has approached the overall issue of reform of the institutions and the procedures under which we operate. Before I get to that can I convey to you, I think you have all met her, the best regards of Vice-President Wallström who departed for Rome this lunchtime otherwise I am sure she would have been pleased to find an opportunity to meet you. In a sense, it is quite significant that we are all engaged together in this exercise in 2007, the fiftieth anniversary of the European Union. It is worth remembering how far we have come and how much has been achieved in Europe by the European Community, by the European Union, by its Member States and institutions in the course of these 50 years, how much is now taken for granted compared to where this whole adventure started from, and even more compared to the sinister first half of the 20th century which preceded the founding of the institutions and the bodies that gradually developed into the Union. This fiftieth anniversary has also been

an opportunity to take stock and look ahead to see what it is that people expect of the Union now. Societies evolve and citizens make new demands on their governments, on their authorities, public authorities are put to much greater tests of accountability nowadays than they were 50 years ago or even 15 or 20 years ago. We have new challenges, some of them developed from others, some of them a result of the successes achieved so far in terms of meeting the needs, the expectations and the aspirations of our citizens, some of them the result of the changing realities around the globe, the opportunities and the needs of Europe and the Europeans, our possibilities as well as the threats we face. In all of these areas we need to look at how we can best work together, what are the structures we need, what are the policies where we can deliver together and what are the policies which are best left to each Member State, what are the methods we use within different policy areas, which is the balance we find between efficiency and delivery and respect for national sensitivities or national or cultural particularities that require to be fully taken into account as well. That has very much been the starting point of the reflection on the work of the Commission in preparing the intergovernmental conference and in giving our input into the negotiations that led to the Mandate agreed in June and now during the IGC. We must always keep in mind that the Treaty is there for a purpose, it is not an end in itself. The Treaty is there to deliver results and, therefore, whatever we agree within the Treaty has to be relevant to delivering those results. I have four very broad points. One is in terms of what we want the Treaty to deliver. The first one is legitimacy, transparency and, if you like—I sometimes hesitate to use the term—democratic accountability, but certainly accountability. To make it easier to understand how things are done and why they are done. To make it more transparent so that people can actually see how they are done and who does what in terms of the division of competences, in terms of the transparency of procedures, including greater openness in debates in the Council, the interaction between Council, Commission, Parliament and so on. Secondly, effectiveness in delivering these different policy areas,

*19 September 2007**Mr Christian Leffler and Mr Michel Petite*

how we can make sure that we reach results but also how we can make sure that the machine has effective safety valves or emergency brakes that will ensure respect and assure Member States, their administrations and their constituents, that there is this respect for their particular concerns or expectations. Thirdly, coming back in a sense to legitimacy, making clearer what is our common fundament of principles and values on which this edifice is built so that there is a recognition of what the Union is there for, not just in very practical terms—the Union is not there to lower roaming charges, that is something useful and people like it but that is not one of our fundamental values—but bringing it down to the fundamentals and making sure that those values, principles, are thoroughly reflected in the way we do business, in the way the institutions and the procedures are built, and in a way that allows Member States or, indeed, individual citizens to challenge the way we do business if they think that in one way or another this goes beyond the broad realm of the acceptable. Fourthly, Europe and the world, our capacity to project our interests and those same principles and values in the interests of Europe, to take advantage of opportunities, to strengthen our common defence, not in the narrow sense of that term but in the broad sense of that term, of what we stand for and of our interests in a whole range of issues, and doing that in a much more effective and coherent way than we have done so far, less compartmentalisation, more of an overall view and within that overall view allowing each actor, the different institutions as well as the national actors, to play their part in bringing together a coherent whole, not making this a single monolithic whole but a common effective chorus. As one of my former bosses, Chris Patten, now one of yours, liked to say, and anybody who is interested in music will recognise, “singing from the same hymn sheet”, the effect of a well-trained chorus is much more than the addition of individual voices, but we all do have to sing in tune otherwise the overall effect is very quickly spoiled. Those are the elements which we try to bear in mind at every stage of this process bringing it down, if you like, as President Barroso said just the other day when he was in Britain speaking at the Liberal Party Conference, to two Rs: results and reform. This Commission, ever since it took up office in 2004, has been stressing the need to deliver results, not spending too much time on grand designs but bringing forth concrete deliverables to the different constituents of the Union and, in doing so, engaging in the intergovernmental conference by looking at what are the reforms necessary to be able to deliver those results in the years ahead. If I may add a third R to those two in the present context: coming up with a reasonable Treaty. Reasonable is not the R I am thinking of. The R I am thinking of is ratification.

Everybody has their own idea of what the ideal Treaty is but we do not need an ideal Treaty, we need a Treaty that works and works in the sense there is sufficient buy-in in every Member State so that it will be accepted as reasonable and legitimate by their governments and their electorates and, therefore, it will have a good chance of being ratified and put in place putting an end to too many years of introverted scrutiny of our institutions rather than somewhat more outward looking efforts on delivering the results. I am sorry I was a bit long.

Q34 Chairman: No. Thank you very much indeed for that useful, eloquent introduction. Mr Petite, would you like to say something and that will lead us into the questions?

Mr Petite: Please go straight into the questions.

Q35 Chairman: Maybe we could begin by getting your view on the progress that has been made, particularly in light of the fact that the group of legal experts have done their first reading and reported on that, but there is still some work to do amongst the legal experts, is there not?

Mr Petite: I now feel embarrassed to take the floor and reduce the level of the discussion.

Q36 Chairman: No, we want to get some of the detail.

Mr Leffler: He is the results man!

Mr Petite: Not the vision man! The Expert Group basically has worked on very technical issues and rather minute issues but has done a lot of checking. This results from the fact that the whole system which is at play is a complex one. There is a text by default, which is the Nice Treaty, in which should be inserted all the “innovations” of the ex-Constitutional Treaty, plus the Mandate. It is the combination of these three which is our work. We have been checking how this puzzle was combined after the Presidency text in July. In the end, I was personally concerned that there could be some divergence of interpretation, for example of what an “innovation” of the ex-Treaty would be. But, in fact, there was nothing much of that. I have to say the work of the Expert Group has been mainly technical. Since July in the Presidency’s text, which I think you have seen, all the changes have been mainly technical. There have been some modifications of presentation and there have been some additions here and there, and I could quote a few examples but you would see that those I quote as the main substantive elements which were added were, in fact, very minor. For example, we have inserted a definition of “Citizenship” in the Treaty of the European Union, purely declaratory, on a request from the Parliament. It makes sense because

19 September 2007

Mr Christian Leffler and Mr Michel Petite

“Citizenship” is mentioned several times in the Treaty on the European Union, and without a prior definition it read very oddly. We have also added mention of those consultative bodies which were at pains not to be mentioned in the Treaty, the Social and Economic Council, the Committee of Regions. We have added some provisions in the Treaty on the European Union on the future Commission’s composition referring very broadly to the way the rotation system of appointment would work, but not going into details: it will still be the Treaty on the Functioning of the Union (TFU), which will make it work. We have also decided to suppress the titles of the articles in the Treaty on the European Union. There was a discrepancy between the Treaty on the European Union (TEU), which had titles on every article except, strangely, on foreign policy, and the TFU which includes no heading for each article because it derives from the Nice Treaty. The idea was to put the two in coherence and I think everybody felt the easiest solution was to delete rather than to invent: thus the deletion of the titles in the Treaty on the European Union. These technicalities, which are not very significant, which are mainly legal checking of all the texts, in the end probably derived from the method used by the group which has been to stick absolutely strictly to the Mandate and not to depart from it. Any discussion or any proposal which would depart from it would be immediately quoted as “out of the Mandate” and put off the debate. This has been extremely efficient. The Presidency has managed that very well. Indeed, some of the interventions here and there which proposed new issues out of the Mandate were cleanly rejected, possibly not without some political effect. Because so far the rule of the game has been that any issue which could be raised at political level with the foreign ministers or with the European Council in October should be raised first in the Expert Legal Group, and if they are off-Mandate they are considered as out of the discussion. Some rather political issues coming from Poland, for example have been treated that way: they have been removed from the table as “off-Mandate” and are supposed not to be reproduced at a higher level. Maybe that is wishful thinking but that is the way in which we have worked so far. We have kept to the agenda. We are now finishing the second reading and we still have a few issues to look at, one or two technically difficult ones. The Group has worked well.

Q37 Chairman: There seems to be a rather fine line there when you say that the group of legal experts had to decide whether something was in the Mandate or outside it and, therefore, if it was deemed outside then it would not go forward to the Foreign Affairs Ministers and then to the Council. In a sense, that is

partly a political decision, is it not? I am interested to know whether you were expecting that was the kind of decision that the legal experts would have to make. There are two particular areas which you have had to investigate which are of interest to us as national parliamentarians. One is the still, as I understand it, not quite decided issue of the use of the word “contribute”, national parliaments “shall contribute” to the successful work of the European Union, or however it is put. I understand that in the French translation it merely says “*contribuent*”, it does not say “shall”. Were the group of legal experts happy that the wording such as it will be in various languages is clear and declaratory and is not being prescriptive? The second issue I want to raise with you, which I think is still causing some problems, particularly for the European Parliament, is the definition of EU citizenship because what they were saying was they would rather see the definition as set out in the Constitutional Treaty rather than the Maastricht Treaty which they say is unacceptable. Do I take it from that that what is in the Reform Treaty, is the Maastricht wording and not the wording from the Constitutional Treaty?

Mr Petite: What the Parliament has wanted is simply to take part of the definition in order to make a marker in the Treaty on the European Union that there is such a thing as European citizenship. It is a very short sentence which is extracted from the common based text between Maastricht and Nice and the Constitutional Treaty, and the rest has remained absolutely unchanged. It is a declaratory sentence or giving a signal and nothing else. As I said, the logic of it is that later on in the same Treaty there is reference to that citizenship, so their technical argument was it sounded odd to have some element of citizenship without having a definition prior to that. It is without any legal consequence.

Q38 Chairman: The group is happy about the reference to national parliaments contributing to the work of the European Union?

Mr Petite: Yes. I think some issues of that kind have been sent straight away to the Linguists and the issue you mentioned is typically one of those sorts. How to translate “shall contribute” into French, is as common practice “*contribuent*”.

Q39 Chairman: Okay.

Mr Petite: This will be checked accordingly.

Q40 Lord Roper: But also how you translate “*contribuent*” into English.

Mr Petite: Exactly.

19 September 2007

Mr Christian Leffler and Mr Michel Petite

Q41 Chairman: It is a declaratory statement they are contributing and presumably will continue to do so. I think it is clear that it is declaratory and there is no intention to impose an obligation. Is there anything you want to add to that, Mr Leffler, or not?

Mr Leffler: No, just to underline that I do not think there was anyone, be it a representative of Member States or any of the institutions, when the Mandate was drafted and agreed who even in their wildest fantasies thought that somehow the Union Treaty could or should instruct national parliaments to contribute. If anything, there was an expectation that most national parliaments would be banging on the door saying, "We want to contribute", and this was a way of expressing that expectation. It is certainly not prescriptive.

Chairman: They would have preferred saying "shall contribute up to a certain point".

Q42 Baroness Cohen of Pimlico: "Shall contribute but not too much".

Mr Leffler: That would be outside the Mandate.

Q43 Lord Roper: I wonder whether I could ask, and it has been covered in your remarks so far, whether the nature of this IGC is somewhat different from some preceding IGCs insofar as the IGC is very significantly constrained by the degree of unanimity which the Council had reached in defining the Mandate, and how far the Commission has felt constrained in terms of its own inputs to the process of the IGC by the nature of that Mandate?

Mr Petite: I think this is absolutely right. I have participated in many IGCs now and it is an entirely new one because the Mandate has completely sealed the issue. Most of the players, including the Commission, absolutely willingly tied their hands to the Mandate because the feeling was that if anything was reopened by somebody it would call for reopening many other issues and it would result in a different ballgame. Everybody felt reasonably content with the Mandate and content to stick with it. On the Commission side in the IGC we have defended the Presidency's text, which we feel is very good, and the Mandate, because we felt it was the only reasonable way to find a quick outcome. We have been sitting on that, refraining from any new ideas and sticking to both the Presidency's text and the Mandate.

Q44 Lord Roper: If I can just pursue that with something Mr Leffler said. He said that one wants a Treaty that works, a reasonable and ratifiable Treaty and, therefore, to some extent one may have to say that the best in some respects, and I noticed this in the comments of the European Parliament, might occasionally be the enemy of the good.

Mr Leffler: Quite.

Mr Petite: If I may add one or two things. We have contributed here and there on technical grounds to find solutions which were raised on the way the Charter would be treated, for example. The group has followed our advice but it was always within the Mandate and very carefully confined.

Q45 Chairman: We have raised the issue already, and you have, of what would and would not be within the Mandate, and the lawyers will see very clearly what that is, but has any decision been taken yet, or how will it be taken if it is taken at all, on the Polish request to come in on the application of the Charter of Fundamental Rights in the UK Protocol so-called? If that was an addition presumably it would be ruled out of court as not being within the Mandate and yet it does not seem as though what they want entirely corresponds with what is in the Protocol regarding the British opt-out. Are they just crying in the wilderness when they say they want to raise this issue?

Mr Petite: No, they are not.

Q46 Chairman: Protocol 7 now does apply to both.

Mr Leffler: One point to bear in mind was that when the Mandate was agreed in June there was a footnote to this Protocol where it was flagged that two other Member States had reserved themselves the right to join that Protocol but they had not quite made up their minds. One of those two was Poland. They have that possibility. They flagged it before the Mandate was agreed and, therefore, I do not think it would be ruled out of court, it would be accepted, but in that case it is the Protocol that is there because that is the one that was agreed and the one that they flagged their interest in possibly joining. That being said, and no doubt M Petite can elaborate on the legal specific aspects of that, ultimately, and it is in the very name, in an intergovernmental conference everybody has to agree on the outcome. We have a Mandate, we expect everybody to negotiate on that basis in good faith since we all agreed it, and so far that has certainly been the case. Going back to one of your earlier comments or questions, there will be differences of interpretation of the Mandate. Where the experts, at whatever level, cannot come to an agreement on what is ruled in and what is ruled out, or for that matter agreement on how to solve an issue even if it is ruled in, that becomes a political question and at the appropriate moment will be raised to the political level.

Mr Petite: Poland had mentioned the fact that they could join basically and this was provided for in the Mandate. I think they have now officially decided to join, so they will join in the special Protocol on the Charter which was initially drafted for the UK in conformity with UK terms.

19 September 2007

Mr Christian Leffler and Mr Michel Petite

Q47 Chairman: That is interesting because there was a stage at which they were saying they did not find that the actual terms of the Protocol suited them entirely, but they have now changed their minds, is that right?

Mr Petite: Yes. On our reading, the Mandate was: either they joined the existing Protocol or it would be outside the Mandate and they could not draft a different Protocol. They either joined or refrained from joining.

Q48 Chairman: Presumably that will apply also to the Ioannina principle, they will not get anywhere with that, will they, because it is outside?

Mr Petite: It is. We have treated the issue so far as outside the Mandate insofar as their request remains that they want the “Ioannina principle” to be inserted as a provision of a Treaty. There are things which can be done with an existing Declaration, but to transform the Declaration into a Treaty provision would not be part of the game. It was raised by Poland but considered outside the Mandate.

Q49 Lord Wright of Richmond: Can I raise a question on the Mandate, which is the question of what is or is not a so-called Schengen building measure? This is obviously quite a controversial point. The Mandate envisages that the Title IV Protocol, the UK opt-in, may also address the application of the Protocol in relation to Schengen building measures. How much discussion has there been of this in the IGC? Is there anything you can tell us about it?

Mr Petite: Well, strangely enough, we had expected that debate on these issues, which are quite technical and quite complex, because the Schengen Protocol and the Title IV Protocol are different in nature and almost the other way round from each other and do raise complex issues when you try to make them work in the new system: but there had been hardly any discussion at all until the beginning of last week. We have had a first discussion, very broad, and there is nothing much more I can say. It is very technical and very complex, we understand the British problem. In a way the contradiction between the UK position and the Schengen countries almost results from a factual situation which is hard to handle: how to insert the existing Protocol in a system which was not necessarily designed for it. It is a technical matter which I think we will have to finalise in the coming days.

Q50 Lord Wright of Richmond: Can we be optimistic about the outcome?

Mr Petite: I think so, we all are. It would be a pity if it became an insurmountable problem. To a large extent, and this is a personal view, my impression is that people feel there is a large part of psychology of

presentation in this issue and it would be a pity not to find a solution that is acceptable to everybody.

Q51 Chairman: Speaking of optimism, without inviting you, as we say in England, to go out on a limb, or probably in this case on a branch that is creaking ominously, do you feel confident that all the work will be done in time for the General Affairs Council on 15–16 October? Is there not going to be any slippage?

Mr Petite: Frankly, I do not think so. The commitment is to do so. We have been ahead of time so far on the whole, there remains the issue you have just mentioned, but the odds are that we should be on time.

Q52 Chairman: Presumably Commissioner Wallström and you are confident that this is going to be done in time?

Mr Leffler: I think that Michel Petite is being somewhat too modest as one of the chief legal experts on the work of the IGC. I think that the Legal Expert Group has done remarkable work in a short period and has been able to clear off the table virtually all issues. Like in any IGC there will be a small handful of issues that will go to the political level and that will need to be decided at the political level. We are well placed to see that happen in a traditional two-step approach. This goes to the General Affairs Council on 15–16 and then to the European Council, to the Heads of State and Governments, and if there is any final issue left to be sorted out at their level they will do it.

Chairman: Lord Wright, I think you were interested in some matters about the outcome of the informal meeting?

Q53 Lord Wright of Richmond: Yes, the informal Foreign Ministers meeting. You have referred already to the Polish problem. The public presentation of the Foreign Ministers meeting was extremely positive. Indeed, to quote you quoting Chris Patten, it gave the impression that all foreign ministers were using the same hymn sheet. Have you got any comment to make on the success or otherwise of the Foreign Ministers meeting?

Mr Leffler: Let me say that this Foreign Ministers meeting as an informal meeting was not there to take formal decisions. They received a report on the state of play, state of progress in the negotiations of the legal experts, they were pleased with what they heard and that contributed to the positive sound of joyous music coming out of the meeting, as did the weather and the warm welcome of the Portuguese. The meeting, even if it was informal, did serve to confirm overall orientations, to confirm very clearly everybody’s respect for an attachment to the Mandate. The music coming out was, “We all love

19 September 2007

Mr Christian Leffler and Mr Michel Petite

the Mandate and we all look forward to 18 October”. That in itself is an important message because it is a recognition that we have made sufficient progress to make this possible. It also served to confirm provisional agreement on a number of issues. Michel Petite has already mentioned the citizenship issue and the addition, or rather the copying, of an element of text from the Treaty on the Functioning of the Union into the Treaty of the Union to have the citizenship highlighted also in the Treaty of the Union. There may be one or two question marks and people will scrutinise how this will play but, on the whole, everybody has said, “This is a good thing, we want it to go ahead”, so it could be put to bed at the expert level. Similarly, the procedure for the adoption of the revised Charter of Fundamental Rights, to be confirmed formally but broad agreement on how and when this is best done so that it inter-relates with the new Treaty as and when the new Treaty is finally in place. That was another issue that could be dealt with. Thirdly, it served to tease out some of the other questions that were in ministers’ minds that some of the Member States still have concerns about which are or are not in the Mandate but are nevertheless issues that will have to be addressed before we conclude the IGC. Whether that has to do with an Austrian concern about overpopulation of their universities, because they do not have any entrance thresholds, and how to deal with that, the answer from most participants at the meeting was, “Please deal with it outside the Treaty framework”, or rather, “within the current Treaty framework”, but we have said from the Commission’s side that we are happy to sit with the Austrians and look at what solutions can be found which still respect the current Treaty or on the Bulgarian point about how to spell the euro in Bulgaria. Why anybody thinks they know this better than the Bulgarians is beyond me but that seems to have been an issue in the past and is still an issue, so it has to be dealt with. We teased out those small issues which we do not want to become big issues. Lastly, and I think quite significantly, there was general recognition at that meeting that communicating about the Treaty and, for that matter, communicating about the Union, the broader context which I described in my introduction, is an essential common task in which we all have to invest and in which we all have to work together to better inform our citizens, our constituencies across Europe, in the hope that information, without turning it into propaganda, will deliver a recognition that the Union is a useful thing and, therefore, one worth having a revised Treaty.

Chairman: Unfortunately, there are some countries, and I will not mention them, where some politicians believe that even giving information is propaganda. However, we will cross that bridge when we come to it.

Q54 Lord Wright of Richmond: Is it your impression that by the end of the informal ministers meeting the Polish problems had been put to bed?

Mr Leffler: No, not all of them, or at least not to bed and to sleep!

Baroness Thomas of Walliswood: You mean they may pop their little heads up with their nightcaps on later on.

Chairman: Shall we move on to the orange card procedure.

Q55 Baroness Cohen of Pimlico: We are very interested in the Commission’s understanding of the proposed orange card procedure. A first look at it raises a number of questions on which the Committee would be grateful for any intelligence that you have to offer. If I can just start with a specific question. The text appears to give national parliaments an advisory role rather than direct power of veto, and it appears that either the Council or the European Parliament can give effect to it. Is a formal power for the European Parliament to act on behalf of national parliaments in this way a constitutional innovation?

Mr Petite: It is Mrs Wallström who deals with the Parliament, and maybe in the future the national parliaments.

Mr Leffler: If you will allow me, maybe I could say one word first on where the Commission comes on relations with national parliaments. I leave aside for a moment the technicalities of the yellow and orange cards. I will gladly leave the intricacies of those procedures to M Petite. This Commission—and I dare say in particular Mrs Wallström, being responsible for institutional relations and relations with parliaments, the European and national ones—believes that engaging more actively with national parliaments is an important element in strengthening both the legitimacy and the effectiveness of the Union. It is not an attempt to somehow circumvent established procedures, to go behind the back of the Council, of governments in the Council and enlist the support of their national parliaments, or to go behind the back of the European Parliament. It is a way of trying to offer a dialogue which will allow national parliaments to be better informed and more actively engaged at an early stage in the preparation and formation of European policy so that they are better placed to engage in the dialogue at national level with their governments to establish that national position which will then be represented by their Member States in the Council. We came with a proposal on this, a ten point plan, in 2005. We are rather pleased with how this has evolved. Over the past two years we have had more than 300 visits by Commissioners to national parliaments for committee hearings, plenary debates, whatever, as a way of putting ourselves at the disposal of national parliaments when they want to discuss issues. As you well know, over the year we

19 September 2007

Mr Christian Leffler and Mr Michel Petite

systematically send all Commission communications and proposals to national parliaments, and in just over a year we have had more than 120 well worked through, reasoned replies, many of them from yourselves, which we then commit to responding to and taking into account in the future work that we do. As I say, all this is a way of trying to make sure that governments will be better placed when they are in the Council to make sure that they fully represent their national positions because those national positions will have been built on the input of well-informed parliaments. It allows us to pick up early signals from parliaments if they feel that we are going beyond our remit or if they feel that we are going down the wrong path. Obviously we will now need to look at how some of these procedures will be adapted or refined in the light of the new yellow and orange card procedure in the Treaty which formalises a role for parliaments, which is indeed a new role, with a specific focus on the issue of division of competences which is one, but only one, of the many roles that in our view national parliaments can play.

Q56 Chairman: Thank you. Before Michel Petite gets into the fine print on the orange and yellow cards, let me raise one other point about national parliaments. You will recall that in the Council conclusions in June 2006 we had what has become known as the Barroso initiative, which was that national parliaments were encouraged to correspond with the Commission, not just on subsidiarity and proportionality but on any legislative matter. This is not reflected in the Reform Treaty. At the recent COSAC meeting in Lisbon, and indeed at the previous COSAC meetings in Berlin, there was much discussion as to whether or not the Barroso initiative was being, as it were, shunted aside by not being mentioned in the Mandate or, as others put it in defence of its not being in the Mandate, it was so obvious it did not need to be spelt out. I have to tell you there is still quite a lot of feeling in COSAC about this, that many of us wonder was a conscious decision made to exclude that reference to “any legislative matters”?

Mr Leffler: My sense on that, and then I will hand over to Michel Petite, is we should distinguish between the formal role now given to national parliaments in the competence/subsidiarity scrutiny, where parliaments are given a very prominent role and are the first instance of formal scrutiny, and the informal role, if that is the correct term, but one that was seen by many as self-evident, of conveying views on the substance, not on the issue of competence but on the substance, allowing us as the Commission to build that in or factor that into the work as we take forward and allowing parliaments to give an early signal to their own governments, or to their colleagues in the European Parliament, of where they

see the key substantive elements. It is two slightly different roles but, as far as the Commission is concerned, we very much hope that national parliaments will continue to be active in both of these areas.

Q57 Lord Roper: Just for the avoidance of any doubt on this, just because there was no explicit reference to the Commission’s commitment which was made in the Barroso Declaration, the Commission will continue to respond to any submissions which are made by national parliaments in response to documents which the Commission have submitted to them?

Mr Leffler: Absolutely.

Lord Roper: I just want to get that on the record.

Q58 Chairman: In fact, those kinds of questions or comments put to the Commission far outweigh the number of any references to subsidiarity and proportionality, which is the more formal part.

Mr Leffler: We will definitely continue to do that.

Q59 Chairman: I am sorry, we have strayed a little bit from Lady Cohen’s original question. Maybe we can go to Michel Petite, if there is anything you would like to add.

Mr Petite: Just to confirm this, my Lord Chairman: I think there is a difference of nature in these two areas. The “Barroso commitment” is a unilateral commitment from the Commission and, therefore, does not need to be embodied in Treaty provisions which are inter-institutional, whereas the yellow card and orange card refer to inter-institutional obligatory provisions and have to be written down in the Treaty. That is the difference. On the original question, I think you are absolutely right in all the elements of your question. These two new devices are institutional innovations, to start with, and they are because for the first time it marks a direct interaction between the national parliamentary level and Europe. It has been formalised. It did not really exist before except informally. This is a new trend, or at least a new institutional device. Also, I think that there is no veto power embodied in this system, it amounts to a strong advisory role from a combination of national parliaments. At this stage that is the most we can say. Maybe there is one technical addition. The IGC group has not discussed these provisions at all because they derive completely and fully either from the previous text or, for the orange card, from the Mandate which attaches the text, and we had to take it as it was. So it was not even scrutinised: it was taken as it emerged from a long night during the June summit.

Chairman: Would you like to follow up on some of the other questions we have on that?

19 September 2007

Mr Christian Leffler and Mr Michel Petite

Q60 Baroness Cohen of Pimlico: The procedures around the orange card and the yellow card differ in as much as the orange card, as I understand the matter, is restricted to Commission initiatives whereas the yellow card proposals can be applied to proposals from other institutions. Why was the distinction made?

Mr Petite: Frankly, I think nobody knows.

Mr Leffler: They were all very tired!

Mr Petite: My own explanation is that the final draft was finalised very late. To my mind, that is the main explanation. I am not sure it matters much because the difference between the two is very minimal. Initiatives which do not come from the Commission, in particular since 2004, are extremely rare cases coming from the Central Bank or from the Court, on very specialised texts. The only significant possibilities are initiatives from a group of Member States. My personal explanation is that the issue has probably been overlooked. The mass of initiatives simply come from the Commission, so it covers the issue. I do not want to think that it came out of suspicion from the Commission. This is an interpretation which nobody on our side had in mind.

Baroness Cohen of Pimlico: No, no, no.

Q61 Lord Roper: Apart from the institutions to which you have referred, are there not initiatives which in terms of the second pillar, the CFSP, come from the Council, so there is that group of initiatives under Pillar 2 to which this does not apply.

Mr Petite: Yes, but they do not come from the Council really.

Q62 Lord Roper: The working parties.

Mr Petite: They are not covered by transmission to national parliaments, I believe.

Q63 Lord Roper: Not by the Commission but, nonetheless, national parliaments become aware of them because in a number of cases Member States have a responsibility to lay them before national parliaments before decisions are made about them. In that case you would say that because that is the responsibility of national states and the relationship is between the national parliament and the Member State rather than with the Community institution. That is right, is it not?

Mr Petite: Probably so, yes.

Q64 Baroness Cohen of Pimlico: If I could dig on. Who is to determine the exact number of votes allocated to national parliaments? This question also applies to the yellow card. Is it the Council?

Mr Petite: The text is pretty precise on this: it allocates two points per Member State. It is precise enough to exclude regional parliaments. It is national parliaments and basically in a system where you have

one national chamber you score two points with that chamber, and if you have two there is one point for each. I do not see much difficulty on the counting of those. What might appear is an area of interpretation on issues which we have not explored at all but we could probably anticipate on, for example, when exactly you decide that there is a negative opinion. When is an opinion negative? It is just when it is not positive? Or has it got to formally state "this is the negative opinion according to . . ." There might be some debate on this, but on the actual mathematics I think it is pretty straightforward.

Q65 Baroness Cohen of Pimlico: When you get to the stage where one nation has put up an orange card, who submits the national parliament's reasoned opinions back to the legislator? Do you do that? Does the Commission do that? Are you the conduit?

Mr Petite: In the "orange card" system, and that is one of the differences from the "yellow card" the Commission is obliged to forward to the two branches of the Legislative Council and the Parliament the national parliament's opinions with its own opinion on their opinion, so the whole lot will be transferred to the legislator for full review of the draft.

Chairman: That answers that one. Thank you very much indeed. Do you want to go for one more before we call your boat in?

Q66 Baroness Cohen of Pimlico: I think really I got an answer to the question what dialogue does the Commission envisage while all this procedure is going on. You plan to talk to them, do you not?

Mr Leffler: Absolutely, all the time.

Q67 Baroness Cohen of Pimlico: I suppose it is a general question of has much thought and consideration been given to all the nuts and bolts, the procedural bits of this?

Mr Petite: I think not yet. A lot will have to be done in each Member State. I have no doubt that when the time comes the Commission will produce its own internal procedure on how to cope with these national parliaments' opinions, how to view them, to treat them, to decide on them, to communicate on them. We will have to have internal rules on this, but not yet.

Q68 Lord Roper: Will those internal rules be discussed, for instance, with COSAC or some other body which is representative of the national parliaments and the bodies which are treating these issues within national parliaments?

Mr Leffler: If the Commission is allowed to have its say on this, obviously when it comes to determining how a Treaty is to be implemented that has to be agreed with Member States and between institutions,

19 September 2007

Mr Christian Leffler and Mr Michel Petite

but if we are allowed to have our say on it it would seem pretty self-evident that we need to discuss this with the body representing the community of national parliaments. If we design a wonderful procedure between institutions here in Brussels but which does not suit national parliaments then it is not much good.

Chairman: I do not know whether it will come as early as the French Presidency. Of course they are very hot on this issue and maybe she will be invited to COSAC when they are in the chair; we shall see. I think we have dealt with the Schengen building measures. We have very few other issues we would like to raise before we let you go. Lord Bowness on the Charter. Lord Bowness was a member of the Convention on the Charter, so he knows whereof he speaks.

Q69 Lord Bowness: Thank you, my Lord Chairman. I gather from an answer we have already had this afternoon that it has not been finally decided how the Charter is going to be dealt with although the draft papers have it within the Declarations. If it is a Declaration what will the effect of that be? Perhaps I can just add to that question. Bearing in mind, since Declarations are merely a political statement rather than something that has got legal force, which is why I think the United Kingdom opt-out to the Charter is actually in a Protocol, which has legal force, if that is right what comfort can people draw from the other Declarations regarding other important issues like CFSP, which apparently will only have a political significance and no legal force? Do you agree that to actually have a legal force they would have to be in the Treaty or in a Protocol?

Mr Leffler: Maybe I can say a word, as I understand it, about the broad consensus on how the Charter will be dealt with and if Michel has any further comments on the issue of legal force I will leave that to him. There has been a discussion, both amongst the legal experts and ministers, on how best to bring the updated Charter into effect. The conclusion of that discussion, supported in principle by all Member States, and therefore likely to be the final result, is that the revised Charter—I talk of the revised one because the Charter already exists and was updated in the course of the 2004 negotiations and the agreement is it is that 2004 version which will now be brought into effect one way or another—was felt less appropriate to do that as a Declaration to the Treaty given that Declarations, as you say, are mostly interpretative, they are a political interpretation of what is in the treaty. Since the Charter is not in the treaty it is difficult to have a Declaration which interprets it. Therefore, the likely procedure is that the Charter will be adopted by proclamation between the three institutions—the Council, the Commission and the European Parliament—as was the case with

the original Charter, and there will be a reference in the Treaty which will be adopted later referring back to the proclaimed Charter giving it legal force except as set out in the Protocol that deals with the specific British and Polish situation. Where the other Member States agree to give it legal force and they refer to the proclaimed Charter, which until the Reform Treaty enters into force will have no legal force, only at that stage will it get that legal effect with the circumscriptions set out in the Protocol. That also makes it clearer that the other Declarations which are attached to the draft Treaty are, indeed, interpretative Declarations of provisions in the Treaty.

Q70 Lord Bowness: Certainly so far as the Charter is concerned I think that is a very helpful answer. I think it is just a little worrying to think that the Declarations are political interpretations of what is in the Treaty bearing in mind that the Declaration has no legal force. Who can make governments, the European Court of Justice or anyone else, follow a political interpretation if the Treaty itself does not guarantee the position?

Mr Petite: If I may, it was always the case that Declarations, which are not Declarations attached to the Treaty but Declarations of the conference, are political Declarations. They are acts of interpretation of the legal texts which are the Treaty and its Protocols. For the Charter I would put the matter in more trivial words than Christian Leffler. Basically the legal status of the Charter derives from Article VI of the Treaty and that is it, full stop. The next question, nevertheless, is which text of the Charter? They needed to have an established text of the Charter and that is why initially the Presidency thought of putting the text in a Declaration to the Convention so you could refer to it when there was the second text on the explanations given to the Charter. In the Expert Group what happened was that two different sources of uneasiness with that initial device arose. One coming from those who—I have to be careful with the words—were defining the new Treaty or the Reform Treaty as a “simplified” Treaty; and a good way to simplify the Treaty is to try and suppress 50 pages of annexes and Declarations, so they were keen on having these Declarations, which are substantial, out of the copy; and second, those who felt to put this Charter as a mere Declaration to the conference was rather downgrading the text and meanwhile there was the need to actually formalise the text. The solution we suggested was to remove these two Declarations, to re-proclaim the new Charter by the three institutions, because it is not the 2000 text, but the 2004 text, which is the one to which Article VI would refer. This meant that the proclamation would have to be done between October and the signature of the Treaty.

19 September 2007

Mr Christian Leffler and Mr Michel Petite

That is it basically: you do not need to have these Declarations attached. It would then be published in the same issue of the *OJ*, both the Charter and the explanations attached to it. That is the simplest device and it does not change the legal status.

Chairman: Thank you very much indeed. There is a Eurostar getting up steam, if that is not an inappropriate way of expressing it. We have just one last very quick question from Lady Thomas, and that will be it.

Q71 Baroness Thomas of Walliswood: We have heard that some Member States are concerned that they would like to have a reduction in the role of the European external relations service on the grounds that the Council Secretariat will become more dominant in the Commission services. What sort of concern is this really? Does it reflect a reality which concerns you or is it a relatively minor matter?

Mr Leffler: As far as I know it is not an issue which has been discussed at all in the current negotiations in the IGC. That is something that will come in the implementation phase. There is no questioning of the wording that establishes the External Actions Service. It will come when we have to define what it will be. We have, no doubt, a number of cross-cutting concerns and aspirations for that new service. It is unusual to hear a concern that the Council Secretariat will become too dominant at the price of the Commission.

Q72 Baroness Cohen of Pimlico: It is a little, is it not?

Mr Leffler: I think there are a number of Member States which have the reverse concern. Of course, the institutions themselves also have concerns and aspirations in this field. This will be an area for very lively debate once we have a Treaty agreed and signed. I am also fairly confident that in the end we will find a practicable solution with a structure that brings together the added value, the best from the Commission services as they exist in Brussels and across the world, the Council Secretariat and the services that they have built up since Javier Solana entered these functions in 1999, and the experience and expertise of Member States. We will all benefit from bringing those together.

Chairman: Thank you very much indeed. I would like to thank you both very warmly on behalf of the Committee for answering our questions so fully and so frankly, and in such a friendly way. I leave you with this one thought: I heard on the BBC this morning that there is one town in England which is going to hold a referendum on the Treaty as soon as possible after it has been published and signed, so you may get an early indication as to whether all of your work has been in vain.

Baroness Cohen of Pimlico: Which town, my Lord Chairman?

Chairman: I thought I heard Reading. Anyway, thank you very much indeed. It has been a great pleasure to see you again.

TUESDAY 9 OCTOBER 2007

| | | |
|---------|---------------------------------|---------------------------|
| Present | Blackwell, L | Harrison, L |
| | Bowness, L | Kerr of Kinlochard, L |
| | Brown of Eaton-under-Heywood, L | Maclennan of Rogart, L |
| | Cohen of Pimlico, B | Symons of Vernham Dean, B |
| | Freeman, L | Thomas of Walliswood, B |
| | Grenfell, L (Chairman) | Tomlinson, L |

Examination of Witnesses

MR ANDREW DUFF, Member of the European Parliament, and MR GUILLAUME McLAUGHLIN, examined.

Q73 Chairman: Thank you very much indeed, Mr Duff, for coming to join us this afternoon. This is on-the-record public evidence; we will be sending you a transcript—you know the form, you have been kind enough to appear before this Committee on a number of occasions, either here or in Brussels, and we are grateful to you for coming to see us here on the second day after our return from the summer vacation, during which you have been working very hard. We are also very grateful to Guillaume McLaughlin who is with you. If at any time you want Mr McLaughlin to join in the conversation, at your proposal he is obviously welcome to do so. Maybe you would like to make an opening statement, a brief one, and in doing so perhaps you could cover two issues: one is how you came to be one of the EP representatives—how did the European Parliament manage to push the door open so that you are there—and what has been your role. We will then get into some of the more detailed questions after that, but you are welcome to start.

Mr Duff: Lord Grenfell, your Lordships and Ladyships, it is a great privilege and pleasure to be here this afternoon and I can bring you greetings from Den Haag because we started today speaking to the Tweede Kamer and the Erste Kamer, the Dutch Parliament, on this very subject, so if you like I have had a practice run today at the Inter-Governmental Conference (IGC) in front of a national parliament. The three of us—Elmar Brok, Enrique Barón Crespo and myself—see it as an essential part of our function as representatives of the European Parliament at the IGC that we speak frequently and frankly to national parliaments, obviously through the formal mechanisms such as COSAC but also in inquiries and committees of scrutiny such as this. We three are there because in the past we have had two “observers” in IGC, although it is not easy to determine precisely how effective they have been. It is a sign of the growing constitutional importance of the Parliament and a signal that our record in constitutive developments over the last years has been creditable, that this time the IGC accepted our request that we should have three “representatives”. That implies we are there of course to represent the settled opinion of the Parliament on all these matters, as it were, because we are complicit in the drafting of

both the Charter of Fundamental Rights through the first Convention, complicit in the drafting of the 2004 Constitutional Treaty through the second Convention, and we have a record to defend and justify. I suppose our primary duty is to see that the advances that we made in the drafting of the 2004 treaty are salvaged as much as possible with respect to the powers of the Parliament, which as you know are promised to increase substantively in the budgetary and legislative fields. But we feel ourselves quite able to opine on almost anything else that crops up in the course of the IGC.

Q74 Chairman: Thank you very much indeed. Maybe we could move on then to the role of the Constitutional Affairs Committee of the European Parliament. I am sorry that we were not able to be present ourselves during the recess, but could you give us some idea of how some of the national parliament representatives present reacted; were they helpful to you?

Mr Duff: Of course, one starts from the understanding that this IGC is not quite like previous IGCs in that its task is to transform a complicated but fairly precise mandate to a proper treaty form and the room for manoeuvre, both politically and legally, for all parties is fairly limited. The Constitutional Affairs Committee leading for the Parliament drafted in July the opinion of the Parliament, without which the IGC could not have started, and we are simply seeking to ensure that the terms of that *acquis* are faithfully followed. National parliamentarians who have attended—and we have had a fair selection—have expressed a certain frustration at their comparative disadvantage because they are not allowed to be there as observers at the IGC themselves, so there has been a fertile exchange of opinions.

Q75 Chairman: There was a move, I remember, at the Lisbon COSAC, led by the Bundestag, to have national parliamentarians at least represented there. I presume that came to nothing.

Mr Duff: The Presidency declined, as politely as possible, that request, and it pointed out as it was bound to do, that ministers in the IGC represent national parliaments (one hopes).

9 October 2007

Mr Andrew Duff and Mr Guillaume McLaughlin

Q76 Chairman: Yes, one hopes. Let us go on for a moment to the technical and legal discussions. These seem to have taken rather longer and been more complex than had originally been envisaged. There was an October 2 to October 3 so-called deadline for them to finish that work; what was holding it up, was it just the complexity of the text or was it a problem of the different languages?

Mr Duff: The legal expert group has been able to expose several technical problems in the drafting of the mandate, and indeed has discovered some areas where the mandate was silent; it is not a comprehensive mandate in the sense that all issues are covered. For example, the necessity of accepting in practice the decision in principle to suppress the third pillar requires a whole clutch of agreements and decisions and conventions in the area of justice and interior affairs to be transposed somehow into first pillar disciplines and instruments. This was not spoken of much in the mandate, but it has proved to be both a complex and controversial issue. Of course, as we know, the greatest political obstacle was the British proposals for its own opt-ins and opt-outs which have proven to be extraordinarily complicated, even tortuous, to negotiate satisfactorily. I will say more about that later.

Chairman: We will come on to that in a little while but what you have just said about the pillars leads us nicely to a question that I know Lord Blackwell wanted to ask you.

Q77 Lord Blackwell: Thank you, My Lord Chairman. Mr Duff, I have some specific points I would like to ask about the collapse of pillars 2 and 3 but before I do that could you just elaborate a bit on what concerns you have and the Parliament has, if any, about the way those pillars are treated in the new treaty?

Mr Duff: Perhaps “collapse” is not the right word here, but the deconstruction of the third pillar has finally been satisfactorily concluded. We understood—and as this was in the mandate we were not seeking to overcome this or to throw it out—that the British wanted the freedom to opt-in and opt-out of the Schengen measures and of the classical third pillar. Clearly, it was going to be unacceptable for everyone else to have a situation where the UK could opt in at the start of a negotiation, change the shape or direction of that negotiation, that draft law, perhaps reduce its whole value, and then at the end opt out leaving everyone else with what they considered to be an inferior product. We had therefore to devise procedures that manage that process without obliterating the British request to have freedom of manoeuvre, and I think we have succeeded. Essentially it is up to the Council, or the Commission in certain circumstances, to decide precisely just how the UK participates in Schengen

and in Justice and Home Affairs (JHA) measures. Timetables have been set which determine the pace of these decisions, including obliging the British to decide promptly, at the start of a negotiation or at the end of a first reading, if they are going to exercise their option or not. Effectively, Britain cannot act but on the terms that will be set by the European Union. Britain cannot claim that a previous measure in which it had agreed to play a part can still be in force should its partners want to change it, and there are also possible financial penalties which could be imposed on the UK in certain circumstances. The essence of this is to ensure that the commonality of the common policy and that the instruments and resources applied to support it are still sufficient for the common law policy to be effective.

Q78 Lord Blackwell: If I could just have a couple of follow-ups on pillar 3, the deconstruction as you call it does involve this whole area moving into the main EU competence of Commission legislation, and a large amount of qualified majority voting. I guess the concerns about what you have said for those who might have reservations about that are firstly, as I understand the Treaty the opt-out only applies to legislation passed or laws passed before the Treaty comes into effect at the end of 2009, in other words the five year transition only applies to things that are passed before the Treaty comes into effect. The second point is the point I just mentioned, that if at the end of five years we then give notice that we do not want to be part of this, the penalties that can be imposed by QMV on the UK are unspecified and therefore could be whatever the rest of the Community decide they would like to use to induce us not to opt-out.

Mr Duff: One ought not to think of this in the sense that we wish to penalise the UK. Obviously we want to encourage the UK and the Irish to opt into everything; that is the spirit of integration. You are correct that at the end of a five-year transition period the UK could refuse to accept the authority of the Commission and the supervision of the Court in an existing measure, part of the *acquis* as is. If that is the case, that measure will cease to apply to the UK, so it is a self-exclusion. We are not seeking to bar the UK from playing a part; indeed, rather the opposite, we are trying to facilitate its association with all aspects of common policy in justice and interior affairs.

Q79 Lord Blackwell: If I could just have a quick follow-up on pillar 2 then, for which I might also use the language “collapse”, there is a question of whether pillar 2 remains inter-governmental but as far as I can see it again moves into an area where the Commission or the foreign minister can set forward proposals and where the foreign minister or the high

9 October 2007

Mr Andrew Duff and Mr Guillaume McLaughlin

commissioner has proposed things, they can then be adopted by QMV. Do you have any concerns that that is de facto turning foreign and security matters into an EU competence where inter-governmental sovereignty is in fact overall?

Mr Duff: You will understand that we start from a slightly opposite premise. We were always in favour of strengthening the capacity of the EU to act abroad, and for that we need a genuine common foreign and security policy, which will apply to those issues and activities where the Member States can agree by consensus. That includes constructive abstention which we might see, for example, in respect of Kosovo. The British have succeeded in, as it were, strengthening the inter-governmental character of CFSP in this reform treaty. As you know, the name of the Solana figure has been changed: he will be called the High Representative as opposed to the Minister, but he will still be in the Commission as a vice-president of the Commission, chairing the Council for Foreign Affairs, managing the external action of the service which is, in my view, the key to his potential success. It is in combining the resources and foreign policy know-how of the Commission in its classical external services, trade, development of a common energy policy and so forth with the classical foreign ministry functions that this new creature will perform so much more effectively than the situation we have at present. Britain has, as you know, insisted on gluing on to the Treaty certain other minimalistic interpretations of the CFSP and we still wait to hear from the Foreign Secretary precisely why he thought these minimalistic interpretations were and are necessary. But they have been accepted, so in so far as Britain has sought to strengthen the separateness of CFSP from everything else, it has succeeded. As to your precise question, the Commission can propose policy in collaboration with the Solana figure, they cannot do it if he does not agree, so there is a sanction there, and of course we all have to work within the broad policy guidelines established by the European Council. I do not think, therefore, that anyone has anything to fear from the agreement which will be reached with respect to the CFSP.

Q80 Chairman: Could I just ask two quick follow-up questions on that? One is really a yes or no one, is it clear that enhanced co-operation has now been extended to ESDP? The second question I have is a little more elaborate, and that is on the question of representation in international fora by the high representative. Am I right in saying that the high representative can only speak in those fora on the basis of what has been agreed in the Council? When we say “agreed in the Council” do we mean agreed by consensus or do we mean that he would be barred from speaking if there are constructive abstentions,

in which case he would not be representing the whole of the EU? I am not quite clear what he or she is allowed to do, taking into account the manner in which a consensus might be reached in Council?

Mr Duff: On your first question you are correct in thinking that the agreement on permanent structured co-operation in defence for the militarily capable and the politically willing core group of Member States is still in the treaty, and it is very centrally and firmly in the British interest that it is so. On the second issue it depends slightly on the forum that we are speaking of as an international forum. In negotiations on international environmental policy, for example, the Commission would seek a very strong mandate from the Council, or on trade, where it is very important to have a clear, strong mandate with negotiating flexibility allowed, built-in, but there are some other matters, especially the more geopolitical security questions—in the Middle East for example—where the high representative will not enjoy plenipotentiary powers, far from it; he will have to be aware of and tolerate the sensibilities of all the Member States, and they are very different. By constructive abstention, if we can pick up the example I cited earlier of Kosovo, I think we will see the majority of Member States approving Kosovo’s progress to a more independent state. Some Member States will have greater apprehension about that, but in order to agree that the EU should be able to assist Kosovo with technical or financial assistance, and certainly with some element of an armed force, there will be what I call constructive abstention because they will agree that we have to assist the Kosovans to encourage the pacification of the Balkans, despite residual misgivings about the pace of development. To track the evolution of the CFSP will be one of the most important and fascinating things that we will have to do over the next four or five years.

Chairman: Thank you very much indeed. I would like to move on to the Charter of Fundamental Rights. Lady Cohen.

Q81 Baroness Cohen of Pimlico: Thank you. Mr Duff, what is the European Parliament’s view on the status of the Charter of Fundamental Rights and what concerns does the Parliament have about the Polish and indeed the UK protocol on the Charter?

Mr Duff: The agreement is that the Charter will have the same legal value as the treaties and that it will be binding on the EU itself—by which we mean the Commission, the Parliament and the Council—and the agencies of the EU which include of course Member States, but in so far as they are carrying out EU law. The Charter exclusively applies itself to the competencies conferred on the EU and to the areas where those competencies have had a practical effect. We are anxious that the Charter which, as you know, is not going to be published as part of the Treaty is

9 October 2007

Mr Andrew Duff and Mr Guillaume McLaughlin

published with sufficient profile, with visibility, to be seen and appreciated. The agreement is that it is solemnly proclaimed between the three presidents of the Commission, Parliament and Council, before the signing of the Treaty, which we expect to be in December, and published in the official journal. So it can then be referred to simply in the Treaty in Article 6. Now the opt-out: here I have, as you probably know, great unhappiness. I cannot see that it is in the interest of the British citizens to be deprived of the privilege of being protected from any abuse of the EU's powers, which is the purpose of the Charter; that is what it is for. There is a domestic discussion that we have to have in Britain on that, but I also have a concern that the British opt-out will contaminate the legal system for everyone else and will subvert the value of the decision to make the Charter binding. The principal reason for my fear is that we sign up in the Treaty to drawing our inspiration, our sources of fundamental rights, from the *common* constitutional traditions of all Member States. But the British are saying "Oh no we don't, we only recognise them as stemming from British law." If the opt-out is juridically flawed is not for me to say, there are greater lawyers than me—even in this room—but I do think that serious questions have to be asked of the British government about precisely what it is that they are trying to achieve; do they appreciate the jeopardy that they are putting everyone else in with their decision on the Charter? My third anxiety is that there is not only legal contamination but political spill-over, and we see that the Poles have agreed to sign up too, incidentally for quite opposite reasons. The Polish are strongly in favour of Title IV of the Charter which is about the social dimension and have actually now proposed a declaration which says as much—I think it is number 54. (There will be other declarations; there will be a lot of them to come). The Polish concern centres on the claims of the descendants of German refugees to get their property back. Mr McLaughlin and I were in Warsaw on Friday and we explained clearly to Madam Fotyga, the Foreign minister, that the Charter did not apply easily, is not relevant to this issue of property litigation, but for all that they have agreed on their opt-out, because they are in the middle of an election campaign, and this is the most appropriate thing for them to achieve. The European Parliament has proposed that Britain accepts an "escape clause" from the opt-out, that is to say a third clause in the protocol, which would say that if Britain were to change its opinion about the Charter, having seen the soundness of the jurisprudence that will flow from the Court in this area of fundamental rights, then the UK could unilaterally suppress its opt-out without putting everyone through the pain of an IGC. On the other hand—and here again I look forward to hearing from Mr Miliband precisely why

he has not accepted this proposal—the Poles are very attracted by the idea of an "escape clause" I am sorry for that slightly protracted answer, but it is a highly controversial if not poignant question for us in the European Parliament.

Chairman: Lord Tomlinson may ask you to make it even more protracted, but that is all right; go ahead.

Q82 Lord Tomlinson: My Lord Chairman, mine is a very simple question. I read with some interest an article on "Reform Treaty MEPs push for inclusion of Charter and citizenship", and in that my good friend, the Spanish Socialist Enrique Barón is quoted as saying that the Charter and citizenship are the European Parliament's "red lines". I would like to know a little bit more clearly what these red lines are. You seem to be stealing the British Prime Minister's language about having red lines; what are the red lines and how do you interpret the final sentence of that paragraph where he says: "One possible solution to this problem could be to leave the Charter out of the new treaty whilst having a 'solemn proclamation' of it at a later date." It seems a very pinkie sort of line that last one.

Mr Duff: I have not seen the article and I myself, I hope, will refrain from falling into Blair/Brown language about red lines. It would be a great mistake for the whole Parliament to seek to be too obstreperous on this, but Enrique Barón Crespo is quite correct that we were extremely concerned that the concept of citizenship had disappeared from the Treaty on European Union.

Q83 Lord Tomlinson: Put citizenship aside and stick with the Charter. It is the Charter part that I am really asking about.

Mr Duff: You have asked the question and for the record, if I might, I would like to explain just what we have asked for and achieved with respect to defining citizenship. It had been put in draft into Article 17b of the Treaty on the Functioning of the Union and we have succeeded in bringing it forward to Article 8 of the Treaty on the European Union, so if we speak of the citizens, which we do, we also will now have some understanding of just who they are and what is entailed in the privilege of being an EU citizen. On the Charter, your press article must have been published some time ago because a decision has now been reached that the Charter itself is not to appear in the treaties but will be solemnly proclaimed, probably in Strasbourg, in a plenary session of the Parliament in November and published. That is what Mr Barón Crespo was speaking about. He does not like that, but I must say that I do, I think that actually in the 2004 treaty structure—if I may look at Lord Kerr here—the Charter was Part II, as you know, and it was a bit sandwiched, a bit squeezed there, between the first and the third parts. It is now to be a

9 October 2007

Mr Andrew Duff and Mr Guillaume McLaughlin

stand-alone proclamation which is the way, after all, that we drafted it in the first place. I think it improves with that special treatment that it gets.

Q84 Chairman: Good, thank you very much. In the quarter of an hour to 20 minutes that we have left there are three issues that we need to cover: one is the question of the orange and yellow cards, which is of particular interest to national parliaments, then the question of the allocation of seats of Member States and, finally, your feelings about what may be still the tough points for negotiation when we come to the General Affairs Council followed by the informal council. Could we start with the orange and yellow cards? We would be interested to hear your views on where we stand on that, because we are not quite sure whether there has been any discussion of the provisions requiring the EP as part of the legislature within the Council to take account of national parliaments' opinions on subsidiarity. Could you expand on that?

Mr Duff: We have considered it and our tentative conclusion is that the orange card, as it has been described—because it was inspired (if that is the right word) by our friends in the Low Countries—is an improvement on the subsidiarity early warning mechanism that we had in the 2004 treaty, because that first one stopped at the pre-legislative phase and was solely targeted at the Commission. We all know that the Commission plays a very important part in initiating a proposal, but then it is sent to us, to the legislature, the Council and the Parliament. It is quite correct that a final assessment of a complaint from national parliaments ought to be in the hands of the legislature as opposed to the Commission. I do not expect it will be often used—I certainly hope it is not going to be deployed too often. I would be awfully surprised if a measure that had so antagonised over 50% of national parliaments was in any sense capable of survival in the Council, but for all that it is an appropriate insurance policy which national parliaments both need and deserve. I do hope—and Lord Grenfell and I discuss this frequently—that the stimulus provided by the existence of these instruments will encourage national parliaments to take more seriously their task of scrutinising, in an informed way, the affairs of the EU. As a European Parliamentarian, I would greatly welcome more of an input on policy matters from national parliaments.

Q85 Chairman: Could you give us a word of comfort on one related issue. You will recall that during the Council last year, it was agreed that the Commission should respond to queries or complaints or comments from national parliaments, not necessarily to do with subsidiarity and proportionality? We have raised this issue a number of times in various fora, saying we were disappointed this was not reflected in

the treaty, and the reply we got—and I accept it but I am a little bit unhappy about it—was just trust in the good faith of the Commission not to be delinquent when it comes to responding to complaints and queries and comments from national parliaments that are not to do with subsidiarity.

Mr Duff: That is quite right actually, I think that was the appropriate answer. Frankly, I find, if I can be completely open with you, this subsidiarity a bore. For us to become obsessed by this federalist principle is complete nonsense. What actually we ought to be concerned about as parliamentarians is the quality of regulation and legislation and of policy that flows out of Brussels and Strasbourg, and in the pursuit of improved quality we have also got to improve our scrutiny of the implementation of the things we do. This is not just about subsidiarity, or it only plays one little part in that, so I am quite sanguine about this reform and I look forward to a more proactive networking of national parliaments across the whole policy spectrum of the EU.

Chairman: I cannot speak on behalf of the Committee but I can say that that is music to my ears, so thank you very much indeed. Let us move on now; Lord Kerr.

Q86 Lord Kerr of Kinlochard: Mr Duff, the Parliament is given the task of proposing the reallocation of seats in the Parliament that will be elected in 2009, and my understanding is that the Constitutional Affairs Committee of the Parliament has come up with a report, with its proposal, which presumably the Parliament will be looking at now. Can you describe that proposal and its prospects in the Parliament, and what will be the effect on UK representation? Can you also tell us whether this is the definitive answer or whether for the Parliament that is elected in 2014 there will be something more?

Mr Duff: We are in the throes of the debate about the recomposition of the Parliament after 2009. As you know, if the treaty comes into force then the size of the Parliament can be increased to 750 members. Germany, the largest country, will have to have 96 and Malta, the smallest, will have to go up from five to six. Between those two parameters we have set ourselves the principle of defining, in practice, the principle of degressive proportionality, which implies that the more populous States have more members than the less populous States, but that the MEPs from those more populous States should represent more people than the MEPs from the less populous States. Messrs Lamassoure and Severin are the co-rapporteurs in this, and we have agreed in the Constitutional Affairs Committee by an impressive majority, 17 votes to 5 or 6 or 7, something like that, to support the proposal. For the United Kingdom we increase the representation for the 2009 Parliament

9 October 2007

Mr Andrew Duff and Mr Guillaume McLaughlin

from 72 to 73. You asked if this is the definitive all-time formula; no, it is not. Apart from anything else the Italians have raised the issue of just how do we define a citizen. As we know, there is a Diaspora of Italians from Chicago to Buenos Aires and, apparently, a lot of these people have Italian passports and if you take all of them into account then Italy shoots up the league and so forth. The Italians, bless them, have opened up a can of worms on this and there is to be a further report that will emerge in the spring of next year which will have a look at the primary law, the 1976 Act which brought in direct elections to the European Parliament, to see if we cannot tease out some of these more tricky issues. I am afraid to say that the rapporteur of that report is myself, so I will not be able to escape this, so perhaps we could schedule a further discussion about these matters sometime in the spring?

Q87 Baroness Symons of Vernham Dean: Having, as a minister, had to argue on this appallingly difficult issue in terms of Parliamentary acceptability in this country, in my experience it was not so much the actual numbers that people in here cared about, it was how it compared to everybody else and whether we were getting our fair slice. It may be a base argument, but actually that is the way that national parliaments tend to think about this. Mr Duff, may I ask you the all-important question: how do we compare to the French under this formula that you have just articulated to us?

Mr Duff: I am certain that I do not detect in Lady Symons' question any Francophobia!

Q88 Baroness Symons of Vernham Dean: Of course not, it is a perfectly straightforward question!

Mr Duff: France has been doing excellently with its population and, incidentally, an awful lot of them are not exactly firstborn French, a lot of them are English and Germans: France will get the two. France goes from 72 to 74, Britain goes from 72 to 73, and the Italians stay on 72. That is quite correct, you have pointed the torch at the really sensitive issue. I am afraid it is also true that some ministers do not care how many MEPs they have—in fact I have spoken to several who would prefer to have a reduction in the number of their MEPs, who are perceived as troublemakers inside the political regime at home! It is not as straightforward as it looks, therefore. But to be serious for a second I think that we are going to achieve an agreement on this in the plenary session on Thursday, and we have to, because if we do not then the IGC will have to determine this on our behalf and it will be like the casino at Estoril with the chips being handed out across the table at the IGC, which would be unseemly, even squalid and certainly not in the interests of the institution which I represent.

Q89 Lord Tomlinson: I was just reflecting, My Lord Chairman, on that last answer—I had not realised you were taking me to an unseemly gaming house for the meeting of COSAC in Estoril! Just to wrap it up, Mr Duff, perhaps you might reflect a little bit on some of the broad political issues that might complicate the final negotiations. Obviously there is the Polish election, what sort of effect will that have, will the timetables stick, is there any Member State or any other Member State besides Poland which is likely to have difficulty in meeting the timetables?

Mr Duff: That is an excellent question and first, if I could just say, the European Parliament still has one or two outstanding issues which it will want to address, especially, and I would like to bring these to your Lordships' attention. Article 24 of the Treaty on European Union concerns the protection of personal data in the field of security where the proposal is that the Council, acting exclusively, by itself, on its own, without scrutiny either from yourselves in national parliaments or the consent of the European Parliament, should set the rules for the transfer and passage of this personal data. It also would exclude the Court from having any supervisory function in this area, and we feel that this is contrary to the spirit of the 2004 constitutional settlement. We would like the support of all Member States in correcting what we think is an anomaly here. The Polish situation of course is troublesome, to put it mildly. They are still demanding that the "Ioannina clause", which is to be subject to a decision of the Council, having the status of secondary law, should be upgraded and brought into the treaty itself to have the status of primary law. This is highly controversial and you will expect the majority of Member States and the Commission and the Parliament to object to such a change to the decision-making procedures. Just how that Polish request and the earlier issue that I talked about, the property rights issue, will play at the IGC is almost anyone's guess. I hope and the Poles hope that these are not going to be insuperable obstacles to achieving a political accord. It is in the interests of the Parliament that the quality of that accord is first class, or is as first class as we can make these things. Expect the negotiations to go on until the early hours of Saturday morning, Lord Tomlinson; I will phone you then.

Lord Tomlinson: If it is in the early hours do not bother!

Q90 Chairman: As a matter of interest could the Ioannina problem be solved by a political declaration?

Mr Duff: In its present draft it is a political declaration which establishes the decision—it instructs the Council to take this decision.

9 October 2007

Mr Andrew Duff and Mr Guillaume McLaughlin

Q91 Chairman: I see, so it is already one, it is just a question of keeping it there.

Mr Duff: Historically it is a descendant of the old Luxembourg compromise, which was a gentleman's agreement, so it would be quite incorrect to put it into the primary law.

Q92 Baroness Thomas of Walliswood: Did I hear you say that the Court would not have any jurisdiction on this exchange of personal data?

Mr Duff: Yes.

Q93 Baroness Thomas of Walliswood: That does strike me as being quite dangerous.

Mr Duff: Yes. I am sorry to say that the United Kingdom has sought especially to exclude the Court from playing a function in the area of foreign security policy.

Q94 Chairman: Thank you. We are just about out of time, just a little over. I hope you will not think this is a frivolous final question, but I would very much like to get your view on this. Valéry Giscard D'Estaing said when he read the text of the reformed Treaty that 90% of what he found in it came from the original IGC accord plus the Laeken declaration. Others have slightly tweaked that statement and said that 90% of the Constitutional Treaty is in the new one. They cannot both be right because there is a significant difference between the two. Could you give us an authoritative statement on where the mathematical truth lies in this?

Mr Duff: With great respect I will decline to try out a percentage; I do not work like that. I am far more interested in the contrast between the Reform Treaty we are going to get, we hope, and the present situation, which is not working well, and there is huge progress there for all concerned. Clearly, structurally, the two treaties are entirely different; substantively they are also very different in some respects. In some respects what we have now will be an improvement on what we had in 2004, the bringing in of combating climate change to the environmental policy, for example: the establishment of a proper common energy policy on the supply side as well as the demand side; the strengthening of the excessive deficit procedure. All these things I think are pluses, are improvements, on what we had before. Of course, for the United Kingdom with its opt-outs and opt-ins and exemptions and derogations, the two experiences are going to be very different and so there is a special argument to be had here, if one is interested in compare and contrast, the comparisons and contrasts would be greater for the UK than they are for the rest of the EU. That, I am afraid, is not a thing that I welcome, but I do know there are other people here at Westminster who do not quite have that view.

Q95 Chairman: Thank you very much indeed, Mr Duff, and also Guillaume McLaughlin, for being with us this afternoon. This has been extremely helpful for us in producing the next in our series of reports on the treaty, and we thank you for your time. We will send you the transcript and we wish you well in what remains of the work to be done on the treaty. Thank you very much.

Mr Duff: We are extremely grateful for the invitation, thank you very much indeed.