



HOUSE OF LORDS

European Union Committee

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11th Report of Session 2006–07

**The Criminal Law  
Competence of the  
EC: follow-up  
Report**

Report with Evidence

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## CONTENTS

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	<i>Paragraph</i>	<i>Page</i>
Introduction	1	5
The <i>passerelle</i>	3	5
EC criminal law competence	6	6
The jurisdiction of the European Court of Justice	9	7
<b>Appendix 1: Sub-Committee E (Law and Institutions)</b>		<b>8</b>
Declarations of Interest		8
<b>Appendix 2: Reports</b>		<b>9</b>

## ORAL EVIDENCE

<i>Mr Geoff Hoon MP, Minister for Europe, Foreign and Commonwealth Office;</i> <i>Mr Peter Storr, Director of the International Directorate, Home Office; and</i> <i>Ms Shan Morgan, EU Director, Foreign and Commonwealth Office</i>		
Oral evidence, 1 November 2006		1
Supplementary correspondence		10

NOTE: References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

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



# The Criminal Law Competence of the EC: follow-up Report

## Introduction

1. On 1 November 2006 Sub-Committee E (Law and Institutions) met the Minister for Europe, the Rt Hon Geoff Hoon MP, to discuss a number of the questions arising from our Report, *The Criminal Law Competence of the European Community*.<sup>1</sup> In particular we were concerned to learn about the prospects of the so-called *passerelle* in Article 42 of the Treaty on European Union (which would transfer certain criminal law competence to the Community)<sup>2</sup> and to inquire about the progress of a number of legislative proposals affected by the ruling of the European Court of Justice (ECJ) in Case C-176/03 where there is an *impasse* between the Commission and the majority of Member States. The meeting also provided the opportunity to question the Minister on a number of other issues, including the proposal to extend the competence of the ECJ over justice and home affairs matters.
2. The purpose of this Report is to publish, for the information of the House, the transcript of the evidence of that meeting and subsequent correspondence, and to draw the attention of the House to three matters especially.

## The *passerelle*

3. It seems clear that little, if any, progress is likely to be made on the *passerelle* pending the outcome of discussion on the future of the Constitutional Treaty. Use of the *passerelle* would enable police and judicial cooperation in criminal matters to be dealt with under the EC Treaty, with consequentially increased roles for the Commission, the European Parliament and the ECJ. The Constitutional Treaty would have similar effect but with express cross-border limitations and an “emergency brake” to safeguard the interests of Member States.
4. While Mr Hoon was keen to maintain that the Government remained flexible in their approach they, and the governments of a number of other Member States (including Germany), have not been enthusiastic about the proposal.<sup>3</sup> However, the Government have consistently stressed their belief that the debate on the *passerelle* is “over”, and their desire to focus on practical cooperation rather than institutional change (Q 15).<sup>4</sup> The Minister described

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<sup>1</sup> *The Criminal Law Competence of the European Community*, 42nd Report (2005–06), HL 227 (‘2006 Report’). <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeducom/227/227.pdf>.

<sup>2</sup> See our 2006 Report, chapter 4. Use of the *passerelle* contained in Article 42 TEU would raise complex questions: the right of legislative initiative; voting procedures and the possible existence of an “emergency brake”; and the future of the UK and Irish opt-ins and the Danish opt-out.

<sup>3</sup> The Minister reported that one country was enthusiastic about the *passerelle* and eight were “pretty firmly against” (Q 5).

<sup>4</sup> On 28 November 2006 Baroness Scotland of Asthal stated: “we consider the current debate to be over and believe that we should instead focus on practical measures”. Written Statement of 28 November 2006 by the Minister of State, Home Office (Baroness Scotland of Asthal) on the Justice and Home Affairs Council. Joan Ryan MP, in a debate on the Hague Programme in the House of Commons on 30 November, said

the then current situation with regard to the use of the Article 42 *passerelle* as “a matter of intellectual inquiry only” (Q 5). In the Government’s subsequent formal response to the Committee’s previous Report Gerry Sutcliffe MP wrote: “we consider that discussion on this question has been conclusive and that the EU should now move on, focussing on practical measures rather than institutional change at this time”.<sup>5</sup>

5. It is clear that what is or might be acceptable in the context of the Constitutional Treaty is not necessarily acceptable as an individual proposal. Accusations of “cherry picking” are still made, and constitute a serious political obstacle to the use of the *passerelle*.<sup>6</sup> Though the *passerelle* was discussed at the December 2006 Justice and Home Affairs Council (JHA) and the following European Council the conclusions of those meetings were indecisive.<sup>7</sup> It seems most unlikely that the *passerelle* will feature on any Council agenda until the future of the Constitutional Treaty becomes clearer.

### EC criminal law competence

6. As we explained in our previous Report, the extent of EC criminal law competence following the ruling of the ECJ in Case C-176/03 *Commission v Council*<sup>8</sup> is contentious between the Commission and a large number of Member States including the United Kingdom. The Commission, taking the view that the Court’s ruling is not limited to the Treaty articles relating to environmental protection, has brought forward several proposals which would require Member States to impose criminal sanctions.<sup>9</sup> We are holding them under scrutiny and monitoring the progress of their negotiation.
7. The hope remains that the extent of criminal law competence under the present (EC) Treaty will be clarified by the ECJ in the Ship Source Pollution case<sup>10</sup> currently before the Court. But a ruling from the Court is unlikely

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that “we think that the current debate is effectively over. We should instead focus our energy on delivering practical measures”. HC Deb 30 November 2006 col 1256.

<sup>5</sup> Letter from Gerry Sutcliffe MP, Parliamentary Under Secretary of State at the Home Office, to Lord Grenfell, Chairman of the Select Committee on the EU, on 5 Dec 2006. To be published in the next Report of Government Responses.

<sup>6</sup> The Minister said: “The cherry picking aspect is quite important to the real world consideration of what happens next” (Q 6).

<sup>7</sup> The JHA of 4–5 December 2006, concluded that “the decision making mechanisms which apply in the justice and home affairs area do not always contribute to effective and efficient decision making processes”. Council press release on the 2768th Council Meeting, Justice and Home Affairs, Brussels, 4–5 December 2006, p 9. [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/jha/91997.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/91997.pdf). The JHA referred the question to the European Council meeting of 14–15 December. The European Council, at this meeting, was “convinced that the framework for pursuing the Union’s policies aimed at enhancing the area of Freedom, Security and Justice will need to be genuinely strengthened in order to meet present challenges”. However, the European Council emphasised its commitment to the principles behind “the Union’s reform process” as “the most balanced basis for future work in the area of Freedom, Security and Justice”. Presidency Conclusions from the Brussels European Council of 14–15 December 2006, p 7. [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/92202.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/92202.pdf).

<sup>8</sup> The Court ruled that a Directive drafted by the Commission, which included a prescription of criminal penalties, should indeed have been a Directive (first pillar legislation) rather than—as the Council had argued—a Framework Decision (third pillar legislation). See our 2006 Report, chapter 2.

<sup>9</sup> For example, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 91/477/EC on control of the acquisition and possession of weapons. Doc 7258/06. Proposal for a Council Regulation, amending Regulation (EC) No 1334/2000, setting up a Community regime for the control of exports of dual-use items and technology. Doc 16989/06.

<sup>10</sup> Case C-440/05 *Commission v Council*, pending.

before the end of 2007 at the earliest (Q 41). In the meantime only one legislative proposal (on the approximation of sanctions in relation to intellectual property right infringements<sup>11</sup>) has suffered delay (Q 39).

8. We note that this is another area where the Constitutional Treaty would change the position, by enabling the making of “minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions”.<sup>12</sup> At the present time the Government are resisting the development of any general Community (i.e. under the EC Treaty) competence (Q 45).

### The jurisdiction of the European Court of Justice

9. In our previous Report we also examined the Commission’s Communication (issued in July 2006) which proposed that the jurisdiction of the ECJ should be extended to allow first instance courts to make preliminary references to the ECJ in matters covered by Title IV of the EC Treaty (asylum, immigration, judicial cooperation in civil matters).<sup>13</sup> Such references can at present only be made by the most senior courts in Member States. The Commission argues that removing the limitations will improve access to justice.
10. The Minister informed us that the UK had chosen not to opt in to the Commission’s proposal (Q 28). While he acknowledged that there could be a benefit for parties faced with genuinely difficult questions of interpretation of EC law, “there is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes” (Q 28).
11. Again this is a matter where the Constitutional Treaty would effect a similar change to that put forward by the Commission. The Minister, when asked about the seeming inconsistency in Government policy, replied: “The Constitutional Treaty was a package of measures agreed as a package ... I do not think at this stage I could say simply because it is in the Treaty we are necessarily going to cherry pick any elements of it” (Q 34).
12. The Committee holds the Commission’s Communication under scrutiny, together with the related ECJ Discussion Paper, ‘Treatment of questions referred for a preliminary ruling concerning the area of freedom, security and justice’.<sup>14</sup>

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<sup>11</sup> Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights. COM(2006) 168 final. Doc 8866/06.

<sup>12</sup> Treaty establishing a Constitution for Europe, Article III-271.

<sup>13</sup> Commission Communication on the adaptation of the provisions of Title IV TEC relating to the jurisdiction of the Court of Justice (Council doc 11356/06). The Court’s jurisdiction in this area (Title IV of the TEC) is currently limited by Article 68 of the TEC: the Commission argues the case for removing existing limitations in relation to Title IV and giving the Court the same jurisdiction in this area as in other matters under the EC Treaty. Historically Member States have often been inclined to limit the jurisdiction of the ECJ in this area, citing concerns about the importance of national control over the definition and enforcement of criminal law, the risk of the ECJ being overwhelmed by appeals, and the potential problem of repeated references being used to prolong immigration and asylum cases.

<sup>14</sup> Doc 13272/06. Brussels, September 2006.

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

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The members of Sub-Committee E are:

Lord Borrie  
Lord Bowness (from November 2006)  
Lord Brown of Eaton-under-Heywood (Chairman)  
Lord Burnett (from November 2006)  
Lord Clinton-Davis  
Lord Grabiner (until November 2006)  
Lord Henley (until November 2006)  
Lord Jay of Ewelme (from November 2006)  
Baroness Kingsmill (from November 2006)  
Lord Leach of Fairford (from November 2006)  
Lord Lester of Herne Hill  
Lord Lucas  
Lord Neill of Bladen (until November 2006)  
Lord Norton of Louth  
Lord Tyler (until November 2006)

### **Declarations of Interest**

Lord Bowness  
*Consultant—Streeter Marshall, Solicitors*  
*Notary Public (fees)*  
*Partner, P & J Consultants (legal consultants)*

Lord Clinton-Davis  
*President, British Airline Pilots Association*

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

## APPENDIX 2: REPORTS

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### Recent Reports from the Select Committee

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

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

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

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

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

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

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

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

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

### Recent Reports from Sub-Committee E

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

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

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

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

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

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

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

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

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

# Minutes of Evidence

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

WEDNESDAY 1 NOVEMBER 2006

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Present:	Brown of Eaton-under-Heywood, L (Chairman) Clinton-Davis, L Lester of Herne Hill, L	Mance, L Neill of Bladen, L Norton of Louth, L Tyler, L
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## Examination of Witnesses

Witnesses: MR GEOFFREY HOON, a Member of the House of Commons, Minister for Europe, MR PETER STORR, Director of the International Directorate, Home Office, and MS SHAN MORGAN, EU Director, Foreign and Commonwealth Office, examined.

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**Q1 Chairman:** Minister, may I first welcome you and your officials on behalf of the Committee. We are always grateful when ministers take time out of their busy schedules to accommodate us. I am not sure whether, having regard to the press today, to be grateful that you are going to be dealing with at least one problem area of our questions or disappointed that you are not able to deal with them all. However, you know the procedure we adopt. We are on air. You will get a copy of the transcript and an opportunity to correct or add to it as would be helpful. Meantime, it will be on the web. You also have had a copy of questions one to eight. Under our present procedure, we now distribute copies of those questions to those present at the meeting so they may the better follow the evidence as it emerges. We understand that you wish—and no doubt it would be helpful for us if you were to—to make some introductory remarks with regard to the overall picture we are going to be looking at.

*Mr Hoon:* I am grateful for this opportunity and I apologise for delaying you slightly. I do attach great importance to these opportunities. I know that there was a suggestion that we should explore wider issues than simply justice and home affairs and I am absolutely willing to do that. Indeed, if there is time today, I am perfectly willing to talk in general terms about that approach. I think I might be in a better position to give you more detail in due course than I can today but I am not against discussing these issues. I had assumed the Committee would have wanted to concentrate on justice and home affairs but if it goes wider I am sure I will be able to cope. Could I introduce my co-witnesses? Shan Morgan is director of the European Union in the Europe Directorate General in the Foreign Office. Just to demonstrate the excellent relations between the Foreign Office and the Home Office, Peter Storr is director and international director at the Home

Office. I am delighted to have him here showing just how closely we work together. I found the material that you produced extremely helpful and interesting. Indeed, I do wonder whether in the specific areas that we are going to look at today I can add much to the thoughts that you have already had, since you have rather effectively summarised what I think is probably my own thinking on the various questions, but obviously we can pursue those in rather greater detail. I have always made clear that I prefer to try and answer questions rather than set out our thoughts so perhaps we could start on that straight away.

**Q2 Chairman:** As you appreciate, our first question is directed to the Constitutional Treaty and generally it would be helpful to know what the government's position now is on that and on its possible revival. Are we looking to any possible progress in the near future and, if so, in what areas?

*Mr Hoon:* I do not want to sound like an old-fashioned needle stuck in the groove of an old-fashioned record but we are at the present time still reflecting, as we agreed that we would in the last full Council meeting. There is work under way in the United Kingdom. I said to Parliament last week that I hoped to be able to offer some thoughts on the basic principles guiding the approach of the government towards the Treaty. My Rt Hon friend, the Foreign Secretary, made clear yesterday that I would be trying to set out some thoughts to Parliament shortly. I cannot do that today and therefore I will not go into a great deal of detail, but it is clear that we have to find a way forward that satisfies the politics of those countries that have not ratified—and I think it is fair to say that in the United Kingdom we tend to see it from that end of the telescope—and there are important politics in those countries that have ratified. I have spent quite a lot of time lately talking

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

to various Spanish ministers and they make the point at every opportunity that they held a referendum. That referendum was passed on the advice of the government; for them to go back and say, "Actually, something different might now be necessary" is obviously difficult for them politically. To try and find a way that satisfies both the countries that have ratified and those that have not is obviously part of the delicate compromise that will have to emerge. I think it is important that the United Kingdom is seen to be in the lead on this subject. It is something that we have taken extremely seriously both in the negotiations leading to the Constitutional Treaty and since, but at the moment I cannot help you further than that.

**Q3 Chairman:** Can we turn to a group of questions about the *passerelle*, particularly Article 42 of the Treaty of the European Union? If you remember, you had some foretaste of this because we met back in July when you were appearing before Lord Grenfell's Select Committee and I asked you a couple of questions about the *passerelle*. That was before we had published the report—the one I am now holding up: *The Criminal Law Competence of the European Community*—which was published at the very end of July. One would hope perhaps you have now had an opportunity to read that. Have you had a chance to read it?

*Mr Hoon:* My officials have read it in detail. I cannot say that I have started at the beginning and worked all the way through, for which I apologise to the Committee but I have looked at important parts of it.

**Q4 Chairman:** I hope your officials found it useful.

*Mr Hoon:* It keeps them awake at night.

**Q5 Chairman:** At all events, since then there has been some correspondence with ministers and you have been alerted to our having received three letters in point from Baroness Scotland at the Home Office, the Minister of State, dated 4 October; the following day from Baroness Ashton at the DCA; and more recently a letter not to us but to our sister committee in the House of Commons, the European Scrutiny Committee there, from Joan Ryan, the Parliamentary Under-Secretary at the Home Office. Those letters begin to suggest that the prospects of invoking Article 42 of the *passerelle* to transfer matters from the Third to the First Pillar are on the back burner. We would be very interested indeed in your views as to whether that is a correct reading of trends.

*Mr Hoon:* I think it is fair to say that there is not any great enthusiasm at the present time, although I would recognise that that lack of enthusiasm is not all for the same reasons. Germany for example has

reservations because it would regard the use of the Article 42 *passerelle* as being a species of cherry picking to which they are opposed politically. We are probably amongst those countries—and this was really the conclusion of the discussion at Tampere—that still have some considerable concerns about the implication of the use of the Article 42 *passerelle* and believe that, following the discussion, there is not a huge enthusiasm amongst any Member States for taking it forward at the present time. I set out in a number of answers to parliamentary questions the fact that I think it is important that we continue to consider in the abstract, for the moment, how the Article 42 *passerelle* might be used and how it might benefit the United Kingdom and indeed other EU Member States, but I emphasise at the moment, in my opinion, this is a matter of intellectual inquiry only. The political result of Tampere was that one country was enthusiastic and supported outright the idea of using the Article 42 *passerelle*, eight were pretty firmly against for one reason or another but not always for the same reasons. At the moment, I would say that we were somewhere in the middle with some reservations, not rejecting it outright, but acknowledging that there is no great enthusiasm at the moment politically for taking this forward. Whatever discussion we have about the Article 42 *passerelle* I hope you accept from me that it is a rather theoretical discussion at the moment.

**Q6 Chairman:** Are there no enthusiasts? I thought the French were originally enthusiastic.

*Mr Hoon:* I cited Germany and I do not particularly wish to pick just Germany out but there are two levels to this debate. There is the substantive level of the debate concerned with the actual provision itself and what it might achieve; there is necessarily though—you were right to start here—a debate about its position inside a Constitutional Treaty which the majority of Member States have ratified. The cherry picking aspect is quite important to the real world consideration of what happens next. Since I cannot answer the question on the Constitutional Treaty for the reason I have set out, there is also the aspect of that in relation to simply dealing with the Article 42 *passerelle* on its own. That is why I say if we have a discussion about it—I am sure we will—it will be a fascinating but rather abstract, theoretical discussion rather than a practical discussion of something that is going to happen in the near future.

**Q7 Chairman:** I am sure you accept that there would be undoubted benefits. You may say they would be outweighed by disadvantages but decision making would become easier. Difficult areas—the fight against international crime and terrorism—

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

might be better able to be taken forward constructively if there was this new approach.

*Mr Hoon:* In the parliamentary answers I have given, I hope that my answers reflect precisely that point. I agree with you that there are clearly potential benefits in relation to providing greater safeguards, not least at the external frontiers of the European Union, although I must say in parenthesis I asked Peter this question earlier on today in preparation for our discussions this afternoon. The view of the Home Office is that there are not practical proposals at the present time that could be taken forward by greater use of majority voting. Balanced against that, I think we have to be clear that the down side is the idea that Community competence in whole areas of our criminal process would not be unnecessarily complicating to our domestic arrangements. Indeed, given our commitment to subsidiarity and the need to ensure efficient arrangements, not least in our own courts, we are certainly not saying that there would be any benefit in whole scale use of the *passerelle* in this area. What I want to do is to maintain our rather flexible position that says certainly we can theoretically see the advantages and the benefits. There are some drawbacks. We would be quite pragmatic in our use if we got to that stage, but I would emphasise I think we are well short of that. I think Peter ought to fill in on the Home Office view of whether there are practical applicable laws that might be brought forward and might benefit from the use of greater qualified majority voting.

*Mr Storr:* The key issues, as we look across the range of justice and home affairs for the Home Office, are clearly the immigration and asylum agenda, counter-terrorism and tackling organised crime. In those fields there is not, in my view, any particular piece of legislation which is blocked as a result of unanimity which would be unblocked if there was qualified majority voting. There are individual framework decisions which are not making particularly quick progress in the Justice and Home Affairs Council for one reason or another. Generally speaking, those do not pertain to the key areas which I have outlined.

**Q8 Chairman:** With regard to those, are we now talking of the consequences of the European Court's decision in the case of *The Commission v the Council*? That gave some criminal law competence in the environmental field under the First Pillar to the Community.

*Mr Storr:* No, I was not referring to that. I was simply trying to answer the question which was, as I understood it, whether there were particular proposals in the form of framework decisions that were being blocked or slowed down in the three areas which I outlined.

**Q9 Chairman:** I thought there were some framework decisions that are now being held up because of that particular case.

*Mr Storr:* There are because of that particular case.

**Q10 Chairman:** That, in a sense, would be unblocked if there was a use of the *passerelle* to transfer these matters to the First Pillar.

*Mr Storr:* Those would be but I did qualify what I said earlier by referring to the three aspects of the Justice and Home Affairs Council which represented priorities for the Home Office.

*Mr Hoon:* I also think that there are theoretical benefits. We have to acknowledge that, as the European Union continues to enlarge, there will be practical difficulties about enacting legislation. Shan reminds me about the quality of legislation.

*Ms Morgan:* Experience has shown in the past that measures negotiated under unanimity can sometimes suffer. The end result can be effectively the lowest common denominator which can be to our disadvantage if we are looking for ambitious legislation, although the opposite works against us in areas that we would regard as highly sensitive.

*Mr Hoon:* In terms of the potential benefits of speed and quality, I want to keep our position relatively open so that we can make a judgment. It does come back in a practical way to how we might respond.

**Q11 Lord Lester of Herne Hill:** I hope what I am about to ask does not sound too European. If the starting point is that, with enlargement, one plainly needs more efficient mechanisms in order that the European sail boat can move forward and not stay in the doldrums, it must be right that one needs at least to cherry pick from what is called the Constitutional Treaty to obtain more efficient mechanisms. I am sure that is not controversial.

*Mr Hoon:* It would be controversial at the moment in Spain and Germany, for example.

**Q12 Lord Lester of Herne Hill:** Because they want the whole thing, but leaving that to one side, if one then comes to justice and home affairs, as I think you are implying, it must be sensible to have a mechanism in which transnational problems—say, terrorism or serious crime—are dealt with transnationally as well as nationally and in which therefore there could be qualified majority voting and a sharing of state sovereignty. Is that right?

*Mr Hoon:* I am going to be very legalistic and pedantic. Of course, we can have transnational solutions without necessarily having qualified majority voting. Where I think the importance lies—and I broadly agree with your approach, having been pedantic—is in ensuring that in the areas that you describe with 27 or more Member States we can reach decisions in the timescale and

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

at the level of quality that are addressing the problems we are trying to resolve. My instincts are in that direction provided that we do not in the process end up with a whole swathe of proposals to harmonise and standardise some aspects of the criminal procedure that we both were probably once upon a time more familiar with, you perhaps more recently than me, where frankly that kind of Community competence is not necessary and would not be appropriate.

**Q13 Chairman:** We have been circling around the question of what the government's position is as to the use of the *passerelle*. How literally would you subscribe to the second paragraph in the Parliamentary Under-Secretary's letter to the chairman of the European Scrutiny Committee in the House of Commons which ends: "The government considers the current debate to be over and that we should instead focus on practical measures in the current JHA agenda"? Do you see it in as bleak terms as that?

*Mr Hoon:* I was hoping to answer the question in a more diplomatic way, as might be expected from a Foreign Office minister, but I think that is a very good shorthand for what I was saying earlier. We have judged politically that the debate at Tampere means it is unlikely to move ahead any time soon. I took rather longer to say something fairly similar in my parliamentary answers on this subject, but I am perfectly happy to discuss this in the abstract. I think I rather agree with the noble Lord Lester in the sense that as we move forward and if we are going to continue to move forward, which we must, there could well be areas where using qualified majority voting would be sensible, but I think we would want to try and focus those in on those areas where it would provide practical benefits for the United Kingdom and for EU Member States to tackle the kind of things which the noble Lord was referring to.

**Q14 Chairman:** You cannot yet identify any particular proposal that would meet that criterion?

*Mr Hoon:* As Mr Storr made clear, there is none on the table at the present time. Therefore, I have to say that I agree with the noble Lord Lester. There must be issues of this kind that are likely to affect us in the future. That is why I think it makes sense for us to remain relatively flexible in our approach to it but there is none currently under consideration.

**Q15 Lord Tyler:** The minister from the Home Office is saying that the current debate is over. From what you have just said, I take it you would say that the current debate is adjourned *pro tem* and that a different set of political and diplomatic circumstances would have to occur for that debate

to be reopened. What we are concerned with is the practical ways either to accelerate those new circumstances or else to find other ways round those circumstances to achieve the ends that I think we all share round this table. I wonder whether you would like to comment on that?

*Mr Hoon:* I want to demonstrate just how joined up we are. In the answer I gave to Parliament I did use the phrase "the current debate". I said "to be over" but all the words are there even if they are in a slightly different order. I cannot say that this will not come back. It is in the Treaty. The Chairman referred to a debate about this in France. There was some talk that the Finnish presidency might consider bringing it forward. That was why it was on the agenda at Tampere. It seems to me the results of that are pretty clear in terms of current lack of enthusiasm. That is why both ministers have said that the current debate is over. I can conceive of the circumstances in which it will come back. I just do not think that is any time soon.

**Q16 Lord Mance:** The lack of enthusiasm and the fact that the United Kingdom sits in the middle may perhaps be attributable, may it, to the fact that we would have an opt in, whereas other countries would be bound axiomatically by majority voting?

*Mr Hoon:* Our position is perfectly poised in the middle, but also with the kinds of safeguards we have available to us. Our position is doubly beneficial. It allows us to take forward proposals where we see vital national interests being enhanced as well as obvious European interests but it would allow us, even within the proposals taken forward, to cherry pick. I cannot think of a better expression. It is an unfortunate one but that is what we would be able to do. We would be able to select those areas where we would opt in. That is doubly helpful as far as the UK is concerned.

**Q17 Chairman:** Having regard to that being the strength of our potential negotiating position: heads we win, tails they lose—

*Mr Hoon:* I would not put it in that way.

**Q18 Chairman:** Even if that mis-states it, we have, for the reason Lord Mance suggested and you accepted, quite a strong position. That might be thought to have tipped us towards greater enthusiasm than other, less advantaged states.

*Mr Hoon:* We have a strong position. I do not think it is heads we win and tails others lose because that, if I may say so, is inconsistent with your final observation about alleged lack of enthusiasm in the UK. I simply think we just have to be very careful not to allow greater confidence in this area than can be justified, not by some abstract concern about sovereignty but more about practicality. I think it is

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

really important that we preserve the best part of our criminal process, recognising that there may well be real benefits for a more European approach in the longer term and on top of which we do not want to be left out of what might be a rapidly developing area of legislation.

**Q19 Lord Clinton-Davis:** Are there any discussions proceeding at the moment with other countries, both for and against the proposition?

**Mr Hoon:** I rather think Tampere drew a line under those discussions for the moment, which is why we have answered the questions in the way that we have. I am sure, with your very great experience of the Commission and the European system, that I cannot rule out officials certainly in the Commission thinking thoughts along these lines. It is clearly possible that this would come back in the December Council. I do not want to speculate about that because at the moment I simply do not know. It has not been around for a time which is why we are having this conversation. I am not a gambling man but I would not say the prospects were more than 50/50.

**Q20 Chairman:** 50/50 for what? Coming back for discussion fresh in December?

**Mr Hoon:** Just having a discussion. 50/50 on the basis that it might come back for further consideration.

**Q21 Chairman:** Disinterred for further discussion?

**Mr Hoon:** Yes, but I would not put it any higher than that. In fact, I might put it a bit lower at the moment.

**Q22 Lord Lester of Herne Hill:** This may seem the very opposite of what I was asking before but I wonder whether you agree. I think this is what you are saying: that it is particularly important, given that our common law systems are in a small minority within the European Union—I think only four countries, us, Ireland, Cyprus and Malta, have common law systems—not to be in a position where civil law systems, inquisitorial systems, which have their own merits, are simply imposed as some kind of harmonising. On the other hand, there are virtues, as I understand it. We can get the highest common factor of good law and practice by easing the process of doing that. Is that really the sort of consideration you have in mind?

**Mr Hoon:** I think the noble Lord has put that rather more eloquently than I have, but yes.

**Q23 Lord Mance:** Is there a countervailing factor? We have had recently a very large number of harmonising proposals or moves under Title IV. I would like to enquire whether you think that if one

did bring Title VI into Title IV through the *passerelle* the consequence would be that there would be much greater focus in the Commission on that area because, as you say, at the moment the proposals coming forward in the Title VI area seem to be to some extent the lowest common denominator. I just wondered, if it was viewed as a majority voting area, whether there would not be a considerable increase in the number of proposals in it.

**Mr Hoon:** I said yes a moment ago to the question from Lord Lester but the truth is—and I think this question highlights it—that it is not actually possible to present quite the neat distinction between a common law criminal process and external rules to provide greater protection against international terrorism, just to use that as an illustration. In a sense, the Title IV points on things like asylum, immigration and judicial cooperation do show the difficulties of the neat distinction that we were perhaps drawing because trying to ensure that we have an effective system of appeal on asylum and immigration, for example, is part of what I might describe as our legal process. At the same time, I can clearly intellectually see the arguments for having an early statement of European law from the ECJ. The two sit uncomfortably on both sides of the argument. I cannot draw intellectually quite the neat distinction that I would like to.

**Q24 Chairman:** I had not appreciated we had passed to the consideration of the jurisdiction of the European Court of Justice.

**Mr Hoon:** We have not but I thought that was the point that was being made.

**Q25 Lord Mance:** The point I was making was perhaps a slightly different one. The letter which we have been given from the Minister of 4 October from Baroness Scotland to Jimmy Hood suggests that the EU should be looking less at legislation or harmonisation and rather at practical measures to encourage mutual confidence. I wondered whether it was thought that there might be a problem about easing the process by use of the *passerelle* and transferring more matters into the majority voting regime, the problem being that in fact you would encourage considerably greater moves towards harmonisation in a wider area. We already see some moves towards harmonisation under Title IV, the area which is already one of majority voting, where at least on two occasions recently this country has not opted in. Criminal and other matters under Title VI are likely to be even more sensitive.

**Mr Hoon:** I think I did understand the question. Maybe I did not answer it in quite the right way. Obviously there is a risk with greater use of qualified majority voting and the *passerelle* that more and

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

more could be pulled across. I accept at the boundaries of that pulling across there would be a risk to our common law system that I would not consider it appropriate to take. Given in the broader sense the thrust of a lot of what we are trying to achieve now in the European Union flows in the opposite direction, we are trying to find ways in which to reduce the level of harmonisation unless it can clearly be justified for single market reasons. The whole argument about deregulation and allowing national processes to prevail where they are providing the right standard and quality of decision making seems to me to run counter to an approach that says, "We are going to harmonise everything for the sake of it." The mood is a much more pragmatic one not only in the United Kingdom but across the European Union. It is not particularly relevant to your current inquiry but have a look at the mass of proposals from Commissioner Verheugen on deregulation. It is a very fundamental shift in the Commission's approach.

**Q26 Chairman:** Amongst your concerns about greater use of the First Pillar and the use of the *passerelle* to get there are that it puts at risk our insistence on the principle of subsidiarity being honoured?

*Mr Hoon:* There is certainly a concern about that. For our theoretical discussion about the use of the Article 42 *passerelle*, even if I conceive of the circumstances in which it might become relevant, as far as the UK is concerned we would be quite restrictive in our approach. The opting in arrangements allow us to do that.

**Q27 Chairman:** We are progressing through our questions. The answer to our question about when the *passerelle* is next due for discussion in the Council of Ministers seems to be a less than 50 per cent chance that it will be next due for discussion within the measurable future. Is that about right?

*Mr Hoon:* I am probably going to get stuck with the "less than 50 per cent".

**Q28 Chairman:** Can we come to the question of the jurisdiction of the Court of Justice? As I understand it, this is in the area of the First Pillar, Title IV, and what we are concerned with here is expanding the Court's jurisdiction to allow first instance courts to make preliminary references and not just the final court—in this country of course the House of Lords—under various provisions. The particular provision in point is Article 68 of the Community Treaty, which makes provision for an Article 234 reference only against those decisions where there is no judicial remedy under national law, which for us is the final court only, the House of Lords. Article

67 made provision that after five years had elapsed from Amsterdam, five years from 1999 so now two years past, the Commission would make proposals and we now have these proposals. What is the general thinking of government on all that?

*Mr Hoon:* The Commission's proposal seeks to remove unnecessary stages of referrals through domestic courts in cases containing genuinely difficult questions of interpretation of EU law. I can see the advantage of that in that it should increase access to justice. It could speed up decision making. I think our anxiety at the present time is that, by allowing all courts to refer cases for preliminary ruling, it could have the opposite effect in slowing down decision making. I think I am right in saying that the average time for a decision of the European Court of Justice at the moment is 20 months. The obvious advantage that we would all assume about an early reference could slow things down rather badly and there is obvious sensitivity in this area in relation to asylum and immigration because the precise problem that we have faced in the past has been—how do I put this politely to my former colleagues in the law?—a tendency to use each and every avenue of appeal frankly as a means of slowing down the decision making process. I could be harsher than that but I will rest on that diplomatic view. I am sure the Home Office could be a lot harsher than I have been. Therefore, there is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity of further complicating our existing asylum and immigration processes. That would not be the case if currently there were speedier decision making in the European Court of Justice but to be fair to the European Court of Justice, having been to look at the building site compared to when I first visited Luxembourg in about 1977, they are undergoing very many changes as a result of enlargement. We tend to see enlargement solely from the perspective of ministers, but it must have had a massive implication for the way in which the European Court of Justice is organised. At the moment it is clearly making decision making rather difficult. I should add that the opt in deadline for this particular proposal was 19 October. The UK did not notify the Council of a decision to opt in by that date. We have concerns about the proposal in the current form for the reasons I have explained. We are certainly aware of the possible benefits and are currently exploring the advantages of playing a more active role in negotiations with a view to opting in after the proposal is adopted, so we are not closing off this process but we would want to look at the ways in which perhaps these arrangements could be streamlined. I am certainly extremely concerned at the idea of a series of references from any level of our legal system.

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

**Q29 Chairman:** Would it be a series? I follow the view you have communicated but it may be that, as matters now stand, litigants are forced up to the highest level in order to have any chance at all of a reference. You might be able to cut out some levels of appeal if you had an earlier reference.

*Mr Hoon:* I think that is the harm that the proposal is designed to deal with. I can understand that, as I said at the outset. That is why we are not simply rejecting this out of hand and we are prepared to look at ways of making this more sensible. I would be slightly nervous about first instance courts or tribunals having the opportunity of making a reference. Perhaps a compromise might be an appeal stage hearing, but at the moment this is slightly theoretical. We have not yet engaged on how we might do that. It is somewhere between the extreme position that is currently the case and allowing references at every stage in the process. If we could get a compromise, that might be something that would be attractive and avoid the problem that you rightly describe.

**Q30 Lord Lester of Herne Hill:** Under European Community law as it stands, an employment tribunal can make a reference and a magistrate can. Is there not a further argument in favour of your approach on the following lines in the area we are dealing with: that, as far as possible, one should seek to approach European law through domestic law, not round domestic law? As far as possible, you should get the domestic legal order to solve the problems if you can because of the need for the citizen to identify with the legal system. Apart from the overload on the European Court of too many references, is there not also the problem of alienation if the domestic legal order is seen to be circumvented too easily without our judges being able to tackle the problem? I have not put it very well but is something along those lines a consideration?

*Mr Hoon:* I think it is. If I were more confident that this was genuinely going to be limited to real points of European law rather than the kinds of points of European law that I could conceive of being used to challenge particularly decisions in relation to immigration and asylum, I would be more comfortable with this proposal. Having spent so long trying to provide a fair but predictable and speedy process in dealing with immigration and asylum cases, I do not want to be responsible for opening up a gap in that that simply means that every case is delayed by 20 months for references to the ECJ. The solution, I accept, is the one that you have quite properly described.

**Q31 Lord Lester of Herne Hill:** If you think about the other European system, the European Court for Human Rights, you cannot get there on immigration

or asylum with human rights issues until you have exhausted all your domestic remedies on the theory which I have just tried to summarise. If you are reading across into this area in the other European system, it is a bit odd that you cannot get to Strasbourg except by going to the House of Lords but you can get to Luxembourg on a preliminary issue on substantial issues of public policy in a very similar area.

*Mr Hoon:* Except that presumably the first point that you made should be the case in relation to the Human Rights Act because more and more of our judges would apply the Human Rights Act and therefore the incorporation of the European Convention. What we would need, I suspect, are more of our judges and tribunal chairmen to be able to apply relevant principles of European law where they did affect asylum and immigration in a way that perhaps resolved the matter in the court or tribunal rather than requiring a reference.

**Lord Lester of Herne Hill:** They can and do of course already do that. My wife is an asylum and immigration judge who applies European law all the time and has to do so.

**Q32 Chairman:** As I understand it, you are saying that you now regard the possibility of going down that road as too wide open to abuse in fields that already some may recognise as being subject to abuse, not least immigration and asylum.

*Mr Hoon:* I did not use the word "abuse". I simply felt that there was a risk that this would provide an opportunity to draw out these cases. We have known in the past that this has been a particular problem for asylum and immigration because inevitably when an applicant is in the country the fact that they have been in the country for a long period of time necessarily makes it harder to resolve the case against them later on. I want to avoid adding an automatic 20 months in every case. I do not say that will be the position; I am simply acknowledging it as a risk and an explanation for our caution, having spent a lot of time trying to improve the process. This is really Home Office territory as much as anything.

**Q33 Lord Mance:** Is another point too that cases refine themselves as they go up the system? Having recently visited the European Court in Luxembourg again on a judicial visit, one is very conscious that they welcome the carefully considered views of higher courts. They do not always get them; sometimes they simply get a reference and I think that is something that needs consideration, but they do value our views. The judgments are fairly neutral but the deliberations take them into account and so do the Advocate General's opinions.

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

*Mr Hoon:* What I am searching for is a way in which we can provide a compromise so that more of our appeal court judges would be in a position to make references in this area. That would provide a reasonable compromise between the extreme that the Chairman set out and the risk that I described.

**Q34 Chairman:** Under the Constitutional Treaty—had that gone ahead that would have replaced Title IV of the European Community Treaty and Title VI of the Treaty of the European Union with a single set of provisions on freedom and security of justice and the whole shooting match would have been subject to the ordinary, preliminary rulings procedure, save only for the very limited area excluded under national police operations, maintenance of law and order and safeguarding of internal security. Under the Constitutional Treaty, the whole of the area we have just been talking about—immigration, asylum and so forth—would have been subject to preliminary rulings from all courts. Have we slightly changed our view on that?

*Mr Hoon:* I am going to retreat into a political answer for that. The Constitutional Treaty was a package of measures agreed as a package. I am probably adopting a Germanic approach if I say that I do not think at this stage I could say simply because it is in the Treaty we are necessarily going to cherry pick any elements of it. Without an overall agreement on the Treaty, although it may well be mined for particular practical proposals, I do not think it necessarily means that because it is in the Treaty we are going to agree to the implementation automatically of each and every one of its provisions.

**Q35 Chairman:** You have indicated the down-side you see. Do you see any virtue or merit in it at all? Have we any interest in going down that road?

*Mr Hoon:* If I only gave the down sides I have given you the wrong impression because I do acknowledge the point that I think you, Chairman, made right at the outset, which is making people wait until they have got all the way to the House of Lords before they can make a reference in this area is not necessarily good for access to justice, or indeed certainty, and frankly could waste a great deal of time in the lower courts and tribunals. I am not ruling out the benefits; I simply want to see that they are going to deliver those benefits in practice and do not risk damaging the structures that we have struggled over quite a long time to put in place.

**Q36 Chairman:** Turning to the Court's own discussion paper, I do not know whether you have had an opportunity to consider that or read it. It is quite a lengthy and dense document. Have you had an opportunity yet to assimilate that?

*Mr Hoon:* I have not read it. I can identify large numbers of documents that I have not read at the moment.

**Q37 Chairman:** Has the government considered depositing it for parliamentary scrutiny? You are probably not in a position to answer.

*Mr Hoon:* I have been helpfully reminded that it was only sent to the Council on 28 September. I have done one or two other things since then.

**Q38 Chairman:** Would not a month ordinarily be long enough to decide whether you are going to deposit it for scrutiny?

*Mr Hoon:* I think we are about to.

**Q39 Chairman:** We come to the question generally arising I think principally as a result of the case that we mentioned earlier, *The Commission v the Council*, under which the European Court accorded a criminal competence under the First Pillar to the Commission which I do not think the UK government or most governments previously had thought they had. How is that now being dealt with? To what extent is that stultifying the work being done generally with regard to Third Pillar concerns?

*Mr Hoon:* On the stultifying point, as I understand it, the only dossier that is significantly delayed as a result of this question about Community competence is one dealing with the approximation of criminal sanctions on intellectual property right infringements. In any event, there are some concerns by a number of governments, including the UK, about whether it is useful to pursue this matter further at the moment. Even that is not the most obvious example of a problem. There is only one other draft Community instrument containing criminal provisions which is to do with an amendment to an earlier directive on the possession of fire arms.

**Q40 Chairman:** That is right. Article 16 of that makes it a criminal offence to manufacture or traffic in arms illicitly, requiring the creation of criminal penalties for those.

*Mr Hoon:* There is still quite a lot of work on this amending directive being done. Obviously some Member States, including the United Kingdom, have made objections on the question of competence. This is still a continuing discussion.

**Q41 Chairman:** Have you any idea as to when the ship source pollution case, which it is hoped will clarify the true scope and range of application of the European decision in *The Commission v the Council*, is going to be decided?

*Mr Storr:* I think the expectation is that the judgment is expected by the end of 2007 at the earliest.

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

**Chairman:** A year away still?

**Q42 Lord Neill of Bladen:** Has the Advocate General said anything about that case on the way up to the Court?

*Mr Storr:* I do not know. We can find out for the Committee.

**Lord Neill of Bladen:** We are very interested in the case and we would quite like to know the timetable.

**Q43 Chairman:** Absolutely. To what extent are you genuinely optimistic that that is going to answer all the doubts that linger on from the decision last year?

*Mr Hoon:* I have always been very cautious, being a politician, about commenting on judicial decisions. Therein madness lies, I suspect.

**Q44 Lord Lester of Herne Hill:** So far as the UK's position in that ship pollution case is concerned, is the position of the government that they are relatively content with the competence if it were confined to pollution but not if it were to extend further, or are you adopting a more restrictive view than that?

*Mr Hoon:* I do not think I would necessarily say pollution. We have the illustration of the directive concerned with possession of fire arms so I think our view would be that there is quite a high burden of proof on the Community and the Community's institutions to show that a criminal competence is necessary for the EU. There are examples. We have discussed the limited number that exist. I am not sure I would go any further as far as the UK's position is concerned. Again, I can conceive, as there is ever greater concern about environmental protection, for example, this is an area where the Community might wish to legislate in a criminal way. The UK position will be always though that this should be a fairly restrictive approach.

**Q45 Lord Lester of Herne Hill:** Leaving aside for a moment the hated "federal" word, are we, in effect, trying to move to a position where, as in the United States, there are some offences so serious and so cross-state that they are federal? As I said, leave out the word "federal" but in the context of Europe there are some offences so serious and so cross-border that competence would be recognisable, but if they were "state", more local, they would not. Is there some such kind of distinction that the Government has in mind to persuade the Luxembourg Court?

*Mr Hoon:* I am certainly going to resist the federal analogy. I think we are a long way short of a federal jurisdiction; I would stay where we were. If a Community competence is required to effectively deal with the harm that has arisen, then I can see the United Kingdom acknowledging that, but I would

not want to go further and suggest some general Community competence in this area.

**Q46 Lord Clinton-Davis:** Would you say, in other words, that you are not prepared to speculate on what the Court is likely to say? After all, you have been invited to hypothesise about this and I think it is impossible to do so.

*Mr Hoon:* We are a party, so I think I can indicate why we are a party and the approach that we are taking as a party, which is to suggest a restrictive interpretation in this area.

**Q47 Lord Tyler:** Could I get it absolutely clear then, it is not so much the outcome of this case, it is whether or not it establishes a precedent that is the concern of the Government?

*Mr Hoon:* I think that is absolutely right.

**Q48 Chairman:** Unless there are any further questions from any members of the Committee on the group of questions that principally you have come to deal with on the *passerelle* and the equivalent provision with regard to the European Court of Justice, perhaps we can go to one other question that I think you did accept fell squarely within the justice and home affairs part of the picture, about inter-institutional agreement with regard to agencies? Are you happy to discuss that?

*Mr Hoon:* Yes, I am.

**Q49 Chairman:** It is not a matter I think we need to go into at any length. I think what we would like is your view particularly on the legal base. Really the issue is the proposed use of Article 308 of the Treaty of the European Community for the establishment of these agencies.

*Mr Hoon:* I have set out the position in a letter to the noble Lord Grenfell, and the basic proposition is that we are examining our situation in the light of the judgment of the European Court of Justice in the European network and information security agency case. I have undertaken to the noble Lord to set out our views once that process has been completed, so I am sorry that I cannot help this Committee any more because we are still weighing up the results of that case.

**Q50 Chairman:** Roughly how long is that going to take?

*Mr Hoon:* I do not know. Somebody might tell me? No, I am afraid I cannot answer that question.

**Q51 Chairman:** Is it totally open-ended?

*Mr Hoon:* I apologise. I simply do not know.

**Q52 Chairman:** Unless there are any other questions for you, it remains then for me to thank you.

1 November 2006

Mr Geoffrey Hoon MP, Mr Peter Storr and Ms Shan Morgan

*Mr Hoon:* My Lord Chairman, I did offer at the outset. I do not want the Committee to feel that I have been unhelpful about the wider questions. I do not have to be anywhere else for another 10 minutes. If there are wider questions that the Committee is anxious to pursue now I am perfectly willing to try and deal with them.

**Q53 Chairman:** Having, as a result of your communication earlier in the week, put all this away I am not sure that we are in a position to explore them. We were interested at the time and we will be interested again when you have written to us, which I think is probably the best solution.

*Mr Hoon:* That is great.

**Q54 Chairman:** Unless you want to make any closing remarks?

*Mr Hoon:* I probably did get it right earlier on in relation to the question of deposit. We have deposited the discussion paper. An Explanatory Memorandum will be deposited shortly, so if there is

any confusion about that, I did get it right the first time.

**Chairman:** Many thanks.

**Lord Lester of Herne Hill:** I wondered if one might ask a question about confidentiality and scrutiny, since it affects the work of our Committee, whether or not we can get some greater access to confidential documents.

**Q55 Chairman:** Yes. Have you still got the originally-intended question on this before you?

*Mr Hoon:* Unfortunately, I have not and I have rather overreached myself now.

**Q56 Chairman:** You can draw your horns back again, and perhaps that can be given in writing as well, it would be helpful if it could. Thank you again and to your officials. I said “your officials”, they are not entirely your officials, but those who have helpfully accompanied you and supplemented your responses to our questions. Thank you very much indeed.

*Mr Hoon:* Thank you.

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**Letter from Lord Grenfell, Chairman of the European Union Committee to the Rt Hon Geoff Hoon MP, Minister for Europe**

Thank you for appearing before Sub-Committee E on 1 November 2006. The Committee welcomed both the opportunity to discuss the proposed use of the *passerelle* with you, and your undertaking to respond in writing on the other subjects that we had proposed for discussion. Having regard to the points you made during the evidence session, we will concentrate these questions on issues which have arisen in recent scrutiny of matters for which you are responsible.

On the issue of the scrutiny of comitology decisions:

We understand that the Commission is preparing a comitology decision to implement a mechanism to verify progress on post-accession judicial reform and measures against corruption and organised crime in Bulgaria and Romania. Would this be a suitable decision to deposit for scrutiny?

On the issue of the scrutiny of confidential documents:

What assessment is made of Council documents prior to the decision to publish them as restricted documents? Is there a case for a more careful assessment of documents to ensure that only those which are genuinely sensitive are withheld from this Committee and from the public?

Has thought been given to anonymising (ie removing specific Member State references from) revised proposal drafts to allow them to be submitted for scrutiny, and thereby ensure that Committees are considering the latest position in the Council? What would the objections be to leaving in any references to the UK's position?

The Committee looks forward to receiving your response.

3 November 2006

**Letter from the Rt Hon Geoff Hoon MP, Minister for Europe to Lord Grenfell, Chairman of the European Union Committee**

Thank you for your letter of 3 November in which you asked about the scrutiny of comitology and of confidential documents.

The Commission are proposing to adopt a Regulation establishing a Justice & Home Affairs monitoring mechanism for Romania and Bulgaria based on the Act of Accession. In accordance with this, Member States will be consulted on the proposal, but the content and adoption of the measure will ultimately be a matter for

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1 November 2006

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the Commission. Nonetheless, this is a potentially important measure, which we are therefore proposing to deposit for scrutiny.

On the scrutiny of confidential documents, the Council Decision adopting the Council's security regulations (28 February 2001) sets out the levels of classification and the application of those levels. The regulations set out that information shall be classified only when necessary and shall be maintained only as long as the information requires protection. The regulations also set out that the classification of a document shall be determined by the sensitivity of its contents in accordance with a clear definition set out in the regulations (Section II, paragraphs 1–4). The regulations also make clear that over classification can result in a loss of confidence in the validity of the classification system.

We have confidence that the system appropriately balances the need to protect national and EU interests with the need for openness in the EU decision-making process.

However, I think it important to say, that we have rarely declined to deposit a document due to its security classification. But where we have done so, we have submitted an explanatory memorandum (without the document itself) explaining the key points.

You ask whether anonymising draft texts would enable them to be declassified. Unfortunately, I do not believe so. Making differences between the Member States public would weaken the EU's common position once it was reached. This could then be exploited in the EU's engagement with third countries and international organisations.

My officials will pass a copy of the 106 page Council Decision adopting the Council's security regulations (28 February 2001) to both the Clerk to the Commons Committee and the Clerk to the Lords Committee.

20 November 2006

**Letter from Lord Grenfell, Chairman of the European Union Committee to the Rt Hon Geoff Hoon MP,  
Minister for Europe**

Thank you for your letter of 20 November which was considered by Sub-Committee E (Law and Institutions) at its meeting on 13 December. We are most grateful for the explanations you have given.

The proposed Regulation establishing a JHA monitoring mechanism for Romania and Bulgaria raises the wider issue of scrutiny of EU delegated legislation. You will recall that we had an exchange of letters on this subject back in the summer and I think it would be helpful if the question of how to identify legally, politically or practically important comitology measures could be revisited.

As regards the question of the confidentiality, we are grateful for the efforts which the Government have made to ensure that Parliament can scrutinise significant proposals. We are disappointed if not entirely surprised that you have rejected our suggestion that documents might be "anonymised". We must continue, therefore, to rely on reports in the media describing the positions of Member States and would encourage the Government to be as open as possible when dealing with Parliament's scrutiny of EU legislation.

14 December 2006

**Letter from the Rt Hon Geoff Hoon MP, Minister for Europe to Lord Grenfell, Chairman of the  
European Union Committee**

Thank you for your letter of 14 December about the scrutiny of new comitology procedures.

Officials from the Foreign and Commonwealth Office and Cabinet Office met with officials from your Committee and the House of Commons Scrutiny Committee in December to discuss this issue. Work is ongoing on drawing up a detailed proposal. I hope to be able to write to the Committees soon to seek your agreement of the procedures we will suggest.

22 January 2007

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