



House of Commons
European Scrutiny Committee

European Union Intergovernmental Conference: Follow-up report

Third Report of Session 2007–08

Report, together with formal minutes, oral and written evidence

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European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

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Contents

Report	<i>Page</i>
European Union Intergovernmental Conference	3
Background	3
The scope of our scrutiny	3
(i) The process for agreeing the IGC Mandate and Reform Treaty	5
(ii) Does the Reform Treaty impose legal obligations on the national parliaments?	5
(iii) The 'red line' in relation to the CFSP and ESDP	7
(iv) The 'red line' in relation to tax and social security	8
(v) The 'red line' in relation to the Charter of Fundamental Rights	9
(vi) The 'red-line' in relation to the protection of the UK's common law system and the protection of police and judicial processes	12
- the 'emergency brake' and opt-in	13
- the new transitional provisions	14
-the Government's explanation and our comments	16
-our assessment of the 'red-line' in relation to justice and home affairs	19
Conclusion	20
Annex 1 Provisions which will appear in Title IV as amended by the Reform Treaty	20
Annex 2 Measures adopted in the field of police and judicial cooperation in criminal matters	21
Council Framework Decisions	21
Agreements, conventions and Council decisions	23
Formal minutes	31
Witnesses	41
List of written evidence	41

European Union Intergovernmental Conference

(28791) 11625/07 COM(07)412	Reforming Europe for the 21 st Century: Opinion of the European Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the governments of the Member States convened to revise the Treaties
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Legal base	—
Document originated	13 July 2007
Deposited in Parliament	17 July 2007
Department	Foreign and Commonwealth Office
Basis of consideration	EM of 25 July 2007
Previous Committee Report	HC 1014 (2 October 2007) and see HC 63–xvi (2002-03) (25 June 2003), HC 38–xiv (2004-05) (23 March 2005)
To be discussed in Council	No date set
Committee’s assessment	Legally and politically important
Committee’s decision	Not cleared; for debate on the Floor of the House

Background

1. In our report of 2 October¹ (which was published on 9 October) we considered a number of issues arising out of the Commission’s opinion on the convening of an intergovernmental conference (IGC) to revise the EU and EC Treaties. The Government’s Explanatory Memorandum on that opinion referred us to the White Paper “the Reform Treaty: The British Approach to the European Union Intergovernmental Conference” (Cm 7174), which was laid before Parliament and published on 23 July.

The scope of our scrutiny

2. As the Explanatory Memorandum referred us to the White Paper for an explanation of the Government’s position on the Commission’s opinion and on the IGC, we assessed the points made in that document in the light of the draft of the treaty text (the ‘Reform Treaty’) which was first made available in English on 30 July,² and which gave effect to the ‘IGC Mandate’ which had been agreed at the European Council on 23 June. Our report of 2 October therefore concentrated on the so-called ‘red-lines’, because these had been advanced by the Government as preconditions for agreement to a new Treaty.³ We also compared the draft Treaty text as it then stood with the Constitutional Treaty of 2004 and commented on the process by which the IGC Mandate and draft Reform Treaty had been prepared, as well as raising the issue of legal duties being imposed on national parliaments.

1 Thirty-fifth Report from the European Scrutiny Committee, Session 2006-07, HC 1014

2 A French text was made available on 24 July.

3 See Cm 7174, p.7.

3. The draft Reform Treaty raises a number of issues of concern which we have not considered in any detail. These include the proposed division of competences between the European Union and the Member States and their classification as exclusive or shared, the declaration on the primacy of Union law, the arrangements for enhanced cooperation,⁴ and the consequences of changes in the way a qualified majority vote is to be calculated. Provision is also made for the creation of a President of the European Council to hold office for up to five years and for the reform of the Commission. Each of these is an important issue in its own right, and it should not be inferred otherwise from the fact that we have not considered these in detail in our reports. In our view it was necessary for us to report before the meeting of Foreign Ministers on 15 October and the informal European Council on 18-19 October. Our role under Standing Order No. 143(1) is to report our opinion on the legal and political importance of deposited European Union documents, but the compressed timetable required us to concentrate our scrutiny on the salient points made by the Government in the White Paper.

4. We gave some outline consideration to the provisions on Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP), because the maintenance of an independent foreign and defence policy was identified by the Government as a red-line issue. We return to this matter only briefly in this report, as we are aware that the Foreign Affairs Committee intends to conduct its own inquiry into the foreign policy aspects of the Reform Treaty.

5. Since making our report of 2 October we have taken oral and written evidence from the Secretary of State for Foreign and Commonwealth Affairs (David Miliband) and from the Minister for Europe (Jim Murphy). We have also had the opportunity to consider a further draft of the Reform Treaty which was first made available on 5 October. We consider this draft to be substantially the same as the draft of 30 August as far as the text of the Reform Treaty was concerned, but noted a number of changes to the Protocols and Declarations which appeared to us to be disadvantageous to the UK, and on which we questioned the Ministers.

6. In the light of that evidence we now report further on the following main issues:

- (i) the process for agreeing the IGC Mandate and Reform Treaty,
- (ii) whether the Reform Treaty imposes legal duties on national parliaments,
- (iii) the 'red-line' in relation to the CFSP and ESDP,
- (iv) the 'red-line' in relation to tax and social security,
- (v) the 'red-line' in relation to the Charter of Fundamental Rights,
- (vi) the 'red-line' in relation to 'the protection of the UK's common law system', and the protection of police and judicial processes.

⁴ I.e. the adoption by eight or more Member States, using the institutions and procedures of the EU and EC Treaties, of measures applicable only to those Member States.

(i) The process for agreeing the IGC Mandate and Reform Treaty

7. We were concerned that the process which led up to the convening of an IGC was proving to be far from transparent. We pursued the issue with the Minister when he appeared before us on 2 October. It was confirmed on behalf of the Minister that there was “no negotiation in the run-up to the June Council until we saw the text for the first time only a couple of days before the June Council itself”.⁵ It was also confirmed that during the 48 hour period “all departments were able to have a look at the text that we had received from the Presidency to prepare the UK delegation for the discussions at the June Council”.⁶ The Minister undertook to write to us to confirm if the consultation was by letter or by e-mail but at the time of this report no reply has been received.

8. We note that, in evidence to the Foreign Affairs Committee on 12 September, the Minister said he thought the German Presidency “handled it pretty skilfully and effectively to get agreement from all 27 Member States”.⁷ In evidence to the Foreign Affairs Committee on 16 October, the Secretary of State (David Miliband) referred rather to a “distinctive” approach which involved bilateral discussions and then the production of the draft treaty on 19 June.⁸ When appearing before us on 16 October, and in reply to the statement that the Committee had found the whole IGC process to be one of “excessive secrecy and haste”, with the UK being given only 48 hours’ notice of the IGC Mandate, and no English text of the draft Treaty being made available until after the House went into recess and the Presidency pressing for agreement at the end of that week, the Secretary of State replied that he thought our points were “very well made” in respect of the conduct or the development of the IGC, and that it was “wholly reasonable” for us to say that there had been a “compressed timetable”. **We welcome the acknowledgment by the Secretary of State of the strength of the points we have made with regard to the IGC process. We again recall that as recently as June of this year the European Council not only emphasised the “crucial importance of reinforcing communications with the European citizens ... and involving them in permanent dialogue” but also stated that this would be “particularly important during the upcoming IGC and ratification processes”. Such statements now ring hollow, and we reiterate our earlier comment that the process could not have been better designed to marginalise the role of national parliaments and to curtail public debate, until it has become too late for such debate to have any effect on the agreements which have been reached.**

(ii) Does the Reform Treaty impose legal obligations on the national parliaments?

9. Whilst we welcomed in principle the provisions in the Reform Treaty on the role of national parliaments, we emphasised that these should not place the national parliaments under any form of legal duty. We pointed out that national parliaments, unlike the

5 Q 14

6 Q 15

7 Uncorrected transcript of oral evidence taken before the Foreign Affairs Committee on 12 September 2007, HC (2006-07) 166-iii, Q 234

8 Uncorrected transcript of oral evidence taken before the Foreign Affairs Committee on 10 October 2007, HC (2006-07), 166-iv, Q 310

European Parliament, were not creations of the Treaties and their rights are not dependent on those Treaties.

10. In this connection, we drew particular attention to the provision (appearing in the Reform Treaty as Article 8c EU) which stated that “National Parliaments shall contribute to the good functioning of the Union”, and that they were to do so by “seeing to it” that the principle of subsidiarity is respected, by taking part in evaluation mechanisms in relation to JHA matters, by taking part in Treaty revision procedures and by taking part in inter-parliamentary cooperation between national parliaments and with the European Parliament. We were concerned that, by accident or design, such a provision imposed a legal obligation on Parliament in respect of its proceedings.

11. The Minister for Europe assured us on 2 October that there was “no policy intention” in the IGC Mandate to “compel sovereign parliaments into specific actions”.⁹ Before the Foreign Affairs Committee on 12 September the Minister had stated that “the problem is one of drafting rather than of intent”¹⁰ and the Foreign Secretary assured the same Committee on 10 October that “we will make it clear that it is for Parliament to decide how it shall do its business, and we all agree on that”.¹¹ However, the Foreign Secretary went on to say that “all of the Member States are clear that we are in favour of Parliament being clear about its own responsibilities and fulfilling them”.¹²

12. We returned to this issue with the Foreign Secretary when he appeared before us on 16 October. On that occasion, the Foreign Secretary reported that:

“... the legal experts group had achieved a consensus that there should be no obligations placed on national parliaments, there should only be rights for national parliaments which those national parliaments would then determine how to exercise, and I requested that the English text reflect the fact that there should be no obligation on national parliaments.”¹³

13. It was suggested to the Foreign Secretary that the word “may” should be substituted for “shall” and the Foreign Secretary agreed that this “might be right”.¹⁴ Referring to his evidence before the Foreign Affairs Committee, the Foreign Secretary stated:

“I assured [Sir John Stanley MP] that it was my absolute determination to ensure there were no obligations on national parliaments, and I will come back with wording that is completely watertight in this area”.¹⁵

9 Q 96.

10 Uncorrected transcript of oral evidence taken before the Foreign Affairs Committee on 12 September 2007, HC (2006-07) 166-iii, Q 293.

11 Uncorrected transcript of oral evidence taken before the Foreign Affairs Committee on 10 October 2007, HC (2006-07) 166-iv, Q 337.

12 Uncorrected transcript of oral evidence taken before the Foreign Affairs Committee on 10 October 2007, HC (2006-07) 166-iv, Q 338.

13 Q 104.

14 Q 174.

15 Q 175.

14. The Foreign Secretary went on to emphasise that “we have put our foot down absolutely clearly that there shall be no obligations on the UK or any other parliament”¹⁶ and that the final Treaty text “will be absolutely clear about this”. It was put to the Foreign Secretary that there were a number of other provisions in the draft Reform Treaty where the word “shall” was used, notably in Article 63.¹⁷ The Foreign Secretary replied “the point is that obligations shall not be put on parliaments, and that is absolutely clear”.¹⁸

15. Since the Foreign Secretary gave evidence, it appears that the text of Article 8c EU has been amended to read “National parliaments contribute to the effective functioning of the European Union”.¹⁹ The text of Article 63 has been amended to read “National parliaments ensure that the proposals and legislative initiatives submitted ... comply with the principle of subsidiarity ...”. However, we note that Article 9 of the Protocol on the role of national parliaments in the European Union continues to provide that “the European Parliament and national parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union”.

16. We are not persuaded that the text of the Reform Treaty has been amended so as to put beyond any doubt the principle that no obligation must be imposed on Parliament. In our view, the obvious amendment would have been to use the word “may” instead of “shall” in Article 8c EU as well as in Article 63 and Article 9 of the Protocol on the role of national parliaments in the Union. The statement “National parliaments contribute to the effective functioning of the European Union” is one from which an obligation can readily be inferred. Given its constitutional significance, we must emphasise that this is not an area in which any ambiguity is tolerable and we shall look to the Government to ensure that its original undertakings are met in any new text.

(iii) The ‘red line’ in relation to the CFSP and ESDP

17. The “red line”, or precondition for agreement to a new Treaty, in relation to the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP) is expressed in general terms as the “maintenance of the UK’s independent foreign and security policy”.

18. The White Paper draws attention to a declaration in the IGC Mandate (which now appears as Declaration No 30 in the draft Treaty text). The Declaration states that “the Conference underlines that the [provisions on CFSP and ESDP] do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representations in third countries and international organisations”.

19. As the White Paper points out, “it will be the Member States, acting by unanimity, who set the strategic interests and objectives of the Union”. On the other hand, once the

16 Q 178

17 Article 63 in the text of 5 October provides “National Parliaments shall ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.”

18 Q 179

19 Provisional working draft of 30 October SN 4579/07.

Member States have so agreed, they will be bound by the duty of loyalty and mutual solidarity in Article 11(3) EU. This provision inserted by the Reform Treaty reproduces the existing Article 11(2) EU, but adds the requirement that Member States “shall comply with the Union’s action in this area”. Although these provisions are cast in terms of obligations, they are not ones which are amenable to the jurisdiction of the European Court of Justice (ECJ).

20. The Reform Treaty extensively modifies the existing EU Treaty provisions on CFSP and adds almost all of the proposals in the Constitutional Treaty. In particular, the limiting CFSP objectives are greatly expanded, and there is a new requirement for, “an ever-increasing degree of convergence of Member States’ actions.”²⁰ An External Action Service is created, and qualified majority voting (QMV) will apply when adopting proposals presented by the High Representative at the request of the European Council. A *passerelle* clause will allow for QMV in additional cases if the European Council agrees unanimously, but without the requirement for national parliamentary approval.²¹

21. In view of the intention by the Foreign Affairs Committee to conduct its own inquiry into the foreign policy aspects of the Reform Treaty, we confine ourselves to the observation that — apart from a few cases where new provision will be made for voting by QMV — the largely intergovernmental nature of the CFSP and ESDP will be maintained, with no significant departures from the arrangements which currently apply under the EU Treaty.

(iv) The ‘red line’ in relation to tax and social security

22. This ‘red line’ is again expressed in general terms in the White Paper as “protection of the UK’s tax and social security system”. The White Paper goes on to state the long-standing Government policy that tax matters should continue to be decided by unanimity and notes that the Reform Treaty proposal makes no change to the status of unanimous decision-making on tax.

23. In relation to social security, the White Paper states that the Government achieved its aim of ensuring that the UK “would have the final say on any matters affecting important aspects of its social security system, including cost, scope, financial balance or structure” and that this was done by means of a “strengthened ‘emergency brake’ mechanism”, which would allow any Member State to refer a proposal to the European Council for decision by unanimity.

24. In our view, control of tax and social security was never seriously threatened. The previous Treaty establishing a Constitution for Europe contained no proposals to move to QMV in relation to tax. In relation to social security, that previous Treaty provided²² for measures on social security to be adopted by QMV, but also provided for an ‘emergency brake’.

20 Article 11(2) EU as amended by Reform Treaty.

21 Article 17(3) EU as amended by Reform Treaty. A *passerelle* (bridging) clause allows for changes in voting procedure without a formal Treaty revision.

22 In Article III-136 CT.

25. As far as we can establish, the only material change is that the ‘emergency brake’ may now be applied in cases where ‘important’ rather than ‘fundamental’ aspects of a Member State’s social security system would be affected.

(v) The ‘red line’ in relation to the Charter of Fundamental Rights

26. At the meeting of the Liaison Committee on 18 June, the then Prime Minister said that the UK “will not accept a Treaty that allows the Charter of Fundamental Rights to change UK law in any way”.²³ A narrower formulation was used in the White Paper where, as we recalled in our previous report, the Government stated that it had achieved the objective of ensuring that “nothing in the Charter of Fundamental Rights would give national or European Courts any new powers to strike down or reinterpret UK law, including labour and social legislation”.²⁴ The White Paper added that a Protocol, specific to the UK, would “clarify beyond doubt the application of the Charter in relation to UK laws and measures” and that the legally-binding Protocol would set out clearly that “the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law”.

27. In our earlier report, we considered that there was at least an ambiguity over the effect of this Protocol (Protocol No 7 on the application of the Charter of Fundamental Rights to the United Kingdom) in cases where the ECJ is called upon to interpret measures of Union law as implemented in the laws of Member States. The ambiguity arose from the fact that the preamble to the Protocol contained provisions recalling the obligations devolving on the United Kingdom under the Treaties and Union law generally and “reaffirming that this Protocol is without prejudice to the other obligations of the United Kingdom [under the Treaties] and Union law generally”. One of these “other obligations” is the duty to interpret and apply measures adopted under the Treaties in accordance with the interpretations given by the ECJ, which is an aspect of the obligations owed under Article 10 EC.²⁵

28. As the Charter applies to Member States when implementing Union law, the provisions raised the question of whether the UK would be bound by ECJ case law when the ECJ, in the light of the Charter, interprets a measure of Union law as implemented in other Member States in circumstances where the same measure has also been implemented in the UK. The Protocol is concerned only with the powers of the ECJ (and the courts of the UK) in relation to laws etc. of the UK and does not constrain the ECJ or other courts in any way in relation to the other Member States.²⁶ It seems to us that a judgment of the ECJ interpreting a measure of Union law in a case brought in another Member State would form part of the body of Union law which the UK courts would be obliged to follow in the UK so as to ensure the consistent application of Union law throughout the Union. If it had been intended that ECJ case law based on the Charter should have no effect at all within the UK, we would have expected some provision in the Protocol to make it clear that the

23 Evidence taken before the Liaison Committee 18 June 2007, HC (2006-07) 300-ii, Q 171

24 Cm 7174, p.10.

25 Cf. *Marleasing* [1990] I ECR 4135. The corresponding provision is now found in Article 4(3) EU under the Reform Treaty.

26 Assuming that the Protocol will not also apply to Poland.

Protocol has effect *notwithstanding* other provisions in the Treaties or Union law generally, and we asked the Government to secure such wording in the Protocol.

29. In evidence to the Foreign Affairs Committee on 12 September the Minister for Europe stated that it was clear that “if someone tries to use the Charter alone to create new rights, the UK’s position will be protected by the Protocol”.²⁷ We think this conclusion is probably correct, but we suggest that this is not because of the Protocol. A person could not rely on the Charter alone against any of the Member States, because the Charter applies to a Member State only when it is implementing Union law. It is possible that, because of the Protocol, the Commission might not be able successfully to allege that the UK is in breach of its treaty obligations on the sole ground that a measure implementing Union law in the UK does not comply with the Charter. However, this leaves open the question of whether the courts of the UK are entitled, by reason of the Protocol, to disregard the interpretative judgments of the ECJ when they consider the interpretation and validity of measures adopted in the UK to implement Union law. Since Member States will be concerned by the Charter only where they implement Union law, the question of the interpretation of such Union law by the ECJ in the light of the Charter is of central importance.

30. As we recalled in our earlier report, the Minister for Europe had written to us on 31 July to explain that the Protocol was not an opt-out from the Charter. When the Minister appeared before us on 2 October it was suggested to him that it would have been better to have made clear that the Protocol took precedence over any other obligations (such as the duty to apply Union law consistently) and it was noted that this had not been done. The Minister agreed that this had not been done and stated that the reason for this was that the Protocol “was not a get out of jail free card, it is a statement of how the Charter provisions will apply in the UK”.²⁸ The Minister added that the Protocol was a “different animal” from the kind of provision which had been suggested to him.

31. In his evidence to us on 16 October the Foreign Secretary confirmed that the Charter would be legally binding,²⁹ and the same point is made in the attachments to the Foreign Secretary’s letter of 18 October to the Foreign Affairs Committee.

32. In order to obtain some explanation of how the Charter and Protocol would operate in practice in the UK in relation to a measure of Union law, we put forward in our previous report the example of the Working Time Directive.³⁰ We expressed the concern that it seemed possible, for example, that the ECJ, having regard to the provision in the Charter that “every worker has the right to limitation of maximum working hours”, might find that the derogation from the Directive allowing a waiver of the 48 hours limit on weekly working had to be interpreted more strictly than before.

33. In his evidence on 16 October the Foreign Secretary commented on this example by referring to the Protocol as a “blanket ordinance there that the Charter shall not extend the

27 Uncorrected transcript of oral evidence taken before the Foreign Affairs Committee on 12 September 2007, HC (2006-07) 166-iii, Q275.

28 Q 64. See also the preamble to the Protocol which speaks of ‘clarifying the application of the Charter in relation to the laws and administrative action of the United Kingdom and of its justiciability within Poland’.

29 Q 108.

30 Council Directive 104/93/EC, implemented in the United Kingdom by the Working Time Regulations 1998 SI 1998/1833.

reach of European courts into British law”. The Foreign Secretary further explained this point by saying, first, that the Charter “only records existing rights; it does not create any new rights: it is a record of existing rights under domestic and international law” and, secondly, that “the Protocol is absolutely clear that there can be no extended reach before the ECJ or anyone else, and that is why, in the case of working time or anything else, any judgment of the court cannot have reach into changing the laws that apply in this country”.³¹

34. The example was commented on in more detail by the Foreign Secretary’s legal adviser, who explained that the relevant Article of the Charter (Article 31) dealing with working time was itself based on the Directive (as well as on Article 2 of the European Social Charter and paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers), so that the wording of the Directive was consistent with the Charter. The legal adviser commented that he saw “no prospect” that the ECJ would alter its interpretation of the Directive, even if it was referred to the Charter as source of that interpretation.³² The Foreign Secretary subsequently emphasised that “every single bit of the Charter is sourced back to existing rights and there is no right for the ECJ or anyone else to extend their reach”.³³

35. The Foreign Secretary went on to say this:

“A better challenge, or a supposedly more difficult challenge, would be not of a British person using the Charter but the example of a foreign case, in a country where there is no Protocol, in which the Charter does not have this limit. So the question that has been put on other sessions is: if there is a judgment in a foreign case which does use the Charter and does do certain things, could that affect rights under British law? To which the answer is no.”³⁴

36. When asked if this answer meant that the ECJ’s ruling in such a foreign case could have no impact on UK domestic policy, the Foreign Secretary replied:

“You can say that there can be no impact. There can be no extension is the key thing. The rights that exist are not diminished by the Charter, but they are not extended by the Charter”.³⁵

37. In further questioning, it was agreed on behalf of the Foreign Secretary that it was for the ECJ to determine whether a given right existed under the Charter and that, in making that decision, the ECJ could take into account decisions reached in other cases involving other countries where the Charter applied but the Protocol did not.

38. It is clear that the Government accepts that the Charter will be legally binding, and it has stated that the Protocol is not an opt-out. Since the Protocol is to operate subject to the UK’s obligations under the Treaties, it still seems doubtful to us that the Protocol

31 Q 107.

32 Q 110.

33 Q 120.

34 Q 122.

35 Q 124.

has the effect that the courts of this country will not be bound by interpretations of measures of Union law given by the ECJ and based on the Charter. If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation.

39. If, as the Foreign Secretary assured us, every part of the Charter is sourced back to existing rights "with no right for the ECJ or anyone to extend their reach" it is hard to see why the Protocol is necessary, since on this basis the Charter could not, by itself, lead to laws in the United Kingdom being reinterpreted or invalidated.

40. Given the open texture of the drafting of the Charter (which is by no means unusual with human rights instruments) we doubt if it is possible to guarantee that it will not be developed and amplified by the ECJ. We equally doubt if it is possible to guarantee that the ECJ will not draw on the Charter as a new source for interpreting measures of Union law such as Directives.

41. If the ECJ does interpret a measure of Union law in this way, we believe the resulting interpretation would be binding in the UK, because of the UK's treaty obligations, notably the duty of sincere cooperation under Article 4(3) EU. These obligations are not excluded or restricted by the Protocol. On the contrary, and as the recitals make clear, the Protocol is subject to those obligations.

42. In our view, the only way of ensuring that the Charter does not affect UK law in any way is to make clear, as we have already suggested, that the Protocol takes effect "notwithstanding the Treaties or Union law generally." We note that this kind of provision has been made in the Protocol to the EC Treaty on the acquisition of property in Denmark (No. 16) and in the Protocol to the EU Treaty on Article 40.3.3 of the Irish Constitution (No. 17), but it has not been made in respect of the Charter.

(vi) The 'red-line' in relation to the protection of the UK's common law system and the protection of police and judicial processes

43. The White Paper noted that the Reform Treaty would move the remainder of the Third Pillar (police and judicial cooperation in criminal matters) to the First Pillar with the consequence that QMV and co-decision would apply as the general rule to Justice and Home Affairs.³⁶ However, the "protection of the UK's common law system, and our police and judicial processes" was also identified as a red line precondition for agreement on a new Treaty. In this connection, we think it important to recall that the powers of the Commission and the ECJ are considerably increased when matters move from the Third Pillar to the First. The Commission acquires the power to commence infraction proceedings against Member States in respect of the implementation of measures in their national laws, and the ECJ acquires jurisdiction, both to entertain such infringement proceedings and to interpret measures adopted at Union level. In respect of the matters

36 The White Paper notes that asylum, immigration and judicial cooperation in civil matters were moved to the First Pillar by the Treaty of Amsterdam in 1997. A list of the provisions which will appear in Title IV as amended by the Reform Treaty is set out in Annex 1.

covered by such measures, and while Union membership subsists, the national courts and parliaments are then no longer the ultimate source of law.

- the 'emergency brake' and opt-in

44. The White Paper drew attention to two safeguards. One of these is the “emergency brake”. As we noted in our previous report, this was contained in the previous Constitutional Treaty and would allow a Member State to require that a proposal relating to criminal justice should be referred to the European Council if the proposal affected fundamental aspects of its criminal justice system. The second safeguard is that the ‘opt-in’ arrangements which are presently available to the United Kingdom and Ireland in relation to measures under Title IV EC (i.e. asylum, immigration and judicial cooperation in civil matters) will also apply to police and judicial cooperation in criminal matters when these are transferred to Title IV.

45. In our previous report, we considered that under the ‘opt-in’ arrangements as they then stood the UK was free to decide whether or not to take part in the negotiations under the transferred provisions, and to that extent was able to protect the distinctive features of the legal systems of the UK, including its criminal law and procedure. Whilst it seemed clear that the UK was free to decide whether or not to opt in, it was less clear if the UK had any right to ‘opt-out’ of a proposal should the negotiations produce a text which was not acceptable. The relevant Protocol³⁷ does not provide for any revocation of the decision to opt in, and we considered that there was a risk (particularly in the case of civil measures, where the ‘emergency brake’ is not available) of the UK being unable to prevent amendments which were disadvantageous to the UK, since these would be adopted by QMV and co-decision.

46. In his evidence on 2 October the Minister for Europe said that if the UK had opted into a “JHA measure” then the UK would be able to apply the “emergency brake” which would “then take us out if it fundamentally affected our systems”.³⁸ We presume that by “JHA measure” the Minister was referring to measures in the field of police and judicial cooperation in criminal matters, since the Reform Treaty makes no provision for an ‘emergency brake’ in respect of the other matters dealt with under Title IV.³⁹ As much seems to be confirmed by the Foreign Secretary’s letter of 11 October to the Foreign Affairs Committee, in which it is explained that the ‘emergency brake’ may be applied by any Member State wherever it considers that a proposal will affect fundamental aspects of its criminal justice system.

47. As far as we can establish, no change has been made to the relevant Protocol to make clear that the UK is free to revoke its decision to opt in. It seems, therefore, that the UK would be bound by the outcome, in areas where it cannot apply the “emergency brake”.

37 Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

38 Evidence taken before the European Scrutiny Committee on 2 October 2007 Q85.

39 “JHA” is used as a generic term to describe justice and home affairs matters.

- *the new transitional provisions*

48. An issue which emerged after our previous report was the treatment of existing EU measures, such as Framework Decisions, in the field of police and judicial cooperation in criminal matters. In the Constitutional Treaty, provision was made (in Article IV-438) for the continuation of all acts of the institutions (and agreements by Member States) adopted under the Treaties repealed by the Constitutional Treaty until such acts (or agreements) were repealed, annulled or amended in implementation of the Constitutional Treaty. The Government's Commentary of February 2005 on the Constitutional Treaty described this provision as ensuring that acts of the EU and its institutions "continue to have legal effect".⁴⁰

49. The provisions of Protocol No 10 on transitional provisions (in the version of 30 July 2007) adopted a similar approach in relation to Title V (CFSP) and Title VI EU (police and judicial cooperation).⁴¹ Article 8 provided as follows:

"The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of those Titles."

50. A substantial number of measures have already been adopted in the field of police and judicial cooperation in criminal matters, as may be seen from the list at Annex 2. Such measures are currently adopted by unanimity, and there are no 'opt-in' arrangements. Under the present EU Treaty, any amendment, repeal or replacement would also require unanimity. The Reform Treaty allows such measures to be amended, repealed or replaced by QMV and co-decision, but provides for a right of the UK to 'opt-in' or not to the replacement measure. It appears reasonable to ask whether existing EU Title VI measures continue to apply in respect of the UK if the UK decides not to opt-in under the Title IV arrangements, and if not, why not?

51. On its face, Article 8 appeared to preserve existing EU measures (such as Framework Decisions) until those measures were repealed, annulled or amended under the Treaties as amended by the Reform Treaty. Any such repeal, annulment or amendment would have to be "in implementation of the Treaties" and this would have included the principle (in Article 2 of the Protocol on the position of the United Kingdom and Ireland) that a measure in respect of which the UK has not opted in shall not "affect the competences, rights and obligations" of the UK or "in any way affect the Community or Union *acquis* nor form part of Community law as they apply to the United Kingdom". This, and the fact that nothing in the IGC Mandate or in the White Paper suggested that the *status quo* would not be preserved, gave the committee good grounds for believing that the UK would be entitled to the continuation of its existing EU agreements, including Framework

40 Cm 6459, p. 255.

41 The provision does not refer to existing Title IV measures.

Decisions where these were subsequently amended, repealed or annulled without the participation of the UK.

52. We were therefore surprised to see, in the version of the Reform Treaty made available on 5 October, a new transitional measure (Article 10, the former Article 8 being re-numbered 9) which appeared to qualify the existing transitional provisions and to defeat the expectation that the *status quo* would be preserved if the UK did not participate in any amendment or repeal.

53. A new transitional arrangement in Article 10, which the Minister for Europe's letter of 26 October 2007 confirms was "inserted at our [i.e. the UK's] insistence," provides that existing EU measures in the field of police and judicial cooperation in criminal matters shall continue, with the powers of the Commission and ECJ unchanged (Article 10(1)), until the measure is amended (Article 10(2)) or on the expiry of a five year period from the date of the entry into force of the Reform Treaty. In his evidence on 16 October 2007 the Foreign Secretary made clear that he thought most of the existing EU measures would be transposed within the five years, at which point the ECJ and the Commission would gain jurisdiction. The *status quo* is therefore limited, even for measures which have not been transposed, to a maximum period of five years. Six months at the latest before the expiry of the five year period, the UK may notify the Council that it does not accept the enforcement powers of the Commission or the compulsory interpretative jurisdiction of the ECJ over existing EU measures which have not been amended under the Reform Treaty (Article 10(3)). If the UK makes such a notification, *all* remaining unamended EU measures will cease to apply to the UK at the end of the five year transitional period (Article 10(4)).

54. If such a notification is made, the Council, acting by QMV in proceedings from which the UK is excluded, may determine "the necessary consequential and transitional arrangements" (Article 10(4)). The Council acting by QMV may also adopt a decision "determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts" (Article 10(4)). Finally, Article 10(5) allows the UK subsequently to apply to participate in acts from which it has been excluded under Article 10(4). In such a case, there is no automatic right for the UK to rejoin, but it is provided that the Union institutions and the UK "shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence". Where the UK is permitted to rejoin, it is obliged to accept the enforcement powers of the Commission and the jurisdiction of the ECJ in respect of the measure in question.

55. We were also concerned by the inclusion of a new Article 4a in the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. This provides that the Protocol will apply also to measures under Title IV which amend existing measures by which the UK or Ireland is bound. The new Article 4a would therefore apply not only to amendments of measures by which the UK or Ireland is presently bound, but also to the amendment of Title IV measures by which the UK or Ireland may become bound in the future. The provision would allow either the UK or Ireland to maintain the *status quo* as it then stands if it decides not to opt into the amendment. However it also provides that, if the UK or Ireland decides not to take part in

the amending measure, the Council may determine that the non-participation of either country makes the existing measure “inoperable”. In this event, the previously existing measure will not be binding on or applicable to the country concerned. Such a determination is to be made by QMV without the participation of the UK or Ireland, as the case might be. The Council may also determine that the UK or Ireland will bear the “direct financial consequences” of ceasing to be party to the existing measure. This differs from the present version of the Protocol, which provides that a Member State which is not bound by a measure adopted under Title IV “shall bear no financial consequences of that measure other than administrative costs entailed for the institutions”.⁴²

56. The new transitional measures also included a declaration (No 39) which provides for the Commission to examine the ‘situation’ under Article 96 EC in any case where a Member State decides not to opt into a Title IV measure. As Article 96 EC provides for action by the Commission against a Member State on the grounds of distorting the conditions of competition in the common market, and the adoption of directives by the Council acting by QMV to eliminate the distortion, we were concerned that this would expose the UK to the risk of unpredictable consequences if it chose not to opt in.

-the Government’s explanation and our comments

57. The new transitional measures appeared to weaken the UK’s position by making decisions not to opt into a measure (whether an amendment to an existing Title IV, or in relation to an existing Title VI EU measure) the subject of unpredictable consequences and risk. We therefore raised this issue with the Foreign Secretary in our letter of 11 October,⁴³ to which he replied on 16 October⁴⁴ and by giving oral evidence before the Committee that day. In his letter of 26 October⁴⁵ the Minister for Europe also commented in detail on the new transitional provisions and confirmed (for the first time) that the provisions on the UK’s opt-in arrangements concerning amendments and Schengen building measures as well as the right of the United Kingdom to “opt out” of measures under Article 10 of Protocol 10 were included at the UK’s “express insistence”.

58. In his letter of 16 October⁴⁶ the Foreign Secretary denied that the new provisions could act as a constraint on the exercise of the opt-in arrangements and explained that they “offer guarantees that we have met our red line, and that we will always have the right to choose whether or not to participate in JHA co-operation”. The Foreign Secretary went on to explain the operation of each of the transitional provisions to which we drew attention, but did not explain whether the UK had pressed for the *status quo* to be preserved so that the UK could continue to have the benefit of existing measures, even if it decided not to opt into any amending measure.

42 Article 5 of Protocol (No 4) on the position of the United Kingdom and Ireland (1997).

43 Ev 41.

44 Ev 42.

45 Ev 44.

46 Ev 42.

59. The Foreign Secretary explained that the new Article 4a secured a choice for the UK to decide whether or not to opt-in to amendment to an existing Title IV EC measure,⁴⁷ but also that “it is necessary to address the potential for knock-on effects of any decision by the UK not to opt-in to an amended measure”. The Foreign Secretary stated that the determination by the Council that an existing measure becomes “inoperable” if the UK does not participate in its amendment was a “threshold” which “protects the UK’s national interests and rights to choose”. The Minister for Europe’s letter stresses that only “direct” financial consequences which are “necessary and unavoidably” incurred are covered. **We accept this was the aim of the new articles sought by the UK in the draft Treaty of 5th October 2007. However, the decision on whether an existing measure becomes “inoperable” would be taken by QMV and, moreover, without the participation of the UK, and could lead to the loss of the benefit for the UK of the existing measure. We accept that the UK retains the final right to choose, but it seems us that the risk of losing the benefit of an existing measure, because of a choice not to participate in its amendment, by virtue of a decision in which the UK cannot take part, must put at least some pressure on the UK to opt in. We also note the new possibility for the Council to decide by QMV that the UK should bear the direct financial consequences necessarily and unavoidably incurred if the UK ceases to participate in a measure. This must import some measure of financial risk, not present before, into a decision not to opt in and we question whether it is in the UK’s interests to be exposed to such risk.**

60. We were less concerned by the provision relating to measures which build on the so-called Schengen *acquis*. As the Minister for Europe explained in his letter of 26 October, the UK is already bound (by reason of Council Decision 2000/365/EC) to take part in proposals which build upon those parts of the Schengen *acquis* in which the UK already takes part.⁴⁸ The Foreign Secretary explained that as such matters are presently dealt with under the Third Pillar unanimity applies, but that under the Reform Treaty, the UK needed to establish its “absolute right” to choose whether to participate in Schengen building measures. We note that, although there is provision for the Council to decide on the consequences of a decision not to take part in a Schengen building measure, the United Kingdom is not excluded from the Council’s deliberations, neither is there any question of financial consequences being visited on the UK.

61. The Foreign Secretary explained the provisions of Declaration 39⁴⁹ as “ensuring there is a full discussion of the possible implications of non-participation before a final decision is taken” and remarked that “Article 96 does not add anything to the *status quo*”. The Minister for Europe stressed that this declaration “cannot trigger legal consequences” and described it in his letter of 26 October as “intended to be helpful to a Member State, such as the UK, by ensuring that there is full discussion on the possible implications of its non-participation in a measure before a final decision is taken”. **We accept that Declaration 39**

47 As the existing Protocol (No 4) to the EC Treaty applies to ‘a proposal or initiative presented pursuant to Title IV it is not explained why an amending proposal is not a ‘proposal’ for these purposes. However, the Minister for Europe in his letter of 26 October also makes the point that the new Article 4a is an ‘additional guarantee’ to make clear that the UK has the right to choose whether to participate in an amending measure.

48 The relevant parts are listed in Article 1 of Council Decision 2000/365/EC. These, essentially, are those Schengen measures which relate to police and judicial cooperation in criminal matters which do not affect the maintenance of border controls.

49 Now Declaration No 40 in the text of 30 October.

does not itself trigger legal consequences but find it difficult to see how it can be ‘helpful’ to the UK in the way the Minister describes. As far as we are aware, Article 96 EC has not previously been cited in provisions relating to the opt-in. We consider that, by being party to the proposed declaration, the UK may have weakened its position, since it will no longer be able convincingly to argue that Article 96 EC should not apply at all in circumstances where the UK decides not to opt-in. As Article 96 EC provides for directives adopted by QMV and binding on the UK to “eliminate the distortion in question” caused by a UK decision not to opt-in, we raise the question of whether some new and possibly unquantifiable risk may have been introduced.

62. In relation to Article 10 of Protocol No 10, the Foreign Secretary commented that “existing Third Pillar measures were not drafted with full ECJ jurisdiction in mind, so Member States will need to prepare for the transition to full ECJ jurisdiction and a Commission role in any infraction process”. The Foreign Secretary went on to explain that the “red line” required that the UK should have the right to decide whether or not to participate in such measures, and added that the UK had secured a “commitment”⁵⁰ from the Commission and the other institutions (in Declaration 39a) to “amend or replace” as much of the legislation as possible during the five year period. The committee concludes that is confirmation that the “70 to 80” measures referred to by the Foreign Secretary in his evidence are likely to come under ECJ and Commission jurisdiction within five years.

63. The Foreign Secretary then explained that, at the end of the five year period, any Third Pillar measure which has not been transposed in this way “will become subject to full ECJ jurisdiction”, but that at that stage the UK would have the right “to choose to opt out, *en bloc*, from all such remaining measures, in order to avoid ECJ jurisdiction”, with the right to opt back into individual measures on a case-by-case basis which would mean accepting ECJ and Commission jurisdiction on each measure. The adoption of five years appears to be based on a particular interpretation of Declaration 39a, but we recognise that the UK has no power of initiative as the Commission controls the process of transposition.

64. **We do not understand why the UK did not interpret the red line on protection of the UK’s position in a firmer form by insisting on a provision which would have preserved the effect of existing EU measures in relation to the UK, in circumstances where the UK decides not to opt in to an amending or repealing measure. This would have ensured that the UK would keep what it now holds and would more effectively have protected the UK’s interests. It would have been open to the UK to keep its existing EU measures in their present form indefinitely as an alternative to opting in to a measure which would be subject to the enforcement powers of the Commission and the jurisdiction of the ECJ.**

65. **We note, in this context, that Denmark’s position is preserved by an amendment to the Protocol (Danish Article 2) on the position of Denmark providing that existing EU measures in the field of police and judicial cooperation will continue to apply to Denmark “unchanged” in their present form even if they are subsequently amended or**

50 Declaration 39a (now numbered 44 in the text of 30 October) in fact invites the institutions “to seek to adopt, in appropriate cases and as far as possible” such amending or replacement measures.

replaced under the Reform Treaty.⁵¹ We accept that the position of Denmark is not wholly comparable to that of the UK, but we do not understand why the UK did not press for a provision along these lines in conjunction with the right to opt in.

-our assessment of the 'red-line' in relation to justice and home affairs

66. The Government describes its 'red-line' in this area as the "protection of the UK's common law system⁵² and our police and judicial processes". The issues of voting procedure (i.e. the move from unanimity to QMV), the enforcement powers of the Commission and the compulsory interpretative jurisdiction of the ECJ are, in our view, central to such protection. Under the system to be established by the Reform Treaty, a Member State will lose the ability finally to determine its own law to the extent that measures are adopted at Union level. Such measures will become the subject of the Commission's powers to require changes in domestic law and will be subject to the interpretative jurisdiction of the ECJ. The ECJ will become, thereby, the conclusive arbiter of the meaning of Union measures and, by extension, of national law passed to implement such measures.

67. The 'opt-in' arrangements are only a means to ensure protection in the sense that the UK may choose not to opt in, which protection will be lost each time a decision to opt-in is taken. Once a decision to opt-in is taken, it now seems clear, on the evidence we have taken, that there is no right to opt-out, if the resulting measure is not thought satisfactory. The only remedy, which is not available in all cases, is the 'emergency brake', which was also proposed in the same areas in the previous constitutional treaty. It is important, therefore, that the consequences of any decision whether or not to opt in is clearly understood and open to full parliamentary scrutiny and approval and is kept free from any new external pressures and constraints.

68. We accept that provision is made for the UK to exercise a right to 'opt-in' in relation to measures which amend or replace existing EU measures, to measures which amend existing Title IV EC measures and to those which build upon the Schengen *acquis*.

69. We note the detailed explanations which have been provided on the operation of the proposed transitional arrangements, but we raise the question of whether these may have the unintended effect of exposing the UK to new and unpredictable consequences and risk if it decides not to opt in to any transposed or amended measure.

70. The 'opt-in' decision under these proposals will become one which may lead to serious consequences for the UK through the transfer of jurisdiction on important measures dealing with civil and criminal justice. It will therefore be important that the arguments for and against opting in are the subject of the closest scrutiny by Parliament and for the accountability of Ministers to the House.

51 The amendment provides that 'acts of the Union in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community which are amended shall continue to be binding upon and applicable to Denmark unchanged' Article 2 of Protocol on the position of Denmark Text of 30 October; emphasis added.

52 Strictly speaking, England and Wales on the one part, and Scotland on the other, has its own system of common law.

Conclusion

71. In this report, we make a number of detailed observations on aspects of the Reform Treaty, notably on the ‘red-lines’ identified by the Government as preconditions for agreement, and on the less than transparent way in which the IGC has been prepared and conducted.

72. We remain concerned that the provisions on the role of national parliaments are still cast in terms in which a legal obligation can be inferred, despite the undertakings given by Ministers; and we repeat that, given its constitutional significance, this is not an issue where any ambiguity is acceptable.

73. We express doubts on the effectiveness of the Protocol on the Charter of Fundamental Rights and do not consider that it guarantees that the Charter can have no effect on the law of the United Kingdom when it is combined with consideration of the implementation of Union law.

74. We draw attention to the provisions relating to the ‘opt-in’ on amendments to existing EU measures, where we consider that a stronger position could have been achieved.

75. We are concerned that the interpretation of the red line to “protect UK civil and criminal justice” as only requiring control of the decision to opt in or not does not recognise the loss of protection that will occur every time jurisdiction is transferred from UK courts to jurisdiction by the European Court of Justice and the Commission.

76. Having drawn these matters and our recommendations to the attention of the House we now consider that the matters raised should be debated on the Floor of the House before the Treaty is signed and we therefore hold the document under scrutiny.

Annex 1 Provisions which will appear in Title IV as amended by the Reform Treaty

Articles 61 to 68 justice	General provisions on the area of freedom, security and justice
Articles 69, 69a, 69b, 69c	Policies on border checks, asylum and immigration
Article 69d	Judicial cooperation in civil matters
Article 69e	Judicial cooperation in criminal matters (criminal procedure)
Article 69f	Judicial cooperation in criminal matters (criminal law)
Article 69g	Supporting action in the field of crime prevention
Article 69h	Eurojust

Article 69i	European Public Prosecutor's Office
Article 69j	Police cooperation
Article 69k	Europol
Article 69l	Operation of competent authorities of one Member State in territory of another

Annex 2 Measures adopted in the field of police and judicial cooperation in criminal matters

Council Framework Decisions

Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union
OJ L 386, 29.12.2006, p.89-100

Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
OJ L 328, 24.11.2006, p.59-78

Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
OJ L 76, 22.3.2005, p.16-30

Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems
OJ L 69, 16.3.2005, p.67-71

Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property
OJ L 68, 15.3.2005, p.49-51

Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking
OJ L 335, 11.11.2004, p. 8-11

Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography
OJ L 13, 20.1.2004, p.44-48

Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
OJ L 196, 2.8.2003, p.45-55

Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector
OJ L 192, 31.7.2003, p.54-56

2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence
OJ L 328, 5.12.2002, p.1-3

2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings
OJ L 203, 1.8.2002, p.1-4

2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States — Statements made by certain Member States on the adoption of the Framework Decision
OJ L 190, 18.7.2002, p. 1-20

Council Framework Decision of 13 June 2002 on combating terrorism
OJ L 164, 22.6.2002, p.3-7

Council Framework Decision of 13 June 2002 on joint investigation teams
OJ L 162, 20.6.2002, p.1-3

Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
OJ L 329, 14.12.2001, p.3-3

2001/500/JHA: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
OJ L 182, 5.7.2001, p.1-2

2001/413/JHA: Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment
OJ L 149, 2.6.2001, p.1-4

2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings
OJ L 82, 22.3.2001, p.1-4

Initiative of the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on criminal law protection against fraudulent or other unfair anti-competitive conduct in relation to the award of public contracts in the common market
OJ C 253, 4.9.2000, p.3-5

Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
OJ L 140, 14.6.2000, p.1-3

Initiative of the Federal Republic of Germany with a view to the adoption of a Council Framework Decision on increasing protection by penal sanctions against counterfeiting in connection with the introduction of the euro

OJ C 322, 10.11.1999, p.6-7

Agreements, conventions and Council decisions

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union

OJ C 78, 30.3.1995, p.2-10

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests

OJ C 316, 27.11.1995, p.49-57

Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)

OJ C 316, 27.11.1995, p.1-1

Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention)

OJ C 316, 27.11.1995, p.2-32

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes

OJ C 316, 27.11.1995, p. 34-47

Agreement on provisional application between certain Member States of the European Union of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the use of information technology for customs purposes

OJ C 316, 27.11.1995 p.58-64

Council Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office

OJ C 299, 9.10.1996, p.1-14

Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests — Statements made by Member States on the adoption of the Act drawing up the Protocol

OJ C 313, 23.10.1996, p.2-10

Council Act of 29 November 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the use of information technology for customs purposes

OJ C 151, 20.5.1997, p.15-28

Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the use of information technology for customs

purposes - Declaration concerning the simultaneous adoption of the Convention on the use of information technology for customs purposes and the Protocol on the interpretation by way of preliminary rulings, by the Court of Justice of the European Communities, of that Convention — Declaration made pursuant to Article 2

OJ C 151, 20.5.1997, p.16-28

Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

OJ C 195, 25.6.1997, p.2-11

Council Act of 19 June 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union and Article 41 (3) of the Europol Convention, the Protocol on the privileges and immunities of Europol, the members of its organs, the Deputy Directors and employees of Europol

OJ C 221, 19.7.1997, p.1-1

Protocol drawn up, on the basis of Article K.3 of the Treaty on European Union and Article 41 (3) of the Europol Convention, on the privileges and immunities of Europol, the members of its organs, the deputy directors and employees of Europol

OJ C 221, 19.7.1997, p.2-10

Council Act of 18 December 1997 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations — Declarations

OJ C 24, 23.1.1998, p.1-1

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations

OJ C 24, 23.1.1998, p.2-22

Council Act of 3 November 1998 adopting rules applicable to Europol analysis files

OJ C 26, 30.1.1999, p.1-9

Council Act of 3 November 1998 adopting rules on the confidentiality of Europol information

OJ C 26, 30.1.1999, p.10-16

Council Act of 3 November 1998 laying down rules concerning the receipt of information by Europol from third parties

OJ C 26, 30.1.1999, p.17-18

Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies

OJ C 26, 30.1.1999, p.19-20

Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property

OJ C 26, 30.1.1999, p.22-22

Council Act of 12 March 1999 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the scope of the laundering of proceeds in the

Convention on the use of information technology for customs purposes and the inclusion of the registration number of the means of transport in the Convention
OJ C 91, 31.3.1999, p.1-1

Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the scope of the laundering of proceeds in the Convention on the use of information technology for customs purposes and the inclusion of the registration number of the means of transport in the Convention — Declarations
OJ C 91, 31.3.1999, p.2-7

1999/435/EC: Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis
OJ L 176, 10.7.1999, p.1-16

Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis
OJ L 176, 10.7.1999, p.36-52

Decision No 1/1999 of the EU/Iceland and Norway Mixed Committee established by the agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association in the implementation, application and development of the Schengen acquis of 29 June 1999 adopting its Rules of Procedure
OJ C 211, 23.7.1999, p.9-11

Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway on the establishment of rights and obligations between Ireland and the United Kingdom of Great Britain and Northern Ireland, on the one hand, and the Republic of Iceland and the Kingdom of Norway, on the other, in areas of the Schengen acquis which apply to these States
OJ L 15, 20.1.2000, p.2-7

Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU related bodies
OJ C 106, 13.4.2000, p.1-2

Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union — Council Declaration on Article 10(9) — Declaration by the United Kingdom on Article 20
OJ C 197, 12.7.2000, p. 3-23

The Schengen acquis — Decision of the Executive Committee of 16 December 1998 on cross-border police cooperation in the area of crime prevention and detection (SCH/Com-ex (98) 51, rev. 3)
OJ L 239, 22.9.2000, p.407-407

The Schengen acquis — Decision of the Executive Committee of 28 April 1999 on general principles governing the payment of informers (SCH/Com-ex (99) 8 rev. 2)
OJ L 239, 22.9.2000, p.417-419

The Schengen acquis — Decision of the Executive Committee of 28 April 1999 on the Agreement on Cooperation in Proceedings for Road Traffic Offences (SCH/Com-ex (99) 11, rev. 2)

OJ L 239, 22.9.2000, p. 428-434

The Schengen acquis — Decision of the Executive Committee of 28 April 1999 on the improvement of police cooperation in preventing and detecting criminal offences (SCH/Com-ex (99) 18)

OJ L 239, 22.9.2000, p.421-423

The Schengen acquis — Decision of the Central Group of 22 March 1999 on general principles governing the payment of informers (SCH/C (99) 25)

OJ L 239, 22.9.2000, p.420-420

The Schengen acquis — Declaration of the Executive Committee of 26 June 1996 on extradition (SCH/Com-ex (96) decl. 6, rev. 2)

OJ L 239, 22.9.2000, p.435-435

The Schengen acquis — Declaration of the Executive Committee of 9 February 1998 on the abduction of minors (SCH/Com-ex (97) decl. 13, rev. 2)

OJ L 239, 22.9.2000, p.436-436

The Schengen acquis — Decision of the Executive Committee of 22 December 1994 on the certificate provided for in Article 75 to carry narcotic drugs and psychotropic substances (SCH/Com-ex (94) 28 rev.)

OJ L 239, 22.9.2000, p.463-468

Council Decision of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the Establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention)

OJ L 271, 24.10.2000, p.1-3

Protocol drawn up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention) amending Article 2 and the Annex to that Convention — Declaration

OJ C 358, 13.12.2000, p. 2-7

2001/419/JHA: Council Decision of 28 May 2001 on the transmission of samples of controlled substances

OJ L 150, 6.6.2001, p.1-3

2001/427/JHA: Council Decision of 28 May 2001 setting up a European crime prevention network

OJ L 153, 8.6.2001, p.1-3

2001/427/JHA: Council Decision of 28 May 2001 setting up a European crime prevention network

OJ L 153, 8.6.2001, p.1-3

Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

OJ C 326, 21.11.2001, p.1-1

Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

OJ C 326, 21.11.2001, p. 2-8

2001/886/JHA: Council Decision of 6 December 2001 on the development of the second generation Schengen Information System (SIS II)

OJ L 328, 13.12.2001, p.1-3

2001/887/JHA: Council Decision of 6 December 2001 on the protection of the euro against counterfeiting

OJ L 329, 14.12.2001, p.1-2

Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention

OJ C 362, 18.12.2001, p.1-1

2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

OJ L 63, 6.3.2002, p.1-13

2002/188/JHA: Council Decision of 28 February 2002 concerning control measures and criminal sanctions in respect of the new synthetic drug PMMA

OJ L 63, 6.3.2002, p.14-14

2002/348/JHA: Council Decision of 25 April 2002 concerning security in connection with football matches with an international dimension

OJ L 121, 8.5.2002, p.1-3

2002/494/JHA: Council Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes

OJ L 167, 26.6.2002, p.1-2

2002/630/JHA: Council Decision of 22 July 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS)

OJ L 203, 1.8.2002, p.5-8

Rules of procedure of Eurojust

OJ C 286, 22.11.2002, p.1-7

2002/956/JHA: Council Decision of 28 November 2002 setting up a European Network for the Protection of Public Figures

OJ L 333, 10.12.2002, p.1-2

2002/996/JHA: Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism

OJ L 349, 24.12.2002, p.1-3

2003/168/JHA: Council Decision 2003/169/JHA of 27 February 2003 determining which provisions of the 1995 Convention on simplified extradition procedure between the Member States of the European Union and of the 1996 Convention relating to extradition between the Member States of the European Union constitute developments of the Schengen acquis in accordance with the Agreement concerning the Republic of Iceland's and the Kingdom of Norway's association with the implementation, application and development of the Schengen acquis

OJ L 67, 12.3.2003, p.25-26

2003/170/JHA: Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States

OJ L 67, 12.3.2003, p.27-30

2003/170/JHA: Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States

OJ L 67, 12.3.2003, p.27-30

2003/330/EC: Council Decision of 19 December 2002 on declassifying the Schengen consultation network (technical specifications)

OJ L 116, 13.5.2003, p.22-23

2003/335/JHA: Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes

OJ L 118, 14.5.2003, p.12-14

Agreement on extradition between the European Union and the United States of America

OJ L 181, 19.7.2003, p.27-33

Agreement on mutual legal assistance between the European Union and the United States of America

OJ L 181, 19.7.2003, p.34-42

2003/642/JHA: Council Decision 2003/642/JHA of 22 July 2003 concerning the application to Gibraltar of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union

OJ L 226, 10.9.2003, p.27-27

Council resolution of 17 November 2003 on the use by Member States of bans on access to venues of football matches with an international dimension

OJ C 281, 22.11.2003, p.1-2

2003/847/JHA: Council Decision 2003/847/JHA of 27 November 2003 concerning control measures and criminal sanctions in respect of the new synthetic drugs 2C-I, 2C-T-2, 2C-T-7 and TMA-2

OJ L 321, 6.12.2003, p.64-65

Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on

Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto

OJ L 26, 29.1.2004, p.3-9

Cooperation Agreement between The European Central Bank — ECB — and The International Criminal Police Organisation — INTERPOL

OJ C 134, 12.5.2004, p.6-10

2004/860/EC: Council Decision of 25 October 2004 on the signing, on behalf of the European Community, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis

OJ L 370, 17.12.2004, p.78-79

Council Decision of 2 December 2004 amending the Council Decision of 27 March 2000 authorising the Director of Europol to enter into negotiations on agreements with third States and non-EU related bodies

OJ C 317, 22.12.2004, p.1-1

Agreement between the former Yugoslav Republic of Macedonia and the European Union on the security procedures for the exchange of classified information

OJ L 94, 13.4.2005, p.39-44

Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances

OJ L 127, 20.5.2005, p.32-37

Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro counterfeiting

OJ L 185, 16.7.2005, p.35-36

Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences

OJ L 253, 29.9.2005, p.22-24

Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA

OJ L 256, 1.10.2005, p.63-70

Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway

OJ L 57, 28.2.2006, p.16-18

Council Decision of 12 February 2007 establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme "Prevention of and Fight against Crime"

OJ L 58, 24.2.2007, p.7-12

Council Decision of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme Criminal Justice

OJ L 58, 24.2.2007, p.13-18

Decision of the Management Board of Europol of 20 March 2007 on the control mechanisms for retrievals from the computerised system of collected information

OJ C 72, 29.3.2007, p.30-31

Agreement between the European Union and the government of the United States of America on the security of classified information

OJ L 115, 3.5.2007, p.30-34

Decision by the Contracting Parties meeting within the Council of 12 June 2007 adopting rules implementing Article 6a of the Convention on the establishment of a European Police Office (Europol Convention)

OJ L 155, 15.6.2007, p.78-79

Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement)

OJ L 204, 4.8.2007, p.18-25

Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)

OJ L 205, 7.8.2007, p.63-84

Formal minutes

Wednesday 14 November 2007

Members present:

Michael Connarty, in the Chair

Mr Adrian Bailey	Mr Keith Hill
Mr David S Borrow	Kelvin Hopkins
Mr William Cash	Mr Lindsay Hoyle
Mr James Clappison	Bob Laxton
Ms Katy Clark	Angus Robertson
Jim Dobbin	Mr Anthony Steen
Greg Hands	
Mr David Heathcoat-Amory	

1. Scrutiny of Documents

The Committee deliberated.

Draft Report, proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 7.7 read and agreed to.

Paragraph 7.8 read, amended and agreed to.

Paragraphs 8.1 to 19.08 read and agreed to.

Paragraph 20 read.

Amendment proposed, in the Headnote, to leave out the word “Cleared” and to insert the words “Not Cleared”. — (*Mr David Heathcoat-Amory.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory
Angus Robertson
Mr Anthony Steen

Noes, 8

Mr Adrian Bailey
Mr David S Borrow
Ms Katy Clark
Jim Dobbin
Mr Keith Hill
Kelvin Hopkins
Mr Lindsay Hoyle
Bob Laxton

Headnote agreed to,

Paragraphs 20.1 to 20.19 read and agreed to.

Paragraph 20.20 read amended and agreed to.

Paragraphs 21.1 to 22 read and agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House

2. Oral Evidence

Rt Hon Lord Williamson of Horton GCMG CG gave oral evidence.

3. European Union Intergovernmental Conference: Follow-up report

The Committee further deliberated.

Draft Report, proposed by the Chairman, brought up and read.

Draft Report, proposed by Mr William Cash, brought up and read as follows:

1. We reported on the Commission's Opinion on the IGC for Reform Treaty and the Government's White Paper on 2nd October. On the basis of that report, we took evidence on 16th October from the Foreign Secretary, having already taken evidence from the Minister for Europe. This evidence, far from allaying the concerns we had already expressed in our report of 2nd October, has increased our concerns in all respects and we also draw attention to what we said then about the lack of transparency and information marginalising the United Kingdom Parliament, which has characterised the negotiations and discussions leading to this Treaty.

2. We included in that report a derivation table comparing the substance of the Constitutional Treaty to the Reform Treaty. We concluded that "The new Treaty produced an effect which is substantially equivalent to the Constitutional Treaty" and we would add that even where derivations or opt-outs for the United Kingdom have been sought by the Government that these do not provide anything like adequate protection nor guarantees for the United Kingdom, its electorate and its Parliament. This substantial equivalence, together with the substance of the Reform Treaty, and the merger of the existing treaties into a union amounts to substantial constitutional change warranting a referendum in accordance with the Government's own criteria for referendums.

3. We also draw attention to the legal obligation which the Reform Treaty seeks to impose on our sovereign Parliament by the words of Article 8cEU, "National parliaments contribute to the effective functioning of the European Union", to be taken with Article 9 of the Protocol on the Role of National Parliaments and Article 63. In combination, these proposals have constitutional significance amounting to substantial constitutional change warranting a referendum in accordance with the Government's own criteria for referendums.

4. The Foreign Secretary in his oral evidence on 16th October conceded that the Reform Treaty would collapse the so-called Third Pillar (police and judicial cooperation in criminal matters) so that QMV and co-decision would generally apply to Justice and Home Affairs with a corresponding increase in the powers of the Court of Justice and the Commission so that, through the application of Sections 2 and 3 of the European Communities Act 1972, our own courts and our own Parliament cease to be the ultimate source of law for our own electorate. This has constitutional significance amounting to substantial constitutional change in the Government's own criteria for referendums.

5. The Reform Treaty, as compared to the Original Constitutional Treaty, requires a referendum of the electorate of the United Kingdom because it is the equivalent to the Constitutional Treaty, even if not the same. It is a distinction without a proper difference and, in the words of our 34th report, is "substantially equivalent to the Constitutional Treaty".

6. A referendum is required for the following constitutional reasons: the Reform Treaty with the merger of the TEC, based on the Treaty of Rome (which was the genesis of the European Economic Community), followed by the Single European Act on the one hand and the TEU (with its genesis in the Maastricht Treaty which deals with European government, followed by Nice and Amsterdam), on the other, into a Union with an overarching single legal personality and a self-amending text is "substantial constitutional change", even "fundamental change" in terms that warrant a referendum according to the government's own criteria.

7. The present Minister for Europe stated to the Foreign Affairs Select Committee on 12 September that a referendum would be required if a Treaty created “substantial constitutional change”. The former Prime Minister stated that a new Treaty “should not be proposing the characteristics of a Constitution”. The former Foreign Secretary stated to the European Scrutiny Committee on 7 June that the government was intending a Treaty “that was very different from the Constitutional Treaty”. The correlation between the Constitutional Treaty and the Reform Treaty in terms of the specific provisions incorporated into the latter demonstrates that this statement can now no longer be substantiated. The government has also stated that a referendum would be required where there is “fundamental change” and where the structure of the relationship between the United Kingdom and the European Union is altered by virtue of the European Treaty. The fundamental nature, not only of the merger of the Treaties, but also the individual proposals in the Reform Treaty, alters the relationship by way of substantial, even fundamental, constitutional change. There are also specific provisions arising in respect of the Charter of Fundamental Rights, the Common Foreign and Security Policy, the legal obligations imposed on the United Kingdom Parliament, measures relating to the criminal law, and measures related to Title IV which are deeply contentious and would require specific exclusion from having effect in UK law which for the avoidance of doubt could only be achieved by excluding their effect by the use of a provision preceded by the words “Notwithstanding the European Communities Act 1972”. Such a formula would be essential but the government, by all accounts, would not be prepared to employ such wording, thereby putting the vital national interests of the electorate in jeopardy.

8. The Reform Treaty on all these tests requires a referendum. It would be a deceit of the electorate (even by the criteria for a referendum set out by the Government) to refuse to hold one, unless the Treaty itself was rejected by the Prime Minister before signature in December. Unless this occurs, refusal to hold a referendum would be a breach of trust with respect to the Reform Treaty (let alone past promises about the original Constitutional Treaty made in 2004) and would run clearly contrary to the assertions of the present Prime Minister that he is committed to restoring good governance, democracy and trust.

9. The accumulation of the existing Treaties since 1972 combined with the merger described above, has in itself culminated in such fundamental change as warrants a referendum. There are 27 million people who have not had an opportunity to express their view on our continuing membership of the European Union. The Labour government to its credit provided a referendum on continuing membership of the then European Economic Community, following its enactment of the Referendum Act of 1975. The present Government has already passed legislation authorising referendums in matters of constitutional change in relation to Scotland and Wales where devolution has given rise to the division of competencies as between Westminster and the respective legislatures of Scotland and Wales. The Reform Treaty itself makes provision for the division of competencies as between Westminster and the European Union and there is no justification for refusing to call a referendum on the Reform Treaty. This division of competencies, in respect of the European Union and in respect of devolution, is ultimately dependent upon legislation passed at Westminster (e.g. the ECA 1972 in respect of the European Union) and therefore, as in 1975, a referendum is not only justified but constitutionally appropriate and necessary no less than in the case of devolution.

10. Contrary to the assertions of the present Foreign Secretary, Parliamentary sovereignty is not diminished but actually is enhanced by the granting of a referendum by parliamentary enactment. The electorate and not Members of Parliament nor the Government are the ultimate source of parliamentary authority, sovereignty and democracy all of which Members of Parliament and members of the Government merely hold on trust subject to re-election at a general election every five years. This Reform Treaty and the merger of all the existing Treaties into a Union of European government, also contains a self-amending text which would effectively obstruct any future referendum arising out of a future IGC. All this clearly requires Members of Parliament to hand back to the voters an impartial question authorised by Parliament and across the political divide a decision in a referendum as to the manner in which the electorate as a whole wishes to be governed.

11. This Reform Treaty therefore must not be put into effect by a Prerogative Act of a former Prime Minister signing the Treaty and departing and then a new Prime Minister implementing into UK law the decision through the Whips in Parliament, without a referendum.

12. It would be a constitutional outrage, in the absence of a rejection of this Treaty to do otherwise.

13. The Reform Treaty has not yet been signed so that an opportunity for the Prime Minister and the Government to review the present decision not to have a referendum and even to reject the Treaty is still open. This is particularly the case as the decision expressed and the announcement made by the Foreign

Secretary and the Prime Minister not to have a referendum has been taken prematurely. The European Scrutiny Committee is specifically charged by Parliament under its own standing orders to report on the political/legal importance of the proposed Reform Treaty and has not cleared the text (the opinion of the European Commission – COM(07)412). Moreover, this announcement is apparently in compliance with the so-called binding mandate of the Member States of the European Union of 19 June 2007. This certainly cannot constitutionally bind the Prime Minister, the United Kingdom Parliament or the electorate of the United Kingdom. The Government has erroneously accepted the Commission’s opinion on the IGC. The Committee therefore calls on the Government either to reject the Treaty or to hold a Referendum. This is on the basis that on both political and legally important grounds, the Government has misleadingly denied that the Reform Treaty is a Constitutional Treaty of the first order, amounting to substantial and even fundamental change to the Constitution of the United Kingdom and to the structure of the relationship between the United Kingdom and the European Community and the European Union. The conduct of the Government and the deceitful manner in which this Treaty has been conducted calls to mind the words of John of Gaunt, “England, bound in with the triumphant sea... is now bound in with shame, with inky blots and rotten parchment bonds: that England, that was wont to conquer others, hath made a shameful conquest of itself.” It would appear that now only Parliament can retrieve this situation by authorising a referendum and the Committee calls on all Members of Parliament to pass legislation authorising a referendum on the Reform Treaty.

14. The Committee does not clear the Commission’s opinion on the IGC from scrutiny and, in consequence, having regard to our duty to Parliament under Standing Order 143, calls upon the Prime Minister to put down a motion for a debate on our report, which we insist should be a two-day debate on the floor of the House held in good time before the proposed signature of the Reform Treaty.

Motion made and Question proposed, That the Chairman’s draft Report be read a second time, paragraph by paragraph.—(*Jim Dobbin.*)

Amendment proposed, to leave out the words “Chairman’s draft Report” and insert the words “draft Report proposed by Mr William Cash”.—(*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided..

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 6

Mr Adrian Bailey
Mr David S Borrow
Ms Katy Clark
Jim Dobbin
Bob Laxton
Angus Robertson

Main Question put and agreed to.

Ordered, That the Chairman’s draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 7 read and agreed to.

Paragraph 8 read.

Amendment proposed in line 22, at end add “We regard this lack of communication and candour as vitiating the IGC process and regard this undermining of the United Kingdom Parliament as of itself so serious as to require the calling of a referendum by Parliament itself in the absence of the Government’s willingness to do so.” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 6

Mr Adrian Bailey
Mr David S Borrow
Ms Katy Clark
Jim Dobbin
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraph 9 read.

Amendment proposed, in line 5, at end add “Indeed, all legal obligations imposed on the United Kingdom arising under the Treaties derive exclusively from their implementation by the United Kingdom Parliament itself which enacted the European Communities Act 1972. As the United Kingdom Parliament is the sole source of legal authority, it cannot itself be placed under any form of legal duty by treaty, which is merely the creature of the prerogative and cannot displace the sovereignty of Parliament. This goes to the very heart of the constitution of the United Kingdom.” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 7

Mr Adrian Bailey
Mr David S Borrow
Ms Katy Clark
Jim Dobbin
Mr Lindsay Hoyle
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraphs 10 to 15 agreed to.

Paragraph 16 read.

Amendment proposed, in line 9 , at end add “Failure to achieve this would amount to substantial constitutional change, warranting a referendum in accordance with the Government’s own criteria for referendums.” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 3

Mr William Cash
Mr James Clappison
Mr David Heathcoat-Amory

Noes, 8

Mr Adrian Bailey
Mr David S Borrow
Ms Katy Clark
Jim Dobbin
Kelvin Hopkins
Mr Lindsay Hoyle
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraphs 17 to 19 read and agreed to.

A new paragraph — (*Mr David Heathcoat-Amory.*) — brought up and read, as follows:

“The Reform Treaty extensively modifies the existing EU Treaty provisions on CFSP and adds almost all of the proposals in the Constitutional Treaty. In particular, the limiting CFSP objectives are greatly expanded, and there is a new requirement for, “an ever-increasing degree of convergence on Member States’ actions.” An External Action Service is created, and QMV will apply when adopting proposals presented by the High Representative at the request of the European Council. A passerelle clause will allow for QMV in additional cases if the European Council agrees unanimously, but without the requirement for national parliamentary approval.”

Question put, That the paragraph be read a second time.

The Committee divided.

Ayes, 5

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory
Angus Robertson

Noes, 4

Mr Adrian Bailey
Ms Katy Clark
Jim Dobbin
Bob Laxton

Paragraph agreed to.

Paragraph 20 (now paragraph 21) read.

Amendment proposed, in line 3, to leave out from “that” to end of paragraph and insert the words, “the provisions in the Treaty which provide for a more centralised and integrated CFSP must call into question whether Declaration 30 will in practice be sufficient to maintain the independence of the UK’s foreign and security policy and the intergovernmental character of decision making”.— (*Mr. David Heathcoat-Amory.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 6

Mr Adrian Bailey
Ms Katy Clark
Jim Dobbin
Mr Lindsay Hoyle
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraph 21 to 26 (now paragraphs 22 to 27) read and agreed to.

Paragraph 27 (now paragraph 28) read.

Amendment proposed, line 14, at end add “We also believe that to avoid any doubt that the Charter would extend to enable any court to strike down UK law that the Government must include in any Bill implementing these provisions the words “notwithstanding the European Communities Act 1972” so that no UK or European Court could apply the Charter as against UK law.”—(*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 5

Mr Adrian Bailey
Ms Katy Clark
Jim Dobbin
Kelvin Hopkins
Mr Lindsay Hoyle
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraphs 28 to 40 (now paragraphs 29 to 41) agreed to.

Paragraph 41 (now paragraph 42) read.

Amendment proposed, in line 6, at end add “Failure to include such words as we have recommended in the Protocol would amount to substantial constitutional change requiring a referendum in accordance with the Government’s own criteria for such referendums. Furthermore, we therefore insist that to avoid any doubt that the Charter would extend to enable any court to strike down UK law that the Government must include in any Bill implementing these provisions the words “notwithstanding the European Communities Act 1972” so that no UK or European Court could apply the Charter as against UK law.”— (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 5

Mr Adrian Bailey
Ms Katy Clark
Jim Dobbin
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraphs 42 to 53 (now paragraphs 43 to 54) agreed to.

Paragraph 54 (now paragraph 55) read, amended and agreed to.

Paragraphs 55 to 64 (now paragraphs 56 to 65) agreed to.

Paragraph 65 (now paragraph 66) read.

Amendment proposed, in line 11, at end add, “This amounts to substantial constitutional change requiring a referendum in accordance with the Government’s own criteria for referendums.”— (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Ms Katy Clark
Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Bob Laxton
	Angus Robertson

Paragraph agreed to.

Paragraphs 66 to 68 (now paragraphs 67 to 69) agreed to.

Paragraph 69 (now paragraph 70) read.

Amendment proposed, in line1, line 12 to leave out “may” and to insert “will”. — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 7
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Ms Katy Clark
Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Kelvin Hopkins
	Mr Lindsay Hoyle
	Bob Laxton
	Angus Robertson

Another Amendment proposed, in line 3, leave out from “justice” to end of paragraph and insert the words, “For the reasons given in Paragraph 65, we believe that the whole question of the red line in relation to Justice and Home Affairs is profoundly unsatisfactory and amounts to substantial constitutional change such as to require a referendum in accordance with the Government’s own criteria for referendums.” at end add “The Committee notes that this abolition of the third pillar would be irreversible, as it reflects vitally important aspects of UK criminal law and procedure where in future, the UK does participate in such JHA measures and under ECA 1972 would be legally binding on the UK. It is therefore essential to reject these provisions as they stand.” —(*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Ms Katy Clark
Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Bob Laxton
	Angus Robertson

Paragraph agreed to.

Paragraph 70 (now paragraph 71) read.

Amendment proposed, in line4, at end add “This lack of candour has vitiated the entire process of the Reform Treaty such as to require a referendum to be insisted upon by Parliament itself in the absence of the Government’s willingness to do so.” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Ms Katy Clark
Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Bob Laxton
	Angus Robertson

Paragraph agreed to.

Paragraph 71 (now paragraph 72) read.

Amendment proposed, in line 4, at end add “Failure to remove such ambiguity would amount to substantial constitutional change for the reasons given in Paragraph 16 such as to require a referendum in accordance with the Government’s own criteria for referendums.”— (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Ms Katy Clark
Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Bob Laxton
	Angus Robertson

Paragraph agreed to.

Paragraph 72 (now paragraph 73) read.

Amendment proposed, in line 4, at end add “We regard this lack of effectiveness and guarantee as amounting to substantial constitutional change such as to require a referendum in accordance with the Government’s own criteria for referendums. In the circumstances, we also call on the Government to include in the Bill, to avoid any doubt that the Charter would extend to enable any court to strike down UK law, the words “notwithstanding the European Communities Act 1972” so that no UK or European Court could apply the Charter as against UK law.” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Ms Katy Clark
Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Bob Laxton
	Angus Robertson

Paragraph agreed to.

Paragraph 73 (now paragraph 74) read and agreed to.

Paragraph 74 (now paragraph 75) read.

Amendment proposed, in line 4, at end add “We regard such a transfer of jurisdiction and loss of protection as amounting to substantial constitutional change such as to require a referendum in accordance with the Government’s own criteria for referendums.” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash
Mr James Clappison
Greg Hands
Mr David Heathcoat-Amory

Noes, 5

Mr Adrian Bailey
Ms Katy Clark
Jim Dobbin
Bob Laxton
Angus Robertson

Paragraph agreed to.

Paragraph 75 (now paragraph 76) read, amended and agreed to.

Annexes agreed to.

Resolved, That the Report, as amended, be the Third Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several Memoranda were ordered to be reported to the House for printing with the Report.

Ordered, That the provisions of Standing Order No.134 (Select committees (reports)) be applied to the Report.

[Adjourned till Wednesday 28 November at 2.30 p.m.]

Witnesses

Tuesday 2 October 2007

Page

Mr Jim Murphy MP, Minister for Europe, **Ms Shan Morgan**, Director, EU, and **Mr Mike Thomas**, Legal Adviser, Foreign and Commonwealth Office

Ev 1

Tuesday 16 October 2007

Page

Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, **Mr Patrick Reilly**, Head, Future of Europe Group, **Mr Mike Thomas**, Legal Adviser, **Mr Kevan Norris**, Legal Adviser, Foreign and Commonwealth Office

Ev 19

List of written evidence

1	Letter dated 11 October 2007 from Michael Connarty MP	Ev 41
2	Letter dated 16 October 2007 from Rt Hon David Miliband MP	Ev 42
3	Letter dated 19 October 2007 from Michael Connarty MP	Ev 44
4	Letter dated 26 October 2007 from Mr Jim Murphy MP	Ev 44
5	Letter dated 18 October 2007 from Rt Hon David Miliband MP	Ev 46
6	Letter dated 18 October 2007 from Rt Hon David Miliband MP	Ev 47
7	Letter dated 11 October 2007 from Rt Hon David Miliband MP	Ev 57

Oral evidence

Taken before the European Scrutiny Committee

on Tuesday 2 October 2007

Members present

Michael Connarty, in the Chair

Mr David S. Borrow
Mr William Cash
Ms Katy Clark
Jim Dobbin
Nia Griffith

Mr David Heathcoat-Amory
Kelvin Hopkins
Mr Lindsay Hoyle
Angus Robertson
Mr Anthony Steen

Witnesses: **Mr Jim Murphy MP**, Minister for Europe, **Ms Shan Morgan**, Director, EU and **Mr Mike Thomas**, Legal Adviser, Foreign and Commonwealth Office, gave evidence.

Q1 Chairman: Welcome, Minister. It is good to see you back. You came before us on 4 July when you gave us evidence on the IGC Mandate¹. Things have moved on since then, in the sense that much has been published both arguing that the Treaty for a Constitution of Europe and a Reform Treaty are two different things, two different animals and will produce two different results; never in the same pamphlet; usually two opposing views of the decisions. We would like to explore further with you some of the matters that have been taking up the attention of the Committee in this session. Sadly, because we only completed our consideration of the Committee's draft opinion on that matter today, the Report will not be available and we cannot therefore put the conclusions of the Report to you and give you a copy of the Report; which is a pity for us because I think there were some gems in there you should have a look at. I am sure the Foreign Secretary will see a copy before he comes before us on 16 October. In the meantime, I am sure the members of the Committee in studying these matters will have quite a few questions to put to you without actually reading from the text. May I start very simply by talking about the vexed question of the transparency of the IGC process, which did exercise us the last time you appeared before the Committee? In the letter to us of 22 February, the then Foreign Secretary said the "Government welcomes parliamentary contributions to the debate". Really is this welcome not rather hollow when you consider, for example, the IGC Mandate itself was first seen, as you gave as evidence, 48 hours before the European Council which had to consider it; and that no text of the draft Treaty was made available in English until after the House went into Recess so it had not been seen by the House formally in English until then; and that the Presidency is now pressing for an agreement in mid-October? I think the Foreign Secretary will go to a meeting on 18th where, if the Commission timetable is fixed, they will expect to reach a conclusion when the House has not been sitting and the political processes of most

parliaments have been in suspension. Can you really say that the parliamentary contribution to the debate has really been welcomed, since there really has been none?

Mr Murphy: Thank you, Chairman, and thank you for your warm welcome. I am pleased to be able to return here again before your Committee today. I look forward to having the opportunity to read your Report when it is published; and, as you rightly say, the Foreign Secretary will be appearing before this and other committees as we continue to take up invitations to give evidence and offer observations to various select committees of the House. What I would say in response to that opening comment, Chairman, is that I have tried, and I hope the Committee would accept, at every opportunity since my appointment to this post to be as open with this Committee, open with Parliament both in accepting invitations to attend evidence sessions and also in the production of documentation in an open way and, unless I am told otherwise by yourself, Chairman, and the rest of the Committee, that we have actually passed to all the relevant committees of the Commons and the Lords, and I think also the Libraries of both Houses, all the Presidency papers that have been available. Really the committees have seen what we have seen. On the specific point about the Recess, of course that is a truism; it is an observation of fact; but all I would add, Chairman, is whether we would wish it to be or not, that has been the practice in so many of the previous treaties; and I think the dates of that are a matter of public record. I cannot really add to what I said when I gave evidence before about the build-up to the June European Council; but what I would say is that the Portuguese Presidency certainly does intend to come to a decision on a treaty in October, as you rightly say; and at that point legal experts will again look at it and jurist-linguists will look at it with a view to formally agreeing it in mid-December. That is the timeline at the moment; it is a timeline that I set out to the Foreign Affairs Select Committee, I believe, a couple of weeks ago². It is at that point the UK,

¹ HC 862-i, 4 July 2007

² HC 166-iii, 12 September 2007

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

along with others, would enter into the formal and political parliamentary ratification consideration process. You are right, Chairman, in your earlier comment that the content of the IGC Mandate was agreed to way back under the German Presidency, and that is the situation we are now in. The formal parliamentary process in addition to the select committees will be through a Government bill through the House of Commons and the House of Lords, and both Houses of Parliament will come to a conclusion as is entirely the right thing to do.

Q2 Chairman: It would be unfair for people to think that the European Commission and those around about the European Presidency, both the last one and the present one, were involved in a process to keep the parliaments, what you might call the “awkward people”, out of scrutinising the document; because in reality it will be concluded and then the debate will be about the conclusion and the final document without parliaments really engaging in the process at all?

Mr Murphy: I think, Chairman, looking at the previous treaties, Nice, Amsterdam and Maastricht, the IGC process met during the UK parliamentary recesses. It is not intended to try and achieve what you are suggesting. It is a fact that there is a determination to get on, to deliver a treaty that reflects the Mandate, and then to enable parliaments, if indeed that is the wish of the 27 Member States. You are right, we will have a conversation through that process about whether there should or should not be a referendum (I note again that only Ireland currently intends to have a referendum) so at the moment the intention is for 26 of the 27 parliaments to consider, debate and potentially ratify this new Treaty. There is no question whatsoever of the intention being that Parliament is sidelined. In fact, as others have observed, the content of the Treaty itself gives greater powers to parliaments.

Q3 Angus Robertson: Before going into some of the detail of things, we are fortunate to have you here today obviously and the Foreign Secretary later this month. Do you agree that it would be important to speak to the Foreign Secretary before the IGC is part of the scrutiny process?

Mr Murphy: The formal agreement on a Treaty will be in December.

Q4 Angus Robertson: Do you agree that it would be important for us as a Committee to hear from the Foreign Secretary before the meeting in October?

Mr Murphy: I think it is important for the Committee and the Foreign Secretary to find a date that suits both of you.

Q5 Angus Robertson: How would that be possible if there was a General Election in October?

Mr Murphy: Mr Robertson, I do not think we could usefully speculate on speculation.

Q6 Angus Robertson: I would be right in thinking that if there was a General Election there would be no scrutiny?

Mr Murphy: The fact is that we are committed to the timetable I have alluded to already. Whether there is an Election is not a matter for me or indeed this Committee.

Q7 Angus Robertson: It is a statement of fact that there would not be scrutiny, there would not be a scrutiny session with the Foreign Secretary if there was an Election in October because there would be no Parliament?

Mr Murphy: Of all the things that may or may not happen if there was an Election, and there are many hundreds of things and we can speculate as to whether that would be one of them, but regardless of whether there is an Election or not in the short-term, regardless of that, and regardless of when an Election would take place, the UK Government intends to put a bill before Parliament and for Parliament to scrutinise the bill in detail and have the opportunity to vote on it, regardless of when there is an Election.

Q8 Mr Hoyle: Obviously, Minister, you are quite right to say that Parliament will not be sidelined. Do you think the public will be sidelined from a referendum, in your view?

Mr Murphy: Mr Hoyle, while we agree on so many other things, we have a difference of view on this.

Q9 Mr Hoyle: I did not express mine. I am glad to hear that you know what my view is!

Mr Murphy: The fact is that the UK Government intends to seek ratification of this Treaty in a similar process to that which has been achieved under previous UK endorsements of treaties and that is true of our system of parliamentary democracy and the sovereignty of Parliament. That is our constitutional settlement. We can have a conversation as to whether the Irish constitutional settlement is a more attractive one or ours. I certainly prefer ours.

Q10 Mr Hoyle: So you rule out a referendum completely?

Mr Murphy: We have said very clearly, the Prime Minister has said again, that if we achieve our red lines he sees no need for a referendum.

Q11 Kelvin Hopkins: First of all, I entirely accept your goodwill on this and intent on these matters. I am not so convinced about the previous Prime Minister’s—the fact that it was all stitched up just before the Recess and the week before he went. I think the new Prime Minister is much more objective about these matters and one would hope he would defend Britain’s interests in a very genuine way, and indeed the interests of Europe. I believe there is a very powerful case for delaying the whole process, shall we say, for another year to give much more thorough discussion about all aspects of the whole of the Treaty, because it is more significant than other treaties. Without you committing yourself, would

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

you take that message back to the Prime Minister, that there is a case for delaying whether or not there is a General Election?

Mr Murphy: I am not sure, Mr Hopkins, there is a compelling case for the type of the delay that you suggest. Thank you for your kind comment about my approach thus far. I do not think there is a compelling case for the type of delay that you wish, although we are operating of course within a timetable, which we have already said, of agreement across all 27 Member States by June 2009. It will ultimately be up to Parliament, both the House of Commons and the House of Lords, whether it wishes to pass, delay, oppose or amend the bill that we put before the House and that, I am sure, will be part of the conversation of both the House of Commons and the House of Lords; but I do not see the case for the delay of a year.

Q12 Angus Robertson: Minister, if I can return to the question of the area which the Chairman started on which is the IGC process, and ask you a couple of detailed questions about that. You remarked in your evidence to the Foreign Affairs Committee on 10 September that the previous Foreign Secretary was speaking about the specific content of the IGC Mandate when she said to us on 7 June there had been no negotiations. Can you explain this remark, given that the IGC Mandate was not seen by anybody representing the UK until 19 June, some 12 days later?

Mr Murphy: Mr Robertson, clearly we spent some time on this subject when we met before in my first week in the job before the Recess and went through the detail about the nature of negotiations, the nature of conversations and everything else. I am not sure there is much I can add, apart from what I put on the record to this Committee at the time when I previously gave evidence; and I stand by the evidence that I gave as an accurate reflection as to what happened as to whether there were negotiations; the timetabling and choreography of it; the role of the German Presidency; and whether there was or was not negotiations in advance of that.

Q13 Angus Robertson: Sticking with this general issue, the Committee wrote to you on 11 July and you were asked to explain whether ministers and departments were consulted about the draft IGC Mandate during the 48-hour period before the European Council. Would you please answer the question now?

Mr Murphy: Chairman, I omitted to introduce my co-witnesses today and that is bad manners on my part.

Q14 Chairman: I was going to suggest that they might answer as they may have been there before you were and might have given some information about who was and was not consulted, since you had just been telling us second-hand because you were not the Minister at the time!

Mr Murphy: Just for the record, can I introduce Shan Morgan and Mike Thomas. Ms Morgan may wish to comment on that.

Ms Morgan: Thank you, Chairman. It was an unusual process, in that there was, as the Minister said, no negotiation in the run-up to the June Council until we saw the text for the first time only a couple of days before the June Council itself. That was, of course, the choice of the Presidency to decide how they wanted to conduct the preparations. They chose to handle the thing very tightly, and not to show texts at any point in advance. It was unusual but it was their prerogative. So we did not see, as the Minister said, any text at all until two days before the June Council when the focal points, of which I was one, were given the text at five o'clock in Brussels and able then to return it to London so that legal experts and others from a range of departments could have a look at it in time for the June Council.

Q15 Angus Robertson: Were ministers and departments consulted in that 48-hour period?

Ms Morgan: During that period all departments were able to have a look at the text that we had received from the Presidency to prepare the UK delegation for the discussions at the June Council.

Q16 Angus Robertson: Can you elaborate a little bit on that? They were able to see it?

Mr Murphy: Questions about these sorts of things are through me, Mr Robertson. Shan Morgan has put on record they were able to see it; it was sent to them as ministers in the relevant departments, which would impact on their role, their policy and their view; and that is what happened.

Q17 Angus Robertson: An email was sent round to all UK government departments in that 48 hours explaining the position and asking for their feedback?

Mr Murphy: What I could do if it would be helpful would perhaps be to return to that in writing, through you, Chairman, if that would be appropriate to say whether it was an email or whether it was a letter. I am not in a position to know, Mr Robertson.

Q18 Angus Robertson: Forgive me, Minister, we have already written and asked you this.

Mr Murphy: That is right, Mr Robertson, but I am not in a position to tell you today whether it was an email or letter, and whether it went to every government department of the United Kingdom. I can offer to get that response to you over the next day or so.

Q19 Mr Cash: Minister, in fact at this very time I was constantly onto the Library asking them if they would get hold of a copy for me, because I had heard that it had already been put in the process; and the Library asked repeatedly and could not get one. It really goes back to the question which was raised earlier about not just keeping people in the dark, but deliberately ensuring that people did not know what was going on. The question which interests me is this: if you are prepared to do that to Parliament, and effectively to exclude Parliament from the process at that time—we hear a great deal, as we said

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

earlier, about parliamentary contributions to the debates—do you not accept, contrary to what the Foreign Secretary said with what I regarded as breathtaking arrogance the other day that it is only Parliament that should decide these questions, that to have a referendum, as you did in 1975, actually enhances Parliament because in order to have a referendum you have to have parliamentary authority? There is a point at which Members of Parliament, including members of the Government, have in my opinion the duty to have some humility about the fact that this enormously important Treaty should not just be decided in Parliament but it should be handed back to the people because it is so important and has the constitutional characteristics which I think you will find when we produce our Report are there for all to see. In other words, why will you not hold a referendum when you have said in your evidence to the Foreign Affairs Select Committee on 12 September that a referendum would be required where there is substantial constitutional change?

Mr Murphy: Mr Cash, there is an awful lot in that. Perhaps, Chairman, with your permission I could just make the observation that Mr Cash has the benefit, over a long period, of being remarkably consistent on this view of course in terms of the need for referendums on European treaties and the need to have a referendum on Maastricht. Where I do disagree with Mr Cash is any suggestion of arrogance or otherwise. Mr Cash, I hope you would accept that I have tried at every opportunity to be available to give evidence; the availability of the documentation, being placed in the Library of both Houses, as I said it would be; material provided to the Committee; and until the Committee says otherwise, with the degree of satisfaction with the material that has been provided, I shall have to assume that that arrangement I agreed to when we met before is working in the way that it should do. In terms of whether there should be referendum—that is a much bigger question, Mr Cash. We could, if we wish, spend the rest of our day discussing that. All I would say is that only Ireland, of all the 27 Member States, currently intends to have a referendum on this Treaty, for the specific reasons of the domestic constitutional arrangements where members of the Dáil are not representatives but messengers to the Dáil. The Irish themselves have made it clear that the UK position is entirely different from that in Ireland. Only recently the Dutch Council of State has made it clear there are real and substantial differences between the original Constitutional Treaty and this Reform Treaty where even in the Netherlands, where there was much speculation on this in recent weeks that there may be a referendum, the Dutch Council of State has made it very clear that the proposed Reform Treaty differs distinctively from the Constitutional Treaty.

Q20 Mr Cash: You did say, with reference to all the other treaties, that the referendum had not been held. You do accept, do you not, it was a Labour Government under Harold Wilson that held a referendum on, as the Act itself said, “an Act to

provide that the holding of a referendum on the United Kingdom’s membership of the European Economic Community . . . ”. The accumulated treaties since then are vast. Millions of people have not actually had a chance to vote on that question: why will you not do it?

Mr Murphy: Mr Cash, it is not for me to accept or not accept. That is just a statement of history that that is what happened in the past in terms of our one ever UK-wide referendum. Mr Cash, we simply disagree about our approach here. Myself and the Government believes fundamentally that the constitutional principles, the constitutional heritage, the way in which we ratify treaties in the United Kingdom is the correct and proper way in our system of parliamentary democracy to deliver. In that we find ourselves in the overwhelming mainstream of other European Member States each and every one, with the exception of Ireland as I say, intends to undergo a system of parliamentary ratification because constitutional treaty has been abandoned; we have said that repeatedly and all Member States have said so. This Treaty is different in style and in content from the Constitutional Treaty and we see no case, as long as we secure our red lines, for having a referendum.

Q21 Chairman: We will come to that vast question about the similarity or dissimilarity of the treaties hopefully a little later. Can I just tidy up this process whereby a treaty appeared. Through you, Mr Murphy, to Shan Morgan, was there at any time, during the process where you were acting as one of the focal points, anyone from the Commission or the Presidency saying, “We are working on a draft”? Or did somebody just suddenly produce a draft like “Here’s one we’ve baked before”? It just seems to everyone in the country, and certainly in the political sphere, that it is not possible to produce a vast document of 277 pages out of thin air and with no previous work. No matter how much the Commission tells us that it is efficient, it is not that efficient.

Mr Murphy: Chairman, of course I take up your invitation to leave Shan Morgan to add to these comments. Certainly it is my understanding that my predecessor, Mr Hoon, set out the UK approach in a written statement on 5 December 2006. It is also my understanding that on 19 June at 5 pm the Presidency provided the first draft of the IGC Mandate at a meeting of all focal points in Brussels, of course with the European Council then meeting subsequently on 21 June.

Q22 Chairman: I think he was reading from a minute of our Committee actually when he said that, because it was sent to us by yourself. We are just trying to get some understanding of where it came from rather than pretend to people that no-one was drafting a treaty.

Ms Morgan: Chairman, I can only endorse what the Minister has already said and what has been said at previous hearings, that there was no text under discussion. We saw no text at any point until the 19th.

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Q23 Chairman: My question to you was not that. My question was: did no-one from the Commission or the Presidency indicate to you in any of your contacts before that someone was in the process of drafting a text?

Ms Morgan: The Presidency who obviously led the negotiations would not discuss draft texts at all.

Q24 Chairman: Or indicate there was drafting going on?

Ms Morgan: No, they did not. I am sorry.

Mr Cash: What is the point in UKREP? What is the point in having people out there on behalf of us in Brussels if they cannot even find out if there is this massive volume of paper which nobody can see?

Q25 Chairman: We are talking about the Foreign Office here and not UKREP. You are saying no-one indicated at any time that a drafting process was going on?

Ms Morgan: That is right, Chairman. We understood of course that there would have to be a draft produced at some point. We were never told at what point.

Q26 Mr Heathcoat-Amory: We have had this truly astonishing admission which is now out in the open that the British Government and all Member States were only shown this document 48 hours before the European Council, and no complaint was made by the British Government about being bounced in this way. The Mandate is now binding on the Intergovernmental Conference; it is a Mandate; and the British Government has said it wants no changes. All the parliamentary debates we are now going to have cannot amend it. That is just window-dressing. This will be unamendable. I find this really awesome in its implications. Not only did Parliament not get any sight of this document but, according to what you said earlier, it is doubtful even that other departmental ministers saw it, except perhaps in an email, and they could obviously not respond in a concerted way in 24 hours. My question to you is this: how is this consistent with all the assurances we get about closing the gap between the people of Europe and the European Union? I remind you, Minister, that the 2001 Laeken Declaration said that Europe had to be brought closer to its citizens. Indeed more recently the European Council has said, "The EU should reinforce communication with its citizens". How can this communication exist at all when even the House of Commons, and most other government departments, do not see sight of a document that is agreed in 48 hours?

Mr Murphy: Mr Heathcoat-Amory, this process, as you know, has been going on for a number of years—the conversations, the discussions, the debates around the time and the context of a constitutional treaty. As I said when I gave evidence on 4 July to the Committee, we went into this in great detail and it is not as if this is now out in the open; I was very clear when I gave evidence on 4 July about the process. I think others observed I was frank and open when I outlined in great detail the process that went on. What you are getting today is confirmation

of what I was saying on 4 July. As to whether this in itself, if it had been done in a different way in terms of events around the German Presidency, would make a contribution to closing the gap between Europe, the EU and its citizens, my view (and I think you know this, Mr Heathcoat-Amory) is the solution to the gap between citizens of Member States and the European Union is not solved by structural change; it is resolved by Europe proving that it adds value and improves people's lives on things that matter to them and which they care about, and it changes and improves their lives. That is the solution, in my view, to closing the gap between Europe and its citizens; not in itself with this Treaty; not other treaties; not any other treaties that may, in decades to come, come forward. It is about delivery on security, environment and flexible economy—those are the issues, I think. To think there is a structural solution to the gap in delivery and perception I think is false. I do not believe it to be the case. I do not believe it to be the case in UK domestic politics; I do not believe it to be the case in international politics; nor in the European Union.

Q27 Mr Heathcoat-Amory: Your view is not shared by the leader of your Party, the Prime Minister, who was a member of the European Council that said that the EU should reinforce communication with its citizens. Is it not a good start that people, or at least their elected representatives, should be shown a document negotiated or drawn up in secret by the German presidency, which even the four focal points did not know existed and then 48 hours later the European Council met and then it is all over? It is agreed and there is a Mandate which has to be agreed by an Intergovernmental Conference, and then there will be an Act of Parliament and the document is unamendable. Do you think that in any way discharges this aspiration that the EU should reinforce communication with its citizens?

Mr Murphy: Mr Heathcoat-Amory, my view (and you are asking me for my view) is that communications is part of it, it is an important part of it; and I went through in some detail in front of the noble Lord Lord Grenfell's select committee in the other place some of the details and reforms that have taken place in terms of how Europe seeks to communicate using information technology, using the internet, open-streaming and all those sorts of issues to close the gap on communication. I will add to my earlier point that structures and communication, either individually or a combination of both of those, do not close the gap. It is delivery that closes the gap. For those of us who believe that Europe can have a positive and constructive influence on the citizenry of the United Kingdom, it is not about structures and it is not about communications, although both are very important; it is about delivery in a way that improves people's lifestyle that will close this gap.

Q28 Jim Dobbin: Minister, in order to bring the Committee up-to-date about where we are now with the IGC, could you explain to us what happened at the Viana do Castelo meeting on 7 and 8 September, and the line taken by the UK Government?

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Mr Murphy: There was an informal meeting of Portugal and I had not attended so I am asking Mr Thomas or Ms Morgan as to whether we have any details. We are not in a position to respond to that.

Q29 Jim Dobbin: This is just a straight question. We are asking to be updated really on what happened there.

Mr Murphy: I will happily update you but we are not in a position today, Chairman, to provide you with that. I did not attend the committee that is being alluded to Mr Dobbin.

Mr Hoyle: Why can we not have the information?

Q30 Chairman: It was an informal foreign affairs council. It should be something I presume that they would tell you about and if the IGC was discussed. They are not keeping secrets from you now!

Mr Murphy: I am sorry, Chairman, I had not heard the full question. The Foreign Secretary attended, of course and there were conversations specifically about, obviously, the Treaty. The Foreign Secretary, along with other leading politicians from Member States, made it pretty clear that we did not want to re-open the Mandate. From my conversations with the Foreign Secretary, there seemed to be a unanimous agreement that there was a determination to stick to the Mandate; and that is what seems to have been reflected in the technical and legal working groups a well. There is a real determination that continues to be both in the informal meeting and the more formal processes to deliver on the Mandate and to do so within the timescale we have put on record. In these meetings there is also an opportunity to discuss other issues, of course, Chairman, not least issues such as Kosovo and other issues that are important to Member States and the European Union.

Jim Dobbin: I apologise that you could not follow my Scottish accent, Minister!

Mr Hoyle: Obviously a different clan!

Q31 Jim Dobbin: I am from the east of Scotland and you are from the west of Scotland.

Mr Murphy: That is right. A different part of Scotland and now a different part of the United Kingdom, Mr Dobbin.

Q32 Nia Griffith: It is a little concerning, Minister. This meeting in September was given to us as perhaps one of the potential milestones where there could be some feedback, some reporting back as to how things are going. Certainly some of the MEPs have raised concerns. I would like to know in what ways you think the process can be more transparent? We just get the general feeling that everything is being terribly rushed, there has been very little opportunity for feedback and, as we understand it now, the European Parliament will be publishing its own proposals for amendments but the Presidency does not intend to hold any meetings at official political level before the informal Council on 18/19 October at which it is seeking political agreement for the final text. As I say, you have given us only the very briefest of references to what we had hoped

would have been perhaps a bit more feedback from the 8th and 9th, and now we seem to be hurtling towards yet another final meeting practically with very little opportunity for a wider debate. What is the absolute urgency that everything has to be done so quickly? What mechanisms do you think could be introduced to perhaps give people more of an insight into what is going on?

Mr Murphy: The timeline ahead of us, as you rightly say, is 18 October, the informal European Council, to get that high level political agreement and then for the legal experts to carry out work to make sure that it has been a thorough process and is legally watertight and, indeed, the legal text reflects what 27 Member States wish it to reflect. There will then be a more formal process in December. Where the House of Commons, where Parliament and where committees play a part is both through hearings, through evidence sessions such as this, and the report to the Government that we will all have the opportunity to read when you publish, but ultimately the more substantial role that Parliament will have is the one which is to come to a view on the Treaty by virtue of the Bill that Government will put to the House of Commons and to the House of Lords and will follow a similar process to the one taken by previous governments on previous Treaties. This does feed into a wider conversation about the nature of the British constitution, the nature of British democracy, the nature of parliamentary sovereignty and all of those other issues which have been long fought for and long established. There is a conversation, of course, which does rage about whether Parliament is sovereign or whether a referendum or a plebiscite is sovereign. Previous governments, three previous Prime Ministers on various Treaties, rightly in my opinion, took the view that Parliament was sovereign and it is a similar approach we are taking here. If the question is are there things we can learn from this process, of course there are things we can learn from the process and it is a process that has now gone on for four years or so, at least. Mr Heathcoat-Amory has been through the whole process and I am sure it feels a lot longer. There are things we can learn, of course, about communications, processes, all those sorts of issues. My expectation, Ms Griffith, and hope would be that there will be a learning process, but not a learning process that we would have to put into place any time soon on the basis that the UK's expectation is we have had enough Treaties, we have had a series of Treaties over 15 or 20 years, and we think we have the structures in place to deliver what we wish to deliver. It is now about putting the political energy and parliamentary energy into ensuring that Europe and its institutions or Member States deliver the type of things that are important. Yes, there are always learning experiences but with the exception of enlargement, and the UK remains committed to a continued enlargement of the European Union, I would expect that there would not be a need for further structural change through a Treaty for us to then implement that learning experience.

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Q33 Mr Hoyle: If I can follow on from what you said, Minister, why do we not stand on the manifesto of saying that we should have a referendum?

Mr Murphy: Mr Hoyle, I guess that is an issue that you and I will discuss in meetings of the Labour Party.

Mr Hoyle: I wondered why we had not.

Ms Clark: We understand—

Mr Steen: Could I ask what the answer was because I could not understand what the Minister said on that.

Chairman: I do not think we will reprise it.

Mr Steen: Was it recorded?

Chairman: It was recorded.

Q34 Ms Clark: We understand that Poland is pressing to have a Protocol along the lines of the UK Protocol in relation to the Charter of Fundamental Rights. Could you confirm that this is the position and indicate if the UK is supporting Poland on this point?

Mr Murphy: It is my understanding that Poland is attracted to having a Protocol on the Charter of Fundamental Rights. Ultimately it is an issue for them if they wish to have that. On the basis that we alone have a Protocol on the Charter at the moment, in principle we are comfortable with others wishing to do that. What we are not comfortable with doing is opening up the whole Mandate again and for people to begin to unpick the entire process. There was also some speculation that Ireland would be interested in achieving a Protocol on the Charter which I now understand not to be the case. I wanted to inform the Committee of that because I think it was just that, it was speculation rather than a firm intent.

Q35 Chairman: Was that the sort of thing that was discussed at Viana do Castelo? Was that what was going on?

Mr Murphy: I do not know if that was specifically discussed but we are aware that Poland would wish to have a Protocol.

Q36 Chairman: But you did not talk to anyone about it?

Mr Murphy: Chairman, I did not attend, it was the Foreign Secretary.

Q37 Chairman: Ah, it was the Foreign Secretary, the Government, but the Government did not talk to anyone about it. It is a mysterious process. You can see why there is growing incredulity among the public about things that are shifting in discussions when nobody is admitting they are going on, certainly no-one is writing them down and no-one is reporting them back. It is a very, very difficult process for people to give any credibility to and at the end of the day the Treaty, therefore, is undermined by this process of secrecy.

Mr Murphy: Chairman, it is probably a matter of open and public record that the Poles are attracted to having a Protocol. In terms of was that specific point discussed at the informal meeting, there are two options really. I undertake to come back to the

Committee and, of course, it is something that will be a question that you will be able to put in your evidence session to the Foreign Secretary.

Chairman: Mr Hopkins, I think you wanted to ask a question.

Q38 Kelvin Hopkins: First of all, the draft that was presented, was that in French or in English? The 48-hour draft that went round to government departments, was that in French or in English?

Mr Murphy: The Mandate was in English.

Q39 Kelvin Hopkins: A more important point is that there is a slight sense that the Foreign Secretary has not briefed you before coming to this meeting, about what took place at Viana do Castelo. This is slightly worrying.

Mr Murphy: That is not the case at all, Mr Hopkins. Myself and the Foreign Secretary speak probably each day on all sorts of issues. The fact is that I am not aware whether he spoke specifically to the Poles about a Protocol on the Charter.

Kelvin Hopkins: Just to pick up a point that you made earlier on about the structures not being important but delivery being important. That has the flavour of “Don’t worry about democracy as long as we have got the policies right” and, again, that is slightly worrying. Clearly the European Union is very worried about structures, they are constantly trying to change structures to aggregate more power to the Commission in particular. If structures were not important the European Union would not be pushing through Treaties like this.

Mr Cash: Like 1984.

Q40 Mr Cash: Is that not the case?

Mr Murphy: Mr Hopkins, what I said, and I think this will be reflected in the record, is that structures in themselves do not solve the problem about the gap between citizens and the European Union. Of course, structures are important, it is important to get the parameters, it is important to get the rules, it is important to have a common understanding of relationships, but my observation today, as has been in the past, is that I have never had the view that in and of themselves structures or, indeed, communications will magically transform people’s perceptions of Europe. People’s perceptions of Europe are partly shaped by history but increasingly shaped by their own personal experience, and that is what will change people’s perceptions of Europe for better or for worse based on their own experience of their everyday lives being improved.

Q41 Kelvin Hopkins: There is a point I have made a number of times in the Commons. Whenever I speak on platforms about Europe, which I do frequently, I ask whether the people in the audience, whoever they might be, would prefer to have a Europe which is made up of independent democratic nations which co-operate voluntarily on matters of mutual interest, or they want to have a progressive transfer of sovereignty from parliaments to the European Union? Invariably people say they would like a looser association of independent democratic states

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

co-operating voluntarily. That is what they say on every single occasion. Even Government ministers have agreed with that view, and from our Government I may say. Would the peoples of Europe not be much happier with a loose association of independent democratic states co-operating voluntarily for mutual benefit?

Mr Murphy: Mr Hopkins, we entered into a conversation similar to this briefly in my last evidence session when I gave you my reflection on the nature of Europe and, worryingly, on that occasion Mr Cash signified his agreement with my view, although we have substantial disagreements, and I will put that on the record as well. I do believe fundamentally in sovereign states agreeing through Treaties to co-operate on policy and working together through structures for the betterment of their citizens, but it is about sovereign nations willingly co-operating and willingly entering into legal agreements with one another for the common good of our own citizens and other citizens. That is my view. It is also my view that this Treaty is entirely in keeping with that view of the world.

Chairman: Nia, you had better rescue him before we burst into tears!

Q42 Nia Griffith: Minister, if I can go back to the fact that we were expecting some sort of progress update from the Viana do Castelo meeting and the fact that three weeks have gone by since then. I think the real issue is this: Britain has got a very specific approach to the whole idea of the Treaty. In the summer we had the four red lines very clearly marked out and, as you said, the Mandate has been preserved. Quite clearly other European nations must be saying, "Britain seems to be having opt-out clauses, exceptions or whatever". What is the atmosphere? Is there any pressure or any bullying of any sort which would be trying to push Britain toward things that the Prime Minister quite clearly said in the summer we would not be going down that route on?

Mr Murphy: Ms Griffith, there is certainly no attempt at bullying. There is a universal acknowledgement that the UK is determined to sign up to a UK specific version of the Treaty. We have made it clear and we have not made it a secret. We have been pretty straightforward, we have been tough in our negotiations and we have said that the Treaty must reflect the Mandate and we have made it very clear that should be the case. Are others delighted with our approach? Probably not, but there are federalists who would like to see a much more integrated Europe who, I am sure, would not be instinctively comfortable with our approach of defending UK interests, but we are determined to continue to do that and achieve the UK's red lines. I recently met with Hans-Gert Pöttering, the President of the European Parliament. It was the first occasion I met him, I met him in Strasbourg. He is a lovely gentleman, a conservative by commitment and by politics. He said on the record that since making the Charter legally binding and extending Community competence to JHA were two of the most important features of the original Constitution the deal struck by Tony Blair in June means that,

and these are his words: "for better or for worse much of its substance will simply not apply in Britain". In other Member States, and in the Commission and in the European Parliament, I suspect there is a wish that we did not have much of our negotiated position but we have and there is now a respect that that is our negotiated position and, more importantly, we have made it very clear that we are not shifting from our position and we are determined to achieve our position.

Q43 Mr Cash: Minister, I would like to turn to the question of the Reform Treaty by reference to its equivalence to the Constitutional Treaty. In the first place, I would just like to clear one point regarding the IGC Mandate. In it, it says at paragraph two of the General Observations, "The word 'Community' will throughout be replaced by the word 'Union' and it will be stated that the two Treaties constitute the Treaties on which the Union is founded and", this is highly important, "the Union replaces and succeeds the Community". So all the Treaties which were previously under the generic character of the Treaty of Rome are merged into those which are generically the same as the Maastricht Treaty, so you have the Economic Treaties merged into the Governmental Treaties. There is also an overarching single personality and a self-amending text. You said when you came to the Foreign Affairs Select Committee on 12 September that you would regard the referendum as required if there were substantial constitutional change. You also said in front of the Foreign Affairs Committee on 12 September that the substance of this Treaty, that is the Reform Treaty, "is substantially different to that of the Constitutional Treaty". I have got two fundamental questions. I have got here a list of 440 provisions which were contained in the original Constitutional Treaty, all but two of which are included in the Reform Treaty. So, of 440 provisions there are only two provisions which are not substantially the same, yet you say: "the substance of this Treaty is substantially different to that of the Constitutional Treaty". By definition, that has to be complete nonsense. You cannot get away from that. The second thing is the question of whether or not there is substantial constitutional change. I would like you to tell the Committee, first of all, how this Treaty is substantially different from that of the Constitutional Treaty and, secondly, what makes you say, if you do say it, that this Reform Treaty is not substantial constitutional change.

Mr Murphy: Chairman, I am not in a position, because I do not have the document that Mr Cash has before him, to—

Q44 Mr Cash: You have seen all the other documents over the months.

Mr Murphy: I am happy to receive that and reflect on it in terms of the assertion that Mr Cash has made.

Chairman: It will be published as an annex to our report. That information is in the public domain.

Mr Cash: You can have it now.

Chairman: He cannot have it now.

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Q45 Mr Cash: Can he not? Well, he ought to have it.

Mr Murphy: In response to your point, I simply do not agree that is the case at all. Mr Thomas may wish to add. In terms of what is different in the Constitutional Treaty, look at the text, look at the commitments, look at the Mandates. Compared to what was in the Constitutional Treaty, CFSP is in a separate Treaty with the no pillar collapse; the High Rep for Foreign Affairs and Security Policy, not a Union Minister for Foreign Affairs; two declarations on CFSP confirming that all countries see CFSP as the responsibility of Member States; on JHA we have got the UK specific extended opt-in on Justice and Home Affairs. Unlike in the Constitutional Treaty, national security is the sole responsibility of each Member State. There are articles about the operation of police co-operation. There are differences in the institutions, in the symbols. There is no Treaty reference to the primacy of EU law and explicit provision for competence to return to Member States if all countries agree. That is a list. I am sure we can exchange lists but it is a matter of public record that these are differences between the previous Constitutional Treaty and this Reform Treaty. Mr Cash, I know, as I have said before, you are a fair and open-minded man, as am I—

Q46 Mr Cash: Not on this subject.

Mr Murphy: I think we both are, I would not be so hard on yourself. The fact is that others who were keener on the constitutional approach now acknowledge that there has been substantial change. The Italian Interior Minister, Amato, spoke last month about this and reflected on the substantial differences between the Constitutional Treaty and the Reform Treaty. There is a general acceptance by Amato, Pöttering and others, and, as I referred to, Dick Roche, the Irish Europe Minister, about the substantial differences in their own domestic arrangements for the Reform Treaty but also an acknowledgement that while every Member State has moved away from a constitution no other Member State has moved away from the Constitution other than the United Kingdom by virtue of the Protocols and opt-ins that we have negotiated and the red lines that we are determined to stick by.

Mr Cash: One last question and that is this: when you see our report which we agreed this morning, and I hope you get it pretty soon, I think you will find—

Chairman: It will not be available until the 10th, Mr Cash, because of the problems of printing. It will not be placed on the record until the 10th of the month, I am afraid.

Mr Cash: Allowing for the fact that I am told it will not be until the 10th, the Foreign Secretary is going to come back on the 16th and I strongly suggest that you and he have a serious conference together about what you have just said because I think you will find that on a substantial number of issues we differ very much from the response you have just given on this

issue of the difference between the Reform Treaty and the Constitutional Treaty. I will leave it at that for the time being.

Mr Steen: Minister, I have always thought of myself as a reasonable man, as somebody you will find on the Clapham omnibus. I am not terribly intelligent but—

Chairman: First class.

Mr Steen: --- interested and concerned. As I have experience of being a reasonable man and the fact that I have got Agatha Christie's home in my constituency, I do tend to think that there may be a plot somewhere. In this case, being the reasonable man I am—

Mr Cash: Mr Poirot!

Q47 Mr Steen: I have just been wondering, listening to your answers, and this is no discourtesy to you, whether ministers actually get programmed by some sort of computer and whether you have been programmed to respond in the way you do because the word "Constitution" has come out of the discussion. When the word "Constitution" is in the discussion you will be saying, "We must have the referendum of course", but take the word "Constitution" out of the discussion and you immediately argue very forcefully that this is just a Treaty like everything else. If Mr Cash is correct, and he usually is on these sorts of matters, and there is only a couple of changes between this Treaty and the Constitution, I do not understand, unless you have been programmed, why you are so adamant that the British people after 30-something years should not be given a chance to express whether they want further integration, which this must be, or whether they do not. I am not a raving euro sceptic, I am a reasonable man on the Clapham omnibus concerned, just like you are, to get the best for the British people. I must tell you the one thing that makes me think there is an Agatha Christie plot is I happened to be in Brussels meeting one of the Heads of the DGs, who is passionately pro-European and wants the whole lot to be federal, and he asked me one very telling question at the end of a meeting which had nothing to do with this. He said, "Do you think if we change the name from 'Constitutional' to 'Treaty' we will be able to get it through the British Parliament?" The amber light went red at that point. With your answers as well I cannot understand why you are resisting the idea of a referendum unless you know which way the British people will go, which would be diametrically opposite the way that you are arguing the case. I am worried to protect you from what might happen if you pursue that line and whether you could re-programme the computer to put the word "Constitution" in so you will get different answers.

Mr Murphy: Chairman, apart from acknowledging that I do not think anyone has evidence at all that you are not a reasonable man, Mr Steen—I am happy to put that on record until such time as we discover otherwise—I do not think the world is arranged in the way in which the former owner or resident of that famous address in your constituency would suggest. That has not been the case in the

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

previous Treaties, on Maastricht, and of course I did not have the opportunity to vote for or against a referendum on Maastricht.

Q48 Mr Steen: It did not have the word “Constitution” in it.

Mr Murphy: Which of course you did, Mr Steen. The fact is that we have moved away from the Constitutional Treaty both in content, style and purpose. We are not re-founding the European Union on a single Treaty as the old Constitution would have done. As this process has evolved, I have tried—

Q49 Mr Cash: It says, “The Union replaces and succeeds the Community”.

Mr Murphy: As this process has evolved, I have tried to avoid praying in aid specific constitutional settlements in other countries, apart from Ireland where there is a specific case. The reason I mentioned the Dutch was simply because there was a similar conversation in the Netherlands and I think it was in this Committee, possibly the Foreign Affairs Select Committee, where there was allusion to the fact that the Dutch may end up with a referendum because of the supposed constitutional nature of this Treaty. The Dutch State Council has been very clear and they went through it with extreme thoroughness devoid, as I understand it, of party politics to-ing and fro-ing, and they have come to a conclusion. They have come to a conclusion and a recommendation for their own government. It is important that we, as a Government, come to a conclusion that is specific to the UK, that protects the UK’s national interests and stands up for Britain. That is what we will continue to do throughout this process as we seek ratification through Parliament. I will put it on record again, I am happy for the record to show that as far as I and most others are concerned you are a reasonable man.

Chairman: I doubt whether he has ever been on the Clapham omnibus myself.

Q50 Mr Heathcoat-Amory: Minister, when you said in front of the Foreign Affairs Committee that “the substance of the Treaty is substantially different to that of the Constitutional Treaty”, you must have been doing that on advice, so you must have done the same analysis that we have done comparing the Constitutional Treaty with what we now have. We find that pretty well everything is taken forward in substance in the Reform Treaty except for the question of the symbols, the flag and the gold stars, but as that has been common practice for over 20 years that can hardly be a matter of substance. I noticed just now when you were giving some examples of where you said there were substantial differences you mentioned some red lines, which is a separate matter, we are talking here about the main Treaties, and you also mentioned the primacy clause, which is indeed important, the assertion that European law is superior to Member State law. Can I just remind you that the Reform Treaty says: “In accordance with the said case law of the EU Court

of Justice the Treaties and law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States under the conditions laid down by the said case law”. In substance that is just the same as what the Constitutional Treaty had in it, there is no substantial difference. I am afraid it is disingenuous of you to pretend that is a substantial difference which allows you to assert that whereas the Constitutional Treaty was of constitutional importance, the Reform Treaty is not. Can you provide us with more details, not now but can you write to us in short order because time is short, showing us what you consider to be the substantial differences, not the name changes, not that the Foreign Minister is now called a High Representative, but substantial differences which alter the effect, political and legal, of the Reform Treaty as compared to the Constitutional Treaty. Will you undertake to do that?

Mr Murphy: Chairman, I have already responded to Mr Cash and others on these questions. Of course, I am happy to correspond with the Committee if that is the wish of yourself, Chairman, and Mr Heathcoat-Amory.

Q51 Mr Heathcoat-Amory: Not correspond with us, you are going to now send us these substantial differences. It is an oral request for a written answer.

Mr Murphy: The way we would have to do that is through correspondence, which is why I said I will correspond.

Q52 Chairman: Can I press you a little. I find this very concerning. I have spent a lot of time this summer reading all the various documentation leading up to our presentation and I have to say I am a bit unhappy with what is going on, and I think a lot of it is down to the way the Government is handling this question. It is certainly the reality that I see that the only thing that was new in the Constitutional Treaty that is not in the Reform Treaty that has been signed up to by many countries without any derogations, without any Protocols, is, in fact, Article I-8 on symbols. Everything else that was new in that Treaty is in the Reform Treaty. It is not all binding on the UK but we seem to argue nonsensically that it is different, that the Reform Treaty is different from the Constitutional Treaty, when it is not. Some of the things do not apply to the UK because we have got derogations, opt-ins and Protocols, but in reality for many countries it is what they wanted. They wanted a Treaty for a Constitution and they are going to get a Treaty for a Constitution under the name of the Reform Treaty minus the symbols. If we said that honestly to the public and then explained to the public where we had disappplied or been allowed options to opt-in or not opt-in in certain areas we would get a much more honest debate. What we get is—you might call it the Government side because it seems to be the Government side—the pro-EU side saying, “It is not the same” and those who know it is not all applying to the UK saying, “It is exactly the same” when they know it is only exactly the same in its wording but does not apply in the same way to the UK as it does

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

to other countries. That is where the problem lies. It is like a dialogue of the deaf, two people not talking the same language. Is it not better for the Government to say, "The Reform Treaty, if it is applied to countries who want it all without the symbols, is exactly the same as the Treaty that was proposed for a Constitution for Europe, but for the UK it is the same but we are not applying this, this and this"? That seems to me to be a much more honest way to frame it, but it has never been framed in that way by Government ministers or those who defend it, as I might defend it? Is it not time to change the language?

Mr Murphy: Chairman, I am not sure I agree in full with the analysis.

Q53 Chairman: Well, you should.

Mr Murphy: I hope you do not take that as a mark of disrespect. However, you are right in saying that the UK has its specific version as a consequence of—

Q54 Chairman: Let us start with the first part. Do you agree that all of the new parts that were in the Treaty for a Constitution for Europe, apart from Article I-8 on symbols, are in the Reform Treaty before us?

Mr Murphy: No, I do not agree, Chairman.

Q55 Chairman: I think you will find you are wrong when you read our report.

Mr Murphy: I look forward to reading your report when it is published on the 10th.

Q56 Chairman: I am surprised your officials do not tell you this because it is true.

Mr Murphy: Chairman, the fact is you are right in saying that the UK alone has a distinct version of this Treaty. You are right in saying that and we have argued that case and will continue to argue that case and will continue to defend that case and make sure the Mandate is turned into the Treaty. Where I do not believe you are right is that the Treaty is the same as the Constitution and, more importantly perhaps than myself, a growing number of others are now reflecting that the Constitutional Treaty as was and the Reform Treaty as is are different. As I alluded to earlier, the Dutch situation with the State Council came to its own conclusion. Of course we will continue to read through the detail of the Dutch State Council conclusion but the purpose, let alone the content, of the Reform Treaty is different from the Constitutional Treaty.

Q57 Chairman: I would not disagree with you on that.

Mr Murphy: We are not seeking to re-found the European Union in the way that the Constitutional Treaty was seeking to do. Obviously I do not want to disagree with you just for the sake of it but it is the case that what we have now in front of us is a Reform Treaty similar in approach to previous Reform Treaties rather than a Constitution for Europe. In terms of the magic bullet of how you have a facts based conversation and debate on the one hand, and the much more substantial point about how you

then break down many of the barriers and how you can transform people's perceptions of Europe, as I say, Chairman, getting the rules and regulations and parameters is right is important but now, hopefully once we conclude this process, it is about putting the continuing circular conversation about Treaties behind us and getting on putting all the energy that we all have into helping to make a Europe to deliver, if that is indeed what we all believe, which I know you do, Chairman.

Q58 Mr Steen: Can I just ask one final question on this. If you took out the word "Constitution" from the initial Constitutional Treaty, would you have argued that it was a Treaty?

Mr Murphy: I know the benefit of that in hindsight, Mr Steen, but I think the fact is that a Treaty that sought to re-found the legal basis of the European Union, it is hard to have called that anything other than a Constitution in my opinion because it sought to re-found the European Union on a different basis. I think it may have been difficult.

Q59 Chairman: I have a number of final questions but I think you should study the contribution made by Gisela Stuart at the Foreign Affairs Committee about whether the last Treaty for a Constitution was, in fact, a Constitution because I think there are some fundamental questions about Euratom and the fact that it did not replace all the Treaties, it just replaced and moved some of them. My question to you, Minister, is, is it your perception, because it is certainly mine, that every other country must adopt the Reform Treaty with all its parts and also agree to the UK opt-out and all 27 countries must agree that package? So in a sense we are agreeing the whole Reform Treaty with our opt-outs just as they are agreeing all of the Treaty with our opt-outs as part of the deal. In fact, what we are all agreeing is the total Reform Treaty, which is exactly the same in all its new parts as the previous Treaty for a Constitution without Article I-8 about symbols. This idea that there are different Treaties for them than for us, it is the same Treaty we all agree with our opt-outs and Ireland's opt-outs in there. There is one package they will vote on with our opt-outs in it, just as we vote for them to have all of the Treaty without any opt-outs as part of the package. If 27 do not agree to that it falls. It is not like we have a different Treaty from them. I think between now and the time when we meet the Foreign Secretary you might discuss this question and maybe we can have a clearer factually based discussion with him.

Mr Murphy: Chairman, it is pretty clear that there will be one text but the impact of the Treaty in the United Kingdom will be substantially different from that in other Member States. Every Member State has agreed to the UK's specific version of a Treaty as it will apply in the United Kingdom and those Protocols and opt-ins will be written into Community law and will have legal effect. With respect, I think that is pretty clear.

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Q60 Angus Robertson: Moving on to the Protocol, Minister, in your letter of 31 July you explained that the “UK-specific Protocol which the Government secured is not an opt-out from the Charter”. Does this mean that the Charter will have some effect within the UK?

Mr Murphy: What is clear is that the Charter, and the rights contained within the Charter, restates—I think this is pretty clear—existing rights which exist in other parts of European law. I think it is sensible that it brings it all back together in one place. It does not create any new justiciable rights in the United Kingdom either for a European court or for a UK court to strike down any UK law, but to make absolutely clear that that is the case we have negotiated that specific UK Protocol.

Q61 Angus Robertson: But will it have some effect within the UK?

Mr Murphy: It does not create any new legal rights.

Q62 Angus Robertson: That is not the question I am asking. Will it have some effect within the UK?

Mr Murphy: It will have the effect of bringing all the rights into the one document in the one place but it will not create any new rights and, therefore, it will not have that effect.

Q63 Mr Heathcoat-Amory: Minister, the Protocol to which you have referred does not relieve the United Kingdom from its duty to apply European Union law generally. Indeed, the Protocol actually explicitly says that it is without prejudice to other obligations of the United Kingdom under the Treaty on the functioning of the European Union and Union law generally. As you know, Article 6, to take one example, does refer to general principles of Union law, so we will have to apply Union law generally notwithstanding this Protocol. So we can imagine a situation whereby the European Court interprets a Directive in the light of the Charter, and does so in a particular way, and the United Kingdom would be bound by that under these general obligations of Union law. Will that general obligation not trump the opt-out or red line or Protocol to which you have referred?

Mr Murphy: Mr Heathcoat-Amory, with your permission, Chairman, I wonder if I could invite Mr Thomas to offer a legal observation on that.

Mr Thomas: The position is consistent with the Protocol. What the Protocol says is essentially that the position that the Government understood the Charter to produce is indeed the position, so it does not row back on the ability of the ECJ to go on doing what it has always done, which is to interpret Union law, and it will go on doing that. It will do so in the light of the Charter but since the Charter restates existing rights and principles it does not introduce anything new into their deliberations.

Q64 Mr Heathcoat-Amory: That has not quite answered my point. Would it not have been better to say that our opt-out or red line, or whatever you call it, which disappplies the Charter in certain cases, is without prejudice to other obligations. We have to

apply Union law generally otherwise surely the Court will come along and say, “All right, you say you have got a specific disapplication, however under other parts of the Treaty you have a duty to apply general principles consistently as every Member State does” and the European Court, which is the final arbiter, might decide that overrides the specific Protocol on which we are trying to rely? Would it not have been better to make absolutely explicit that the Protocol takes precedence over any other obligations and that has not been done in the Protocol?

Mr Thomas: No, it has not. The reason it has not is because the Protocol is not a get out of jail free card, it is a statement of how the Charter provisions will apply in the UK, “So they will apply, and this is how they will apply”. In other words, the Protocol is a different animal from the one you are describing, I think.

Q65 Mr Heathcoat-Amory: So the Charter will apply? If there is a judgment of the European Court which interprets a Directive in a certain way in accordance with the Charter that will be binding on the United Kingdom?

Mr Thomas: The ECJ will have to interpret the Charter insofar as it concerns the UK in the light of the Protocol but, subject to that, the Charter becomes part of the provisions of the Treaty by virtue of the Article which introduces it. The Protocol explains how the Charter will have effect in the UK but it does not say it does not apply to the UK, far from it.

Q66 Mr Heathcoat-Amory: The Charter will not directly apply but the interpretation of the Charter by the European Court could well apply because of this general obligation to apply Union law consistently. The more you talk, the more threadbare becomes the Protocol on which the Government is apparently relying.

Mr Thomas: I think you have to see the Protocol as part of the Charter package, by which I mean all the provisions of the Charter including the so-called horizontal provisions at the back end of the Charter which explain how it works. The other main part of the package is the explanations or commentary to the Charter which the Reform Treaty would require all courts to have regard to when interpreting the Charter and the Protocol. You have to look at the whole package together.

Q67 Mr Heathcoat-Amory: Finally, supposing we insist that the Charter cannot alter British law but the Commission or some other Member States insist that we have to apply Union law generally and, therefore, the case law of the European Court judging a Directive in a certain way should apply to the United Kingdom. If there is a dispute of that nature am I right that the deciding body will be the European Court, which is hardly a neutral observer in these matters given that it is a European Union institution?

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Mr Thomas: I will not comment on the last part of that, but on the legal substance of your question the European Court of Justice will continue to be the final arbiter of European Union law.

Q68 Mr Heathcoat-Amory: Even though it will have judged an earlier case and therefore will then be deciding whether it should apply to the United Kingdom. In that sense it is a party to the whole dispute.

Mr Thomas: I do not think you can regard the arbitrator as a party to the dispute. The European Court is the adjudicative body of the Union like any other court, so it is not party to its own proceedings.

Q69 Mr Heathcoat-Amory: No, I am making a different point. It will have decided, in my hypothetical example, whether a Directive is consistent with the Charter, so it will have already sat in judgment on the issue about whether the Charter applies. In my example it is then being asked to decide whether our Protocol is stronger than our general EU obligations in a separate case, but it will have already been perhaps not a party to but it will have been involved in the case about the Directive in question, so the same body will be deciding two aspects of the same case. I put it to you that that does not give them a position of neutrality between the state's rights and the rights of the European Union in this matter.

Mr Thomas: If we took specific examples, including a real Directive and so forth, there are lots of interesting avenues which we would need to explore. The bottom line is that the European Court of Justice has to interpret the Treaties and the law made under the Treaties, including the Protocols to the Treaties, without distinction, if you like. The European Court will not be able to ignore the Protocol which will have exactly the same status as Treaty Articles by virtue of being a Protocol, so it will not be a question of picking and choosing. I think in the abstract I cannot say more than that. After that one needs to get into the detail of particular cases and—

Q70 Mr Heathcoat-Amory: Are you happy as a lawyer to leave the decision to a Court which is itself an institution of the European Union which obviously has a self-proclaimed interest in ever closer union and has a long record of seeing the gradual accretion of powers by the European Union as a natural consequence of the Treaties?

Mr Thomas: I think you have asked for my political view there, which I will not give you. The European Court is a creature of the Treaties which are themselves the construct of the Member States so, as I see it, what the European Court is doing is what the Treaties require it to do.

Q71 Mr Cash: You have raised, Mr Thomas, if I could perhaps continue this conversation through you with Mr Thomas for a moment, the question of the relationship of British law to European law is settled on the face of it by sections 2 and 3 of the European Communities Act 1972. The question,

therefore, in relation to this Charter, Protocol, the application of uniformity throughout the European Union, the cases of *Costa v ENEL*, *Simmenthal* and all the other cases, which by the way did not have their origin in Treaty, they were constructs of the jurisdiction of the European Court itself off its own bat which has been accepted by the European Union, raises a whole series of questions in this Treaty with respect, for example, to where there are complications on British opt-outs or opt-ins in relation to the Charter of Fundamental Rights, Common Foreign Security Policy, the legal obligations imposed on the United Kingdom Parliament, measures relating to criminal law and Title IV, amongst others. In all these cases under this Treaty there are serious doubts as to whether or not it is possible for the United Kingdom to get the measure of acceptance, exemption, that the Government has been seeking both under its red lines and generally. In this very serious situation, therefore, would you not accept that it would be right, and I refer to Mr Murphy here, to agree by commitment, which the Government could give, that because the Government wants to achieve these exemptions for the United Kingdom people in the vital national interests of the electorate it should say in the Bill implementing this Treaty to provide for the words “notwithstanding the European Communities Act 1972” because that would be the only way in which you would, according to what Mr Thomas has just said, be able to avoid the European Court being able to exercise its jurisdiction over these provisions on a uniform basis?

Mr Thomas: On the question of the European Court's jurisdiction, I think it is quite clear that if the United Kingdom is not subject to a measure which is made under the Treaty then the European Court will have no jurisdiction over the United Kingdom's actions in that sphere because it will not be governed by the legislation. The Treaty will make that perfectly plain.

Q72 Mr Cash: Well, it has not done so.

Mr Thomas: We have not got the Treaty yet.

Q73 Mr Cash: No, but I am talking about in the past. Take the Working Time Directive, for example, I remember having discussions with Michael Howard at the time and I said, “If you go down this route it is the old Article 118(a) and it is a declaration, and no more, the consequence of which is you will find yourself caught by this because the European Court of Justice will insist” and so it did, and so we found ourselves caught in it and the present Government is rather unhappy about that in many respects. What I am saying to you is that the evidence in the past is that unless you are crystal clear and use your own Westminster-based legislation where it is express and, where necessary, inconsistent with European law you have to have a notwithstanding provision which says, “Notwithstanding the European Communities Act” and then legislate in the Bill because otherwise you

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

fall into the trap of the European Court applying the legislation against you despite what you have just said.

Mr Thomas: I cannot see any prospect of that happening.

Q74 Mr Cash: I can.

Mr Thomas: As long as the Treaty is clear that certain legislation made under it would not apply to the United Kingdom then in the circumstances when it does not apply neither our courts nor the European Court could make it apply.

Mr Cash: Well, the Merchant Shipping Act is a good example.

Q75 Chairman: Can I just remind the Minister and his legal adviser, I asked a question of the Prime Minister about what the red lines would be and the first one he said was “First, we will not accept a Treaty that allows the Charter of Fundamental Rights to change UK law in any way”. It is my understanding, and it will have to be tested because these things may be hypothetical until someone takes a challenge, that it will be possible because of the way it is written. It says that the Protocol will not be binding and the European Court of Justice will not have a role except insofar as the UK has already legislated in that area. The point made by Mr Cash about the Working Time Directive as an area where it would be possible for a trade union, for example, to take the matter to the European Court of Justice and ask for a ruling about the implementation in the UK of the Working Time Directive, which may be different from the way the Government at this moment is interpreting and enforcing it, that would be a case where, unfortunately, the Prime Minister’s assurance would not be sustainable because we do have law in that area and it would be possible to take that to the European Court of Justice. Is that not correct?

Mr Thomas: I hope I understand the circumstances you are positing correctly. In the case of the Working Time Directive the UK is bound by that Directive as well as every other Member State.

Q76 Chairman: Exactly.

Mr Thomas: So we are in the normal position that cases can go to the European Court for interpretation of the Directive and then for our courts taking that interpretation to decide whether our law is consistent with the Directive. That seems to me to be a paradigm case under the Treaty about the European Court exercising its jurisdiction to interpret Community law.

Q77 Chairman: In any other place where there is employment law where a trade union does not think the Charter of Fundamental Rights is being applied similarly to UK workers as to other workers, there is quite a lot of scope for people to take these matters to the European Court of Justice and request or ask for a ruling that the Charter of Fundamental Rights must apply. That is one of the areas where it does

seem to me we have some legal advice that is contrary to the ability of the former Prime Minister’s assertion to be sustainable.

Mr Murphy: On that point, Chairman, and then if I can address the point that Mr Cash made, I do not suspect we can stop people trying to take things to the European Court, I do not think that is the world we want to live in.

Q78 Mr Cash: Nor stop them from adjudicating.

Mr Murphy: Article I of the Protocol is pretty clear, that the Charter “does not extend the ability of the Court of Justice or any court or tribunal in the United Kingdom to find that laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms”. I think that is very clear indeed in Article I. In terms of the point raised by Mr Cash, you said you raised the point about 118(a) with Mr Howard, and I thought you were going to give us his response at the time. On the specific point how we frame a Bill—we have not got to the point where I have seen a first cut at a draft of a Bill—when the Bill is taken to Parliament, of course, you will exercise, and I do not think I could stop you exercising, the opportunity to make whatever amendments you see fit and the one that you have mentioned today may be one that you would see fit to try and amend. At the moment I cannot usefully speculate on the content of a Bill that we have not yet designed the first draft of.

Q79 Chairman: Can I just say that this little debate has certainly reinforced for me that the first question asked by Mr Robertson may not have been answered in a way that it may turn out in the future. It does appear to me that the European Court of Justice’s interpretations based on the Charter of any application of a law that we already legislate in will have some effect on UK law. I find it very difficult, given the legal possibilities, that the assertion made will be sustainable and I do think that the Government has a real problem in delivering on that given that we do not know what cases will be taken to the European Court of Justice in the future.

Mr Murphy: Chairman, we have framed the Protocol in a way that we are certain gives us the protection that we need in terms of what we have said. As I alluded to earlier on, everyone celebrated the fact that we negotiated this specific condition, not least—

Q80 Chairman: I would say some of my friends in the trade union movement are looking to challenge it as soon as possible.

Mr Murphy: That is right, not least our good friends at the TUC. They were unhappy that we secured this Protocol but the Protocol is very clear on our legal position about what the Protocol helps us to achieve.

Q81 Mr Cash: Chairman, can I just mention what the European Parliament has said about this. This is all part of the process. There was a meeting of the European Parliamentary Constitutional Affairs

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Committee, and I just flag this up, and in respect of the Charter the following statements were made: “The Charter of Fundamental Rights should not be annexed to the Treaties as a Declaration, but should be formally proclaimed as a stand-alone document before the signature of the Reform Treaty; the Protocol disapplying the Charter of Fundamental Rights from the UK”, according to them, “threatened contamination of the whole EU legal system” and Poland was complicating issues by wishing to join the UK in the disapplication of the Charter of Fundamental Rights. What I am trying to say to you in a nutshell is that this is an extremely hot issue. It is a hot issue with respect to the trade unions, it is a hot issue with regard to the Poles and it is a hot issue regarding the European Parliament. The confidence with which you have expressed your view and Mr Thomas has expressed the view that somehow or other this is all fine and dandy is not actually reflected in the extreme concern which is being expressed in the documents I have referred to.

Mr Murphy: Chairman, it is a fact that I have alluded to on two occasions. Others in the European Union would wish that we did not have this Protocol, let us be clear about that. It is not a universally popular measure but we think it is the right thing to do for the United Kingdom. It will continue to be an issue because others do not believe we should have had this, but we are pretty clear it is the right thing to do for the United Kingdom and we will defend it.

Q82 Chairman: Can I move on to another issue. Some of the MEP observers at the IGC are reported as being concerned that the UK might opt-in to measures under Title IV, which we have the right to do, so as to participate in the negotiations on these issues but then opt-out at the last minute when we do not get the text that suits us. What do you say to these concerns? Are they valid?

Mr Murphy: They have not been offered to me, so I rightly accept your observation, Chairman. Again, it is controversial in some quarters, others in the European Union would rather we did not have this specific opt-in arrangement as well. We have got that automatic opt-in to enable us to opt-in on a case-by-case basis and that has now been extended. What we will do, and I do not want to pre-empt decisions years down the line, is we will basically look at this on an individual case-by-case basis and make our decisions as to whether we opt-in. We will judge each one on the merit of what it means for Britain and is it good for our country, is it good for our legal system, is it good for the way in which we operate, and if it is we would consider opting in. We have not yet been confronted with a list of “Are we going to opt-in to this, would we opt-in to that” and the speculation around it, we will just make a case-by-case judgment. We are very pleased that we have the opt-in.

Q83 Chairman: Surely there must be an interpretation by the Foreign Office on behalf of the Government as to what it actually means. If it is interpreted that the opt-in means that you decide

you are going to opt-in to a particular Article or subsection of an Article, and once you opt-in it is Qualified Majority Voting, and then along the way in the negotiations you find that what has been offered to you in the negotiations is something you do not find compatible with these aspirations you have put so well on behalf of the British people, et cetera, do you think it is the Government’s right to opt-out if the negotiation text at the end of the day is not acceptable? Or do you think the process is one where if you say “We are opting into this section” you take what you get when eventually the text is agreed and put to Qualified Majority Voting? What are the safeguards?

Mr Murphy: Without speculating on a specific proposal—

Q84 Chairman: You must have done this in the past in opting in. I am thinking of Schengen, for example.

Mr Murphy: In terms of one specific issue and one specific principle that is before us there is the issue about the EU’s ability to define what is a criminal offence. That power already exists where the crime is serious and where there is a cross-border dimension, such as people trafficking. That power already exists. In that circumstance, if the UK chose to opt-in, and this is the one I am most involved in, and remained nevertheless unhappy and our discontent or discomfort could not be met then we do reserve the right on that to withdraw ourselves again. I think that is important to put on the record today. If it fundamentally affects our criminal justice system then we have the opportunity to remove ourselves even if we had opted in.

Q85 Chairman: I think you are talking about the emergency brake there, you are not talking about the opt-in. They are two different things.

Mr Murphy: If we had opted in to a JHA measure we could then have the emergency brake which would then take us out if it fundamentally affected our systems.

Q86 Angus Robertson: Minister, I know you are running out of time because you are going to be meeting the European Ministers of the devolved governments in the UK. Much as I would like to see Scotland representing itself directly in Europe, something that you praise the Irish for doing, at the present time it is the UK that represents Scotland, Wales and Northern Ireland, areas where the shared sovereignty in much of the EU’s policy area is in fact the Scottish Government, Welsh Government and Northern Ireland as well. Would it be possible for you to tell the Committee which priorities have been shared with you by the administrations in Edinburgh, Belfast and Cardiff that you are taking seriously and you are negotiating on behalf of them within the IGC at the present time? What do you agree with that they want you to pursue and what do you not agree with?

Mr Murphy: You are right to acknowledge that I celebrate the fact that the Irish have the approach that they do, primarily because Ireland is an independent country and it has the right to do what

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

it does. I happen to believe in the United Kingdom. I believe in the union of our islands and I do not believe in breaking up the United Kingdom, and that will not be a surprise to you, Mr Robertson. In that context it is right to celebrate what Ireland does but acknowledge that Scotland achieves, and continues to achieve, much more by being part of a United Kingdom. Forgive me for making that point, Mr Robertson, but I think it was important to make. In terms of the meetings with the Ministers in the devolved administrations later on, the Scottish Executive Minister, Linda Fabiani, will present a paper on her priorities and, as I understand it from the paperwork, her priorities, the Executive's priorities, seem to be around the issue of fishing in particular, and that is something we will discuss this afternoon.

Q87 Angus Robertson: That is a matter, of course, that has been shared with the UK Government by the First Minister already, so obviously it is something you have thought about in some detail and you will have worked out what your position is. Could you share your view with the Committee on how the UK Government will be supporting or not supporting the position of the Scottish Government?

Mr Murphy: The Scottish Executive, of course, rather than Scottish Government. As I understand it, the SNP Executive is opposed to this Treaty in terms of the debate that took place in the Scottish Parliament because of the suggestion that the Treaty in some way reduces Scottish capacity for its fishing industry to continue. That is not the case. We have had that conversation with Mrs Fabiani, we have looked into it in some detail and the Common Fisheries Policy, which we secured the reform of in 2002, can continue to change and evolve but the Treaty in itself, and I will make this clear to the Europe Minister from the Scottish Executive, does not change the role and purpose of the Common Fisheries Policy and the Treaty itself does not change the nature of the Common Fisheries Policy.

Q88 Angus Robertson: So what policies that the Scottish Government has asked you to support are you supporting?

Mr Murphy: The substantial one that I have been approached on is the fishing policy.

Q89 Angus Robertson: You are not very supportive of that.

Mr Murphy: I have made it clear that is what I have been asked to do and that is what I will respond to.

Q90 Angus Robertson: Minister, of the things that you have been asked to support, what are you supporting? So far it is nothing.

Mr Murphy: The things that we think there are a need for co-operation on is where the Scottish Executive, quite rightly, along with the other devolved administrations continues to play a part and are processes that the Scottish First Minister has put on the record he is very appreciative of in the way in which the Foreign and Commonwealth Office has continued to involve the devolved administrations.

That is a matter of public record. Mr Salmond wrote to the Foreign Secretary in July about that. There is strong co-operation and there is a request from Mrs Fabiani for that to continue and we are happy for it to continue and we support it.

Q91 Angus Robertson: I make the slightly glib observation that now structures and co-operation are very important. I asked you for a concrete policy example—policy, not co-operation, not structures, and that is not important apparently going back to your earlier answer, what is important is policy delivering—which policies which the Scottish Government has asked you to support are you supporting.

Mr Murphy: Mr Robertson, the specific concrete example that has been raised and, you are right, you did make a relatively glib statement, but that is something you are entitled to do, of course, is about the Common Fisheries Policy and I have given you my observation on that.

Q92 Chairman: Fine. Can we move on to one last item? I am concerned at the comments made about the informal meeting in Portugal and the general agreement, you said, that the Mandate was not up for amendment. When you last met us we did raise with you the question under Article 8cEU of the role of national parliaments, which says: "national parliaments shall actively contribute to the good functioning of the Union" and then it goes on to say a number of things that we shall do. Of course, it was then, and still is, of deep concern to this Committee that it would appear that the EU is instructing this Parliament how to behave, along with all the other parliaments. You did say that it would be looked at by the Foreign Office in its negotiations. Can you inform us if this will be amended rather than just left in and in the future to be up to hypothetical judgments in the courts? We do think it is a fundamental change in the way a Treaty of the European Union addresses the role of parliaments and should not be allowed to continue.

Mr Murphy: Chairman, on the specific point about that word "shall", we have made some progress and have looked into it in some detail. It is our understanding, as I think I said in July and I certainly said at the Foreign Affairs Select Committee, that it is clumsy drafting rather than policy intent. That observation in itself is not enough, it is important also to reflect my understanding that the French text does not contain the word "shall".

Q93 Chairman: It does have that in it.

Mr Murphy: It is my understanding that even though part of this was motivated by the determination of our colleagues in the Dutch Government neither is it in the Dutch text, so that reinforces this point. We are determined to make sure that the concerns that you have raised, which I think I have said before are entirely reasonable and we share them, are met and overcome around this issue.

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Q94 Chairman: Can I just press you on that. That is all very well but if it is not textually altered then it remains in there and I do not care who is ascribing to a conspiracy theory or that the drafters are also in cahoots with the Commission, it does require to be amended not just to be agreed in general discussion with other ministers that it was a very bad piece of drafting.

Mr Murphy: Chairman, we will make it clear in text and the text will reflect what you are asking today and what I have said previously on record that there is no intention or desire to mandate sovereign parliaments in their actions. That will be reflected in the text.

Q95 Mr Cash: Chairman, you raised an extremely point, if I may say so, with respect to the distinction that is made having regard to the exclusive and so-called binding nature of this Mandate where the legal experts get together, and I have got the note here about the legal experts working group, and come up with the conclusion that somehow or other you can adjust the wording, as for example with regard to the question of the obligation on national parliaments, and that is all right but at the same time, however, the Portuguese Presidency and the Foreign Minister before they took over, when Germany was still in control, issued a statement saying, "There will be no departure from this". I spoke to the Foreign Secretary personally about this and I said, "Is this legally binding on the British Government as far as you are concerned?" and he said to me, "It is binding as far as we wish it to be binding". What I am interested to know is just exactly, as a matter of principle, how this is operating. We have a Treaty, which is a prerogative act, and we have the Prime Minister saying that in line with the sort of considerations of Lord Lester's Bill we are now actually going to take away the prerogative in relation to the declaration of war and the making of Treaties and have it all approved by Parliament, yet at the same time we have situations where in this particular Treaty everything is defined by a legally binding Mandate but it appears that the legal experts can get together and can then decide as to whether or not they are going to re-interpret provisions or not. We had Mr Thomas telling us that actually the European Court of Justice under the European Communities Act, as I put it to him, will have the last say, but he then said, "Ah, but you see there may be questions of interpretation which will let us out of it". I have to say to you, Mr Murphy, that what really worries me about all of this is the extent to which the whole of this racket, which is what it basically is, is being forced through by prerogative act by a former Prime Minister followed by a new Prime Minister against the background of an impending General Election and exceptions are given to the legal experts to make adjustments, for example, on national obligations and the wording but not with respect to the question of whether or not particular provisions will apply to the United Kingdom. In other words, this is developing into an operation which lacks transparency, is not candid, is bypassing the British Parliament to a great extent—

we went into that at the beginning—and at the same time bypassing the British people because they are not going to be allowed a referendum. Would you not agree that is a pretty tragic state of affairs and one that should be strongly resisted by the British people?

Mr Murphy: Mr Cash, it will not surprise you that I do not agree. I suspect that is a reflection of an equivalent set of comments you have given on other Treaties, including Maastricht. You have a different perspective on the nature of Europe describing it as "a racket", and it is entirely your prerogative to do that. In terms of the two specific points of fact you raised, firstly, the Mandate is not a legally binding Mandate, it is a political agreement and there is now a process where lawyers, interpreters, go through the process to make sure that a Treaty can be created that reflects that political Mandate that was achieved under the German Presidency.

Q96 Mr Cash: What is the difference between a political and a legal Mandate?

Mr Murphy: Mr Cash, a political Mandate is the Prime Ministers of the 27 Member States have signed up at a political level that the content of the Mandate is something that they would support and they would wish then to be turned into legal text. It is when the legal text becomes available and when the legal text is then turned into a Treaty that you get involved in the legally binding and ultimately when the Treaty is ratified through 27 Member States and comes into effect. That is an entirely different process from what happened under the German Presidency. In terms of the point about the word "shall", Mr Cash, I hope you will accept the fact that that is not an attempt to reopen a negotiation or anything whatsoever, or reopen the Mandate, it is a reflection of what the UK believes it was signing up to. It is a reflection of what the text in other languages currently records. There was no policy intention through the Mandate agreed at a political level to compel Member States, sovereign parliaments, into specific actions. That is shown in the French and the Dutch texts and it should similarly be shown in the English texts.

Mr Cash: That is not what the Presidency is saying.

Q97 Chairman: I want to pursue that point. I am not sure that we have this right. Our understanding, for example, is that the style used in the French text which is under Article 212 of the Penal Code was written in such a way that it did seem to compel France also. It was the way it was phrased which was then rendered that national parliaments "shall" ensure in its translation. Our understanding is that the IGC is specifically not up for amendment without political authority. What we need to get from you to advance us from where we were in July is, is that political authority now agreed that this text will be changed? As you say, in its drafting it was compulsory on everyone to agree with the IGC Mandate, it was mandatory, but it can only be changed if the political will is to change it. We have had several months, so is the political will now to change it?

2 October 2007 Mr Jim Murphy MP, Ms Shan Morgan and Mr Mike Thomas

Mr Murphy: Chairman, the European Council Legal Services agree with us that this was not the intention. It is not something that Heads of Government are actively engaged in on the basis that it is what I said it is, it is clumsy drafting, not a reopening of the Mandate. There was not a process whereby there was an attempt by the European Union or Member States to compel one another into certain actions. The Mandate in the use of that word does not actually reflect what was agreed. Certainly the advice I have, Chairman, and as I said at the Foreign Affairs Select Committee my French is patchy—my Dutch is stronger than my French—it is not in the Dutch text and it is my understanding that it is not in the French text. It is not a renegotiation of the Mandate and the European Council Legal Services agree with us.

Chairman: I look forward to seeing that redraft.

Q98 Mr Heathcoat-Amory: Are we not now paying the price for this incredibly compressed negotiation? You had these focal points, these Sherpas, there since January, they were shown no text, there was no negotiation, and the former Foreign Secretary said there were no discussions. If there had been a transparent process which included this Parliament we would not be in this muddle whereby there is an apparent obligation for us to contribute actively to the good functioning of the Union. If that is interpreted by a future European Court it may find this Parliament or a future Parliament in breach of Treaty law if it became obstructive. This would not have happened if you had just taken it at a slower pace and brought everyone in alongside with you to join in the negotiations. My question to you is just supposing we do not get this change and the word “shall” endures as a potential obligation on this

Parliament, can that be amended when Parliament—this Parliament—discusses the Treaty and in any ratification process? If your answer to that is “no” then we are powerless from now on.

Mr Murphy: Thank you, Mr Heathcoat-Amory. With your permission, Chairman.

Q99 Chairman: I am conscious of your time. We did say we would let you go at 3.30.

Mr Murphy: We are confident that this will change. Council Legal Services have been very clear that it is not reflected in other texts, it was not part of the Mandate, and we are pretty straightforward that this should change in the way that I have alluded to your Chairman.

Q100 Mr Heathcoat-Amory: We have a pious hope but no powers.

Mr Murphy: No, we have an absolute determination.

Mr Cash: But notwithstanding the European Community of 1972.

Chairman: I think we have heard these things and they are all on the record. Can I just thank you again, Minister, and Shan Morgan and Mike Thomas. Our report will be in the public domain, we understand, by the 10th of the month and hopefully the points that we have put to the Government, and there are many, many points in there to be answered by the Government, will be answered before the 16th in some written form. If not, we would have to go through every one of them with the Foreign Secretary when he has agreed to come and see us on the 16th. There are many points to clarify before people can be happy in this Committee that our concerns have been answered by the Government in the final IGC negotiations. Thank you very much for your time.

Tuesday 16 October 2007

Members present

Michael Connarty, in the Chair

Mr William Cash
Mr James Clappison
Ms Katy Clark
Jim Dobbin
Nia Griffith

Mr Greg Hands
Mr Lindsay Hoyle
Angus Robertson
Mr Anthony Steen

Witnesses: **Rt Hon David Miliband MP**, Secretary of State for Foreign and Commonwealth Affairs, **Mr Patrick Reilly**, Head of Future of Europe Group, and **Mr Mike Thomas**, Legal Adviser, Foreign and Commonwealth Office, and **Mr Kevan Norris**, Legal Adviser, Home Office, gave evidence.

Q101 Chairman: Foreign Secretary, thank you very much for agreeing to come before the Committee. We did have the pleasure of some of your predecessors coming before us, but maybe not with so much attention from outside observers as this issue is having. Can you possibly introduce your team and then we will get started?

David Miliband: Thank you very much, Chairman. On my left is Patrick Reilly, who is from the Europe Group in the Foreign Office. You may have met before Shan Morgan, but she has got a bad cold today and so is out of action. Mike Thomas is from the Foreign Office legal team and, given the interest that you have shown in the JHA questions (Justice and Home Affairs), Kevan Norris from the legal team at the Home Office is here as well. I hope it is in order at various points, if there is legal clarification required, that I bring them in to elucidate a particular legal point.

Q102 Chairman: Thank you very much, Foreign Secretary. I hope whoever is here as a legal adviser is also someone who can tell us what happened in the group of legal experts which obviously was involved in the redraft, which we now have, of 5th October, of the Reform Treaty. I want to say two things. The first is, you have written in reply to a letter which we sent you last week, and we know it was a very short timescale but the Committee would wish me to express concern that we received it one hour ago. The extra copies we have will be made available to members of the public—we will not have one for everyone—and also a copy of the letter we wrote to you. It has obviously been very difficult for us to focus in detail on the letter. It does merge with a number of questions that we will be asking you and intended asking you from previous correspondence and briefings, but it is not a good sign that a committee receives such an important letter and one I am sure you took a great deal of thought to write—it is four pages long—one hour before the Committee is due to meet, but we will incorporate it into our discussions with you.

David Miliband: Can I answer that, Chairman?

Q103 Chairman: You can answer when I have finished my opening statement. I thought I would put that on record because the Committee wished me to do so. The first thing, Secretary of State, is that

we are pleased to acknowledge the efforts your department has made to provide the Committee with text information in the past. We have considered the new text of 5 October but find it substantially the same as the one we considered in our report, apart from some new provisions in the Protocols and Declarations which we think are disadvantageous to the United Kingdom and about which we have written to you. Whilst acknowledging the efforts of your department, we must equally say that the whole IGC process the Committee has found to be one of excessive secrecy and haste, with the UK being given only 48 hours' notice of the IGC Mandate in June. No English text of the draft treaty was made available until after the House went into recess and the Presidency is now pressing for a political agreement by the end of this week. I hope you will agree with the Committee that our statement is valid, that the process could not have been better designed to marginalise the role of national parliaments, which, of course, we are here to safeguard. You may wish to respond to that since you wished to respond to my comments on your letter.

David Miliband: Thank you very much, Chairman. I am pleased to be here to be able to go through all of your questions and to try to provide facts that explain every issue that you raise. The role of this Committee is very important in ensuring that there is proper scrutiny but also publicity for European policy, and I think this is an important chance to put on the record the facts that lie behind and that lie in the draft treaty in front of us. You made reference to the letter which I have sent, which includes material that was finally agreed yesterday, including the very important point which I assume you will want to return to because you have raised it both in written and in oral briefings, which is the question of the rights of national parliaments under the Reform Treaty and whether or not there are obligations on national parliaments as a result of the Reform Treaty. The assurances that I received on that issue only came yesterday; so that explains why the document was written today. I hope you will agree that it would have been far less satisfactory for me to have sent you this letter after this hearing, because you would have been well within your rights to say that you wanted to ask me questions about this document, but the timing is explained by the fact

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

that we had a General Affairs Council in Luxembourg yesterday, which I am happy to brief you on, and it was important to include this important question of the rights and obligations, or alleged obligations, on national parliaments. There are no alleged obligations. In respect of the conduct or the development of the IGC, I think your points are very well made in that regard. We discussed this with the Foreign Affairs Select Committee last week, or I discussed it with them. The point is made that, in the course of the first six months of last year, bilateral discussions were held between the then Presidency of the German Government and all 27 Member States and a draft mandate was only produced on 19 June before the European Council. I think it is wholly reasonable for you to say that that is a compressed timetable—I think last week I described it as a distinctive approach to the particularly difficult hand that had been dealt to the German Presidency at the beginning of 2007—but I do understand the motivation behind your question in that respect, although I hope you will agree that at every stage subsequently the Government has provided all the information and all responses in as due speed as possible. Let me also address the question of whether or not the draft legal text that was put out on 5 October is, in your words, a redraft, because we do not believe it is a redraft. It is the first time a full, legal text with all the aspects of the mandate has been published, and it was published in English: a full legal text with all of our protocols, which have legal status the same as articles, for the first time on 5 October. It is an important document, not because it is a redraft but because it is the first time we have had that comprehensive layout of the material. A final word about the Protocols themselves. We do not see them as footnotes to this Treaty, the Protocols have legal force, and I am happy to go through the details of that, but from our point of view and from the point of view of the facts of the case they are not footnotes, they are very important to the text; and so, in respect of justice and home affairs, about which you are very interested, rightly, the detailed explanation of how in respect of so-called transitional measures, amendment to JHA measures and so-called Shengen building measures the details of how that will work are going to be very important to showing that the red lines that we have talked about have indeed been secured and, as my letter explains in a lot of detail—thank you for saying that—the red lines have been protected, so the protocols are very important in that respect as well.

Q104 Chairman: These are the very issues that we will explore with you and probably consider. We did receive all of the Protocols and the Declarations as well as the new Treaty and the reference was to the Treaty. In terms of the Treaty it is true that the Protocols were different. We would take up with you whether these were advantageous or disadvantageous. Just to let you expand a little, could you possibly give the Committee an overview of how the meeting with foreign affairs ministers went. One point of concern in consulting the agenda,

there was the impression that the draft Treaty had only been given 45 minutes on the agenda. You could maybe expand just how much time was taken up with the issues. We will come to the specific issues of the Protocols later.

David Miliband: Certainly. One point of information: what was agreed in June by the 27 heads of government was a mandate for the intergovernmental conference. It was a uniquely detailed mandate. No intergovernmental conference has ever had, before it started, the sort of detailed mandate that was agreed in June, but that was not a legal text, and the process that has been going on since June in the legal group has been to turn a political mandate into a legal text, and it is important to have that on the record. Thank you for the opportunity to talk about yesterday's General Affairs Council. In respect of the time, it was the first item on the agenda, the IGC. That means that everyone could have talked for as long as they liked and, indeed, I think about 20 countries intervened on the debate. I would say it probably took about 50 or 55 minutes, but I would need to check that. So there was no limit on the amount of time, and the agenda timings there are, I think it would be right to say, indicative. If there was more to say, more would have been said. A wide range of issues were raised by different Member States, some of them within the mandate, others not within the mandate and as to others there was dispute as to whether or not they were in the mandate. The issues that I raised were obviously, first of all, in respect of the red lines, which are an important part of the Government's negotiating position on the Treaty, and I obviously talked about the importance of respecting the detailed mandate in turning the mandate into legal text. I also raised, and I think this is something you personally but also your Committee and the Foreign Affairs Select Committee and, to be fair, the Government have raised consistently, the far from arcane debate about whether the phrase that "parliaments shall contribute to the effective functioning of the European Union" is in fact an opportunity, a right, for parliaments or an obligation placed on parliaments. I do not want to put words in your mouth, but it has been your position all the way through and it has been the Government's position that the only people who should set the rule for Parliament is Parliament. In the question of national parliaments' role in the new Treaty, which is something we might come on to talk about later, the so-called yellow cards and orange cards that allow national parliaments to block measures, it was very, very important for me to make clear that it was completely unacceptable for any suggestion to remain that national parliaments were being told what to do. I was happy to be able to report, or to say to the General Affairs Committee that the legal experts group had achieved a consensus that there should be no obligations placed on national parliaments, there should only be rights for national parliaments which those national parliaments would then determine how to exercise, and I requested that the English legal text reflect that fact that there should be no obligation on national

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

parliaments. There was no dissent from that and, in his summing-up, the President of the Council, the Chairman of the meeting, confirmed that the English legal text would, indeed, be amended, as requested, to put beyond any doubt that the reference to parliaments contributing to the work of the Union is an opportunity for parliaments to take up as they will and certainly no obligation on them. We are awaiting the final legal version of how that is to be achieved, but, as I say, the President summed up the meeting in that regard and I take it, and we take it, that there is a commitment to achieve that. I am sure that will be brought forward and I think that is something that will be welcomed on all sides of the House.

Q105 Chairman: We may come back to that specific detail later. Can I ask you what prospects you think there are for agreement at the European Council at the end of this week?

David Miliband: Agreement on the IGC text?

Q106 Chairman: On the Reform Treaty Protocols and Declarations as you have seen?

David Miliband: I was asked this on the radio this morning. There seemed to be an awful lot of debate yesterday about the position of Austrian medical students. I do not quite understand how that has got into the debate about the Reform Treaty, but it is something to do with allocation of medical places in Austria. That aside, there is an important issue in respect of Poland and some questions about voting rights and there is obviously a Polish general election in five days' time, but I think there are reasonable prospects of securing agreement and, certainly in the areas that we are concerned about, there was no challenge to the position. I guess all of us have been around long enough never to say that a meeting is going to end on time, but I think there are reasonable prospects of that.

Q107 Jim Dobbin: Welcome, Secretary of State. The Chairman and myself and Mr Robertson were in Lisbon yesterday at a COSAC meeting and we were gauging the feelings of the other 26 countries. It was an interesting meeting we were at, but on the Charter of the UK's Protocol, in paragraph 58 of our report, we suggested an example of a case relating to the Working Time Directive where, notwithstanding the Charter, our interpretive judgment of the European Court of Justice, based on the Charter itself, would seem to have the potential to affect UK law. Do you wish to make a comment on that example?

David Miliband: I am happy to make a comment on the situation, which is that we have a protocol which makes it absolutely clear that in no way can the Charter be used to "extend the ability of the Court of Justice of the European Union or any court or tribunal to find that the laws, regulations or administrative provisions, practices or actions are inconsistent with the fundamental rights, freedoms and principles". So, we have a blanket ordinance there that the Charter shall not extend the reach of European courts into British law. How is that possible? The first point is that the Charter, of

course, only records existing rights; it does not create any new rights: it is a record of existing rights under domestic and international law. Secondly, the Protocol is important because it has legal status as much as an Article, and the Protocol is absolutely clear that there can be no extended reach before the ECJ or anyone else, and that is why, in the case of working time or anything else, any judgment of the court cannot have reach into changing the laws that apply in this country. So, it is a generic answer and it goes to the heart of what the Charter is about. As I say, the Charter records existing rights but there is a double-lock, because the Protocol records that the Charter shall not be used to extend the reach of the Court of Justice.

Q108 Chairman: You have not quite answered the question. It is correct that the Charter will be a legally binding document?

David Miliband: Yes.

Q109 Chairman: And that it is possible that a case could be taken to the European Court of Justice on that matter?

David Miliband: I will bring in the lawyers here, but only on the basis of rights that are in domestic legislation. For example, in respect of maternity leave, to take that as an example, we have domestic laws in that respect. People can challenge those laws, but the Charter cannot be used to extend the reach of any court, and that is why it is important, this point I made (and I speak here as non lawyer, so apologies for this), the Charter records rights rather than creating them, and that is critical in this respect because its records national and international rights. I do not know if Mike Thomas wants to have another shot at that, but that is the reason.

Q110 Chairman: I think we have recorded a dialogue with Mr Thomas before in our evidence session with the Minister for Europe when I thought we had almost reached agreement with him that our view is likely to be as right as any other lawyer's view.

Mr Thomas: If I gave that impression, Chairman, I am afraid it was a wrong one. If you are content, I can explain why I think we differ, but it will require a little bit of explanation. I will take the example given in your report about the Working Time Directive, if I may, since that is one that did come up last time. What one must do in seeing what the effects of the Charter will be in relation to any example is a process of analysis of the various parts of what I think last time I called the package of measures to do with the Charter; that is to say one has to look at Article 6 of the Treaty on the European Union as to be revised in the proposed Treaty. One needs to look at the specific Charter provision that is in issue, one needs to look at the so-called horizontal articles of the Charter, in particular Articles 51 and 52, one needs to look at the explanations which run alongside the Charter and one needs to look at the Protocol; so one needs to look at the entire package in relation to the situation under review. In the report you have taken the example of a provision in the Working Time

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Directive, which relates to weekly hours of work and the possibility that exists under the Directive for Member States to provide for waivers by certain classes of employee, and you considered whether the effects of the Charter might be to alter the interpretation of that provision in the future. It seems to me the answer to that question is that there would not be any alteration, and I will take you through the elements in the package which lead me to that conclusion. I need not say anything much, I think, about Article 6 of the Treaty, which introduces the Charter and indicates that the Union will recognise the rights and principles set out in the Charter, but it is worth noting, I think, in passing that the Treaty article itself is clear that the Charter cannot extend EU competences and that it is to be interpreted in accordance with the horizontal articles and the explanations. In relation to working time---. Perhaps just before getting on to the Charter article, in Articles 51 and 52 there are certain important provisions about the interpretation of the Charter. One is clearly (and that is why we are discussing this in relation to the Working Time Directive) that it applies to Member States, but only when implementing EU law—not when they are doing their own thing domestically in other words—also that the Charter does not modify powers in the Treaty and, finally, that rights that are provided for in the Treaty are exercised in accordance with what the treaties say. It is a point about sourcing of rights that are recorded in the Charter. In relation to the Working Time Directive, the relevant article of the Charter is Article 31, paragraph two, “Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and an annual period of paid leave.” That is the basic right. One needs to read this in accordance with the relevant explanation, which is (and I can read it because it is very short), “Paragraph two”, which I have just read out, “of the Article is based on Directive 93/104 concerning certain aspects of the organisation of working time”—that is the very directive that is in issue—“Article 2 of the European Social Charter, and point eight of the Community Charter on the rights of workers.” I think one could perhaps make the point that it has all got a bit circular in that one is referred by the explanations in the very directive that you are interested in but I think the circularity indicates why the wording of the Directive is consistent with the Charter. It is one of the very sources that the Charter drafters had in mind. So, I see no prospect that the European Court would alter its interpretation of the Directive, even were it referred to the Charter as a source of that interpretation.

Chairman: Very good. Mr Cash.

Mr Cash: Chairman, after what I think I might reasonably describe as a bit of legal gobbledegook, it really does worry me—

Chairman: It is very clear.

Q111 Mr Cash: ---that this issue, which is fundamentally about the question of whether or not the Charter is going to be enforceable, including the right to strike, for example in this country, by our

judges. This morning I understand that a spokesman from the European Legal Service has said that the Charter is a clearly binding text on both the European institutions and the Member States and added that the legal effect of the UK Protocol on the Charter has still to be sorted out, and added that the as yet unknown impact of this Protocol can only be assessed in the light of future decisions taken by the national judges in England, Wales, Northern Ireland and Scotland. Against that background, which is really at the heart of this issue, the question is (as I mentioned in the previous session with you and with Mr Murphy) in relation to the Merchant Shipping Act, which I have got here, which was struck down by the national judges on the grounds that it went beyond European requirements, European obligations. Are we not, in fact, going to be in exactly the same position with respect to this Charter, which is that the judges, under sections two and three of the European Communities Act, in line with all the case law that has been established, the stuff I mentioned last week—*Costa* and *Scimitar*, all that stuff—and we find ourselves in the position where, despite what you put in by way of a protocol, there will still be a requirement for the national judges and an opportunity for them to, effectively, give effect to this Charter as part of English law? Perhaps Mr Thomas would answer, as I suspect Mr Miliband has already said he is not a lawyer. I would be interested to hear what Mr Thomas has to say about that.

Mr Thomas: Well, it is true that the European Court of Justice will go on doing what it has always done.

Q112 Mr Cash: Exactly.

Mr Thomas: It is tasked by the treaties to interpret and enforce the law, which is no more than you would expect of a court. The court is a creature of the treaties and that is the task that is set for it. It will go on doing that. You mentioned, Mr Cash, the question of the Charter’s bindingness. As the Secretary of State has said, the Charter will be binding. Article 6 of the Treaty on the European Union effectively says so. The question is, I think, will it make any difference? There, as I did in the previous exercise, one needs to look at the content—one cannot do this sort of thing in the abstract—and, as to content, the rights and principles in the Charter exist already and bind certainly Member States. They will bind the Union too; some of them already do. So, as to content, I think the ability of the European Court to interpret laws is effectively unchanged.

Q113 Mr Cash: But they have been doing this for years, and we have found, on a number of occasions, that the effect of the European Court’s decisions, the effect of sections two and three of the European Communities Act and in the case, for example, of *Factortame*, that the Merchant Shipping Act was struck down by our judges and, just as on the same principles they strike down an enactment, so they can just as well apply a provision, notwithstanding your attempts to achieve a different objective. So, could you press for the Protocol of the Charter to be

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

amended, as we recommended, so that it takes effect notwithstanding the treaties, the Union law generally, and also to put a provision in the Bill which says, notwithstanding the European Communities Act 1972, which would take the matter, as in line with Lord Denning's judgments in *McCarthy v Smith*, Lord Diplock in *Garland*, and all these other cases, so that we could get it beyond any doubt whatsoever that this Charter does not have application in our law and that our national judges would not be able to apply it? Why cannot you put a provision of that kind in the Protocol and in the Bill?

Mr Thomas: To do so would not be consistent with the Government's policy on the Charter.

Q114 Mr Cash: That is a different question.

Mr Thomas: But the point is that I am explaining in the context of government policy. You cannot ask me to make up another policy, since I am a servant of the Government.

Q115 Mr Cash: Let the Minister answer.

David Miliband: I am happy to answer it, which is that the Government's policy is that the Charter should record existing rights, and no-one has been able to point to a single right in the Charter that is new, it is not. It records; it does not create.

Q116 Mr Cash: The right to strike would be one.

David Miliband: Hang on, let us address that. I will address it now. Under UK law strike is given immunity from legal action under certain restrictions. Some people think there should be greater restrictions, other people think there should be fewer restrictions, but we have clear rules under which strikes are allowed to take place. It is quite wrong to suggest that somehow there are no circumstances in which strikes happen in the UK and plenty of circumstances in which they happen in Europe. There are circumscribed circumstances in which strikes are permitted in the UK and on which trade unions are given immunity against action against them in that respect. So, the Charter does not create new rights, point one. Secondly, it is the Government's policy that the Charter should not extend the ability of the European Court of Justice to reach into and change UK law. That is established in Article 1 of the Protocol, which has legally binding force and which is simple and clear, and I do not believe that either UK judges or European judges are going to fail to understand the words of one or two syllables that are expressed here very---

Q117 Mr Clappison: You will be surprised what judges misunderstand.

David Miliband: Expressed here in words of one or two syllables is that very, very clear principle.

Q118 Mr Cash: So, you will give the judges directions, will you?

David Miliband: No, it is for Parliament to give the judges directions by passing---

Q119 Mr Cash: No, sections two and three already give them the directions. The question I am raising is whether or not you are prepared to say that the judges will not be able to carry that law through?

David Miliband: I am saying it is the job of Parliament to enact---

Q120 Mr Cash: Do it properly then.

David Miliband: It is the job of Parliament to enact the law. Point one—I defy anyone to show that this has been breached—the Charter records existing rights; it does not create a single new right. Some people would like it to create new rights, but it does not. Point two, the Charter, in words of one or two syllables, makes absolutely clear that there is no extension of the reach of the ECJ or of any other court. That is the Government's policy. That policy, with the evidence that you have just heard from Mr Thomas, is absolutely clear, and the circularity of the argument comes from the fact that we have these two points: (1) every single bit of the Charter is sourced back to existing rights and (2) there is no right for the ECJ or anyone else to extend their reach.

Chairman: Mr Clappison, do you want to come back?

Q121 Mr Clappison: You accept that a party can take a case to the European Court of Justice on the basis of the Charter on Fundamental Rights?

David Miliband: Only on the basis of the rights that they already have.

Q122 Mr Clappison: Yes or no?

David Miliband: They have a right to claim that their rights are being violated in maternity, or working time, or anywhere else. Those rights are also recorded in the Charter. In the judgment that is used there is no ability for the court to extend its reach. A better challenge, or a supposedly more difficult challenge, would be not of a British person using the Charter but the example of a foreign case, in a country where there is no protocol, in which the Charter does not have this limit. So the question that has been put in other sessions is: if there is a judgment in a foreign case which does use the Charter and does do certain things, could that affect rights under British law? To which the answer is no.

Q123 Mr Clappison: But a case can be taken to the European Court of Justice. Yes?

David Miliband: If rights have been breached under British or international law already, then anyone, you or I, can say that our rights have been breached.

Q124 Mr Hands: So a case could be taken to the ECJ but the ECJ's ruling could have no impact, as a result of that case, on UK domestic policy?

David Miliband: You can say that there can be no impact. There can be no extension is the key thing. The rights that exist are not diminished by the Charter, but they are not extended by the Charter.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Q125 Mr Cash: I think, therefore, you are saying they will not be extended, but the question is: what will the impact be with respect to the judgment of the judges in the English courts, in the UK courts?

David Miliband: They are not extended. You say, “They are not extended. Oh well, that is meaningless” when actually “they are not extended” is quite a big thing.

Q126 Chairman: Can I ask a naive question? I am not a lawyer either, but it does seem to me that there is confusion between policy and law. If someone believes that the policy applied by the Government is not the correct extension of someone’s right under the law, in other words you are not giving someone something that they think they should have a right to under the law because of our Government policy, if you go to the ECJ and, if they are correct, the Government would have to apply the law correctly and thereby change their policy.

David Miliband: Well, only if---. If we have got a law saying that people have got certain maternity rights and they are not being given those rights, then their rights are being breached, but that exists now.

Q127 Chairman: So their policy is wrong. We cannot change our application of policy.

David Miliband: We can change our domestic laws on maternity rights perfectly easily. The proposal is different, but it is for the parties to extend or restrict rights.

Q128 Mr Cash: The European Court can tell us to get stuffed.

David Miliband: No, it cannot tell you to do anything that extends their reach by using the Charter.

Q129 Chairman: I am sorry, I think Mr Thomas might have been going to agree with me there. I have moved on to the question of policy. If we are not interpreting the law by the policies we apply and someone goes to the European Court of Justice, they could have those policies changed to make sure the law is applied correctly under this Charter.

Mr Thomas: What I was going to interject actually, Chairman, was the difficulties of conducting this debate in the abstract, and the first question you have to ask is: is what the UK is doing implementing Union law? For all I know, in the example given by the Secretary of State for maternity leave, it has absolutely nothing to do with community law and therefore the Charter is not in issue. The Charter becomes in issue when there is a question of implementing Union law.

Q130 Chairman: It is my understanding, and I admit that I may be naively simplistic in this, that when a directive is passed, part of the duty of the European Court of Justice is to ensure that directive is applied uniformly across Europe. Is that correct.

David Miliband: That each country implements the directive.

Q131 Chairman: And if someone wishes to challenge the way our Government has implemented that directive by reference to the Charter and a specific directive, it does seem to me that there is a challengeable case. It may be that we are uniformly applying it, that we are applying it correctly, but it does seem to me that that directive—

David Miliband: Let me explain to you in legal terms why it is not the Charter that they will be appealing to.

Mr Thomas: People when they are litigating will do what they want to do. People will mention the Charter and, it is a binding document, they would be right to do so. As to content, the Charter is sourced in the existing rights and principles, so the content has not grown. I think that is what we have been trying to say in various ways. So, it is perfectly right that litigants may want to rely on the Charter and say, “Dear Court, have a look at Article such and such because we think it is relevant to our case”, and the Court and no doubt the other parties will then do the sort of exercise that I did, looking at the entire package and seeing what the effect is, but since the content of the rights, the concrete content, is based on other sources which currently exist—

Q132 Mr Cash: You mean the ECHR.

Mr Thomas: All over the place, the ECHR for some of the rights.

Q133 Mr Cash: But they do not overlap exactly.

Mr Thomas: Then those will be the rights which, in substance, are protected; so it is the same rights and principles as exist now.

Q134 Mr Clappison: I think you are coming on to a point which was actually very important in our report. I think you accepted that you agree that the Charter of Fundamental Rights is justiciable in this country, subject to what you have said about the Protocol’s effect of reserving it to existing rights.

David Miliband: Just to be clear, justiciability is a word that is kicked around. We can get into that but, as I understand it from the discussions I have had with the legal people before, justiciability is too loose a term. There are rights recorded in the Charter and people can claim their rights in that respect. That is what we have said.

Q135 Mr Clappison: I understood the Oxford Dictionary said that justiciability meant “liable to trial”, and I think in the answer you gave me a moment ago you accepted that a party could use the Fundamental Rights Charter to take a case to trial at the ECJ.

David Miliband: Let us just have it recorded that the word justiciability that you used there is disputed.

Q136 Mr Clappison: You can dispute the meaning of justiciability, but a party can take a case to the European Court of Justice on this basis which we have discussed. Who decides, who interprets whether or not the right which has been prayed in aid, which has been litigated over, is an existing right or not? Who decides?

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Mr Thomas: The Treaty has decided. The Charter says as much.

Q137 Mr Clappison: Who decides when it gets to the European Court of Justice whether it is an existing right or not?

Mr Thomas: I think you probably know the answer to that question. Who decides when something goes to court? It is the court.

Q138 Mr Clappison: When the court is making that decision, can it take into account decisions which have been reached in other cases involving other countries where the whole Charter of Fundamental Rights applies?

Mr Thomas: The whole Charter of Fundamental Rights applies in all the Member States, but the answer is yes.

Mr Clappison: Yes, you can. Thank you.

Q139 Mr Steen: Just a quick question. I am a lawyer, unlike the other two.

David Miliband: That disqualifies you from asking a question!

Q140 Mr Steen: I want to get a matter of clarification. Would the debate we are having now have been changed in any way if the Constitution existed rather than the Treaty? Are we dealing with an identical situation?

David Miliband: We are not dealing with an identical situation for three reasons, one of which is to do with the content of the proposed treaty in front of us. Leave aside whether the previous one was called the Constitutional Treaty and this one is called the Reform Treaty, the content of the treaty in front of us is different in part for the discussions that we are having. The second aspect: the Reform Treaty is different in legal precedence because the Constitutional Treaty, the proposed Constitutional Treaty, the now defunct, dead as a parrot Constitutional Treaty—

Q141 Mr Cash: Which is actually the equivalent to this one?

David Miliband: Substantially equivalent, in an amendment that was defeated in this Committee, an amendment that you put but that was defeated in this Committee, according to the—

Q142 Mr Steen: That is a party political point, Secretary of State.

David Miliband: I think yours was a party political point actually. It is different in terms of legal precedence because the Constitutional Treaty was legally unprecedented because it rolled together all preceding treaties of the European Community and treaties of the European Union into a single, new re-founding document (with the addition of the Euratom Treaty). The Reform Treaty in front of us is not legally unprecedented, it is legally preceded in many ways—single European Act, Maastricht, et cetera—because it amends the existing law on constitutions. The third aspect of difference, which is important for all these discussions, is the

consequences of the Constitutional Treaty versus the consequences of the Reform Treaty, and these are political consequences, I think. The “period of reflection” that has happened since the defeat of the referenda in France and Holland has meant that the old debate which was still going around at the time of the Constitutional Treaty, which is whether Europe would continue to be a coalition of nation states or whether it was on the road to a super-state, is ended by the Reform Treaty, because the current voting and other measures will not come in until the middle of the next decade (2017), and the reason why there are some people who are so disappointed by this Reform Treaty is precisely because it does end that debate in favour of not just the British vision of the future of the EU but other countries as well, and I think that is relevant. I am sorry to give a slightly longer answer, but those three aspects of the difference between the Reform Treaty and the Constitutional Treaty are, I think, important.

Mr Steen: That is very helpful.

Chairman: Thank you for putting that on the record in this Committee. You have put it on the record on many other occasions. I think there is actually a nearer agreement than you think. Clearly, on the question of interpretation in the courts lawyers will differ about until the cases are taken but we do believe that it will affect the way people approach directives. You always resist saying so. You do not think we needed the extra safeguard of a clause saying, notwithstanding the former treaties and agreements, we thought it would have been helpful to have those. I think we should leave it there. Can we move to the justice and home affairs matters, Mr Hoyle?

Q143 Mr Hoyle: Thank you, Chairman. Secretary of State, the opt-in arrangements. Can I just bring those to your attention? You have seen the comments in our reports on the opt-in for justice on the third pillar? Will you confirm if it is the Government’s view that the UK may politically opt out having once opted in?

David Miliband: The UK has a right to choose whether or not to opt into every single measure under justice and home affairs. To take a specific example, you say, if we have already opted in to a justice and home affairs measure, which currently is under either the third pillar or—

Q144 Mr Hoyle: Do we have the right to opt out?

David Miliband: I will address that. Will we have the right to opt out of a justice and home affairs measure under the third pillar or under the first pillar at the moment? The answer is that, because the third pillar measures are going to be turned into measures for the new treaty on the functioning of the Union, that gives us the opportunity to exercise an opt-in and an opt-out on those measures.

Q145 Mr Hoyle: The issue of red lines?

David Miliband: The red-line is about the right to choose. The UK has a right to choose. For every single JHA measure, the UK Government has a right to choose whether or not to opt into every

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

single measure, both those existing measures which are transposed into the Treaty on the Functioning of the Union and those that are amended and those that are the so-called Shengen building measures, and I have tried to set that out in my letter.

Q146 Mr Hoyle: I think we are getting to the key point, are we not, because what people would argue is that the red lines are actually water-based, that they are not permanent. The fact is that after five years we have to make a decision, am I not right to say? We either opt in completely or we completely opt out?

David Miliband: I am sorry, Lindsay, that may have been a fault of my letter. That is just not right. Let me rehearse that very clearly. The five-year question that you raise and that the Chairman of the Committee raised in his letter to me, your allegation—

Q147 Chairman: We will come back to that. I am not sure it is related to—

David Miliband: He raised the five years.

Q148 Mr Hoyle: I raised it because what we are talking about is the guarantees, are we not?

David Miliband: The guarantees are absolute, both for those measures that are transposed from the third justice and home affairs pillar at the moment to the new Treaty on the Functioning of the Union within five years. At the end of five years, if there are any remaining measures waiting to be transposed, we will have the opportunity to exercise a block opt-out on the remaining measures and then, as they are transposed, one by one, case by case, we can choose whether or not to opt in, or not, to each measure. So, for every single measure on justice and home affairs, there are 70 or 80, I think, at the moment, in existence, but the new justice and home affairs area is extended. We have a right to choose whether or not to opt in for each measure, whether it be a transitional measure, whether it be an amending measure or whether it be a so-called Shengen building measure.

Q149 Chairman: Can we just finish the question. The accusation made in some of the discussions in the European Parliament, for example, is that the ability of the UK to opt in could be used by the UK to become involved in negotiations, and to weaken the measure in the negotiations, and then decide it was still too strong for us and we would opt out at the end but they would be left with a weakened measure. If we decided we would like to opt into something because we think we might, through co-operation, advance the UK advantage, which I presume we would always do, and then in the negotiations we find that the opt-in would draw us further into an agreement and into procedures we did not like, could we then say, “No, we said we would opt in but we do not like what you are offering us at the end. We are not going to sign up, we are going to opt out of that issue”? Once we start the process, is that a single-way ratchet, is it a single door going one way or is it a revolving door which we can come back out?

David Miliband: The so-called ratchet is a different and wrong allegation. Let us come to that separately, because that is about the Passerelle and how that works. What we face at the moment is: do you want to opt into a measure and then be privy to it, or do you want to hold your fire until the measure is completed and then decide whether or not you opt in? Once you opt in you have opted in. If you want to hold your cards close to your chest and wait to see, then you have not opted in.

Q150 Chairman: So when the negotiation starts as to how it will actually be proceeded with and what the process will be and what the commitments of the UK will be, you are stuck. You are telling us you would start to say, “We will opt into that”, and that is it, you are in regardless of how the final arrangement comes out?

David Miliband: It is not a question of being stuck. If you have doubts about whether or not you want to opt in, then you do not opt in, you wait to see how the measure comes out and, if you like it, you opt in and, if you do not like it, you do not opt in. That is the red-line. The red-line is that we have the right to choose on every justice and home affairs measure, whether existing or future, and that seems to me to be perfectly clear.

Q151 Chairman: So, someone else draws up the process and the results of it and you say, “I will take it”, or not?

David Miliband: If you do not join the club, you do not shape the rules for that particular measure.

Chairman: Fine. I see

Q152 Mr Hoyle: Just so we have got it right, we have the right to opt out—that is definitely there, there are no problems—but what we cannot do is start to enter into a negotiation and then, when we get part way through, we do not like it and then want to opt out?

David Miliband: Just for the avoidance of doubt, and I will get Kevan Norris to say something about this, this is not about the Reform Treaty: this exists now. I answered a question that you asked me about the Reform Treaty, which is whether or not those measures which we have opted into now, do we have the right to opt out when they are transposed---. Just let me finish. The question is: do we have the right to opt out from a measure that we have already opted into when it is transposed into the Treaty on the Functioning of the Union? I said, correctly, that we do have that right. However, under current systems and enduring systems, if you want to be part of the negotiations, you opt in; if you want to hold your position, if you want to hold back, you hold back and then decide at a later date.

Mr Norris: That is exactly right. We opt in to the negotiating process and then, obviously, we have to negotiate along with all the other Member States. So we have a three-month period from when the proposal is presented in which to decide whether to opt in. If we opt in, we opt into the negotiating process.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Q153 Mr Hoyle: That is the lock in?

Mr Norris: We are then bound like other Member States if it is then adopted. The only exception to that is, if we block it or form part of a blocking minority, then after a reasonable period other Member States can go ahead without us. So we cannot actually, contrary to what the European Parliament was suggesting, hold back the development of a measure.

Q154 Mr Hoyle: So we can allow the rest of Europe to go ahead and we have the right to remain outside.

Mr Norris: Generally. So, once we take a decision, we decide to opt in and then we are in the negotiating process and, as the Foreign Secretary was saying—

Q155 Chairman: During that one period you mentioned, is the process of opt-in and the condition of opt-in in any way open to be altered or is it a deal we are offered, we have three months to consider it and we go in on the terms we are offered at the beginning, or can we vary those terms by negotiation?

Mr Norris: We opt into the negotiating process, so having opted in we are in the same position as the other Member States.

Q156 Chairman: And after three months.

Mr Norris: We opt in during the three months period and, having opted in, we then sit round the negotiating table and negotiate along with the other Member States.

Q157 Chairman: And you are locked in unless you can block the measure at the end of the day?

David Miliband: If you have got doubts, you stay out and see what the final colour of the measure is.

Q158 Mr Hoyle: Do you have any?

David Miliband: There has been a recent measure, I cannot remember what it was, that came across my desk: should we go into it and declare our hand now or should we stay out? We decided to stay out and see how it turned out. Let us go back to basics. What the mandate said was that the UK would have the right to exercise the right to choose on all justice and home affairs issues. That is what we have done. Any government, whether this or a future government, if it has got doubts, does not opt in: once it is sure it thinks something is in the national interest, it opts in.

Q159 Mr Clappison: We seem to have got there. We have got to a point which we are very interested in as a committee and we have had correspondence about. This is not about matters in the future, this is about the existing matters which you helpfully referred us to. I think you said there are about 70 or 80 existing matters in the judicial and home affairs field, matters which we were party to but over which the European Court of Justice did not have jurisdiction—

David Miliband: Correct.

Q160 Mr Clappison: ---and the Commission did not have a role.

David Miliband: Exactly.

Q161 Mr Clappison: I would be grateful if your lawyers would correct me if I am wrong.

David Miliband: No, I can tell you, you are right so far.

Q162 Mr Clappison: So these are the matters which are now covered by Article 10 of Protocol 10 as regarding five-year opt-in period?

David Miliband: Yes, it is not a five-year opt-in period.

Q163 Mr Clappison: We will come to that in a minute.

David Miliband: It is a period of five years after which there is a new system.

Chairman: Mr Clappison, we are jumping ahead in our agenda. The Committee have other people who have indicated they wish to clarify some other points before we come to this.

Mr Clappison: We will come to it later.

Chairman: We will.

Mr Clappison: I thought we had got there any way?

Chairman: No, it leached into the question on our opt-in, opt-out process. I am going to call on Mr Robertson, who indicated he had a question he wished to ask.

Q164 Angus Robertson: Yes. Thank you, Chairman, and welcome to the Committee, Foreign Secretary. My apologies for being late; I had to attend Scottish Questions, which I am sure you can understand. Can I ask you a question about the role of Member State parliaments. We were told by the Minister for Europe on 2 October that the Government shared the Committee's concerns over the placing of a legal duty on Parliament to actively contribute to the good functioning of the Union and was determined that these would be met and overcome. President Barroso signalled—

David Miliband: Can I save you from further embarrassment. I think I addressed this before you arrived. The “shall/will” question I addressed right at the beginning. I am sorry; I could not let you dig yourself deeper into this.

Mr Cash: You have not given us the wording.

Chairman: I think it might be useful to explain the position that we have agreed because there are still some questions to be asked about the use of the word “shall”.

Q165 Mr Cash: We have not got the wording.

David Miliband: To save you from digging further—

Q166 Angus Robertson: I do not feel like I am digging.

David Miliband: Well, I promise you, you are. You will have been pleased to hear, no doubt, that the UK Government was negotiating on the UK's behalf in the General Affairs Council and elsewhere and I raised this issue of whether or not the new treaty would or should place any obligation on any national parliament, and I reported that it was the

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

view of the legal group of all the countries, it was the consensus of the legal group, that there should be no obligation on national parliaments and the Presidency summed-up the discussion of the IGC by saying that the legal text in English (because in Dutch apparently it is clearer) could be cleared up, amended, to make absolutely clear beyond anyone's doubt that there were no obligations for national parliaments, there were only rights for national parliaments. Bill Cash is right to say we have not yet seen it, but as soon as we have agreed it, you will see it and you will see that there is absolutely no question about it. What I said last week at the FAC was what we all believe is that parliaments shall be able to make a contribution to the functioning of the Union. We are all agreed about that. We are absolutely clear. There will be no obligation on national parliaments to do anything. It will be up to them what they do.

Q167 Angus Robertson: Just to finish the point, so when will we actually see the formal wording?

David Miliband: The Presidency summed it up at the end of the session yesterday morning; they have not given me a timeline, but it is a commitment, it was in the Presidency Conclusions, and we will get a watertight legal change to the Treaty.

Q168 Mr Hands: I am just surprised that you do not have a word in mind. You mentioned just a moment ago "shall be able" and I have heard other people use the word "may". What is the French word that we are talking about here?

David Miliband: I do not know, what is the French word we are talking about?

Mr Cash: Contributor.

Mr Clappison: *Devoir*.

Q169 Mr Hands: Chairman, I do want to come in on this point because I am surprised that you are not able to tell us what the UK suggestion is as to what the translation would be.

David Miliband: What I would say to you is that the first priority was to get agreement that the text had to be changed. The second priority was to make sure there was agreement that the change should ensure, absolutely beyond doubt there, were no obligations on the parliaments. Last week at the FAC I gave a non-lawyer's explanation which is that "shall" could be "shall be able to", but we will wait and see what they suggest. We are absolutely clear that there will be no room for doubt about the—

Q170 Mr Hands: Should we not be making the suggestion rather than waiting for them to?

David Miliband: Fire away, make a suggestion.

Q171 Chairman: Should you not be making the suggestion?

David Miliband: I made the suggestion last week. I said last week that what we want to encapsulate is the idea that parliaments "shall be able to" make a contribution, but I am not a lawyer so I am not going to say that is the right way of doing it, I want to make sure—

Q172 Angus Robertson: But you are the Foreign Secretary, what wording was proposed by the UK?

David Miliband: We have not proposed the wording yet. We have got agreement—

Q173 Mr Hands: Could we ask you to propose "shall be able"?

David Miliband: Only if we think "shall be able" is the most watertight version. If there is a better version then we will put in a better version, and I am waiting for legal advice to make sure that we have got the best possible version of it.

Q174 Mr Steen: Can I give you some legal advice that the word "may" might be right.

David Miliband: The word "may" might be right. It might even be sensible to take out the word "shall" because then—

Mr Cash: --- Or even to reject the Treaty as a whole! How about that?

Q175 Chairman: You could not miss that one, Mr Cash!

David Miliband: When that was proposed it was defeated even in your own Committee, so let us not go there. It may even be sensible to take out the word "shall". Those are all perfectly sensible suggestions. I had an exchange with Sir John Stanley who said he thought the issue of constitutional magnitude in the proposed Treaty related to this question of "shall" and whether or not there was an obligation on national parliaments. I assured him that it was my absolute determination to ensure there were no obligations on national parliaments, and I will come back with wording that is completely watertight in this area.

Q176 Chairman: Secretary of State, I think this started on 2 June with promises for change. First we had just an interpretation of the French. Then we were told by other people, French linguists in fact, that the French wording did in fact compel in some way and was very well translated by the word "shall".

David Miliband: You are never happy!

Q177 Chairman: We have waited for a long time for a better definition by the Government and it would have been useful—

David Miliband: We have never had a Presidency—

Q178 Chairman: If you will let me finish --- it would have been useful at this time, four or five months later, if we had an indication by the Government that they had actually put their foot down on something and said, "We want this wording because it satisfies our legal experts." It would have been very helpful.

David Miliband: We have put foot our down absolutely clearly that there shall be no obligations on the UK or any other parliament. For the first time, not four months ago but 24 hours ago, it was in the Presidency Conclusions that this was not just a conclusion of legal experts, it was the shared determination of all members of the European

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Union in the Conclusion of the Presidency document. You will see that the final Treaty text, which we will debate in Parliament at great length, will be absolutely clear about this. It is not a question of putting your foot down; it is a question of getting the right result, and we have got the right result.

Q179 Chairman: Can I ask that our legal experts go through the document because there are a number of uses of the word “shall” not just in 8c but also, I note, in 63, and make sure that they are taken out wherever they exist because we will not be compelled as a Parliament?

David Miliband: The point is that obligations shall not be put on parliaments, and that is absolutely clear.

Q180 Mr Cash: You mean, despite the European Communities Act which actually imposes the obligation to accept all European law? That is why the argument is circular, Mr Miliband.

David Miliband: No, it is not because the rights that are extended to national parliaments have never existed before. Under this reform Treaty, stronger than the Constitutional Treaty, this Parliament has the right to contribute to the governance of the European Union. It has never had that before.

Q181 Mr Hands: That is an absurd argument, Foreign Secretary, that we have never before had the right as a Parliament to contribute to the governance of the European Union. That is what you have just said. Of course we have had the right to do that. As an elected UK Parliament, of course we have had the right to contribute to the governing of the EU.

David Miliband: Only through Treaty change. In the future, measures that have previously been adopted only by governments will now be open for national parliaments to have a say. I would have thought you would actually recognise that is a good thing, not a bad thing, we agree on that.

Q182 Mr Cash: We were there before 1972.

David Miliband: You were indeed there before 1972.

Q183 Chairman: We have to deal with the world as it is at the moment. I understand people wish to change it but we are talking about the world as it is at the moment. Can we move on to the new provisions affecting the right to opt in, which we are going to come to in this series of Protocols. If we refer you to the new provision which appeared for the first time on 5 October, it was the first time we had ever seen a text relating to the UK opt-in and the ECJ jurisdiction over police and judicial co-operation in criminal matters. You have said in your letter once again that somehow the IGC Mandate was adhered to. How did it come about that these important disadvantageous provisions, these new Protocols which we have in the new Articles in the Protocols, were included as late as 3 October? We were told that for example Article 10 was added on 3 October.

David Miliband: I am sorry, I do not understand—

Q184 Chairman: It was not mentioned in the IGC Mandate which is a Mandate we were told at one time by your colleague, the Minister for Europe, was not amendable, but these seem to be serious amendments.

David Miliband: I have got the IGC Mandate here so let me just read it out for you: “The scope of the Protocol on the position of the UK and Ireland will be extended so as to include, in relation to the UK, and on the same terms, the chapters on judicial co-operation in criminal matters and on police co-operation. It may also address the application of the Protocol in relation to Schengen building measures and amendments to existing measures. This extension will take account of the UK’s position under the previously existing Union *acquis* in these areas.” So the Mandate was absolutely clear that our right to opt in would be extended.

Q185 Chairman: On the same terms?

David Miliband: On the same terms.

Q186 Chairman: But they are not on the same terms.

David Miliband: I am sorry, if anything they are stronger.

Chairman: They are not on the same terms.

Q187 Mr Clappison: Can I take you through them Chairman. I think we have arrived at the argument that we had arrived at a few moments ago. This is to do with Article 10. As you have helpfully said, I think the original Mandate was that things would continue as they were on the existing measures and that we would have the right to opt in as we had previously. I think we are in agreement on that. If I am right about this, I think it is Article 9, which was in the original Treaty before October, which governed these provisions. I will look to your legal advisers—correct me if I am wrong—earlier in the summer these matters were governed by Article 9 of Protocol 10 which has been superseded by Article 10 of Protocol 10, which is the one which I would like to ask you about, if I may.

David Miliband: Shall we have a look at the legal position?

Q188 Mr Clappison: Put me right if I am wrong.

Mr Norris: Article 9 of Protocol 10 provides that the legal effects of acts of the institutions, so that would cover the legal effects of existing third pillar measures “shall be preserved and they shall remain the same until those Acts are repealed, annulled or amended.” So what that Article is concerned with is to say, for example, where you have got a third pillar measure which is provided not to have direct effect as is currently provided for, that will remain the position in relation to that third pillar measure until that measure is either replaced or amended.

Q189 Mr Clappison: That is good; I am in agreement with you on that.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Mr Norris: That clearly stays there. Article 10 is actually looking at something slightly different and that is to do with the powers of the institutions, so I think they are dealing with two separate things.

Q190 Mr Clappison: There I am going to have to disagree with you because I would say that the first of those covers the second. It is important in substance if I could put this to you, Foreign Secretary, because Article 10, which is the one which has just appeared, as your adviser rightly said, deals with the powers of the institutions, and at the moment the European Court of Justice and the Commission do not have jurisdiction over the United Kingdom in third pillar matters. These are matters such as the European Arrest Warrant and recognition of foreign criminal judgments. It may have that jurisdiction over other countries but it does not have that jurisdiction over the United Kingdom. Have you got a copy of Article 10 there because it would be very helpful if you could have a look at it? Article 10 covers these existing measures, that is made clear in it. Its effect is that four years and six months after the coming into effect of the Treaty, the United Kingdom may notify the Council that it does not accept the power of the European Court of Justice or the Commission over existing measures. If the United Kingdom does not give that notification they will apply to us so that the institutions, the European Court of Justice and the Commission, will have those powers over us. That is correct, is it not?

David Miliband: Right.

Q191 Mr Clappison: You have not mentioned in your correspondence so far—correct me if I am wrong—or to the Committee today what happens to us if we do give that notification.

David Miliband: Yes I have, honestly James, I have.

Q192 Mr Clappison: Let me just take you through it. All right, I may have missed it. If we do give them that notification that we want continue and we are not going to opt in to the European Court of Justice and Commission to have jurisdiction over us, we lose the benefit of the whole of the measure concerned. Tell me if I am wrong because I think it is quite clear here—if we give that notification that we are not going to opt in, we lose the benefit of all the measures concerned; is that right?

David Miliband: Let me answer it.

Q193 Mr Clappison: Is that right; yes or no?

David Miliband: If you are saying that we will lose the benefits of the European integration that is marked by opting into these JHA Protocols, you are right.

Q194 Mr Clappison: No, no—

David Miliband: What you are saying is how terrible it is, you are saying that we are not going to have enough integration afterwards.

Q195 Mr Clappison: With respect, Foreign Secretary, that is not the case. We would lose the benefit of the European Arrest Warrant on its

present terms where the European Court of Justice does not have jurisdiction over us. That is what we would lose.

David Miliband: Let me just go through this. I applaud your commitment that we should be part of the European Arrest Warrant. Let us all be absolutely clear about that. You are delighted that we have opted into this piece of European justice and home affairs work, and so am I; I think the European Arrest Warrant is a good thing. As it happens, we are clear, as I have quoted in my letter, that the commitment in Declaration 39a to amend or replace existing measures means that much of the legislation will be transposed from pillar three into the Treaty of the Functioning of the Union, the 70 or 80 Articles that you talk about, and we would anticipate, since the European Arrest Warrant is an important part of this, that it would be one of the early measures to be transposed and, if it is, it will be transposed into a position where it is then subject to ECJ jurisdiction and we would have the right to decide whether to continue to opt in, as you and I want, or not. Let us address the situation where, for the sake of argument, the Arrest Warrant is not one of those items that is transposed in the first five years. You are right that we would then face a choice: do we have a block opt-out on all remaining measures, including the Arrest Warrant, or not? What I explain in my letter is that it is quite open for any government to opt out of all of those measures and then as they are transposed we have the right to opt back in if we consider that the new framing of the measure is appropriate.

Q196 Mr Clappison: Can I interrupt you there, Foreign Secretary.

David Miliband: Just so we are clear, I did address that, that is exactly your point.

Q197 Mr Clappison: I do not think you have addressed it actually because we are opting in not to the existing arrangement whereby the European Court of Justice and the Commission do not have jurisdiction over us, but under a new arrangement where they would; they would gain.

David Miliband: That is why we have the opt-in. That is the whole point of the opt-in; we have the choice about whether or not we want to subject ourselves to that.

Q198 Mr Clappison: As matters stand at the moment we have free will as to whether we choose to exercise that opt-in or not.

David Miliband: And we do in the future, James.

Q199 Mr Clappison: Except that when we make that decision of whether or not we are going to opt in, we have to bear in mind that if we do not opt in we will lose the measure altogether, that the Council will determine new transitional provisions without UK participation --- you are smiling, Foreign Secretary, but can you just read it.

David Miliband: I am smiling because you are bemoaning the fact that your reputation is not that of a Euro enthusiast. That is why I am smiling.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Q200 Mr Clappison: I am bemoaning the fact that we have lost the free will which we had before of the freedom to opt in. If you let me finish, Foreign Secretary; I listened to you. We have bought ourselves an opt-in, yes, but it is an opt-in which contains penalties as far as we are concerned. If we do not opt in we will lose the benefit of the measure concerned, we will have transitional measures decided by others against us, and we may also have to pay costs to compensate for that. If you disagree with any of those—

David Miliband: I do.

Q201 Mr Clappison: Which one do you disagree with? Which of those penalties will we not suffer?

David Miliband: I disagree.

Q202 Mr Clappison: Which penalty will we not suffer.

David Miliband: Number one, if you do not opt in to a measure you do not receive the benefits of a measure; correct. The red-line is that we must ensure that for each and every JHA measure we have the right to choose whether or not to opt in, whether it has been adopted already or whether it is coming down the track in the future. You and I agree about that. There is then a question which arises which is if you do not opt in, what is the effect of that? If we do not opt in to a so-called transitional measure or to a Schengen building measure or to an amending measure, you have to ask yourself are there impacts on the underlying measure? In the case of amending measures does it render inoperable the whole system, in which case the consequences that I explained in my letter come into play. Just so we are clear, they are not penalties. As I explained very, very clearly, if there are costs that are incurred as a result of the opt-out, then we would bear them. A good example would be that if we have people from Customs & Excise and elsewhere seconded to the EUROJUST system and the EUROPOL system and if, for the sake of argument, we decided to opt out of it there may be costs associated with breaking the contracts of those people. They are very, very narrowly described so they are not penalties.

Q203 Mr Clappison: You have given your description, Foreign Secretary, but I will read to you the text which you have signed up to, it says: “The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union. The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.”

David Miliband: You could be reading my letter. That is what my letter says.

Q204 Mr Clappison: None of that applied before the summer when it was being dealt with under Article 9 and when we had complete free will, which is what this about, as to whether we wanted to opt in to these provisions or not. We have had our free will constrained.

David Miliband: I am sorry, Chairman, in my letter I have laid out exactly the position, some of which James has just quoted. Free will is the ability to choose whether to opt in or not. I hope that we can get to the end of today in the spirit that the Chairman had at each stage of trying to say what is agreed and what is not agreed. Let us try and seek agreement that for every conceivable type of justice and home affairs measure we have the ability measure-by-measure to decide whether to opt in or not, because what I have shown you in these areas—

Q205 Chairman: For five years?

David Miliband: No, even beyond the five years.

Q206 Chairman: After five years there are penalties. Clause 3 and Clause 4 do not come into play until after five years.

David Miliband: They do not come into play until the ECJ—

Q207 Chairman: Until after five years. It says five years.

Mr Norris: If we are talking about the transitional provisions—

Q208 Chairman: They do not come in until after five years.

Mr Norris: For five years for every Member State those institutional powers do not apply in relation to existing measures which are not replaced or amended.

Q209 Chairman: But for new measures?

Mr Norris: For new measures brought forward under the new Treaty they will be subject to the provisions in the new Treaty arrangements.

Q210 Chairman: Which will be European Court of Justice jurisdiction and Commission jurisdiction for all new opt-ins?

David Miliband: Yes, but we have a choice about whether to opt in to that or not within the five years. Hang on, Michael missed some of this because he was out for a second. Just so we are absolutely clear, because we went into some detail and actually we agreed about it, for a period of five years the Commission will propose the transposition of measures that were already part of the JHA system to put them in to the Treaty on the Functioning of the Union.

Q211 Chairman: Which at the moment do not have European Court of Justice jurisdiction?

David Miliband: Exactly. For each and every one, as they do it, the UK has a choice about whether or not it wants to opt in, meeting the red-line, and once it is

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

enacted as part of the new Treaty the consequences flow in terms of the ECJ and the role of the Commission after infraction proceedings.

Q212 Chairman: If we do not opt in for the first five years there are no consequences on those matters we have already agreed?

David Miliband: It depends what you are talking about because there are amending measures that will also be going on in the period of the five years and there are the so-called Schengen building measures, but the five years point is that the system of replacing the existing measures that are not subject to ECJ jurisdiction, after five years, if there are any measures that have not been transposed in that period then we have a block opt-in or opt out on them. If we opt out (which we can do) we then see case-by-case as they are transposed the red-line met. Someone referred to watery red-lines. This red-line is absolutely clear at every stage of the process. If we can at least get that clear today I think that is a big step forward.

Q213 Mr Clappison: Foreign Secretary, I do not think we are going to reach agreement on this, but I am going to suggest to you, for the benefit of the record, that you have given up something here where we had free will and you have got nothing in return. You have given a great present free of charge to the European Commission and the European Court of Justice because you have given them jurisdiction and authority in matters over which we had an unconstrained opt-in which was entirely due to our free will. We are now being put in a position where we have to consider whether or not to use that opt-in after four years and six months and we will face penalties if we do not. You have put your interpretation and I have put mine. These are not even the matters covered by your red-lines.

David Miliband: It is a red-line. It is about the red-line of whether or not we have the right to opt in. That has been what the argument is about.

Q214 Mr Clappison: This is about existing measures, not future measures to come before the Commission.

David Miliband: Imagine if I had come here and said, "Do not worry, the Treaty only applies to future measures and we have not got the right to choose on the existing 70 measures." You would have had my guts for garters, rightly.

Mr Clappison: No, Foreign Secretary, because you would have kept the position which we had which was we had free will as to whether we opted in or not. That is misleading.

Q215 Chairman: Let us clarify, the status quo at the moment is the Government came to the British people and said on some items in the Amsterdam Treaty, the Schengen arrangements, we have got an opt-out; we can opt in to them when it suits the UK, and that is what we have been doing.

David Miliband: And we have maintained it.

Q216 Chairman: We have been doing that on the basis that the European Court of Justice does not have the right to interfere and bring infraction against us for how we implement those agreements. That is the status quo. Is that going to be changed and when? Do not give us flannel; give us a straight answer.

David Miliband: Measures will no longer exist in the third pillar. The whole point of the Treaty reform is that you have got a Treaty of the Functioning of the Union, and our pledge was—

Q217 Mr Cash: So you are changing the structure.

David Miliband: --- Our pledge was we were reforming the institutions because it is a reform Treaty.

Q218 Mr Cash: It is substantial constitutional change.

David Miliband: Our pledge was on each and every measure we will have the right to choose whether or not we think it is in the British national interest, in which case we can opt in, or if we think it is not in the British national interest to have the ECJ jurisdiction, then we do not opt in.

Q219 Chairman: Let us be clear, there are some we have opted in to at the moment; correct?

David Miliband: Correct.

Q220 Chairman: Will those change?

David Miliband: When they are transposed, yes.

Q221 Chairman: In what way will they change when they are transposed? Is that now or is that five years from now?

David Miliband: It will be over the course of the five years and possibly beyond. I do address this directly in the letter and it is important to be clear about this: "Transitional measures address existing JHA measures in the current Third Pillar of the EU." This is the critical point because you are right to say that the ECJ does not have jurisdiction at the moment. "Existing Third Pillar measures were not drafted with full ECJ jurisdiction in mind, so Member States will need to prepare for the transition to full ECJ jurisdiction and a Commission role in any infraction process."

Q222 Chairman: Why?

David Miliband: Hang on—

Q223 Chairman: What would change if we did not?

David Miliband: Given the earlier exchange, if you simply said leave the existing measures, you would give the ECJ absolutely massive freedom to do what it liked. Your adviser is nodding, I am pleased to say. The whole point about drafting something for legal interpretation is that it is different from if you are not drafting it for legal interpretation. I think you would agree with me that you would want every single

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

thing that we opt into to be drafted with great care if it is going to be subject to ECJ jurisdiction. That is what we are determined to do.

Q224 Chairman: But it is not subject just now and it will not be subject unless you allow it to become subject.

David Miliband: It will become subject when it is transposed into the Treaty on the Functioning of the Union. We have protected our right to decide whether it is still in the British national interest to be part of that European Arrest Warrant or not. If we think it is not sensible to be part of the European Arrest Warrant, which will be redrafted so that it is in proper legal language, then we do not have to opt in to it. It is the whole point about the red-line.

Q225 Chairman: So the result is what the Commission have got and what the people who have proposed the reform Treaty have got is in fact the insertion of the European Court of Justice into areas it is not inserted at the moment for us. You say it will have to be transposed and when it is transposed—

David Miliband: It is not a question of what they have got or we have got; it is the proposals in the—

Q226 Chairman: What is proposed?

David Miliband: It is proposals in the reform Treaty.

Q227 Chairman: And it was not proposed by us, was it?

David Miliband: I do not know where the proposal came from.

Q228 Mr Cash: Foreign Secretary, this is an extension of the Mandate, and furthermore you have admitted—

David Miliband: No, it is a delivery of the Mandate.

Mr Cash: No, it is an extension of the Mandate.

Chairman: It is not the same terms.

Q229 Mr Cash: And it is different. Furthermore, this was done at very short notice in circumstances which one could only describe as having a lack of candour about them. Having said that, you have already admitted just now that, in essence, this is a change in the nature of the pillars and furthermore, therefore, it is fundamental constitutional change and it is therefore within the parameters of substantial equivalence to the existing Constitutional Treaty and therefore a referendum is required because it is constitutional change of that order. You cannot get away from that.

David Miliband: You can because what you have said is wrong. This is not fundamental constitutional change.

Q230 Mr Cash: You can go on saying that forever.

David Miliband: Just a minute; I listened to you. Your own Committee did not believe your argument. They defeated you by seven to three in the Committee.

Q231 Mr Cash: Let us just say that is an internal party political question. They voted for the first Bill, Mr Miliband, which actually endorsed a referendum back in the second reading of the original Constitutional Bill.

David Miliband: I am sorry that David Heathcoat-Amory is not here because I could have teased him about how he was the Deputy Chief Whip—

Q232 Mr Cash: --- Well, I was not.

David Miliband: Let me finish and make my point. I could have teased him about being Deputy Chief Whip who was against you on the Maastricht Bill. You were in favour of a referendum and he was against.

Q233 Chairman: Take a warning from people who go to lots of dinners; do not use jokes again and again, we have read them in the last script.

David Miliband: You what?

Q234 Chairman: It is an old joke. The person is not even here and you are finding a pretence to use an old joke.

David Miliband: But I could have moved it on because he then had an excuse about the euro, which was priceless. I do not agree that it is fundamental constitutional change. Remember, the allegation is that the justice and home affairs opt-in has not been preserved. What I have shown you is that for every conceivable instance it has been preserved.

Mr Clappison: It has not been preserved to make a choice.

Q235 Chairman: Not on the same terms. Clearly the terms are different. You say it is because of a transposition that that is different.

David Miliband: It is our choice as a Government.

Q236 Mr Cash: It is like Napoleon saying he won the Battle of Waterloo.

David Miliband: We can choose whether or not we want to participate in the European Arrest Warrant.

Q237 Mr Clappison: Foreign Secretary, can I take you through one other issue which is important on this, which is similar but different in some respects, and that is Article 4a which deals with amendments to existing measures after the Treaty comes into force. I imagine that it will therefore relate to quite a number of measures which will come before the relevant councils as amendments of existing measures. Article 4a concerns the operation of the opt-in by the United Kingdom in these circumstances. Can I take you through that as well please because that also is very instructive in the text. I would be grateful if your advisers would indicate if I am getting this wrong. Article 4a concerns the operation of the opt-in by the United Kingdom on amendments to existing measures—

David Miliband: Correct.

Q238 Mr Clappison:—On our exercise of the opt-in, which you have told us about, on judicial and home affairs to amendments. If the United Kingdom

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

decides not to opt in under Article 4a—and I will be grateful to be corrected if I am getting any of this wrong or not reading it out right—the Commission may suggest to the Council that the application of the measure is inoperable for other Member States. If the Council then determines by qualified majority voting, with no UK participation, that this is the case, that the measure is inoperable, it may urge the UK to opt in. If the United Kingdom does not opt in, it loses not just the amendment but the whole of the existing measure as well and the Council, on qualified majority voting, again on a proposal by the Commission, may decide that the United Kingdom pays for the financial consequences of its cessation of participation in the measure. Is any of that wrong, Foreign Secretary?

David Miliband: You could practically be reading out the letter I have sent you.

Q239 Mr Hands: Your letter denies the fact that we, the UK, cannot participate in the vote and says that there would be no financial consequences. I think it is diametrically opposite.

David Miliband: I am sorry, that is just not true, Greg. If you look at what I say in the financial consequences on amending measures and transitional arrangements, there is absolutely no suggestion that I have tried to muddle this.

Q240 Mr Clappison: You will understand, Foreign Secretary, as you have been told by the Chairman, we got your letter, in some of our cases, less than one hour before this Committee.

David Miliband: That is a serious allegation and you can see that it is not well-founded.

Q241 Mr Hands: You quite clearly state in your letter that the UK would participate fully in any votes on such measures. Mr Clappison has just said, which is our belief, that the UK would not vote in such measures. The last sentence in the fourth paragraph from the end talks about financial consequences and Mr Clappison has said that the financial consequences could be quite serious.

David Miliband: It is different for different measures, Greg, and I have actually explained that in the letter.

Mr Norris: I should point out that we do participate in the decision on financial consequences.

Mr Hands: So there are elements of what Mr Clappison said that you disagree with.

Q242 Mr Clappison: Which is qualified majority voting by the way, as well; it is not unanimity. So before we decide whether or not we are going to opt in to an amendment we have to consider that we run the risk of the Commission bringing a case against us that makes the measure as a whole inoperable, that we will lose the benefit of the whole measure, and that we may have to pay costs to people. I suggest to you that that does not just fudge your red-lines; it drives a coach and horses through them because anybody who wants to use an opt-in in those circumstances will be advised by their civil servants they are taking a very big risk.

David Miliband: I am sorry, it does not drive any coach and horses through the opt-in. The opt-in is absolutely clear and we also have the benefit of restricting any financial consequences to those necessarily and unavoidably incurred. That is an extremely narrow basis, and certainly the legal advice will be that you have got a political decision to make: do you want to be part of this or do you not want to be part of it? It is simply wrong to say that we have not protected the opt-in. We may disagree in the end about whether or not it is sensible to exercise the opt-in, but the opt-in is absolutely clear.

Q243 Mr Clappison: Foreign Secretary, once again before this measure emerged in Article 4a we had complete freedom as to whether we opted in or not under existing provisions, that was the plan.

David Miliband: We still have complete freedom.

Mr Clappison: It is freedom subject to pressure, subject to constraint. You have given something for nothing.

Q244 Chairman: I had visions of “peace in our time” when you speak, Secretary of State.

David Miliband: Excellent—

Q245 Chairman:—that you have come back here with this great deal—

David Miliband: Not excellent, actually, that is a terrible suggestion. I thought you meant peace between us. Come on Michael, you cannot say that.

Q246 Chairman: There is always peace between us but do not pretend that this is not a bullying tactic by whoever proposed it to pressurise the UK. If the UK had such a good case for opting in and those who were proposing the measures wanted us in them, they would convince us; they would not bully us. These are bullying clauses and I am shocked that you try to defend them. Honestly, I really am. I say that in the spirit of comradeship as well. I know what is happening out there, we have just been through it—a lot of nations are unhappy with the UK, they say, contaminating the process because we have opt-outs and Protocols, and these appear to me and appear to all sensible people who see it as additional clauses put in to make sure the UK does not either opt in and still have the freedom of not having the European Court of Justice—

David Miliband:—Can I just pick up one thing you said.

Chairman: Let me finish --- Or on the other hand to cajole us or pressurise us to opting in. On those terms I do not think anyone with a bit of principle would sign up to them.

Q247 Mr Hands: Absolutely.

David Miliband: The Chairman has made a very, very serious point and I just want to pick it up.

Q248 Chairman: I do think that your argument is very, very thin here.

David Miliband: There was one thing which you said which cut to my absolute quick and I think it is important to give you the opportunity to see whether

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

you really want to say that. You compared me, or Gordon Brown, and you said it was “peace in our time”. What you are saying is that what we are doing today is the equivalent of Neville Chamberlain coming back from Munich—

Q249 Chairman: You have got a highly sensitive imagination.

David Miliband: Maybe I feel this particularly personally, but to say that this is the equivalent of Neville Chamberlain coming back in the late 1930s from Munich claiming to have had an agreement with Adolf Hitler, that is not worthy of this Committee.

Q250 Chairman: I think you are making a straw man to knock down.

David Miliband: I did not use the phrase “peace in our time”.

Q251 Chairman: You have said that we have a great deal here that will not in any way damage the red-lines—

David Miliband: I did not—

Q252 Chairman: Let me finish, and you said and it does not in any way interfere with our right to opt in. It interferes in a great way because it puts massive pressure and there are now penalties for not opting in that were not there before. If you are offended by that then that is your sensitivity, and I apologise for saying it if it hurt your sensitivity. It seems to me that you were pleading there has been no real change. There has been change in the terms—there is no doubt about that—and the terms you are now claiming are not different from before are much different from before. You have defended your right to opt in but under conditions that some other people would find offensive.

David Miliband: Can I say that there are two separate matters here. First of all, you said that what we are doing is the equivalent of “peace in our time”. Peace in our time is Neville Chamberlain in the 1930s. Any comparison between the European—

Q253 Chairman: You have my apology for that and you know that it was not meant in those terms. It is your sensitivity, not mine.

David Miliband: Yes, it is my sensitivity about that.

Q254 Chairman: Good and that is fine and I have apologised—

David Miliband: And I think we are all sensitive about it for quite good reason. The second aspect is whether or not we have preserved the opt-in. In the Mandate that was set out in a political declaration, it was not set out in legal form; it now has legal form. After efforts in the legal group which were not done in a matter of hours, as Bill suggested, but were actually done over a matter of months—

Q255 Mr Cash: There were only two of them in the negotiations.

David Miliband: Hang on --- which were done over a matter of months with UK participation and they show at every stage that we have the right to choose whether or not to opt in to each and every JHA measure.

Q256 Mr Hands: Can I come back on my questions, I have been trying to come in for a little while now. It seems to me, listening to your justification—which is quite ably put I might add—that it really does not cut much ice with me, probably for two reasons. The new clauses published on Friday are likely to be deeply damaging for the UK. You admitted a little bit earlier on they were not drafted by the UK, even though you were claiming that they have strengthened our red-lines quite considerably. You have also admitted there were clauses in the Protocol that were not drafted by the UK. Secondly, I am intrigued by the fact that you appear to have made very little effort to publicise these new clauses. If they are really so beneficial to this country, why did it take a letter from this Committee to you to tease out a justification for them. It seems to me that throughout you have been engaging in subterfuge here on these new provisions in the Treaty to try and cloak from our view and the view of the British public what is really going on here, which is a severe weakening of your red-lines and a weakening of our right to govern ourselves in justice and home affairs.

David Miliband: I think people will judge for themselves what was scripted before and what was not. The idea that we have not publicised this --- as soon as this legal text was published, it was sent to the Library, it was sent to the Clerks of your Committee. I appeared for two and a half hours in front of the FAC last week. I answered a letter from the FAC.

Q257 Mr Hands: Before it was published.

David Miliband: No, it was after it was published.

Q258 Mr Hands: It was published on Friday.

David Miliband: No, it was published on 5 October, so I have appeared at the FAC to discuss it, I am now appearing here to discuss it, and if there are any issues that we have to follow up—

Q259 Mr Hands: I did not see any press release saying “Great victory for the United Kingdom in the publication of the new Protocols”. Why is that?

David Miliband: I think the new Foreign Office is a bit chary that press releases change the world.

Q260 Chairman: I have never accused you of subterfuge because I do not think that is what was going on.

David Miliband: So there is no subterfuge; thank you very much.

Chairman: I do not think there is a question of subterfuge but I do think there is a question of analysis, and I must admit I am not convinced by your arguments that this has strengthened the hand of the UK, I am sorry.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Q261 Mr Clappison: Foreign Secretary, the case which I am going to put to you is that this, surprisingly, has emerged over the summer, we did not know about this before September or October, and it does make a serious change (I do not believe to the red-lines which you have set up) to your opt-in. This makes a very serious change because on amendments, and one imagines that quite a lot of the business will be by way of amendments, we have lost freedom of will and unconstrained decision as to whether we opt in or not, in exchange for facing serious consequences if we do not opt in. I have suggested—and I put this on the record—that this drives a coach and horses through your red-lines, such as they are, the red-lines are in tatters and for you to agree to something like this and get nothing in return suggests to me that somewhere along the line somebody has been, quite frankly, asleep at the wheel.

David Miliband: That one is on *Today in Parliament* as well. We have ten minutes to get all the sound bytes out. Was that a question?

Q262 Mr Clappison: That is the case I am putting to you. Please give your response.

David Miliband: Let me answer it. I do not know if it was before you came in, James, or if you were here at the beginning, but I explained that the Chairman in his opening remarks was perfectly within his rights to say that the process in the run-up to 21 June was one that did not give the sort of engagement that he wanted. It was a uniquely difficult hand that the German Presidency were dealt but I said I understood the strength of feeling. What this delivers for the first time is clarity that the right to choose, the right to opt in or not, has been retained for every JHA measure. The allegation has been that the red-line was not clear. What I am clear about is that the red-line is very clear and at every stage we have the right to opt in.

Q263 Mr Cash: And you admit that it changes the structure of the pillars. I must have an answer to that, Chairman. Could I have an answer please, Foreign Secretary?

David Miliband: The third pillar will not exist after the—

Q264 Mr Cash: So it changes the structure of the pillars and therefore it is substantial constitutional change.

David Miliband: No, it is not substantial constitutional change. It involves less transfer of power.

Q265 Mr Cash: Well, you cannot deny it; you have admitted it.

David Miliband: I can deny it because it is not true and there are plenty of other people who will deny it as well.

Chairman: We are not going to agree on this. I was going to ask Katy Clark to ask some questions.

Mr Clappison: Can I give a jolt, Chairman, to help Katy. Declaration 39 is where a Member State decides not to opt in to a justice and home affairs

measure and what happens then. This covers all the measures regarding the opt-in, not just amendments but everything.

Q266 Ms Clark: Can I apologise, Foreign Secretary, I was at Scottish Affairs Questions. My colleague has referred to Declaration 39, which I have noted was not included in your letter to the Foreign Affairs Committee. Do you think it is sensible for the UK to sign up to a declaration which would provide the basis for action to be taken against the United Kingdom under Article 96 for distorting the market if we do not opt in to a proposed measure? Does this not expose UK interests to serious risk?

David Miliband: Katy, I can understand why you ask that but it does not because the Declaration is a political declaration with no legal consequences. I have tried to set that out in my letter and I will just read it out: “Declaration 39 cannot . . . trigger legal consequences.” The same is true for Article 96. I can assure you that there is no legal consequence because it is a political declaration. In another neck of the woods—and I do not know if we are going to discuss common foreign and security policy today—some people are arguing that the political declaration is too weak. There are legal declarations about the unanimity of foreign and security policy and about the fact there is no role for the European Court of Justice in respect of foreign and security policy. The political declarations, whether they relate to foreign policy or this matter, are only political declarations; they cannot trigger a legal process.

Q267 Chairman: Why is it in there? It has been added, it was not there before, it is now there and it refers to Article 96?

David Miliband: There are all sorts of reasons why politicians want to make political declarations. The point I am making is that they cannot trigger the sort of dangers that Katy has perfectly reasonably raised for me because they do not have legal consequences.

Q268 Mr Clappison: Can I just ask you about that, Foreign Secretary. You and your advisers will have greater familiarity with these matters than any of us, but if you could just assist us because it does say—and tell me if I am getting it wrong—under Article 39, where a Member State (in this instance the United Kingdom) opted not to participate in a measure based on Title VI, Part III, which is a judicial and home affairs matter, that “the Council shall hold a thorough discussion on the possible implications and effects of that Member State’s non-participation.” It then goes on—and will you tell me what this means please—“In addition, any Member State may ask the Commission to examine the situation on the basis of Article 96 of the Treaty of the Functioning of the European Union.” Can you explain what that means?

David Miliband: Article 96, as I say in my letter, simply confirms what Member States are already able to do, so there is absolutely no change as a result of that. This exists at the moment. You may not like it but there is no change as a result of that.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Q269 Mr Clappison: What happens if there is a finding against us on the basis of Article 96?

David Miliband: There are no findings. It is not a legal mechanism.

Q270 Mr Clappison: Okay so what happens?

Mr Norris: Article 96 is concerned with competition and I think there was some concern that if the UK did not opt in to some criminal measure, perhaps on requiring banks to supply information—

David Miliband: Or Ireland it is important to say, it is not just the UK.

Mr Norris: --- On terrorist funding or whatever, that somehow that could put UK banks in a privileged position or it would distort competition, giving the UK banks a competitive advantage. Obviously that kind of consideration is not normally going to arise, but if it did there is Article 96, which is already in the Treaty, which refers to the Commission looking at anything which distorts competition, and this is simply saying that in those circumstances the Commission, as it could do anyway, could look at whether there is a distortion of competition.

Q271 Mr Clappison: What could the Commission do under Article 39 if it decides there has been distortion of competition?

Mr Norris: 39 is a declaration. Under Article 96, the Commission would have to decide whether there is any action it could take to avoid the distortion on competition, but what is quite clear is that would not require the UK to participate in a measure that it had not opted in to because we have a clear flexibility in our Protocol not to participate, so it is really just flagging up what the context of discussions could be in the unlikely scenario where we do not opt in to a measure on something to do with law enforcement and some other Member State says, “We think this is putting our banking system at a disadvantage,” or whatever.

Q272 Mr Clappison: Forgive me if I am wrong, but this is triggered by the United Kingdom decision not to opt in, is it not?

David Miliband: Or Ireland.

Q273 Chairman: The point is that within this process, which is somewhat mysterious to most people, and may even be mysterious to you, Secretary of State, why would this be added by countries who are negotiating in good faith with a Government, the UK, who are not in any way seen as a malign force in Europe? It seems like a punitive addition that is unnecessary. You say that it cannot legally trigger any consequences, so it is symbolic, but what is it symbolic of then? It seems to say we will use competition assessment on matters to do with civil and criminal justice, asylum and immigration.

David Miliband: It is symbolic of the fact that some governments think that if they throw a political declaration towards some of their population they might get them off their backs.

Q274 Mr Hands: Let us come back to the point of who actually wrote this; which politician do you think wanted to get their population off their back?

David Miliband: I was not in the legal group but I can find out for you and write to you about it.

Q275 Chairman: What is more important is why would the UK sign up to such a declaration? You as a Government have been asked to sign up to it and it has not been removed before we sign up to the final Treaty?

David Miliband: It is the UK or Ireland, point one. Secondly, because it is a political declaration and not a legal declaration we do not think it has malign consequences for the UK.

Q276 Mr Cash: This is not just dancing on the head of a pin, Foreign Secretary, this is about this continuing surge towards greater integration. We slightly lose sight of some of that when we are dealing with these detailed matters, but actually the bottom line is that this is more and more European Court of Justice, more and more integration undermining this Parliament and its ability to make decisions, because everything that is done falls within the European Communities Act, becomes part of our law, and removes the right of British people in general elections to make decisions because it reduces the options open to the Government.

David Miliband: I am sorry, we profoundly disagree a) about the benefits of British membership of the European Union and b) whether there is a “surge of integration” going on as a result of this.

Q277 Mr Cash: It is certainly a merger of the European Union from the European Community to the Union itself.

David Miliband: We have got another nine months to go of this while negotiations are on-going.

Q278 Mr Cash: You are not going to get rid of that because that is at the heart of it.

David Miliband: You have not persuaded your front bench yet of getting out of the European Union.

Q279 Mr Cash: They cannot deny it.

David Miliband: I am not going to debate with Bill Cash now, although we will later, the benefits or otherwise of the European Union, but the idea that this Treaty represents a surge of integration when the Vice President of the Convention says how disappointed he is at the lack of integration there is, when the Dutch Council of State which is a group of independent legal experts, not politicians --- James Clappison snorts. It is chaired by Queen Beatrix. What more could you want? Do not snort at Queen Beatrix would be my advice! This is what the Dutch Council of State said: “These changes are aimed as far as possible at purging the Constitutional Treaty of those elements which could have formed starting points for the development of the EU in a more explicitly centralised or federal direction.” I am

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

going to save my quotes of Ken Clarke and all the others who also say this. Bill Cash raised the allegation—

Mr Clappison: For the record, I was snorting because I can produce an equally long list of people who say it is 90% of the old Constitutional Treaty.

Chairman: If you let the Secretary of State answer, you can add a comment after.

Q280 Mr Clappison: I want to put that on the record.

David Miliband: Bill Cash raised the allegation that this is a surge of integration. What I am saying to you is that this Treaty represents a very important point precisely because it ends that great navel-gazing European debate about whether or not we are heading for a European super state or whether in fact the European Union will continue to be a coalition of nation states. I have always believed it would be a coalition of nation states, but on this basis, with a voting system which does not come in until 2017, there is no way that this is a federal super state. That is why the people who are proponents of a federal superstate are so disappointed.

Mr Cash: It merges into a union with a single personality, self-amending text and actually, Foreign Secretary, I know you have not been in the job very long but I really have to say to you that your judgment on this is extremely faulty.

Chairman: I think these are matters of opinion which will be repeated again and again. Katy Clark wanted to come in and then Angus Robertson.

Q281 Ms Clark: We come back to the Article and it refers to thorough discussion; what do you think that will mean in reality?

David Miliband: You are talking about Article 96 now, not Declaration 39.

Q282 Ms Clark: The actual text of the declaration we have been given refers to “thorough discussion”.

David Miliband: It could mean a discussion at the General Affairs Council. It is impossible to know what it would mean. What I would say is it cannot have legal consequences, which I think is pretty relevant to this.

Chairman: Before we come to the final question, Mr Robertson has indicated he has a question that he wishes to put.

Q283 Angus Robertson: I have a couple of questions, Foreign Secretary, in relation to the interests and concerns of devolved governments. Members of the Committee are well aware that through devolution there are many issues where sovereignty or powers are exercised at a Scottish, Welsh and Northern Irish level and not in the UK Parliament in relation to European matters, and from the Scottish perspective especially the fishing question is one that is very important. Can I ask you two questions. Firstly, could you take us through the consultation that you have had, say for example with the Scottish Government, about these matters in the run-up to the IGC?

David Miliband: That is one question; what was the other question?

Q284 Angus Robertson: I will come on to that in a second.

David Miliband: Just so we are clear, because you made reference to those matters which are reserved and those which are not reserved, all European negotiations are done by the UK Government after consultation with the devolved Parliaments and Assemblies.

Q285 Angus Robertson: Devolved Governments.

David Miliband: What is now known as the Scottish Government, the Welsh Assembly—

Q286 Angus Robertson: Welsh Assembly Government.

David Miliband: Sorry?

Q287 Angus Robertson: Welsh Assembly Government.

David Miliband: --- Representatives on non-reserved matters of the people of Scotland, Wales and Northern Ireland. There is then the co-ordination of the process and it has two aspects to it, one of which I can talk about from my period as Secretary of State for the Environment, where I met my opposite number, both before the May elections in Scotland and afterwards, to discuss matters that were of particular interest in respect of the environmental questions and, secondly, an overarching co-ordination mechanism, the so-called JMC Europe Committee which involves representatives of the devolved Governments, Parliaments, Assemblies. What I think is important to note is that although you refer to the division of responsibility between reserved and non-reserved matters, of the 21 items identified by the Scottish Government as their concern on European matters, only two were actually devolved, 19 were of a reserved nature. If you would like to have notification of when the meetings happened, I would be happy to write to the Committee.

Q288 Angus Robertson: I am pleased because you indicated that you are aware of the issues that are of particular concern and, that being the case, you will be aware that the Scottish Government has said that it has a red-line and that is on the issue of fishing competence and the fact that it is enshrined in the European Reform Treaty as an exclusive competence. I think you will be aware that there has been an option shared with the UK Government from the Scottish Government, put together by Professor Sir Neil MacCormick, in this regard. We are only a few days before the IGC, so could you indicate to the Committee how the UK Government (as you pointed out representing all parts of the United Kingdom) is going to take on board the considerations and concerns of the Scottish Government in this question and is it going to support those concerns in the IGC or not?

David Miliband: The legal advice that we have is that the fisheries provisions in the reform Treaty replicate the existing division of powers. That may be something that people can get different legal opinions on but that is our opinion. That has been

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

discussed both between Defra and their opposite numbers in Scotland and it was also raised at the meeting of the JMCE, the co-ordinating committee that we discussed, and it is our very clear view that the reform Treaty simply replicates the existing position and puts into legal form the existing position.

Q289 Angus Robertson: Just for clarity's sake, the UK Government is not going to support this red-line issue of concern to the Scottish Government? Have you communicated that to the Scottish Government? Have you spoken to the First Minister about the fact that the UK Government is not going to support the Scottish Government's red-line at the IGC?

David Miliband: Mrs Fabiani participated in the meeting of JMCE—

Q290 Mr Hands: Who is she?

David Miliband: The Scottish Minister who represents them on the JMCE. Thank you for asking for clarification on that. She was there and obviously we did discuss it with her, and I understand that there have also been discussions between Hilary Benn and his opposite number in Scotland. In the end, different parties had different points and different positions on whether they wanted to withdraw from the Common Fisheries Policy or not. That is completely open to them but the Treaty replicates the existing division.

Q291 Angus Robertson: Foreign Secretary, without getting into the analysis of it, what I am trying to pin down is whether the UK Government has decided ahead of this IGC that it is not going to support the Scottish Government's position and has it communicated that formally to the Scottish Government?

David Miliband: We have been in communication—

Q292 Mr Clappison: It is a yes or a no; yes it has or no it has not.

David Miliband: You asked two questions, as you yourself have said, so there can be one yes and one no. The discussions have been going on between the Scottish representatives and the UK Government. We have made it clear that we do not see the provisions in respect of fisheries as changing the status quo and we certainly do not propose to veto the Treaty on this basis.

Q293 Jim Dobbin: We are coming to the end of this session, Secretary of State, and just to be fair to you, the impression that certainly I have picked up, and I think other colleagues have picked up, of the visit we had to Lisbon yesterday was that on Article 10 and the issue of five years the impression from other national parliament representatives was that this was an attempt to sort out the perceived benefits that they thought the UK were getting over all the issues with the red-lines. I think you just need to be aware of that before we sign up to anything.

David Miliband: That is interesting. There is no question—and this goes right against the allegation that the Chairman made that we were being bullied—that in the corridors of Europe there is absolute clarity; the UK has been extremely firm and extremely clear in standing up for its red-lines. That has been a consistent position since before the June Council and I do not make any apology for that, but as I say, it gives lie to the idea that we have been bullied; quite the opposite, we have been absolutely firm about our positions. The only thing I would say about the general chatter around is that all countries are expected to stand up for their interests in the European Union. When there is a debate about Austrian medical students, Austria will decide that is a priority for them, and that is the way the European Union works. I think one has to be slightly careful because sometimes in some countries we may have things which they wish they had, in which case it is quite nice for them to beat up on us, but that is politics really.

Chairman: Mr Clappison, you did indicate that you wanted to come back on something.

Q294 Mr Clappison: It was only the comment I needed to clarify with the Foreign Secretary. The Foreign Secretary mentioned the European Arrest Warrant. I would like to say that for my part I am in favour of Britain's membership of the European Union and I think we have had some good things out of co-operation, and the European Arrest Warrant would be an example. I would support that and I think it has produced good results for this country, but on the basis on which it is presently implemented, which is co-operation, and my concern is that the European Court of Justice, the European Commission and the rest of the institutions of the European Union are going to enlarge their powers and enlarge their role over our criminal justice system, and I do not think there is a place for the European Union in making criminal law in this country, in the criminal procedure of this country and the criminal justice system of this country. I am afraid I think your red-lines, Foreign Secretary, have fallen apart on this, and that is exactly where we are heading because of what you have agreed to.

David Miliband: I am sorry to disappoint you, James, but they do already, so if you like it now then you can like it in the future. Do you want to explain why?

Mr Norris: I am happy to explain what the ECJ jurisdiction is under the current third pillar, if that would help.

David Miliband: Just for the record, why do you not explain ECJ jurisdiction under the third pillar.

Mr Norris: At the moment the ECJ has jurisdiction under the third pillar, in particular in relation to the annulment of instruments. There is also a preliminary reference jurisdiction, although that is on an opt-in basis.

16 October 2007 Rt Hon David Miliband MP, Mr Patrick Reilly, Mr Mike Thomas and Mr Kevan Norris

Q295 Mr Clappison: I do not necessarily say that I agree with that. It is very limited at the moment and the ambitions of the European Commission go much further than that, and there is no place for them in it.

David Miliband: The European Commission is different from the Court.

Q296 Mr Clappison: The European Court of Justice, the institutions.

David Miliband: What I would say is the decision that you will then face and we will face is whether or not you want to remain part of the European Arrest Warrant and that is exactly the right to choose I have been arguing with you has been established at every stage in this process.

Mr Cash: You can have co-operation without ending up by having the Court of Justice adjudicating over a wide range of matters. That is where the problems arise.

Q297 Mr Hands: I have a very simple question and that is whether you are satisfied—

David Miliband: They are never simple in this area.

Q298 Mr Hands: It is a very simple one as to whether you are satisfied with the text of the Treaty as it currently stands before going into the next round of negotiation?

David Miliband: I am satisfied that the Treaty respects our red-lines.

Q299 Mr Hands: That is not quite the same thing. Are you satisfied with the Treaty or will you seek to have any changes? What changes are you looking at?

David Miliband: As I have repeatedly said, I am satisfied that the Treaty respects our red-lines. I am determined to ensure that we get the change in respect of the role of national parliaments in respect of the revised text. The question of whether or not any of us are “satisfied” carries with it connotations of a whole range of things, and the process that we have discussed has all sorts of things associated with

it. In respect of the red-lines, I am satisfied that they have been respected but I do want to get this finalised.

Q300 Mr Hands: I am going to repeat—so the only change that you are currently looking for is the change in the translation in relation to “shall” in relation to national parliaments?

David Miliband: Subject to anyone else trying to negotiate changes which might necessitate changes.

Q301 Mr Hands: That is only the change you are looking for in the negotiation?

David Miliband: Correct.

Q302 Chairman: I think that is a very good point on which to end. I have to say that you have made a very robust defence of your position but I am not convinced on the question of the change in the terms of our opt-in. I think it has fundamentally been changed by the punitive sections in the new Article 10. It may conserve the red-lines and it may be justifiable in your own mind that that is the way we should go and it may be that people, and maybe even I would argue that we should be opting in, but in looking at this as an objective exercise, it is quite clear that the terms of our opt-in and opt-out powers have been fundamentally changed by this Article. I would say on 39 that I am deeply offended by the addition of a declaration, which you say is only a political symbol, and the fact that we are willing to accept a declaration which would use competition law on matters of criminal justice. On those matters I do remain unconvinced. I look forward to someone challenging on the use of the Charter to see whether the case law will be found against us or not. I think there is a lot still for those people who have concerns to be concerned about. You have obviously done a good job in the terms that you have set yourself and people will have to judge this evidence session and what is said in the House in the future to see whether we achieve what we are setting out to achieve. Thank you.

David Miliband: Thank you.

Written evidence

EUROPEAN SCRUTINY

Letter from the Chairman of the Committee to the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office, 11 October 2007

THE IGC MANDATE AND THE PROPOSED REFORM TREATY

You have agreed to give evidence to the Committee on the proposed Reform Treaty on 16 October, and the Members look forward to the opportunity to ask you questions about the draft texts and the outcome of the General Affairs Council earlier that week.

You will know from the Committee's recent report of 2 October ("European Union Intergovernmental Conference"), that the Committee has a particular concern over the effectiveness of the safeguards for the UK position on those questions identified by the Government as "red-line" issues.

The Committee noted that, in answer to oral questions on 9 October, you referred to the "legal draft" which became available on 5 October and stated that this:

"... makes absolutely clear the direction in which Europe is moving, which is to respect the red lines that the United Kingdom has asked for".¹

The Committee has only had the briefest of opportunities to consider the 5 October draft, but noted at its meeting yesterday new provisions which appear to have the potential to act as a considerable constraint on the free exercise of the "opt-in" arrangements. I refer, in this context, to the new Article 4a which is to be inserted in the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and to Declaration No 39 ("Declaration on non-participation by a Member State in a measure based on Title IV of Part Three of the Treaty on the Functioning of the European Union").

These provisions appear to have been inserted in the draft texts at some point between 17 September (when an interim French text was made available, which did not contain these provisions) and 5 October. They were not contained in the 2004 Constitutional Treaty and do not appear to be provided for in the IGC Mandate, even though the latter is said to be "the exclusive basis and framework" for the work of the IGC.

The provisions appear to be designed to dissuade Ireland or the United Kingdom from exercising a right not to opt-in. In the case of the new Article 4a, the provision appears to have the effect of obliging the UK to participate in an amending measure under Title IV, or face the loss of the existing measure in its entirety.

Declaration No 39 goes so far as to refer to the possibility of the Commission examining "the situation" on the basis of Article 96 EC in the event that the UK decides not to opt into a proposed measure. As you will be aware, Article 96 EC provides for action by the Commission against a Member State on the grounds of distorting the conditions of competition in the common market, and for the possibility of directives being adopted by QMV to eliminate the distortion. If we have understood the position correctly, the amendment to the Protocol and the Declaration could well have the effect of persuading the UK to opt-in for fear of unpredictable consequences if it did not. The Committee will be grateful for your comments on whether this is acceptable to the UK.

The other provision on which the Committee will be grateful for your views is the new addition (Article 10) to Protocol No 10 on transitional provisions. This, again, has been inserted at some time between 17 September and 5 October and does not appear to be based on the IGC Mandate.

The new provision governs the transitional arrangements applying to measures adopted under the EU Treaty relating to police and judicial cooperation in criminal matters. It appears to provide that the existing powers of the institutions (the ECJ and the Commission) will remain as they are now, but only for a period of five years from the coming into force of the Reform Treaty. The United Kingdom must then choose whether or not to accept the jurisdiction of the ECJ and the powers of the Commission. If the UK does not accept such jurisdiction and powers, the Draconian consequence appears to follow that all of the measures which have so far been adopted under the EU Treaty will cease to apply, and the Council will also gain the power to determine by QMV that the United Kingdom "shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of its cessation of its participation in those acts". The effect of this provision would seem to be that the UK would not only lose the benefit of all EU measures so far adopted (such as the European Arrest Warrant), with the consequent Disruption to our systems of criminal justice, but might also face the risk of incurring a potentially unlimited financial liability.

If we have understood it correctly, the intention of this provision seems to be to oblige the UK to accept the jurisdiction of the ECJ and the powers of the Commission, on a retrospective basis, over EU measures which have already been adopted. It is not explained why the UK should not continue to be entitled to the status quo in respect of such existing EU measures, (as indeed was provided for in Article 9 of Protocol No 10, which Article 10 now appears to contradict or override).

¹ Official Report, 9 October 2007, col 151.

The Committee will, of course, also wish to revisit the questions it has raised in its report, and would find it helpful, having regard to the legal complexity of the matters under discussion, to have the relevant legal advisers handling these negotiations accompany you as witnesses at the evidence session.

I am copying this letter to Lord Grenfell and Simon Burton in the House of Lords; Les Saunders in the Cabinet Office; and Tom Hines, Scrutiny Coordinator, and Guy Janes, Select Committee Liaison Officer, in the FCO. In view of the compressed timetable of these negotiations and the wider public interest in their progress, I am making the contents of this letter public.

Letter from the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office, to the Chairman of the European Scrutiny Committee, 16 October 2007

THE IGC MANDATE AND THE PROPOSED REFORM TREATY

Thank you for your letter of 11 October, in which you consider the detail of the Justice and Home Affairs (JHA) provisions of the Reform Treaty, set out in full for the first time in the draft Treaty text of 5 October, and the UK's opt-in arrangements for Justice and Home Affairs. I will of course be glad to discuss this with the Committee at our session today. But I thought it might also be helpful to write, in advance of our meeting, to respond to your points in detail, and set out more background to the JHA discussions during the IGC.

It is important to be clear, from the outset, that the new provisions you have highlighted in respect of JHA derive directly from the clear commitment in the IGC Mandate, carefully negotiated by the Government, that the UK would have a right to choose whether to participate in all JHA measures—the so-called “opt-in” that is one of the Government's “red lines”. The reason the provisions have emerged at this stage is that the draft legal text published on the 5th October represents the first, public, legal manifestation of the commitments in the Mandate. There is therefore no question of the provisions contradicting or diluting the Mandate; in fact the opposite is the case.

You express concern in your letter that the various new provisions could act as a constraint on the exercise of the opt-in arrangements. In fact, they offer guarantees that we have met our red line, and that we will always have the right to choose whether or not to participate in JHA co-operation. They will ensure that our right to opt into JHA measures will be watertight. I will address each of the issues that you raise in turn.

TRANSITIONAL ARRANGEMENTS

Transitional measures address existing JHA measures in the current “Third (JHA) Pillar” of the EU. Existing Third Pillar measures were not drafted with full ECJ jurisdiction in mind, so member states will need to prepare for the transition to full ECJ jurisdiction and a Commission role in any infraction process. We are clear that this would be a change to each measure which requires the UK to have the right to decide whether or not to participate in such measures.

We were concerned to ensure that such measures are transposed efficiently, which is why we have secured a commitment from the Commission and other Institutions, through declaration 39a, to “amend or replace” (and thereby effect a shift of measures to the Treaty on the Functioning of the Union) as much of this legislation as possible during the first five year period. We have the right to opt in to all such proposals, and we would expect key instruments to be amended or replaced early on in the process.

After five years, any Third Pillar measures that have not been transposed in this way, with the UK exercising its right to opt-in, will become subject to full ECJ jurisdiction. We were clear that the red line required the ability for the UK to choose whether or not it wanted to accept this. We have secured the right to choose to opt out, en bloc, from all such remaining measures, in order to avoid ECJ jurisdiction. But we have also secured the possibility to opt back in to individual measures on a case by case basis subject to the existing rules under the Schengen and JHA Protocols—and thus continue to benefit from valuable JHA co-operation where it is in the UK interest to do so.

It would not be realistic for the same measure to operate in different ways in two separate Treaties for different countries in the EU. But we have ensured that full ECJ jurisdiction cannot be extended to JHA measures in the UK without the UK having expressly chosen to take part in such measures.

AMENDING MEASURES

“Amending measures” concern existing JHA measures in which the UK already participates, whether currently in Pillar I or Pillar III, and the circumstances that will obtain if there are proposals that these measures should be amended. We have secured an explicit opt-in on these amending measures: the UK will have the choice of whether or not to participate in the amended measure. I believe this is important and

worthwhile. It removes, clearly and definitively, any scope for argument as to whether the UK's right to opt in to JHA measures extends to amendments to existing measures however minor or technical such amendments might be.

It is necessary to address the potential for knock-on effects of any decision by the UK not to opt-in to an amended measure. The new Article 4a in the opt-in Protocol, to which you refer, provides for the Council to consider the implications of the UK's non-participation in an amending measure. If the Council decides that our non-participation will render the underlying measure "inoperable", then that underlying measure will cease to apply to the UK. This threshold protects the UK's national interests and right to choose. It is an objective criterion that ensures that the consequences of a UK decision not to opt in, if indeed there are any, will be necessary and proportionate. Thus this provision is not, as you fear, designed to dissuade Ireland or the UK from exercising its right not to opt-in to an amended measure, but instead to provide for a situation where the decision not to opt in renders the underlying measure inoperable. Indeed by making explicitly clear that the UK's Protocol extends to amendments, it removes any risk that by opting into a JHA measure the UK might then have to accept future amendments which we considered to be unacceptable.

SCHENGEN

As you know, the UK is not a full participant in Schengen but participates in the police and criminal judicial co-operation parts of Schengen which do not affect the maintenance of our border controls. Since 2000 the UK has participated in all Schengen measures relating to police and criminal judicial co-operation (except for "hot pursuit"). So, for example, we participate in Schengen arrangements on mutual legal assistance and on cross-border police co-operation. Under the terms of our participation in Schengen, we are obliged to participate in any measures which build on elements of the *acquis* in which we participate. Under current arrangements, because unanimity applies to measures based on the Third Pillar, we have veto power over such measures which build on Schengen *acquis* (so called "Schengen building" measures). For the Reform Treaty, we needed to establish an absolute right to choose whether to participate in Schengen building measures. This we have done. You will see that our red line is protected.

We have also addressed the issue of the impact on Schengen measures of a decision not to participate in a "Schengen building" measure. Our priority was to ensure this was done on an objective basis with a high bar for any consequences to follow. This we have also done. The procedure will be as follows. Following a UK decision not to participate, member states of the EU will be able to consider the implications—if any—of the UK's non-participation on the existing Schengen *acquis*. The Council can decide, by QMV, whether and to what extent the UK should cease to participate in related parts of Schengen legislation, but only on the basis of objective, reviewable criteria: the decision by member states must ensure the "widest possible participation" of the UK without "seriously affecting the practical operability" of the Schengen *acquis* while respecting its coherence. In the unlikely event that the Council, having addressed the matter at least twice, cannot reach a decision, the matter can be referred to the European Council for a decision. In the highly exceptional case where the European Council cannot itself reach a decision, a decision must be taken by the Commission according to the same, objective criteria.

In the case of both amendments and "Schengen Building" measures, if we consider that the objective criteria have not been respected we can demand a review of the decision before the European Court of Justice.

DECLARATION 39

You were also concerned that Declaration 39 on the non-participation of a Member State in a JHA measure could deter Member States from deciding not to opt in to a proposal. It ensures that there is a full discussion of the possible implications of non-participation before a final decision is taken. Declaration 39 cannot in any event trigger legal consequences, should a Member State choose not to participate in a proposal. Similarly Article 96 does not add anything to the status quo: the Commission's powers set out in Article 96 of the Treaty of the European Community already exist, and in practice Member States are already able to ask the Commission to examine a situation in the light of Article 96.

FINANCIAL CONSEQUENCES

Finally, I would like to clarify the point about the financial consequences provision in the texts on amending measures and transitional arrangements. It is by no means likely that UK non-participation will incur any financial consequences. The burden of proof is the other way. And the provision offers clear protection for the UK by limiting any financial liability in a very strict way. The reference to "*direct financial consequences . . . necessarily and unavoidably incurred*" makes clear the very circumscribed grounds for any such action. The circumstances under which this would apply are very narrow indeed. The UK will participate fully in any votes on such measures.

In closing, I am confident that the agreements we have secured on JHA are good for Britain. They meet our red lines by giving us the full right to choose whether we want to participate in JHA measures. The legal text is indeed new—deliberately so. It fulfils the IGC Mandate and our commitment to see it through to legal fruition.

Let me also make reference to a further valuable issue raised by your Committee (and the FAC), concerning the role of Parliament in the new arrangements. As you know we are committed to creating new rights for our Parliament to participate in European decision-making. I believe you share this goal, but along with the FAC and ourselves wanted to ensure that there was no question of the Treaty placing *obligations* on Parliament. I explained to the FAC last week that I was confident that this was not the intended interpretation; the consensus in the Legal Group had been precisely the opposite. I am pleased to report that at the General Affairs Council in Brussels yesterday it was confirmed that the English legal text would be amended to ensure there was no room for doubt on this issue.

I am copying this letter to the Chairman of the Foreign Affairs Committee, the Chairman of the Lords EU Select Committee, the Clerks of all three Committees, Tom Hines, FCO Scrutiny Co-ordinator, Guy Janes, FCO Parliamentary Relations Co-ordinator, and to Les Saunders at the Cabinet Office European Secretariat. I look forward to seeing you later today.

EUROPEAN SCRUTINY

Letter from the Chairman of the Committee to Mr Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office, 19 October 2007

THE IGC MANDATE AND THE PROPOSED REFORM TREATY

My letter of 11 October to the Foreign Secretary and the subsequent evidence session raised a number of questions over the new provisions on transitional arrangements.

These provisions are the new Article 4a which is to be inserted in the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, and the new addition (Article 10) to Protocol No 10 on transitional provisions. Declaration No.39 ('Declaration on non-participation by a Member State in a measure based on Title IV of Part Three of the Treaty on the Functioning of the European Union') also caused concerns.

On the evening after the evidence session, you will recall that we had an informal conversation following our contribution to the Newsnight programme. In the course of our conversation I learned that the new Article 4a and Article 10 of Protocol No 10 were in fact proposed by the UK. That they were not inserted as additions to coerce the UK is of paramount importance to my understanding of the process at the IGC.

This came as a surprise to me, as it was not made known nor did it come out during the evidence session. Your statements were borne out by additional explanations. Not having these facts on the record or confirmed places me in a difficult position in relation to the Members of the Committee and with regard to the conclusions we can reach in our report of our scrutiny work for the House.

As this is a fact which is likely to be important to the Committee's work, I would be grateful if you would confirm if my understanding of what I was told is correct. It would also be helpful to know if you wished to add anything to what has been said about these provisions.

Letter from Mr Jim Murphy MP, Minister for Europe, Foreign and Commonwealth Office, to the Chairman of the European Scrutiny Committee, 26 October 2007

Thank you for your letter of 19 October. I am grateful for the opportunity to provide further background on the special arrangements secured for the United Kingdom in relation to Justice and Home Affairs.

I can confirm that the provisions in the United Kingdom's opt in arrangements concerning amendments and Schengen building measures, as well as the right of the United Kingdom to opt out of measures under Article 10 of Protocol 10, were included at our express insistence in order to ensure that our red line in this area was absolutely watertight.

You will recall that the United Kingdom's red line on Justice and Home Affairs is to protect our common law system and police and judicial processes and in particular to ensure that EU cooperation in this area does not affect fundamental aspects of our criminal justice system. That means ensuring that we have the right to choose whether or not we wish to operate under EU rules.

The IGC mandate moves the provisions of the "third pillar" for police and judicial co-operation in criminal matters,² and places them with other JHA provisions (ie asylum, migration and civil law) in Title IV.³ Provisions under Title IV are largely subject to qualified majority voting and a greater degree of ECJ

² Title VI TEU.

³ TEC, which will be renamed the Treaty on the Functioning of the Union.

jurisdiction than the title VI. We made clear that we could only agree such a change if we in the United Kingdom continued to be in a position to protect our national law and processes by deciding for ourselves whether to participate in EU rules in this area.

There is a precedent for this in the Amsterdam Treaty which moved the JHA title IV areas of asylum, migration and civil law from the third to the first pillar in the same way. At that time the UK secured an opt in protocol in respect of future Title IV measures. At the June Council we insisted that the Mandate for the IGC provided for a similar extension to cover all police and judicial cooperation on exactly the same terms as the Title IV protocol. This was secured in the first draft of the Reform Treaty circulated in July.

There were however two areas where, based on our experience of operating the Title IV opt in, we sought *additional* guarantees to make clear that the UK would have the right to choose whether or not to participate in any JHA measure—Schengen Building measures and amending measures. The mandate made clear that these points would be discussed during the IGC.⁴

Under the current arrangements for UK participation in Schengen, the UK is bound to participate automatically in proposals building on the parts of Schengen in which it takes part.⁵ This means that following the move to QMV in this area the UK would not have had a choice about whether to participate or not in Schengen proposals relating to police and criminal judicial cooperation.

As regards proposals for amendments to measures in which we participate, we also sought an explicit guarantee that the UK would have the right to choose whether to opt into such amendments.

In addition to the two areas outlined above there will remain a body of measures agreed under existing third pillar arrangements in which we currently participate. Following the entry into force of the Reform Treaty, these measures will become subject to the wider first pillar arrangements on the role of the ECJ. We were concerned to ensure that the UK was not bound to participate in measures agreed under the third pillar once new rules were in place.

In the technical discussions during the IGC, we insisted that the opt in had to be comprehensive: the UK had to have the choice whether or not to participate in any JHA measure; including new measures, amending measures, Schengen building measures and existing third pillar measures when they became subject to wider ECJ jurisdiction. We secured these objectives. The Protocol is crystal clear on our right to opt in or out in all of these areas. Where existing third pillar measures are amended, or repealed and replaced, we would have the choice whether or not to participate in the amended or replacement measure. Otherwise, they will continue to be subject to current third pillar arrangements for a transitional period of five years. At this stage, any remaining measures that were agreed under the third pillar will become subject to first pillar rules on ECJ jurisdiction. We secured a right for the UK to opt out en bloc of any such remaining measures at the end of the five year period.

The technical discussion also covered the practical implications of this much wider and more comprehensive opt-in. There are potential practical issues which arise as a result of the UK's ability to opt out of Schengen building measures and the right to opt in to future amendments to measures in which we participate. If, for example, the UK chose at some future date not to participate in an amendment to a measure in which we had previously chosen to participate for instance, the question would arise as to whether it was practical for us alone to continue to participate on the old, unamended rules, when all other Member States had moved to new arrangements. There was general agreement that it necessary to provide some objective, tightly defined, transparent process for resolving such practical issues if they arose. Amended Article 5 of the Schengen Protocol, and Article 4a of the Protocol on the position of the UK and Ireland set out processes agreed for Schengen building and amending measures respectively. It also covers the *direct* financial consequences, if any, which are "necessarily and unavoidably" incurred as the result of the United Kingdom ceasing to participate in existing measures. There are no financial or other penalties.

I can therefore confirm that these new provisions were not introduced to coerce the United Kingdom. Quite the contrary. They have been introduced at our insistence not only to extend our existing opt-out but to secure three *new* explicit opt-outs to make our protection absolutely watertight and to ensure that no new EU rules can be imposed on us as a result of the abolition of the Third Pillar. We have maintained an absolute right to choose whether to subject our laws to such rules and have safeguarded our ability to protect our common law and judicial system.

You were also concerned about Declaration 39 on the non-participation of a Member State in a JHA measure. I can confirm that this declaration is intended to be helpful to a State, such as the UK. By ensuring that there is a full discussion on the possible implications of its non-participation in a measure before a final decision is taken. Declaration 39 cannot trigger legal consequences, should a Member State choose not to participate in a proposal. Similarly Article 96 does not add anything to the status quo: the Commission's powers set out in Article 96 of the Treaty of the European Community already exist, and in practice Member States are already able to ask the Commission to examine a situation in the light of Article 96.

⁴ IGC Mandate paragraph 19(1) "[the protocol] may also address the application of the Protocol in relation to Schengen building measures and amendments to existing measures. This extension will take account of the UK's position under the previously existing Union *acquis* in these areas".

⁵ Article 8 of Council Decision 2000/365/EC states "the United Kingdom of Great Britain and Northern Ireland shall be deemed irrevocably to have notified the President of the Council under Article 5 of the Schengen Protocol that it wishes to take part in all proposals which build upon the Schengen *acquis* referred to in Article 1".

Finally, on the separate issue of the Charter of Fundamental Rights, it may be helpful to comment on the doubts that have been raised in some quarters about the workability of the arrangements in the UK's Protocol and in particular that the Courts would not respect provisions seeking to protect national law or would uphold claims based on the alleged non-uniform application of EU law.

As the Government made clear on successive occasions, and as the Prime Minister made clear to the House on 22 October, the UK Protocol on the Charter is not only legally binding on the Courts but is an integral part of the Treaty. It has exactly the same status as the provisions which give the Charter legal effect.

There are a number of precedents for Protocols which protect specific areas of Member States' national law—such as that for Denmark on legislation on the acquisition of second homes or that for Ireland relating to Article 40.3.3. of the Irish Constitution or which envisage that EU legislation may apply in some Member States but not in others. While none of these are exact precedents for the UK Charter Protocol, which simply guarantees what we consider is in any case the effect the Charter, there is no basis for the claim that the Courts will not in respect of protection for specific Member States explicitly enshrined in Protocols to the Treaty.

Letter from the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office, to Mike Gapes MP, Chairman of the House of Commons Foreign Affairs Select Committee, 18 October 2007

When I appeared before the Committee on 10 October, I promised to write with further details on two points: ECJ jurisdiction over CFSP; and the details of our JHA opt-in arrangements.

ECJ AND CFSP

As I made clear in my evidence, CFSP remains intergovernmental and in a separate Treaty (Treaty on European Union). Unanimity is the rule and the ECJ has no jurisdiction over CFSP policy or ESDP missions. Sir John Stanley MP asked for further information on the exclusion of ECJ jurisdiction over CFSP, and the two small exceptions to that rule.

ECJ jurisdiction over CFSP is limited to two very specific areas: policing the boundaries between CFSP and other EU external action; and hearing appeals against EU sanctions.

Article 240(a) in the Treaty on the Functioning of the European Union (TOFU) sets out the limits of the ECJ's role:

“The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 25 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”.

This means that the ECJ will continue to monitor and give a ruling on which actions should be undertaken by the Council through CFSP, and which actions should be undertaken by the Commission through the tools it has at its disposal such as development assistance. The ECJ already performs this role under Article 47 of the current Treaty on European Union, a provision introduced by the Maastricht Treaty.

The Reform Treaty, however, considerably improves on the existing position. It makes clear that the implementation of other Community policies (which are set out separately in the new Treaty on the Functioning of the Union) cannot affect the procedures and powers of the institutions when taking action under CFSP. This is designed to ensure the “ring-fencing” of CFSP as a distinct, equal area of action.

The second area of ECJ jurisdiction is to do with EU sanctions. This provides that the ECJ will be able to hear appeals from individuals and groups against their listing as targets of EU sanction. This provision is intended to ensure the judicial protection of the individual and consistency with ECHR obligations. I should underline that this does not in any way force the UK to implement sanctions only through the EU.

As I said before the Committee, the Reform Treaty gives a very clear statement that ECJ jurisdiction over CFSP is excluded, except for the two very limited areas set out above.

JHA

Gisela Stuart MP also raised a question about the impact of both Protocol 10 and Declaration 39, which both relate to aspects of Justice and Home Affairs, on the UK's red lines. The Government was clear, from the start, that we needed to protect our common law system and police and judicial processes. There was a clear commitment in the IGC mandate that the UK would have a right to choose whether or not to participate in all JHA measures. The provisions which Gisela Stuart raised are part of the package of measures which secure this.

Protocol 10 on transitional measures addresses existing police and criminal judicial co-operation measures in the current "Third Pillar" of the EU. Existing third pillar measures were not drafted with ECJ jurisdiction in mind, and Member States will need to prepare for the transition to full ECJ jurisdiction and a Commission role in any infraction process. We are clear that this is a change which requires the UK to have the opportunity to decide whether or not to opt in.

We were concerned to ensure that such measures are transposed effectively in a way the UK can accept, which is why we have secured a commitment from the Commission, through declaration 39a, to amend or replace as much of this legislation as possible during the first five year period. We have an opt in on all measures to which this process applies, and we would expect key instruments such as the European Arrest Warrant to be amended or replaced early on in the process.

After five years, any Third Pillar measures that have not been amended or replaced will become subject to full ECJ jurisdiction. We were clear that the red line required a choice for the UK whether or not to accept this change. We have secured the right to choose to opt out, en bloc, from all such remaining measures, in order to avoid ECJ jurisdiction. But we have also secured the possibility to opt back in to individual measures on a case by case basis subject to the existing rules under the Schengen and JHA Protocols—and thus continue to benefit from valuable JHA co-operation where it is in the UK interest to do so.

This means that ECJ jurisdiction cannot be extended to JHA measures in the UK without the UK having expressly chosen to take part in that measure.

Gisela Stuart also asked about Declaration 39, on the non-participation of a Member State in a JHA measure. This is a political declaration; as such, it cannot trigger legal consequences, should a Member State choose not to participate in a proposal. The reference in the Declaration to Article 96 of the Treaty of the European Community does not add anything to the status quo: the Commission's powers as set out in Article 96 already exist, and in practice Member States are already able to ask the Commission to examine a situation in the light of this Article. The only legal basis for consequences following a UK non-participation in JHA are in the UK's Schengen and Opt-In protocols.

I am copying this letter to the Chairman of the European Scrutiny Committee; the Chairman of the Lords EU Select Committee; the Clerks of all three Committees; Tom Hines, FCO Scrutiny Co-ordinator; Guy Janes, FCO Parliamentary Relations Co-ordinator; and to Les Saunders at the Cabinet Office European Secretariat.

**Letter from the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs,
Foreign and Commonwealth Office, to Mike Gapes MP, Chairman of the House of Commons
Foreign Affairs Select Committee, 18 October 2007**

Following my appearance before the Committee on 10 October, I wrote to set out in detail where the UK red lines were reflected in the draft Reform Treaty. As I mentioned, some of the provisions, in particular those relating to Justice and Home Affairs are very complex. To provide further explanation, I attach an annex explaining how the provisions relating to each red line (on the Charter of Fundamental Rights, Common Foreign and Security Policy, Justice and Home Affairs, and Tax and Social Security) ensure the UK's concerns have been met.

I hope these are helpful in setting out the deal secured by the UK, and I look forward to continuing contacts with the Committee as the parliamentary ratification process takes place.

I am copying this letter to the Chairman of the European Scrutiny Committee, the Chairman of the Lords EU Select Committee; the clerks of all three Committees; Tom Hines, FCO Scrutiny coordinator; Guy Janes, FCO Parliamentary Relations Coordinator; and to Les Saunders at the Cabinet Office European Secretariat.

I have arranged for the annex to this letter to be placed in the Libraries of both Houses.

*Justice and Home Affairs***Red line: protection of the UK’s common law system, and our police and judicial processes***Draft Reform Treaty—Protocol 10 on Transitional Measures on Transitional Provisions*

Commentary: This section of the protocol on transitional measures sets out the legal arrangements for measures agreed under the existing third pillar following the entry into force of the Reform Treaty.

Article 9

The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.

Commentary: This Article confirms that the legal effect of existing “third pillar” measures does not change for as long as they are left unamended. In particular, this means that existing third pillar measures will continue not to have direct effect which means that an individual cannot rely in a national court on any rights set out in a third pillar measure unless it has been implemented by national law.

Article 10

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 226 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

Commentary: This Article states that for a transitional period there shall be no extension of ECJ jurisdiction or right for the Commission to initiate infraction proceedings for measures agreed under existing “third pillar” intergovernmental arrangements.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

Commentary: This confirms that if in future existing third pillar legislation is amended, full ECJ jurisdiction along with the right for the Commission to initiate infraction proceedings will apply. However, in the case of amendments to existing legislation the UK’s opt-in would apply, so we would be able to choose whether to accept the amended proposal with ECJ jurisdiction and Commission powers.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community.

Commentary: This states that the transitional period for which ECJ jurisdiction and Commission infraction proceedings will not apply to existing third pillar measures will run for five years after the Reform Treaty has entered into force.

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

Commentary: This paragraph allows the UK to decide to opt out en bloc of all remaining “third pillar” measures that are unamended (ie haven’t been repealed and replaced or amended) at any time up to six months before the end of the five year transitional period. Where the UK decides to opt out, the remaining third pillar measures will cease to apply to the UK once the five year transitional period has ended.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

Commentary: This paragraph provides that a decision shall be taken by qualified majority (without UK participation) on any necessary arrangements that should be made following the UK's decision to opt out of the remaining measures. This might for instance include administrative arrangements necessary following the UK's decision to opt out (eg how to amend existing processes for information exchange to take into account of the UK's intention not to participate).

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

Commentary: This paragraph provides for a decision to be taken by qualified majority (with UK participation) on any "direct" financial consequences, which are "necessarily and unavoidably" incurred as a result of the UK's decision to opt out of existing measures. There may be cases where our non-participation in a measure incurs costs, and where it would be reasonable to expect the UK to bear those costs. For instance, in the unlikely event that the UK were to cease to participate in Eurojust (the EU's agency responsible for co-ordinating investigations into serious crime), it would be reasonable to expect the UK to bear the costs of bringing UK staff home from Eurojust, and settling their contracts.

5. The United Kingdom may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4, first subparagraph. In that case, the relevant provisions of the Protocol on the Schengen *acquis* integrated into the framework of the European Union or of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as the case may be, shall apply. The powers of the institutions with regard to those acts shall be those set out in the Treaties. When acting under the relevant Protocols, the Union institutions and the United Kingdom shall seek to reestablish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence.

Commentary: This paragraph enables the UK to apply to opt back in to any JHA measures under the relevant provisions of the Schengen and opt-in protocols. This means that the UK can choose to accept ECJ jurisdiction and Commission powers to initiate infraction proceedings for individual measures where it is willing to do so. The provision sets out clearly that the Union institutions should accede to any UK request to participate so far as is possible without affecting the operability of the relevant parts of the JHA Acquis.

Draft Reform Treaty—Schengen Protocol

Commentary: The UK currently participates in the police and judicial co-operation aspects of the Schengen Acquis as set out in Council Decision 2000/365/EC.

The Protocol integrating the Schengen *acquis* into the framework of the European Union shall be amended as follows:

Article 5 shall be replaced by the following:

1. Proposals and initiatives to build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties.

Commentary: This reflects the existing provision that a proposal building on an aspect of the Schengen Acquis will have a legal base from the relevant part of the Treaties.

In this context, where either Ireland or the United Kingdom has not notified the Council in writing within a reasonable period that it wishes to take part, the authorisation referred to in Article 280d of the Treaty on the Functioning of the European Union shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.

Commentary: This clarifies that where the UK/ Ireland have decided not to opt in to a Schengen building measure, permission to proceed on the basis of enhanced co-operation is deemed to have been granted to the other Member States.

2. Where either Ireland or the United Kingdom is deemed to have given notification pursuant to a decision under Article 4, it may nevertheless notify the Council in writing, within three months, that it does not wish to take part in such a proposal or initiative. In that case, Ireland or the United Kingdom shall not take part in its adoption. As from the latter notification, the procedure for adopting the measure building upon the Schengen *acquis* shall be suspended until the end of the procedure set out in paragraphs 3 or 4 or until the notification is withdrawn at any moment during that procedure.

Commentary: This paragraph makes clear that, notwithstanding Council Decision 2000/365/EC (which sets out the parts of the Schengen Acquis in which the UK participates), the UK has the right to decide whether or not to opt in to a Schengen building measure. This safeguards the UK's red line by ensuring that the UK should not be automatically bound to participate in any measure proposed as part of the Schengen Acquis.

3. For the Member State having made the notification referred to in paragraph 2, any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a

decision of the Council acting by a qualified majority on a proposal from the Commission. That decision shall be taken in accordance with the following criteria: the Council shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen *acquis*, while respecting their coherence. The Commission shall submit its proposal as soon as possible after the notification referred to in paragraph 2. The Council shall, if needed after convening two successive meetings, act within four months of the Commission proposal.

Commentary: This provision allows for a Council Decision (taken on the basis of a qualified majority on a proposal from the Commission) to limit UK participation in some parts of the Schengen Acquis as a whole, should the UK's non-participation in the Schengen building measure "seriously affect . . . the practical operability of the various parts of the Schengen Acquis". This decision shall take effect only when the proposed measure that the UK has not participated in comes into force. This allows other Member States to safeguard the coherence of the Acquis as a whole, whilst ensuring that any limitation on UK participation is subject to robust and objective criteria.

4. If, by the end of the period of four months, the Council has not adopted a decision, a Member State may, without delay, request that the matter be referred to the European Council. In that case, the European Council shall, at its next meeting, acting by a qualified majority on a proposal from the Commission, take a decision in accordance with the criteria referred to in paragraph 3.

Commentary: This enables any Member State to refer the matter to the European Council if no decision has been adopted within four months. The European Council may then take a decision by qualified majority. This allows the UK to escalate the decision on the UK's ongoing participation in the relevant parts of Schengen, should there be disagreements at the JHA Council.

5. If, by the end of the procedure set out in paragraphs 3 or 4, the Council or, as the case may be, the European Council has not adopted its decision, the suspension of the procedure for adopting the measure building upon the Schengen *acquis* shall be terminated. If the said measure is subsequently adopted any decision taken by the Council pursuant to Article 4 shall, as from the date of entry into force of that measure, cease to apply for the Member State concerned to the extent and under the conditions decided by the Commission, unless the said Member State has withdrawn its notification referred to in paragraph 2 before the adoption of the measure. The Commission shall act by the date of this adoption. When taking its decision, the Commission shall respect the criteria referred to in paragraph 3".

Commentary: This provision states that where there has been no decision on whether to limit UK participation in the Schengen Acquis at Council or European Council level, the Commission shall take a decision, respecting the objective criteria for determining the extent of UK participation—namely that the decision should retain the widest possible participation of the Member State concerned, whilst also preserving the coherence and operability of the Schengen Acquis. This means that there is no prospect of the UK's participation in the Schengen Acquis being limited automatically. Comprehensive discussion must take place at Council level at least twice, with the matter elevated to European Council level if necessary. The UK has the right to withdraw its opt-out at any point up to the adoption of the Schengen building measure.

Draft Reform Treaty—Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice

The Protocol on the position of the United Kingdom and Ireland shall be amended as follows:

Commentary: This extends the UK's existing Title IV opt-in protocol to cover all justice and home affairs matters and makes minor technical changes.

- (a) at the end of the title of the Protocol, the words "in respect of the area of freedom, security and justice" shall be added;
- (b) in the second recital of the preamble, the reference to Article 14 shall be replaced by a reference to Articles 22a and 22b of the Treaty on the Functioning of the European Union;
- (c) in Article 1, first sentence, the words "pursuant to Title IV of the Treaty establishing the European Community" shall be replaced by "pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union"; the second sentence shall be deleted and the following paragraph shall be added:

"For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.";
- (d) at the beginning of Article 2 the words "provisions of Title IV of the Treaty establishing the European Community" shall be replaced by "provisions of Title IV of Part Three of the Treaty on the Functioning of the European Union"; at the end of the Article, the words "acquis communautaire" shall be replaced by "Community or Union acquis";

- (e) Article 3(1) shall be amended as follows:
- (i) in the first sentence of the first subparagraph, the words “pursuant to Title IV of the Treaty establishing the European Community” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union” and the second sentence shall be deleted;
 - (ii) the following new subparagraphs shall be added after the second subparagraph:

“Measures adopted pursuant to Article 64 of the Treaty on the Functioning of the European Union shall lay down the conditions for the participation of the United Kingdom and Ireland in the evaluations concerning the areas covered by Title IV of Part Three of that Treaty.

For the purposes of this Article, a qualified majority shall be defined in accordance with Article 205(3) of the Treaty on the Functioning of the European Union.”;
 - (f) in Articles 4, 5 and 6, the words “pursuant to Title IV of the Treaty” shall be replaced by “pursuant to Title IV of Part Three of the Treaty on the Functioning of the European Union”;
 - (g) in the second sentence of Article 4, the reference to Article 11(3) shall be replaced by a reference to Article 280f(1) of the Treaty on the Functioning of the European Union;
 - (h) the following new Article 4a shall be inserted:

“Article 4a

1. The provisions of this Protocol apply for the United Kingdom and Ireland also to measures proposed or adopted pursuant to Title IV of Part III of the Treaty on the Functioning of the European Union amending an existing measure by which they are bound.

Commentary: This confirms that the UK has the right to choose whether to opt in to proposals for amendments to existing measures in which it already participates.

2. However, in cases where the Council, acting on a proposal from the Commission, determines that the non-participation of the United Kingdom or Ireland in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to make a notification under Article 3 or 4. For the purposes of Article 3 a further period of two months starts to run as from the date of such determination by the Council.

Commentary: This provides for a decision to be taken by qualified majority in the Council to urge the UK to participate in the amended measure should UK participation in the unamended measure without amendment make application of the amended measure “inoperable” (a very high threshold). It also confirms that there is an additional two months for the UK to consider its position in this case.

If at the expiry of that period of two months from the Council’s determination the United Kingdom or Ireland has not made a notification under Article 3 or Article 4, the existing measure shall no longer be binding upon or applicable to it, unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure. This shall take effect from the date of entry into force of the amending measure or of expiry of the period of two months, whichever is the later.

Commentary: This confirms that the original measure shall cease to apply to the UK where it has chosen not to opt in to the amendment and the Council has decided that the UK’s non-participation makes the measure inoperable.

For the purpose of this paragraph, the Council shall, after a full discussion of the matter, act by a qualified majority of its members representing the Member States participating or having participated in the adoption of the amending measure. A qualified majority of the Council shall be defined in accordance with Article 205(3)(a) of the Treaty on the Functioning of the European Union.

Commentary: This ensures that a full discussion takes place and that the decision is taken by a qualified majority representing all the Member States participating in the amendment.

3. The Council, acting by a qualified majority on a proposal from the Commission, may determine that the United Kingdom or Ireland shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in the existing measure.

Commentary: This provides that should the Council may take a decision by qualified majority on whether the UK should bear any “direct financial consequences . . . necessarily and unavoidably incurred” as a result of its non-participation. The UK participates in this decision-making process, and the test for bearing financial consequences is robust.

4. This Article shall be without prejudice to Article 4”.

- (i) at the end of Article 5, the following shall be added: “, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise”;
- (j) In Article 6, the words “the relevant provisions of that Treaty, including Article 68,” shall be replaced by “the relevant provisions of the Treaties”;

(k) the following new Article 6a shall be inserted:

“The United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 15a of the Treaty on the Functioning of the European Union which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title IV of Part Three of that Treaty where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 15a”.

Commentary: This ensures that where the UK has chosen not to participate in a JHA measure, the relevant rules relating to data protection shall not apply for the UK.

Draft Reform Treaty Declaration 39b on Article 5 of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference notes that where a Member State has made a notification under Article 5(2) of the Protocol on the Schengen *acquis* integrated into the framework of the European Union that it does not wish to take part in a proposal or initiative, that notification may be withdrawn at any moment before the adoption of the measure building upon the Schengen *acquis*.

Commentary: This confirms that the UK has the right to notify its intention to participate in a measure building upon the Schengen Acquis at any time before adoption.

Draft Reform Treaty Declaration 39c on on Article 5(2) of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference declares that whenever the United Kingdom or Ireland indicates to the Council its intention not to participate in a measure building upon a part of the Schengen *acquis* in which it participates, the Council will have a full discussion on the possible implications of the non participation of that Member State in that measure. The discussion within the Council should be conducted in the light of the indications given by the Commission concerning the relationship between the proposal and the Schengen *acquis*.

Commentary: This Declaration confirms that there should be full discussion on the implications for the Schengen Acquis if the UK chooses not to participate in a Schengen building measure. This discussion should be based on the Commission proposal, which must respect the objective criteria set out in Article 5(3) of the Schengen protocol; “shall seek to retain the widest possible measure of participation of the Member State concerned without seriously affecting the practical operability of the various parts of the Schengen acquis, while respecting their coherence”.

Draft Reform Treaty Declaration 39d on Article 5(3) of the Protocol on the Schengen acquis integrated into the framework of the European Union

The Conference recalls that if the Council does not take a decision after a first substantive discussion of the matter, the Commission may present an amended proposal for a further substantive re-examination by the Council within the deadline of four months.

Commentary: this confirms that should the Council fail to take a decision based on a first Commission proposal, a second proposal may be examined within the four month period.

Draft Reform Treaty Article 1, point 5

Article 3, renumbered 4, shall be replaced by the following:

“Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Commentary: the final sentence of paragraph 2 explicitly confirms for the first times in the Treaties that matters relating to national security are the sole responsibility of Member States.

*Charter of Fundamental Rights***Red line: Protection of the UK's existing labour and social legislation**

The Government pledged that nothing in the Charter of Fundamental Rights would give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation. This sets out what will be the legal consequences of the amendments to the draft Reform Treaty concerning the Charter of Fundamental Rights.

A reference to the Charter in the Reform Treaty (new Article 6 TEU) will make the Charter legally binding once the Reform Treaty comes into force. The Charter will be addressed primarily to the EU institutions who will be required to recognise the rights, freedoms and principles in the Charter. The Charter simply records existing rights which already bind Member States when they implement EU law. The Charter creates no new enforceable rights.

The text of the Charter and explanations will include the amendments made in the Constitutional Treaty. Courts will have to give due regard to the horizontal articles in the Charter, and to the accompanying explanations. These confirm that the Charter does no more than to reaffirm rights, freedoms and principles already recognised in EU law, and restates the circumstances in which courts can already take them into account. The Reform Treaty reference to the Charter will set out how the ECJ should use them to interpret the Charter. Furthermore, the Reform Treaty will also include a declaration, agreed by all Member States, underlining that there is no extension of the EU's powers to act, and a specific UK Protocol. The Protocol guarantees that the Charter does not create any greater rights than already apply in EU law nor extend the powers of any court to strike down UK laws. This package of safeguards guarantees that the charter would not give national or European courts any new powers to strike down or reinterpret UK law, including our labour and social legislation.

The mandate notes that the reference to the Charter is to “the version of the Charter as agreed in the 2004 IGC which will be re-enacted by the three Institutions in [2007]. It will be published in the Official Journal of the European Union.

The Charter does not create any new rights, freedoms or principles. It simply records rights, freedoms and principles that are already recognised in EU and national law, and makes them more visible. This is made clear by the horizontal provisions in Title VII of the Charter, as amended by the 2004 IGC, and by the accompanying explanations.⁶ In particular, the horizontal provisions say:

- The Charter applies to Member States “only when they are implementing Union law”.
- The Charter does not extend or modify the Union's powers or tasks.
- Rights deriving from EU law or the ECHR are the same (ie the rights in the Charter are not more extensive).
- Rights resulting from the common constitutional traditions of the Member States “shall be interpreted in harmony with those traditions”.
- Acts of the Union may implement provisions of the Charter that contain principles, but these principles “shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”.
- “Full account shall be taken of national laws and practices as specified in this Charter”.

As is well-established in the case law of the ECJ, courts already have the power to strike down national legislation that is incompatible with a fundamental right constituting a general principle of EU law, if the legislation implements or derogates from EU law.⁷ After the Charter is made legally binding, that will remain the case. The Charter does no more than to restate the fundamental rights to which courts have always had regard, and the circumstances in which they may take those fundamental rights into account.

The Charter also includes “principles”, that—as the Horizontal Articles explain—do not have legal effect independently of the legislation that gives them effect. Their purpose is to guide the EU legislature, rather than to give justiciable rights to individuals. For instance, the Charter records that when the EU legislates, it should do so in a way that will ensure a high level of human health protection. But that does not create an individual right to health care. And a court may only have regard to such principles when considering whether the EU legislature has taken them sufficiently into account when acting.

⁶ The revised Charter is in Part II of the Constitutional Treaty: <http://eur-lex.europa.eu/en/treaties/dat/12004V/htm/C2004310EN.01004101.htm>. The revised explanations are in the declarations accompanying the Constitutional Treaty: <http://eur-lex.europa.eu/en/treaties/dat/12004V/htm/C2004310EN.01042001.htm>

⁷ For example: Case 5/88 *Wachauf* [1989] ECR 2609, para 19, Case C-260/89 *ERT* [1991] ECR I-2925, para 43, Case C-368/95 *Heinrich Bauer Verlag* [1997] ECR I-3689, para 24. Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 49; Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75; Case C-540/03 *Parliament v Council (Family Reunification)* [2006] ECR I-5769; Case C-370/05 *Festersen*, judgment of 25 January 2007, paragraphs 35–37; Case C-303/05 *Advocaaten voor der Wereld*, judgment of 3 May 2007, paragraph 45.

Incorporating the Charter into the Treaties

Article 1, point 8 of the draft Reform Treaty states that current Article 6 TEU which deals with fundamental rights will be replaced with the following:

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted [at . . ., on . . . 2007], which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Commentary: This article makes the Charter legally binding, giving it the same legal value as the Treaties. The text of the Charter will not however form part of the draft Reform Treaty. There is also a clear provision that the Charter does not extend the competences of the Union beyond what is provided in the Treaties. The article also confirms that the Charter must be interpreted in the light of the Horizontal Articles (as set out in Title VII of the Charter) and the Explanations. Additionally, the Union will accede to the ECHR—again this will not affect the Union's competences.

Protocol no: 7 on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom

Commentary: The protocol specifies what an incorporated Charter does and does not do, bearing in mind that it does not create new rights and principles but simply records those that already exist. The protocol is intended to guarantee for the UK that the new reference to the Charter in Article 6 EU does not increase the extent to which courts applying EU law may already have regard to fundamental rights, freedoms and principles.

Article 1

1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Commentary: This makes clear on the face of the Treaty that the Charter cannot have the effect in the UK of “extending” the ability of any court to strike down UK law, because it does not “extend” any aspect of EU law. Therefore if, despite what the Charter provisions say, someone tried to argue that the Charter creates new rights, the argument would fail: the Protocol makes it clear that the Charter does not give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation.

2. In particular, and for the avoidance of doubt, nothing in [Title IV] of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.

Commentary: This paragraph applies “in particular” to the social and economic provisions in Title IV of the Charter. Some of those provisions contain principles rather than rights. Other provisions expressly say that they apply in accordance with national law. It follows that, as this paragraph guarantees, those articles either do not reflect any rights at all, or do no more than reflect the rights that already exist in UK law. As the words “in particular” indicate, the same is also true of other provisions in the Charter that either contain principles rather than rights, or expressly give no rights going beyond those provided for in national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.

Commentary: This applies to provisions in the Charter that refer back to national law and practice. It reinforces the point—as provided for in Article 52(6) of the Charter—that those provisions are limited in the same way as national law.

Declaration on the Charter of Fundamental Rights

1. The Charter of Fundamental Rights, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined by the Treaties.

Commentary: This Declaration, agreed by all Member States, underlines the fact that a legally-binding reference to the Charter does not extend the application of Union law or modify existing tasks or powers in any way.

Annex C

*Common Foreign and Security Policy***Red line: maintenance of the UK's independent foreign and defence policy***Draft Reform Treaty Article 1, point 27*

Article 11 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following two paragraphs:

“1. The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.

Commentary: This provision sets out the scope of CFSP in the same terms as are already used in the existing Treaty. It reiterates that all areas of foreign policy and matters relating to the Union’s security continue to fall within the intergovernmental provisions of CFSP. CFSP continues to be defined and implemented in accordance with the EU Treaty and as such is kept distinct from other EU policies which are contained in the Treaty on the Functioning of the European Union. The distinct character of CFSP is reinforced against encroachment by non-CFSP matters by the improved provisions of Article 25 (formerly Article 47).

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise.⁸ The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor the compliance with Article 25 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 240a of the Treaty on the Functioning of the European Union.

Commentary: This new overarching provision sets out explicitly the distinctive legal and procedural character of CFSP. It sets out the separate framework within which the CFSP is carried out, emphasising its distinctive intergovernmental nature and the fact that there is limited Commission and EP participation. In particular it is clear that legislative acts can not be adopted, and that ECJ jurisdiction is excluded other than in two defined areas.

Draft Reform Treaty Article 2, point 223

The following two new Articles 240a and 240b shall be inserted:

“Article 240a

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 25 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

⁸ The cases in which the Council or the European Council may act by QMV when taking decisions in CFSP are set out in Article 17 (2), Article 28 (3) TEU, Article 30 (2) and Article 31 (2) and (3) as amended by the Reform Treaty, Article 1, Point 34), Point 46) and Point 49).

Commentary: The powers of the Court are listed in the Treaty on the Functioning of the European Union. This provision makes absolutely clear that the ECJ will have no jurisdiction over either provisions relating to CFSP or any acts based on such provisions.

There are only two specific exceptions.

The reference to Article 25 TEU relates to the power of the Court to adjudicate, as now, on the boundary between the CFSP and the Treaty on European Union and other Union policies contained in the Treaty on the Functioning of the European Union (TOFU).

However, in contrast to the existing provision (Article 47 TEU) which simply provides that nothing in the EU Treaty shall affect matters in the EC Treaty, the new Article 25 TEU also explicitly provides that the implementation of policies under the Treaty on the Functioning on the European Union shall not affect the procedures and extent of the powers of institutions provided for under CFSP. The Court must therefore protect the distinct character of CFSP against encroachment from non-CFSP provisions.

Article 230 allows individuals and groups, in limited circumstances, to challenge legal acts which affect them directly, ie The ECJ is currently is already able to review Community regulations imposing sanctions on individuals and groups under the TEC (and has done so on a number of occasions)—sanctions that will have followed from a CFSP decision. This judicial protection of individuals' rights is reinforced by allowing those directly affected to seek review of a CFSP Council Decision listing them as a target for sanctions.

Draft Reform Treaty Declaration 30 concerning the common foreign and security policy

The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

It stresses that the EU and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.

Commentary: This Declaration confirms that nothing in the provisions relating to CFSP affect Member States' own responsibilities in relation to foreign policy.

Draft Reform Treaty Declaration 31 concerning the common foreign and security policy

In addition to the specific rules and procedures referred to in paragraph 1 of Article 11 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the UN.

The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

Commentary: This Declaration reaffirms that the CFSP does not interfere with Member States powers in the o conduct of their own independent foreign policies nor affect their national diplomatic services, membership of international organisations, including the UN Security Council, or relations with third countries. It also confirms the limited role of the Commission and European Parliament.

*Tax and Social Security***Red line: Protection of the UK's tax and social security system***Social Security brake (draft Reform Treaty Article 1, point 51)*

“Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or
- (b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted”.

Commentary: Under the terms of the provision, where any Member State assesses that it would affect important aspects of its social security system (including cost, scope, financial balance or structure) it may refer the proposal to the European Council. In that case the legislative procedure is suspended. The European Council then takes a decision by consensus on how to proceed. If no action is taken within four months the proposal will fall.

Declaration 33 on the second paragraph of Article 42 of the Treaty on the Functioning of the European Union

The Conference recalls that in that case, in accordance with Article 9b(4), the European Council acts by consensus.

Commentary: This Declaration (agreed by all Member States) confirms that any decision taken the European Council under the above brake must be by consensus—ie all Member States must agree. So once the brake is activated, any Member State can block a proposal and it falls.

**Letter from the Rt Hon David Miliband MP, Secretary of State for Foreign and Commonwealth Affairs,
Foreign and Commonwealth Office, to Mike Gapes MP, Chairman of the House of Commons
Foreign Affairs Committee, 11 October 2007**

I welcomed the opportunity to discuss the EU Reform Treaty with you and the other members of the Committee on 10 October. Andrew Mackinlay asked, and I agreed, to provide factual references on where the red lines were protected in the actual Treaty text published in English on 5 October. As the Government set out in its White Paper “The Reform Treaty: The British Approach to the European Union Intergovernmental Conference, July 2007”, the red lines are:

- protection of the UK's existing labour and social legislation (relevant text in Annex I);
- protection of the UK's common law system, and our police and judicial processes (text in Annex II);
- maintenance of the UK's independent foreign and defence policy (text in Annex III); and
- protection of the UK's tax and social security system (text in Annex IV).

The red lines that we asked for have been achieved in this draft, and I believe that this will be confirmed in the final conclusion of the Intergovernmental Conference to be signed in December. The following are the main points for each of the red lines. The Annex gives the relevant Treaty and other texts. I will be happy to provide further details or commentary as necessary, and will write separately on the other questions raised.

The Charter of Fundamental Rights

The Charter of Fundamental Rights is intended to record, not create, rights. The Government pledged that nothing in the Charter of Fundamental Rights would give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation. This will be achieved in the Reform Treaty via a package of safeguards:

1. a clear provision in the Treaty stating that courts, including the ECJ, must have due regard to the “Explanations” detailing the sources of the rights contained in the Charter when interpreting its provisions;
2. “Horizontal Articles” setting out the precise scope and application of the Charter. These confirm that the Charter cannot be used to expand any of the EU's powers;

3. a specific UK protocol, with legal force, that guarantees that the Charter does not create any greater rights than already apply in EU law, or extend the powers of any court—European or domestic—to strike down UK laws; and
4. a Declaration of the 27 Member States on the Charter underlining that it does not extend the EU's powers to act.

The text of the Charter of Fundamental Rights will not be included in the text of the Reform Treaty. Therefore it is not printed in the draft text. However Article 1, point 8 of the draft Treaty (which will become Article 6, Treaty of the European Union) provides that it shall have the same legal value as the Treaties. The Charter will be published, with the Horizontal Articles and Explanations (setting out the existing sources of the rights it records) in the EU's Official Journal. The Protocol, which is also legally binding, and has the same status as the Treaty, will form part of the Treaty.

Justice and Home Affairs

The Government was clear that we needed to protect our common law system and police and judicial processes. This meant that no Justice and Home Affairs proposal should be imposed on the UK against our will and we therefore needed the full right to choose, across the board, whether to participate in EU co-operation in JHA.

This will be secured in the draft Reform Treaty by an extension of our existing opt-in covering Title IV of the current Treaty on the European Community (on asylum, immigration and civil law matters) to all JHA proposals, and by amendments to the existing Schengen Protocol. The details are extensive, covering “transitional measures”, amendments to existing JHA measures, and measures building on Schengen *acquis*. I can provide a commentary on what is very dense procedural text if that would be helpful. In addition, the draft Reform Treaty includes an “emergency brake” which Member States can pull where they think a proposal will affect fundamental aspects of their criminal justice system.

For measures already agreed under intergovernmental “third pillar” arrangements, we have ensured that there will be no extension of ECJ jurisdiction for the UK unless the UK agrees to it. In other words, we will choose whether or not to participate.

The new Treaty will also make explicit, for the first time, that national security remains the sole responsibility of each Member State.

Common Foreign and Security Policy

The Government is committed to ensuring that the UK should retain its independent foreign and defence policy. The Reform Treaty will confirm that CFSP will remain an intergovernmental process. In fact, CFSP remains distinct from other policy areas, in a separate Treaty. In effect, we have retained it in a separate pillar. Unanimity in decision-making will remain the rule (ie the UK will hold a veto), legislative activity is excluded, and the ECJ will not have jurisdiction over CFSP except, as we discussed, on consequential questions of boundaries and sanctions.

As is the case now, it will be the Heads of State or Government (in the European Council), acting by unanimity, who set the strategic interests and objectives of the Union. It will be the Member States (in the Council) who then task the new High Representative for Common Foreign and Security Policy to take forward activity under the CFSP.

The preceding is all in the Treaty. Two Declarations will confirm that all 27 Member States agreed that provisions on CFSP will not affect the responsibilities of the Member States, as they currently exist, for the formation and conduct of their foreign policy, or of their national representations in third countries and international organisations.

Tax and Social Security

As our White Paper⁹ reiterated “it is long-standing Government policy that tax matters should continue to be decided by unanimity”. The current Treaties guarantee this and there will be no change to the status of unanimous decision-making on tax in the draft Reform Treaty.

The Government was clear that the UK should have the final say on any matters affecting important aspects of its social security system—including cost, scope, financial balance or structure. This was achieved by a strengthened “emergency brake” mechanism. This provision allows any Member State to refer a proposal to the European Council, for decision by unanimity, where it might affect important aspects of its social security system. If the European Council does not reach agreement within four months, the proposal will automatically fall. This means that under the terms of the Reform Treaty, the UK retains ultimate control over any proposals which might affect important aspects of its social security system.

⁹ “The Reform Treaty: The British Approach to the European Union Intergovernmental Conference, July 2007”.

I am copying this letter to the Chairman of the European Scrutiny Committee, the Chairman of the Lords EU Select Committee; the Clerks of all three Committees; Tom Hines, FCO Scrutiny Co-ordinator; Guy Janes, FCO Parliamentary Relations Co-ordinator; and to Les Saunders at the Cabinet Office European Secretariat.

I have arranged for the annex to this letter to be placed in the Libraries of both Houses.
