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Constitution Committee

6th Report of Session 2007–08

**European Union
(Amendment) Bill and
the Lisbon Treaty:
Implications for the
UK Constitution**

Report with Evidence

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EU (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution

CHAPTER 1: INTRODUCTION

Scope of the report

1. The remit of the Constitution Committee is to consider the constitutional implications of all public bills and to keep under review the operation of the constitution. There can be no doubt that the European Union (Amendment) Bill,¹ and the Lisbon Treaty which it aims to implement, are of constitutional significance. As the Committee recognised in its first ever report, the relationship between the United Kingdom (UK) and the European Union (EU) is of “first class constitutional importance”.²
2. The European Union (Amendment) Bill would provide statutory approval for the Treaty of Lisbon and incorporate the Treaty in UK law, to enable the Government to ratify the Treaty; and create new arrangements for parliamentary approval of future changes to the treaties which will govern the EU. It is clear, therefore, that our assessment of the bill must also consider the likely impact of the Lisbon Treaty itself upon the UK constitution.
3. The Committee is conscious of the work of other committees in both Houses of Parliament in gathering evidence on the Lisbon Treaty and providing analysis. We make reference in particular to the report of the House of Lords European Union Committee, *The Treaty of Lisbon: an impact assessment*.³ It is our intention that our report should be read in conjunction with that and other reports. **Our approach to the Lisbon Treaty is different to that of other committees: we are concerned exclusively with the changes that may be brought about to the workings of the UK constitution rather than the operation of the EU’s institutions and processes. We also make comments and recommendations on Parliament’s control over amendments to the treaties governing the EU.**
4. Our report does not deal with the question of whether or not there ought to be a referendum either on ratification of the Lisbon Treaty or on the UK’s membership of the EU.⁴ Whilst the principles and practices governing the use of referendums are clearly of constitutional importance, an inquiry into this subject would require us to range well beyond EU matters. It is a subject which the Committee may choose to return to at a later date.
5. In preparing this report, we decided to adopt methods similar to those used in our report on *The Draft Constitutional Treaty for the European Union* in

¹ Introduced to the House of Lords on 12 March 2008.

² 1st Report (2001–02): *Reviewing the Constitution: Terms of Reference and Method of Working* (HL Paper 11), paragraph 42.

³ 10th Report (2007–08): *The Treaty of Lisbon: an impact assessment* (HL Paper 62).

⁴ In the Committee’s 9th Report (2002–03): *The Draft Constitutional Treaty for the European Union* (HL Paper 168), we published written evidence from Professor Rodney Brazier on this issue, who noted “the inadequacy of the present ad hoc situation concerning referendums” (page 47).

October 2003.⁵ Accordingly, we issued a Call for Evidence to a panel of academic experts from across the UK. We are indebted to those who responded and their evidence is published with our report.

- Professor Mads Andenas (University of Leicester, who wrote with Professor Andreas Follesdal of the University of Oslo)
- Dr Gordon Anthony (Queen’s University, Belfast)
- Professor Damian Chalmers (London School of Economics and Political Science)
- Professor Alan Dashwood (University of Cambridge)
- Dr Valsamis Mitsilegas (Queen Mary, University of London)
- Professor Jo Shaw (University of Edinburgh)
- Dr Eleanor Spaventa (University of Durham)
- Professor Takis Tridimas (Queen Mary, University of London)
- Professor John Usher (University of Exeter)

6. We also wrote to the Foreign Secretary to ask him to set out the Government’s view of how the Lisbon Treaty would affect the UK constitution. His reply is reproduced alongside the other evidence.
7. The Foreign and Commonwealth Office has produced a consolidated version of the texts of the two treaties that will, if the Lisbon Treaty comes into force, govern the operation of the EU: the Treaty on European Union and the Treaty on the Functioning of the European Union.⁶ All references are to those versions of the treaties.

Background to the Lisbon Treaty

8. There are two principal treaties under which the EU currently operates:
 - the Treaty establishing the European Community (often referred to as ‘the Treaty of Rome’); and
 - the Treaty on European Union (the Maastricht Treaty).

Amendments to these treaties were made most recently by the Treaty of Amsterdam (which entered into force in May 1999) and the Treaty of Nice (February 2003).⁷

9. In 2003, the Convention on the Future of Europe (chaired by the former President of France, Valéry Giscard d’Estaing) concluded work on a *Draft Treaty establishing a Constitution for Europe*.⁸ The purpose of this new treaty was, in the words of the Government, “to make the EU more efficient, simpler to understand, more accountable to the European and national Parliaments, and better prepared to function effectively with 25 and more members”.⁹ The text produced by the Convention was revised and agreed at an Inter-Governmental Conference and adopted in October 2004 as a *Treaty*

⁵ Ibid.

⁶ *Consolidated Texts of the EU Treaties as amended by the Treaty of Lisbon*, Cm 7310. The text of the Lisbon Treaty is published as Cm 7294.

⁷ Various Treaties of Accession have also enlarged the membership from the original six states to 27.

⁸ The text was scrutinised by this Committee and others. See *The Draft Constitutional Treaty for the European Union* (HL Paper 168) and, for example, the European Union Committee’s 41st Report (2002–03): *The Future of Europe: The Convention’s Draft Constitutional Treaty* (HL Paper 169).

⁹ Cm 5934, p 16.

establishing a Constitution for Europe (“the Constitutional Treaty”). The agreed text of the Treaty was laid before Parliament in August 2003.¹⁰ In order for the Treaty to come into force, it needed to be ratified by all Member States according to the requirements of their national constitutions. In 18 of the Member States, the Constitutional Treaty was ratified. In May and June 2005, however, the Treaty was rejected by the people of France and the Netherlands in referendums. The seven remaining Member States (including the UK) therefore halted the procedures leading to ratification.

10. Following the demise of the Constitutional Treaty, EU leaders agreed a detailed mandate for a new reform treaty at the European Council in June 2007. This led to the Lisbon Treaty, which was agreed by the governments of the Member States in Portugal in December 2007.¹¹ If ratified by all Member States, the Treaty will come into force on 1 January 2009. **There has been considerable debate over how different the Lisbon Treaty is compared to the abandoned Constitutional Treaty. We do not enter into that debate. Our focus in this report is on the changes that the Lisbon Treaty would make to the arrangements currently in force.**

Amendments made by the Lisbon Treaty

11. The Lisbon Treaty would make numerous textual amendments to the Treaty on European Union and the Treaty of Rome. Notably, it would bring an end to the legal entity called the European Community (EC) so that henceforth it would be the EU that exercises all powers under the Treaties. The existence since 1992 of two European entities (the EC and the EU) along with the terminology of ‘three pillars’¹² representing different fields of policy and law-making has done little to assist public understanding of ‘Europe’, and it is to be hoped that this change will bring greater clarity.
12. If the Lisbon Treaty comes into force, there will still be two principal treaties governing the operation of the EU:
 - the Treaty on European Union, which as now will be a relatively short document—the 55 Articles set out the principles, basic institutional framework and main policy areas over which the EU has responsibilities; and;
 - the Treaty on the Functioning of the European Union—this is the renamed Treaty of Rome, as amended, and provides a more detailed statement of the powers and procedures of the EU institutions in 358 Articles.
13. The Treaty on the Functioning of the European Union would be in seven parts.

¹⁰ Cm 6429.

¹¹ For the Government’s stance in the final negotiations of the treaty, see the White Paper published by the Foreign and Commonwealth Office, *The Reform Treaty: The British Approach to the European Union Intergovernmental Conference, July 2007* (Cm 7174).

¹² In *The Treaty of Lisbon: an impact assessment*, the European Union Committee explained: “Under the existing Treaties, the ‘first pillar’ of the European Union is the supranational European Community. The ‘second pillar’ (foreign and security policy) and ‘third pillar’ (justice and home affairs) are areas of intergovernmental cooperation with their own decision-making mechanisms, where the Union does not have explicit legal personality. The Lisbon Treaty merges the first and third pillars, and abolishes the European ‘Community’ because the distinction is no longer necessary—there is just one organisation, the Union. Justice and home affairs policy moves into the generally applicable mechanisms of the Union (based on those of the old first pillar/Community), which are laid out in the TFEU. The Common Foreign and Security Policy, which remains subject to specific procedures, is outlined in the TEU” (paragraph 2.4).

TABLE 1**Treaty on the Functioning of the European Union**

Part One	Categories and areas of Union competence
Part Two	Non-discrimination and citizenship of the Union
Part Three	Union policies and internal actions
Part Four	Association of the overseas countries and territories
Part Five	External action by the Union
Part Six	Institutional and financial provisions
Part Seven	General and final provisions

14. This report considers those aspects of Parts One, Two, Six and Seven that are of relevance to the UK constitution, but we do not consider Parts Four and Five. It is Part Three of the Treaty on the Functioning of the European Union which is the most significant for our purposes. It sets out provisions (many of which are already in place) on policy and law-making powers in the following areas:¹³

TABLE 2**Part 3 of the Treaty on the Functioning of the European Union**

I	The internal market
II	Free movement of goods
III	Agriculture and fisheries
IV	Free movement of persons, services and capital
V	Area of freedom, security and justice
VI	Transport
VII	Common rules on competition, taxation and approximation of laws
VIII	Economic and monetary policy
IX	Employment
X	Social policy
XI	The European Social Fund
XII	Education, vocational training, youth and sport
XIII	Culture
XIV	Public health
XV	Consumer protection
XVI	Trans-European networks (in the areas of transport, telecommunications and energy infrastructures)
XVII	Industry
XVIII	Economic, social and territorial cohesion
XIX	Research and technological development and space
XX	Environment
XXI	Energy
XXII	Tourism
XXIII	Civil protection against natural or man-made disasters
XXIV	Administrative co-operation

¹³ The numbers correspond to the 'Titles' into which Part Three is sub-divided.

15. Most of the competences enumerated as Titles I to XXIV in Part Three of the Treaty on the Functioning of the European Union already exist in the current treaties. From the perspective of the UK constitution, some of the most potentially significant innovations relate to Title V, the “area of freedom, security and justice”.¹⁴ This includes provisions on internal and external border controls, asylum and immigration, and prevention of crime, racism and xenophobia. It also encompasses judicial cooperation in civil and criminal matters, police cooperation, and the operation of Europol (the European Police Office). We comment on the constitutional implications in Chapter 3.
16. Another important change concerns the Charter of Fundamental Rights of the European Union, which we consider in Chapter 3. In its current incarnation, it is a political document rather than a legally binding one. Under the Lisbon Treaty, the amended version of the Charter (agreed in December 2007) would acquire legal force.

Protocols

17. The Lisbon Treaty also contains 35 protocols, which are attached to and would have the same legal effect as the Articles of the Treaties. Some of the protocols are new; others are amended versions of protocols in the current Treaties. A number of protocols relate to or have implications for national constitutional matters:
 - Protocol on the role of national parliaments in the European Union;
 - Protocol on the application of the principles of subsidiarity and proportionality;
 - Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (i.e. Title V of Part Three of the Treaty on European Union); and
 - Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

Declarations

18. Finally, a number of ‘declarations’ were made at the time of agreeing the Lisbon Treaty, some of which relate to matters of constitutional significance.¹⁵ A declaration, unlike a protocol, is not legally binding. It may, however, have political force and provided that it has been agreed by all Member States, the European Court of Justice (ECJ) may have regard to a declaration in interpreting Treaty provisions to which it relates, insofar as it does not conflict with those provisions.

¹⁴ See *The Treaty of Lisbon: an impact assessment*, Chapter 6.

¹⁵ For example, Declaration 17 concerning primacy provides that: “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260): ‘Opinion of the Council Legal Service of 22 June 2007. It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/6411) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’”

CHAPTER 2: PARLIAMENTARY CONTROL OF FUTURE ALTERATIONS TO THE EUROPEAN UNION TREATIES

19. In this chapter we examine how formal amendments and other changes may in the future be made to the treaties on which the European Union is founded—principally, these are the Treaty on European Union and the Treaty Establishing the European Communities (to be renamed the Treaty on the Functioning of the European Union if the Lisbon Treaty comes into force). Our particular focus is on the power of the UK Parliament to control the Government’s ability to agree to such amendments and changes and to be involved more generally in the processes of treaty revision.
20. Consideration of this issue takes place against the general background of the Ministry of Justice’s consultation paper *The Governance of Britain—War Powers and Treaties: Limiting Executive Powers*,¹⁶ published in October 2007. We note, however, that the consultation paper does not address in any detail the special arrangements (considered below) that apply to treaties upon which the EU is founded.

How the Treaties may be amended in the future

21. The two key EU Treaties mentioned above will, if the Lisbon Treaty comes into force, continue to constitute the principal framework under which the EU operates. This framework would remain the basis of the relationship between the Union and its Member States. Given that the relationship between the UK and the EU is of “first class constitutional importance”,¹⁷ it follows that questions of how and by whom the Treaties may be amended are of constitutional significance. The Treaties as revised by the Lisbon Treaty would enable amendments to be made in three main ways.
- The “ordinary revision procedure” set out in Article 48(2)–(5) of the Treaty on European Union. A convention—composed of representatives of national parliaments, heads of state or government of Member States, the European Parliament and the Commission—must be held to examine proposals for amendments, though this may be dispensed with “should this not be justified by the extent of the proposed amendments”. Each Member State would need to ratify the amendments.
 - The “simplified revision procedure” set out in Article 48(6) and 48(7) of the Treaty on European Union. The former deals with future proposed changes to Part Three of the Treaty on the Functioning of the European Union (internal policies and action of the Union).¹⁸ The latter deals with future proposals to change voting methods in the Council or the legislative procedure (and because of this scope may be regarded as a kind of ‘*passerelle*’).
 - The so-called *passerelles* (‘bridges’) in the Treaties which permit procedural requirements in relation to some decision-making to be altered by the European Council or the Council without formal revision of the Treaties.¹⁹

¹⁶ Consultation Paper CP 26/07, Part 2.

¹⁷ See paragraph 1, above.

¹⁸ See Table 2, above.

¹⁹ See paragraph 32, below.

22. Clauses 5 and 6 of the European Union (Amendment) Bill would impose new requirements for prior parliamentary approval before the Government formally binds the UK to agree to amendments made under the ordinary revision procedure, the simplified revision procedure or the *passerelles*.

The Ordinary Revision Procedure

23. Clause 5 of the Bill seeks to create a new requirement for prior parliamentary authorisation of ratification. It would apply to amendments of the founding treaties—the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty Establishing the European Atomic Energy Community—when those amendments are made by the “ordinary revision procedure”.
24. Before examining clause 5 in more detail, it must be noted that the need for express parliamentary approval before the Government ratifies a treaty amending the founding Treaties of the EU has been recognised in one important respect for some time. Section 12 of the European Parliamentary Elections Act 2002 (a consolidating statute) provides that “No treaty which provides for any increase in the powers of the European Parliament is to be ratified by the United Kingdom unless it has been approved by an Act of Parliament”.²⁰ Section 12 of the 2002 Act was originally enacted as section 6 of the European Assembly Elections Act 1978. The provision was introduced by a Government amendment at Committee Stage in the House of Commons “to allay the concern expressed by some Members of Parliament that direct elections would be the first step towards increasing the Assembly’s [i.e. European Parliament’s] powers”.²¹ The then Foreign Secretary, Dr David Owen, referred to “the continuing anxiety of many hon. Members that direct elections mean movement towards federalism inside the Community, and that it might be followed by other moves whereby the powers of the House of Commons would be eroded through the extension of those of the European Assembly, without there being adequate consideration of the issues in Parliament and without Parliament having the full opportunity of examining any such change”.²²
25. The relationship between the requirement for parliamentary approval under section 12 of the European Parliamentary Elections Act 2002 (which clause 4 of the bill seeks to provide) and clause 5 of the bill, which would apply in the future, is not clear. It is not immediately obvious whether in the future the requirements of clause 5 would in effect supersede that imposed by section 12 of the 2002 Act or whether the existing and new provisions are intended in some way to complement each other. Clause 5 is drawn more broadly than section 12 in that it is not confined to treaty amendments which increase the powers of the European Parliament. It is possible to envisage treaty amendments which fall outside the scope of section 12 (for example, amendments to common foreign and security policy) but which would fall

²⁰ Clause 4 of the Bill will provide parliamentary approval for the use of the Government’s prerogative powers to ratify the Lisbon Treaty for the purposes of section 12. Similar provisions are to be found in the several European Union (Amendment) Bills that have been introduced to Parliament since 1978 following agreements between EU Member States to amend the founding treaties. In and of itself there is therefore little that is constitutionally noteworthy about clause 4.

²¹ Patricia M. Leopold, “European Assembly Elections Act 1978” (1979) vol 42 *Modern Law Review* 66, p 67.

²² HC Deb 2 February 1978 col 794.

within the ambit of clause 5. It is difficult, perhaps impossible, to envisage treaty amendments which fall within section 12 but outside clause 5.

26. If it is the case that clause 5 is intended to subsume any possible amendment that might in the future fall within section 12 of the 2002 Act, there appears to be no practical purpose in retaining section 12 on the statute book.
27. **We welcome the requirement created by clause 5 of the Bill that the Government must seek parliamentary approval before ratifying any future amendments to the founding Treaties made under the “ordinary revision procedure”. However, we call upon the Government to explain and resolve the relationship between the new requirement created by clause 5 and the existing requirement under section 12 of the European Parliamentary Elections Act 2002 for parliamentary approval of treaty amendments which enlarge the powers of the European Parliament.**

The Simplified Revision Procedure

28. As we have already noted, the simplified revision procedure would operate in relation to two kinds of change.
- Article 48(6) is about changes of substance. It would enable amendments to be made to Part Three of the Treaty on the Functioning of the European Union.²³ The European Council (the heads of state or government of the Member States, its President and the President of the Commission) would, after consultation, be able to adopt a decision amending “all or part of the provisions of Part Three” although the amendments “shall not increase the competences conferred on the Union in the Treaties”.²⁴
 - Article 48(7) is about changes of procedure. It covers future proposals to change the voting method in the Council from unanimity to qualified majority voting (in which each Member State’s minister’s vote is weighted to reflect the size of the Member State’s population) in a given area of the Treaty on the Functioning of the European Union or in Title V of the Treaty on European Union (General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy). Article 48(7) would also allow the European Council, by unanimity, to substitute the ordinary legislative procedure (co-decision of the Council and European Parliament) in areas where the Treaty on the Functioning of the European Union provides for special legislative procedure. These particular simplified revision procedures may be regarded as ‘*passerelles*’ (which we consider further below).
29. Under Article 48(7) of the Treaty on European Union, national parliaments must be notified of any intended exercise by the European Council of the simplified revision procedure in respect of changes of procedure. If any national parliament “makes known its opposition within six months”, the European Council would not be able to make the revision. Any revision would have to be agreed unanimously by the European Council (so every Member State has a veto) and the consent of the European Parliament would also be required.

²³ See Table 2, above.

²⁴ For more detailed discussion see *The Treaty of Lisbon: an impact assessment*, Chapter 3.

30. In addition to the constraints on the use of the simplified revision procedure contained in the Treaty on European Union, the European Union (Amendment) Bill would provide further controls within the UK. Clause 6 provides that “a Minister of the Crown may not vote in favour or otherwise support a decision” relating to the use of the simplified revision procedure powers under either Article 48(6) or 48(7) “unless Parliamentary approval has been given”. Under clause 6(2) of the Bill, Parliamentary approval would be deemed to have been given if each House approved a motion moved by a minister seeking approval for the Government’s intention to support the adoption of a specified draft decision.
31. **We welcome the specific requirement contained in the Bill for parliamentary approval prior to Government agreement to amendments made under the simplified revision procedure. These provisions of national law would reinforce the controls contained in the Treaty on European Union itself.**

Passerelles

32. The term *passerelle* has slipped into the jargon of the EU. It is not a term used in the Treaties but has been coined to describe a category of provisions in the Treaties which permit alterations to be made to decision-making processes within the EU institutions without the need for a formal amendment to the Treaties. There are a number of *passerelles* in the Lisbon Treaty including, as we have noted, the simplified revision procedure set out in Article 48(7). Changes made under the *passerelle* provisions, once agreed by the governments of Member States, are typically brought about by the adoption of a decision by the Council.
33. Professor Tridimas told us that “It is clear that these provisions [the *passerelles*] are far reaching since they enable decisions which are taken by unanimity, and in which therefore national Governments retain the power of veto, to be taken in the future by majority without the need to go through the full procedure for the revision of the Treaties” (p 75).
34. In respect of Article 48(7) of the Treaty on European Union and Article 81²⁵ of the Treaty on the Functioning of the European Union, national parliaments must be notified of proposed changes in procedure and if any objection is forthcoming (within six months) the revision cannot be made. Professor Tridimas explained that “Member States enjoy discretion as to how national Parliaments may exercise that power. In particular, it will be up to each Member State to decide whether a decision to oppose a Treaty revision should be taken by a simple or any other kind of majority” (p 76).
35. Clause 6 of the Bill would introduce parliamentary control over the Government’s capacity to agree to changes made under *passerelles*: “A Minister of the Crown may not vote in favour of or otherwise support a decision ... unless Parliamentary approval has been given”. Clause 6(1)(b) deals with the general *passerelle* in Article 48(7) TEU, which is made under the simplified revision procedure. Paragraphs (b) to (i) of clause 6(1) of the bill deal with other *passerelles* created elsewhere in the Treaty.

²⁵ Article 81 contains a provision allowing the Council to change the legislative procedure in respect of family law with cross-border implications.

36. We asked the Foreign and Commonwealth Office to explain the significance of the seven *passerelles* listed as paragraphs (c) to (i) of clause 6(1) and whether there were other *passerelles* or similar provisions in the Treaties that were not being made subject to prior parliamentary approval in the bill. They responded by saying:

“The Bill includes all provisions which allow a move from unanimity to QMV or co-decision. This is further to the Prime Minister’s commitment in his post European Council statement on 22 October where he said: ‘To ensure that no government can agree without Parliament’s approval to any change in European rules that could, in any way, alter the constitutional balance of power between Britain and the European Union, we will make a provision in the Bill that any proposal to activate the mechanisms in the treaty which provide for further moves to QMV—but which require unanimity—will have to be subject to a prior vote by the House.’ The Bill also covers the two new general simplified revision procedures which are introduced in by Article 48 TEU, as amended by the Lisbon Treaty. The Bill does not purport to cover all provisions which are, or could be, considered to be *passerelles*. Such provisions have existed since the Single European Act and have not previously been made the subject of a statutory requirement for Parliamentary approval.”

37. We also sought clarification of the scope and operation of clause 6(3) of the bill which seeks to create a “disapplication provision” in relation to the requirement for parliamentary authorisation. Such a provision, if accepted by Parliament, would allow the Government to agree to a draft decision which is slightly different from the one that Parliament approved in the first place. The Foreign and Commonwealth Office told us:

“In most cases, notably proposals to move to QMV or co-decision, the choice will simply be either to support or reject a specified draft decision. There may however be occasions where some negotiation on the final wording of a specified draft decision may be envisaged—for example in relation to the date from which a decision is to take effect or, in relation to the simplified revision procedure, the precise language of a proposed change to a provision in Part III of the Treaty on Functioning of Union. In these cases, the Bill makes clear that any flexibility is entirely a matter for Parliament where it wishes to allow Ministers some flexibility to take advantage of the negotiating process in order to promote the UK’s interests.”²⁶

38. Under clause 6(2), Parliamentary approval would only be deemed to have been given if each House agreed the motion without amendment. However, clause 6(3)(b) makes clear that Parliament would be free to reject a Minister’s proposal to be granted the negotiating flexibility outlined above (through the disapplication provision) while still authorising the Government to support a specified draft decision. This reinforces the point made above, that the granting of the negotiating flexibility envisaged by clause 6(3) would be wholly a matter for Parliament.
39. It will be for the House as a whole to consider whether the Bill sets out with sufficient specificity the procedures to be adopted when the Government

²⁶ Supplementary evidence not printed.

moves a motion seeking approval for support of a specified draft decision. As a minimum, it may be thought desirable to have an express statutory requirement to lay an explanatory document before Parliament.²⁷ Such a document might, for example, include information about consultations that the Government has carried out with the devolved administrations. The Bill is silent as to the length of time that Parliament and its committees would have to scrutinise the Government's proposals. In other contexts, legislation enables Parliament to consider draft proposals and specifies a timetable;²⁸ this is a model that might be adopted here.

40. **We broadly welcome the provisions in the European Union (Amendment) Bill which would establish parliamentary control over Government decisions to agree to changes under the *passerelle* mechanisms. There are, however, two ways in which the procedure could be strengthened so as to ensure proper scrutiny. We recommend that the Government lay an explanatory memorandum or make a written statement when tabling a motion seeking approval for support of a specified draft decision; and we further recommend that the Bill be amended to ensure that Parliament is given sufficient time to scrutinise the proposals in respect of *passerelles*.**
41. **Whilst we accept that some *passerelle* mechanisms have existed in earlier EU Treaties, we are not convinced that this fact alone provides a cogent justification for the Bill's omission of a comprehensive list of *passerelle* and similar enabling provisions both in the Lisbon Treaty and in previous treaties. We call on the Government to provide a list enumerating all these provisions in order to allow Parliament to consider during the passage of the Bill whether each one should or should not be subject to parliamentary control under clause 6.**

The Flexibility Clause

42. Finally, we draw attention to Article 352 of the Treaty on the Functioning of the European Union which, whilst not amending the Treaties, would enable the Council, with the consent of the European Parliament, to adopt measures "to attain one of the objectives set out in the Treaties" even though the Treaties "have not provided the necessary powers".²⁹ This provision already exists in the current treaties as Article 308 EC. In his evidence to us, Professor Chalmers noted that Article 352 would have "a wider remit as it acts as a flexibility provision to the Union now and not the EC. This is particular[ly] significant given the frequent usage of Article 308 EC, about 30 times [per annum]" (p 12). **Clearly, Parliament will wish to pay particular attention to initiatives brought under Article 352 of the Treaty on the Functioning of the European Union in its role of scrutinising compliance with the principles of subsidiarity and proportionality.**³⁰

²⁷ In a different context, see for example section 14 of the Legislative and Regulatory Reform Act 2006.

²⁸ For example, section 15 of the Legislative and Regulatory Reform Act 2006.

²⁹ Considered in more detail in *The Treaty of Lisbon: An Impact Assessment* para 11.17.

³⁰ See Table 3 below.

CHAPTER 3: THE LISBON TREATY AND THE UK CONSTITUTION

Introduction

43. In this Chapter, we consider those features of the Lisbon Treaty that appear to have direct implications for the UK constitution. In surveying these we do not seek to replicate the detailed work of the European Union Committee in their report, *The Treaty of Lisbon: an impact assessment*. Rather, the two reports should be read in conjunction with each other.
44. In our Call for Evidence, we invited witnesses to address how implementation of the Lisbon Treaty would affect the practical operation of the key elements of the UK constitution. We start by considering whether the Lisbon Treaty is likely to bring about a period of stability in the UK's relationship with the EU. We then look at the possible impact of the Lisbon Treaty on the following areas of constitutional significance:
- the definition of the competences of the EU and Member States;
 - people's rights and responsibilities;
 - citizenship;
 - the UK Parliament and parliamentary sovereignty;
 - the UK's nations and regions;
 - the Area of Freedom, Security and Justice; and
 - the courts and the judiciary.
45. An issue which has generated debate is whether the Government have successfully defended their 'red lines'. The 'red lines' were non-negotiable positions which the Government insisted were preconditions to the UK agreeing to the text of the Lisbon Treaty. The 'red lines' related to the following areas:
- labour and social legislation;
 - foreign and defence policy;
 - police and judicial processes;
 - the tax and social security system; and
 - national security.

Making a judgement on the solidity of the exemptions secured in these five areas is highly complex and we do not seek to duplicate the detailed policy analysis undertaken by the European Union Committee. However, as part of our examination of the arrangements in respect of the Area of Freedom, Security and Justice (an area which relates to key aspects of the UK constitution) we do consider the exemptions secured in accordance with the third of these 'red lines'.

A lasting settlement?

46. Given the failure of the *Treaty establishing a Constitution for Europe* (the Constitutional Treaty), and the frequency with which reforms have been

proposed in recent years, we sought to gauge whether the Lisbon Treaty offers the prospect of a period of stability in the years ahead. As Professor Tridimas pointed out, the treaties governing the EU have been amended no fewer than nine times in the past 30 years, leaving aside the Charter of Fundamental Rights of the European Union and the Lisbon Treaty itself.

47. The Government view the reforms that would be brought about the Lisbon Treaty as providing a lasting settlement. They drew to our attention the agreement made at the December 2007 European Council that “the Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead, including globalisation and climate change”. The Government also highlighted the preamble to the Lisbon Treaty which provides that it will “complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action” (p 19).
48. Dr Anthony told us that the Lisbon Treaty represented a “further maturation” of the EU, but equally the proposed new institutional arrangements should not be regarded “as key to any lasting settlement” (p 19). Similarly, in a forthcoming academic article sent to us, Professor Paul Craig states that the Lisbon Treaty would “not represent ‘constitutional finality’”, though it would “provide the institutional foundations for the EU to move forward in the next decade”.³¹ Professor Usher’s view was that, while the Lisbon Treaty “should not be regarded as set in stone, it should considerably reduce the need for frequent Treaty amendments”. He tentatively suggested that, in terms of the scope of the EU’s powers, “a plateau has been reached, though it is highly unlikely that there will never be a future issue which it is felt appropriate to deal with at Union level” (p 79). Professor Dashwood reminded us, though, that “there can be no further step towards a closer union without amending the Treaties” and that the Lisbon Treaty “will not remove Member States’ control over such developments” (p 16).
49. **Constitutional stability is a desirable characteristic. We note that the Government view the reforms that would be brought about by the Lisbon Treaty as providing a lasting settlement. We therefore hope that, if ratified, the Treaty will provide a period of stability in the institutional framework of the EU and we urge the Government to use their influence to ensure that this is the case. This, in turn, will enable the UK constitution to develop further the procedures needed to ensure that the Government are properly accountable for the exercise of their powers in the sphere of the European Union, with effective roles for the United Kingdom Parliament and the governments and legislatures of Northern Ireland, Scotland and Wales.**

Defining the European Union’s competences

50. From the perspective of the UK constitution, clarity about the allocation of policy and law-making powers between different spheres of government is of

³¹ “The Lisbon Treaty, Process, Architecture and Substance”: to be published in the April edition of the *European Law Review*.

obvious importance. While such ‘division of powers’ questions are commonplace in federal systems, they have not needed to be addressed in the UK until comparatively recent decades. The modern ‘multi-level’ constitutional arrangements which now exist require clear demarcations of responsibility between the UK Government and the devolved administrations in Northern Ireland, Scotland and Wales, as well as between the UK as a whole and the EU.

51. The Lisbon Treaty makes a welcome attempt to set out with greater clarity the demarcations of responsibility between Member States and the EU. Professor Dashwood highlighted “the addition to Article 1 [of the Treaty on European Union] of the phrase ‘on which the Member States confer competences to attain objectives they have in common’”. He said that “this asserts the primacy of the Member States in two ways: they are the source of the Union’s competences; and the Union exists to enable them to pursue common objectives” (p 17). Articles 4 and 5 of the Treaty on European Union set out a “principle of conferral”, under which “competences not conferred upon the Union in the Treaties remain with the Member States” (Article 4(1)).³² Those Articles also outline the principles of subsidiarity³³ (compliance with which will be ‘policed’ by national parliaments) and proportionality. The ECJ will, as at present, have the final say in determining the legal boundaries of the competences.
52. The Government welcomed these clarifications, telling us that “The Lisbon Treaty sets out—for the first time—definitions and lists of the Union’s competences, setting out clearly the areas where [the] EU can act. The Treaty underlines that the EU can only act within the limits of the competences conferred on it by the Member States. It also recognises that competences can be transferred back to Member States. The Treaty explicitly confirms for the first time that national security remains the sole competence of Member States” (p 20).
53. Acknowledging that issues of competences were “hugely complex”, Dr Anthony nonetheless told us that “the delimitation of competences within the Reform [Lisbon] Treaty marks a very definite move towards a clearer allocation of power between the EU and it[s] Member States” (p 10).
54. Professor Shaw’s assessment was less favourable. She suggested that the “provisions are doubtless more concerned with sending signals containing certain symbolic messages about European integration to key national interests” (p 66). Professor Tridimas agreed that the categorisation of competences, whilst increasing transparency, would “not avoid intricate problems of interpretation” nor would it necessarily provide “bright lines between the powers of the Union and those of the Member States” (p 72).
55. **Questions of distribution of power are inherently complex. In the United Kingdom, devolution and membership of the European Union have the combined consequence that the United Kingdom Government and Parliament operate in a system of multi-level governance: for practical purposes they have such powers as have not been conferred on the devolved administrations and legislatures or**

³² See *The Treaty of Lisbon: an impact assessment*, Chapter 2.

³³ Subsidiarity is the principle that action should only be taken by the Community or Union if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved at European level.

the European Union. With this in mind, we welcome the Lisbon Treaty’s attempt to set out with greater clarity the demarcations of responsibility between Member States and the European Union. These demarcations will continue to be open to interpretation by the European Court of Justice.

56. In addition, Articles 2 to 6 of the Treaty on the Functioning of the European Union set out areas of policy in which (a) there is exclusive competence for the EU, (b) competence is shared between the EU and the Member States, and (c) EU actions may support, coordinate or supplement the actions of the Member States. Professor Dashwood said that the categories of exclusive, shared and supporting competences are “usefully defined” by the Treaty, adding that this is “by way of a clarification: the definitions reflect distinctions found in the detailed provisions of the present [Treaty Establishing the European Communities]” (p 17).
57. However, Professor Shaw argued that the statement of categories of competence “does not ultimately appear to offer the promised simplification for the benefit of citizens” because they are being introduced “without in fact changing the existing conceptual basis upon which powers are attributed and defined, under the legal basis system of the existing Treaties” and they will coexist “with the limited attempts which the Court of Justice has made, notably in the sphere of external economic action, to define a distinction between shared and exclusive competences” (pp 66–7).
58. **The articulation of categories of competence in the Treaty on the Functioning of the European Union would be a useful step in clarifying the distribution of powers between the European Union and the Member States.**

People’s rights and responsibilities

Introduction

59. Rights and responsibilities are a key element of the UK constitution. The Lisbon Treaty would make changes relating to two of the main documents setting out people’s rights: the Charter of Fundamental Rights of the European Union (‘the Charter’) and the European Convention on Human Rights (ECHR). We now consider the likely impact of these changes on rights and responsibilities in the UK.
60. First, Article 6 of the Treaty on European Union, as amended by the Lisbon Treaty, would make the Charter (first agreed by the governments of the Member States in December 2000) legally binding.³⁴ Although the 54 Articles of the Charter are not set out in the Treaty, they are declared to “have the same legal value as the Treaties” (Article 6.1). Until now the Charter has been a political document, though one referred to from time to time in the European Court of Justice (ECJ) and national courts. The Charter contains “rights” (which may be enforced by courts) and “principles” (which are factors to be taken into account by courts when interpreting legislation but which do not in and of themselves create

³⁴ The Lisbon Treaty refers to the amended 2007 version of the Charter (2007 OJ C 303/1). The revised text of the Charter may be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF>.

enforceable rights).³⁵ Protocol 7 to the Lisbon Treaty provides for the application of the Charter to the UK and Poland.

61. Second, Article 6.2 provides that the EU “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms” (the full title of the ECHR).

The practical significance of the Charter

62. As we have noted, although the Lisbon Treaty does not set out the provisions of the Charter, it would give express legal effect to it. The Government told us that “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” (FCO memorandum, p 31).
63. Several of the witnesses stressed that fundamental rights in EU law were nothing new. Dr Spaventa emphasised that “fundamental rights have long been recognised to be part of the general principles” of EU law (p 67; see also Professor Chalmers p 13). She said that the “Charter does not create ‘new rights’, it merely codifies existing rights” and noted that it is in any case “primarily directed at the European institutions to ensure that when they legislate or take any other action they are bound by fundamental rights”. It only applies to Member States when they are implementing EU law, she explained (p 68).
64. Similarly, Professor Dashwood explained that “the change in the Charter’s status [is] unlikely to amount to much more than a formality. The European Courts can be expected to refer to the Charter more regularly than at present, but only by way of confirmation, once the existence of a right has been established in the traditional way, by pointing to the European Convention or to constitutional traditions common to the Member States” (p 16). He has also written that “the Charter is not, in itself, a source of rights but simply provides a record of rights that receive protection within the Union, from one source or another”.³⁶
65. Professor Chalmers told us that there was “very little evidence” of the EU fundamental human rights law which has been enunciated by the ECJ in recent years “disrupting the British constitutional settlement in any way”. And, while the Lisbon Treaty would have the effect of “enunciating a broader explicit catalogue of rights”, it also contains “greater constraints than previously to limit judicial activism”, not least because “Article 6(1) TEU makes clear that the Charter cannot be used to extend EU competencies”. But he believed that in the future it is “likely that immigration, asylum, and extradition law will be governed fairly extensively by EU fundamental rights law and that it will also touch some aspects of family and penal law” (p 13). The “practical import” of this is, he suggests, “unclear”. Because the Charter requires courts to interpret it in line with the ECHR, and the ECJ (the EU court) has tended to “slavishly follow” the case law of the European Court of

³⁵ Chapter 5 of the European Union Committee’s recent report contains a very helpful account of the main rights contained in the Charter. For discussion of the distinction between rights and principles, see paragraph 5.15.

³⁶ “The Charter of Fundamental Rights and its Protocol—Drawing the Teeth of a Paper Tiger”, *Parliamentary Brief* (February 2008), pp 9–10.

Human Rights (the Council of Europe court), it is the latter court that will be influential. Professor Chalmers called into question its legitimacy: “The difficulty is therefore not the Charter but the increasing importance of the European Court of Human Rights and its unaccountability in our human rights law. I see nothing in its methods of appointment or reasoning which justifies such an elevated position” (p 13).

66. Dr Anthony told us that the Charter might affect the approach taken by judges in the UK courts: it could “enjoy an analogical force in cases concerning common law fundamental rights, rights arising under the Human Rights Act 1998, and/or those that may be found in any future Bill of Rights for Northern Ireland” (pp 9–10). Nonetheless, Professor Tridimas suggested that “the Charter is unlikely to be a major threat to national sovereignty or a vehicle for the introduction of social legislation” (p 73).
67. **We conclude that the change in status of the Charter from political document to having the force of a treaty would be less of a radical step than at first it may appear. This is because the Charter is declaratory of rights already recognised as existing in law by the courts and therefore currently available to the UK citizen.**

The Protocol concerning the United Kingdom and Poland

68. One of the Government’s ‘red lines’ was to protect UK law from any possible consequences that might follow from the change in the Charter’s legal status. One way in which the Government have sought to achieve this is by Protocol 7 on the application of the Charter in the legal systems of the UK and Poland.
69. Article 1(1) of the Protocol provides that the Charter does not extend the ability of the ECJ or any UK or Polish court to find the laws and practices of the UK or Poland inconsistent with the Charter—in the words of Professor Tridimas, “the Charter ... may not expand the scope of fundamental rights jurisdiction of the ECJ or UK courts beyond the scope of application of Community law” (p 74). The Government explained that “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” (p 33). In relation to Article 1(1), Dr Spaventa suggested that “this is the case regardless of the Protocol since nothing in the Charter extends the jurisdiction of the Court of Justice beyond what is provided for under the current Treaties as interpreted by the Court” (p 69). Similarly, Professor Chalmers suggested that the ECJ would “almost certainly state that [the Protocol] is otiose in the light of Article 6(1) TEU which states that the Charter does not extend Union competencies”. In any case, he continued, “almost every provision of the Charter codifies other international treaties”, so “if a court cannot rely on the Charter it will just use these to reach the same result” (p 13).
70. Article 1(2) of the Protocol sets out that, for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the UK except insofar as such rights are provided for in their national laws. The rights contained in Title IV are social or “solidarity” rights such as workers’ rights to information and consultation, collective bargaining, fair and just working conditions, social security, health care and consumer protection.

The Government explained that “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” (p 33).

71. Article 2 of the Protocol declares that to the extent that the Charter refers to national laws and practices, it shall apply to the UK and Poland only to the extent that the rights or principles it contains are recognised by the laws and practices of the UK or Poland. In relation to Article 2, Dr Spaventa explained that this “seeks to preserve the UK system of fundamental rights from the ‘infiltration’ of Charter rights in those areas which are recognised as falling within the Member State competence (e.g. family law, but also rules regulating the modalities for the exercise of a right such as the right to strike)” (p 70). Professor Usher told us that “references to national laws and practices only apply to the extent that they are recognised in Polish or UK law—which begs the question of what happens to national laws and practices which have evolved into general principles of EU law and therefore already have to be observed by the UK in the context of EU law” (p 79).
72. The Government’s general view of the Protocol was that it “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” (p 32).
73. Professor Dashwood in his evidence to the European Union Committee said that the Protocol would play a role in assisting interpretation of the Charter: “The Protocol is not an opt-out for the United Kingdom: it is an interpretative Protocol”.³⁷ In his written evidence to us, he said that the Protocol “has been provided just in case the paper tiger, that is the Charter, should acquire teeth through an aberrant interpretation treating its provisions as capable in themselves of giving rise to enforceable rights. In that unlikely event, the United Kingdom would be able to invoke the Protocol, to resist any challenge to its law or practices” (p 16). Professor Chalmers told us that he was “very sceptical” that the Protocol would create “a differentiated position” for the UK and Poland in relation to the Charter (p 13).
74. The European Union Committee received a great deal of expert evidence on the legal effect of this Protocol.³⁸ They concluded that “The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol”.³⁹

³⁷ *The Treaty of Lisbon: an impact assessment*, Q E332.

³⁸ See *The Treaty of Lisbon: an impact assessment*, Chapter 5.

³⁹ *Ibid*, paragraph 5.87.

75. **We agree with the European Union Committee that Protocol 7 clarifies the application of the Charter rather than operating as an opt-out.**

Accession of the EU to the European Convention on Human Rights

76. The Lisbon Treaty paves the way for the EU to become a signatory to the European Convention on Human Rights.⁴⁰ The Government said “This will make the EU directly accountable to the Council of Europe’s European Court of Human Rights for the rights contained in the ECHR. It would thus reinforce harmony between the EU’s legal order and the ECHR—as interpreted by the European Court of Human Rights” (p 19).
77. Dr Anthony described accession as “unremarkable” (p 10). Similarly, Dr Spaventa asserted that there “should not be any particular effect on national law deriving” from the European Union’s accession to the Convention. She also noted that the Protocol “makes clear that the agreement on accession must ensure that the Union’s accession does not affect the situation of the Member States in relation to the Convention, including the possibility of derogating from it and the reservations made by the Member States” (p 70).
78. **In our view, the European Union’s accession to the European Convention on Human Rights should have no impact on national law, and therefore no constitutional implications.**

Citizenship

79. Citizenship is of fundamental constitutional importance in any political system. After amendment, Article 9 of the Treaty on European Union will provide that “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it”; a similar provision also appears at Article 20(1) of the Treaty on the Functioning of the European Union. Professor Shaw told us that “the major difference between the EC Treaty provisions and the Lisbon Treaty provisions concerns the wording of the relationship between national citizenship and EU citizenship. This is now articulated as ‘additionality’ rather than the earlier formulation of ‘complementarity’. The inclusion of this change was insisted upon by the Member States, in order to reinforce the point that EU citizenship can only **add** rights, and cannot **detract** from national citizenship” (p 65). Moreover, Dr Spaventa pointed out that “the ‘additional’ nature of Union citizenship is confirmed by the fact that Union citizenship can only be acquired through nationality of one of the Member States, and cannot be autonomously gained” (p 70).
80. The Government told us that “Given that EU citizenship does not replace, and is additional to, national citizenship, we do not see any implications for current and future trends in the concept of British citizenship and ‘Britishness’. It will continue to be a matter for Member States to determine who are their citizens and who thus, on this basis, enjoy the status of EU citizens. Just as membership of the European Union is an important and valuable aspect of the political and economic identity of the United

⁴⁰ See the Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Kingdom, British citizens will continue to enjoy the complementary status, and benefits, of EU citizenship” (p 20).

81. Dr Anthony agreed that “there is ... nothing to suggest that developments in EU citizenship should prevail in—or arguably even inform—ongoing debates about British citizenship and ‘Britishness’” (p 10); Professor Dashwood (p 16) and Dr Spaventa (p 70) concurred.
82. There are, however, further aspects to the concept of Union citizenship. Article 10 of the Treaty on European Union will provide that “Citizens are directly represented at Union level in the European Parliament” and “Every citizen shall have the right to participate in the democratic life of the Union”. Article 11 of the Treaty on European Union and Article 24 of the Treaty on the Functioning of the European Union contain what Professor Shaw termed “an important legislative power”, permitting the European Parliament and Council, acting by co-decision, to adopt the provisions necessary to implement the “citizens’ initiatives” which “allow citizen power, especially via the internet, to be channelled into seeking specific legislative initiatives to be put forward by the Commission” (p 65). Such citizens’ initiatives require a million or more people in a “significant number of Member States” to request action. She argued that “there seems no reason to fear that an enhanced political citizenship within the European Union will have a damaging effect upon national political citizenship” (p 66). The question arises, however, as to whether the UK Government will feel it appropriate to support or oppose such citizens’ initiatives (at national or EU level), and if they do, how they will be accountable to Parliament for the position they take on each such initiative.
83. **We conclude that the continued existence of citizenship of the European Union in and of itself has no constitutional implications for British citizenship. Although it remains to be seen whether the new formal procedures for citizens’ initiatives at European Union level will have any significant practical impact (in addition to their symbolic aspirations), they can be seen as complementing proposals contained in the Government’s *Governance of Britain* programme for citizens’ “calls for action” at local authority level and the development of online petitions on the Number 10 Downing Street website.**
84. **We urge the Government to clarify whether they envisage taking a formal or informal position on any such citizens’ initiative, and whether this would entail making representations at the European Union level. If the Government do expect to play such a role, they must explain how they intend to keep Parliament informed and how they envisage remaining accountable to Parliament in the exercise of this function.**

The United Kingdom Parliament and parliamentary supremacy

85. It was clear to us that the Lisbon Treaty would bring about changes to the role of national parliaments of Member States. We therefore asked witnesses to elaborate what these changes would be and how, in particular, they may affect the roles and responsibilities of the United Kingdom Parliament in

relation to EU matters.⁴¹ We also asked about the impact of the Lisbon Treaty on the constitutional principle of parliamentary supremacy.

86. An avowed aim of the Lisbon Treaty is to strengthen the role of national Parliaments in the governance of the EU in a variety of ways set out in Article 12 of the Treaty on European Union and summarised in Table 2. There is also a new Protocol on the role of national parliaments in the EU and a Protocol on the application of the principles of subsidiarity and proportionality.

TABLE 3

The Role of National Parliaments

Role of Parliament	Change in relation to UK	Treaty provision
Both Houses of Parliament will receive documents directly from Commission and other institutions	Currently documents are deposited by the UK Government	Article 12 of the TEU and Protocol on the role of national parliaments in the EU
Enhanced cooperation between national Parliaments and the European Parliament	Express legal basis and formalisation work currently carried out by the Conference of European Affairs Committees	Protocol on the role of national parliaments in the EU
“Early warning” scrutiny of EU proposals for breach of subsidiarity principle using “yellow and orange cards” ⁴²	New procedures enabling either Commons or Lords, or both, to submit reasoned opinion to Commission within 8 weeks of transmission	Article 5 of the TEU; Article 69 of the TFEU; and Protocol on the application of the principles of subsidiarity and proportionality
Expressly informed of evaluations of policies in the area of freedom, security and justice	New provision	Article 70 of the TFEU
Scrutiny of Europol’s activities	New provision	Article 88 of the TFEU
Control over UK Government’s use of simplified revision procedures and <i>passerelles</i> (see Chapter 2)	New provision	Article 48 of the TEU and other provisions & clause 6 of the bill
Notification of applications to join the EU	New provision	Article 49 of the TEU

⁴¹ *The Lisbon Treaty: an impact assessment*, Chapter 11.

⁴² For a detailed explanation of this process, see *The Treaty of Lisbon: an impact assessment*, Chapter 11.

87. Professor Dashwood told us that the revised Treaties “create real opportunities for national Parliaments, if only they are willing to grasp at them, to strengthen democratic accountability in the EU” (p 18). Professor Usher suggested that “these provisions considerably strengthen the position of national Parliaments in the EU legislative process, provided national parliaments have in place machinery to enable them to take advantage of these opportunities” (p 82). Dr Anthony said the “principal issue here appears to be how far—if at all—Parliamentary procedures should be adapted given the enhanced role to be played by national Parliaments in the EU process” (p 11).
88. However, Professor Chalmers sounded a note of caution. He warned that “the challenges have been under-estimated” in the proposal that national parliaments be given a more proactive role in the law-making process, because the “eight week period given to national parliaments is very little”. He therefore suggested that “national parliaments must require the Commission to involve them in its initial pre-legislative consultations” and that “the United Kingdom parliament might consider whether it might want to move to a ‘mandate’ system for certain sensitive fields of EU policy-making, such as anything that touches on or near the so-called ‘red lines’”. Professor Chalmers also expressed pessimism about the operation of the Protocol on subsidiarity and proportionality “not because the EU Institutions will not listen to national parliaments if a sufficient number express concerns. It is because the nature of the subsidiarity debate has been misconceived, as it is based on the idea of a measurable trade off between integration and autonomy with a debate only about where the balance should be struck. It is more untidy than that. Most subsidiarity-based concerns are highly particularist in nature” (p 14).
89. **We welcome the enhanced role for national parliaments proposed by the Lisbon Treaty. In order to make the most of these new opportunities, it is essential that both Houses should work together to develop complementary scrutiny procedures, particularly in respect of the role of select committees. It would also be desirable for Parliament informally to seek the earliest possible involvement in the policy-making processes at the European level.**

Mandatory obligations on national parliaments?

90. In its November 2007 report, made before the conclusion of the Lisbon Treaty, the House of Commons European Scrutiny Committee considered the question of whether the text of the draft treaty would impose legal obligations on national parliaments of Member States. They expressed continuing concern that provisions on the role of national parliaments “were still cast in terms in which a legal obligation can be inferred” and expressed the view that “given its constitutional significance, this is not an issue where any ambiguity is acceptable”.⁴³ As the House of Lords European Union Committee recounted in their recent report, the English-language version of the Treaty has been altered to remove peremptory “shalls” from two

⁴³ Third Report (2007–08): *European Union Intergovernmental Conference: Follow-up report* (HC16-iii).

Articles.⁴⁴ On that basis, the Committee was able to “regard it as settled that the Lisbon Treaty places no obligations on national parliaments”.⁴⁵

91. **We agree with the House of Lords European Union Committee that the Treaty of Lisbon does not subject the United Kingdom Parliament to legal duties.**

Parliamentary Sovereignty

92. We now consider whether the Lisbon Treaty would change the relationship between EU law and the principle of parliamentary sovereignty. Like the current treaties, the Lisbon Treaty contains no express provision about the principle, enunciated by the ECJ since 1963, that European law takes priority over any inconsistent national law. Under this principle, any national court or tribunal (from a bench of lay magistrates to the Appellate Committee of the House of Lords) must immediately set aside any statutory provision or other rule of national law which is determined to be incompatible with EU law. However, Declaration 17 appended to the Lisbon Treaty does state that “in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”. Dr Anthony commented, though, that “the questionable legal status of such Declarations may mean that the doctrine can only ever continue to lack an agreed basis” (p 11).
93. The Government told us that the principle of the primacy of EU law—whether formally articulated or not—does not have implications for parliamentary sovereignty:
- “Parliament exercised its sovereignty in passing the European Communities Act 1972 and has continued to do so in passing the legislation necessary to ratify subsequent EU Treaties. The UK Parliament could repeal the European Communities Act 1972 at any time. The consequence of such repeal is that the United Kingdom would not be able to comply with its international and EU obligations and would have to withdraw from the European Union. The Lisbon Treaty does not change that and indeed for the first time includes a provision explicitly confirming Member States’ right to withdraw from the European Union” (p 21).
94. Dr Anthony told us that it “is highly unlikely that the new Treaty will add anything to debates on the effects of EU membership” on parliamentary sovereignty (p 11). Professor Chalmers agreed (p 14), as did Professor Dashwood who explained that primacy of European Union law “remains a principle developed in the case law of the ECJ” (p 17). We agree with this analysis.
95. **We conclude that the *Lisbon Treaty* would make no alteration to the current relationship between the principles of primacy of European Union law and parliamentary sovereignty. The introduction of a provision explicitly confirming Member States’ right to withdraw from the European Union underlines the point that the United**

⁴⁴ *The Treaty of Lisbon: an impact assessment*, paragraph 11.25.

⁴⁵ *Ibid*, paragraph 11.49.

Kingdom only remains bound by European Union law as long as Parliament chooses to remain in the Union.

Nations and regions

96. We now consider the Lisbon Treaty’s constitutional implications for the governments and legislatures of Scotland, Wales and Northern Ireland and their relations with the UK Government and Parliament.
97. The Government believed that little would change under the Lisbon Treaty:
- “The role of the Devolved Administrations in relation to EU matters—and the current arrangements governing the UK Government’s relationship and engagement with the Devolved Administrations—will be unchanged by the Lisbon Treaty. The Memorandum of Understanding between UK and DA Ministers, including the Concordat on Co-ordination of European Union Policy Issues, remains in force. The Lisbon Treaty also includes a new provision, Article 3A(2) [now Article 4 of the Treaty on European Union], explicitly stating that the Union must respect each Member State’s national identities inherent in their political and constitutional structures and including regional and local self-government. The Protocol on Subsidiarity and Proportionality ... notes that it is for national Parliaments to consult, where appropriate, regional parliaments with legislative powers in the application of Article 6 of that Protocol”. (p 20)
98. However, it is important not to overlook the need for ongoing consultation between the UK Government and the devolved administration on relevant EU matters.

Relations between the UK Government and the devolved administrations on EU matters

99. In our January 2003 report *Devolution: Inter-Institutional Relations in the United Kingdom* we noted that, as of December 2002, “given that relations with the EU are not devolved and that the devolved administrations are affected significantly by EU law, the adaptation of the devolved governments to the process of EU law making has been remarkable for being less problematic than might have been expected”. We added that “the longer term problem, when there is not the goodwill deriving from the same party dominating inter-institutional relations, can only be addressed in a UK context”.⁴⁶
100. We returned to the issue in our March 2006 report on the *Government of Wales Bill*⁴⁷ especially in relation to the Joint Ministerial Committee (the JMC, comprising ministers of the UK Government and the devolved administrations), which was established under a Memorandum of Understanding or “concordat”. We drew attention to the fact that “the Memorandum also provides for ‘functional’ meeting of the JMC with relevant Ministers gathering to discuss policy areas (currently specified as Health, the Knowledge Economy, Poverty and Europe). Of these four, only the JMC on Europe meets regularly (though there is no public notification of the dates, attendance or agendas). There was no plenary meeting of the JMC

⁴⁶ 2nd Report (2002–03) (HL 28), paragraph 189.

⁴⁷ 8th Report (2005–2006) (HL 142).

during 2003, 2004 or 2005”.⁴⁸ We concluded by stating that we “continue to be concerned about the dormant condition of the JMC arrangements. It is important for the long-term future of devolution for the formal machinery of inter-governmental relations to be kept in good working order”.⁴⁹

101. We have since ascertained that the JMC has still not met in plenary session since 2002, although there is an intention within Government to revive the plenary meetings. The JMC on Europe—the most relevant part of the JMC in this context—continues to meet three or four times each year, usually around two weeks before the European Councils. Whilst we welcome the regular meetings of this part of the JMC, we are dismayed at how difficult it was for us to find out these statistics, and at the continued lack of publicly-available information on the JMC.
102. On the specific issue of the Lisbon Treaty, we highlight the concerns expressed by the European and External Relations Committee of the Scottish Parliament that “neither the Explanatory Memorandum nor the White Paper [Cm 7174, setting out the United Kingdom Government’s position on the Reform Treaty] refer to consultation with the devolved administrations or respective ministerial responsibility for these devolved matters covered by the Treaty. In particular, there does not appear to be any reference to a separate Scottish legal system or that aspects of Justice and Home Affairs are devolved”.⁵⁰
103. **There is a clear need to develop and enhance cooperation between the United Kingdom Government and the devolved administrations on those aspects of European Union policy that are devolved or have implications for the devolution settlement. Frequent meetings of the Joint Ministerial Committee (JMC) on Europe are essential in this regard. Moreover, cooperation between the different administrations ought to be undertaken in as open and transparent manner as possible. We therefore recommend that information relating to meetings of the JMC on Europe should be made much more widely available.**

Relations between the UK Parliament and devolved legislatures on EU matters

104. It is important to consider not only the relationships between the different administrations, but also the levels of cooperation on EU matters between the UK Parliament, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.
105. Dr Anthony told us that “more formal co-operation among the legislatures would be desirable insofar as this would complement the ‘national’ Parliament’s role in the broader EU process where that process has implications for the work of the devolved institutions” (p 11). A similar view was taken by Mr Andrew Duff MEP when he gave evidence to the Scottish Parliament European and External Relations Committee in February 2008. He argued that “A formal agreement between the Edinburgh and Westminster Parliaments is now essential. Among the 26 other member states, plenty of examples exist of agreements between regional Parliaments

⁴⁸ Ibid, paragraph 42.

⁴⁹ Ibid, paragraph 43.

⁵⁰ *The Treaty of Lisbon: an impact assessment*, S156.

with legislative powers and their national Parliaments”; he conceded that not all practices in other Member States were good.⁵¹

106. On a more specific point, cooperation between the legislatures would be particularly desirable in respect of the Lisbon Treaty Protocol on the Application of the Principles of Subsidiary and Proportionality, which suggests that national parliaments should consult regional parliaments “where appropriate” as part of the ‘yellow card’ procedure for policing the subsidiarity principle.
107. **There is a clear need for cooperation between the United Kingdom Parliament and the devolved legislatures on European Union matters, particularly the ‘yellow card’ procedure for policing the principle of subsidiarity. We therefore suggest that the respective legislatures give further consideration to a formal mechanism for improved cooperation on these issues.**

The Area of Freedom, Security and Justice

108. Several witnesses highlighted Title V of the Treaty on the Functioning of the European Union, the “area of freedom, security and justice”, as being especially relevant to the constitution and constitutional principles and it is on this which we focus.⁵² Under the current EU Treaties, the provisions on EU policies concerning justice and home affairs are divided between the Treaty on European Union, which covers police and judicial cooperation in criminal matters (the third pillar), and the Treaty establishing the European Community, which covers migration, visas, asylum and judicial cooperation in civil matters (part of the first pillar). Measures adopted in the third pillar must be agreed by unanimity in the Council; every Member State has a veto. The measures in the first pillar are generally adopted by Qualified Majority. But a Protocol⁵³ provides that a measure does not apply to the UK (or Ireland) unless they decide to “opt in” to it, either at the early stage of the negotiation of the measure or after it has been adopted.⁵⁴
109. The merging of the third pillar with the first by the Treaty of Lisbon would result in Qualified Majority voting becoming the general rule for measures in what will be called the Area of Freedom, Security and Justice. But the whole of that area of EU policy would be subject to the opt-in Protocol, as amended. The UK will be able to decide, on a case-by-case basis, whether to opt in to a proposed measure in that area. Apart from any repercussions at a policy level, there may be direct consequences of not opting in. Where a UK decision not to opt in to a measure which amends one which does apply to the UK would make the original measure “inoperable”, the other member States may decide to exclude the UK from the original measure. If such exclusion gives rise directly to costs, the UK must bear such costs as are “necessarily and unavoidably” incurred.

⁵¹ See <http://www.scottish.parliament.uk/s3/committees/europe/or-08/eu08-0302.htm#Col345>.

⁵² See also *The Treaty of Lisbon: an impact assessment*, Chapter 6.

⁵³ The Protocol on the position of the UK and Ireland.

⁵⁴ Another protocol, the Protocol integrating the Schengen *acquis* into the framework of the European Union, makes particular arrangements for the application of measures and opt-in arrangements on border checks and associated cooperation among police and judicial authorities (originally made as the Schengen Agreements by certain of the Member States).

110. Transitional arrangements, for five years, are made under the Treaty in relation to the powers of the Commission and the jurisdiction of the EU Courts concerning existing third pillar measures. To the extent that those measures are not amended or repealed under the procedures put in place by the Lisbon Treaty, the UK will have to decide before the end of the five years after the Treaty comes into force whether to opt out of the measures *en bloc*, though it may seek to opt back in to specific measures. The UK may have to bear costs necessarily and unavoidably incurred in consequence of opting out. A detailed analysis of the opt-in arrangements can be found in the report of the European Union Committee.⁵⁵
111. Notwithstanding the ‘opt-in’ arrangements for the UK, the European Union Committee’s report concluded that bringing criminal law and policing within Title V of the Treaty on the Functioning of the European Union “is clearly a significant change”.⁵⁶ Similarly, Dr Mitsilegas described this reform as “fundamental constitutional change” and predicted “a fresh impetus for a number of new, extensive legislative initiatives in EU criminal law” (p 60). In practical terms, this means that in future the European Union will have competence to adopt legislation in the fields of criminal law and procedure and policing using qualified majority voting in the Council and that such legislative proposals will be subject to greater scrutiny by the European Parliament than is currently the case. The ECJ will acquire corresponding new jurisdiction. Inevitably, views about the desirability of these developments are sharply divergent.⁵⁷
112. From the UK’s point of view, the House of Commons European Scrutiny Committee and the House of Lords European Union Committee have both emphasised the importance of ensuring that there is systematic parliamentary scrutiny of how the Government decides to use the “opt-ins” and “opt-outs” it has secured.⁵⁸ The European Union Committee has also drawn attention to the importance of the Government maintaining “a proper balance between liberty and security” in exercising their powers.⁵⁹
113. Title V of the Treaty on the Functioning of the European Union and the protocols associated with it create a complex set of arrangements which inevitably have constitutional implications. In practice, much will depend on how the Government choose to exercise the opt-ins they have negotiated. **We conclude that the importance of how the opt-ins and opt-outs are used is such that Parliament must be fully involved in their use. We therefore recommend that the European Union (Amendment) Bill be amended so as to require the Government to obtain approval from both Houses of Parliament before using opt-ins or opt-outs in any policy area. This would be consistent with the Bill’s policy to require parliamentary approval of the use of the Simplified Revision Procedure and *passerelles*.**

⁵⁵ *The Treaty of Lisbon: an impact assessment*, Chapter 6, in particular paragraphs 6.244 to 6.345.

⁵⁶ *Ibid*, paragraph 6.20.

⁵⁷ See *ibid*, Chapter 6.

⁵⁸ 3rd Report (2007-08): *EU Intergovernmental Conference: Follow-up Report* (HC 16-iii), paragraphs 67 and 70; and *The Treaty of Lisbon: an impact assessment*, paragraph 6.275.

⁵⁹ *The Treaty of Lisbon: an impact assessment*, paragraphs 6.305–306.

Courts and the judiciary

114. The Lisbon Treaty renames the courts of the EU collectively as the Court of Justice of the European Union and introduces a number of changes to its jurisdiction and procedures. Against any yardstick, the Court of Justice is an institution of constitutional importance.
115. In their evidence to us, the Government explained in some detail the changes in the European Court of Justice's (ECJ) jurisdiction that would be brought about by the Lisbon Treaty. They concluded by saying "The Government welcomes the ... changes in reinforcing the existing role of the Court in upholding the rule of law within the European Union. They do not however alter the current relationship between the European Union and the United Kingdom, or between the ECJ and UK courts, and do not therefore impact on the Constitution of the United Kingdom" (p 22).
116. Several of the academic experts drew attention to the role of the ECJ in determining the direction and speed of some types of future developments in the EU. For example, Professor Shaw told us that "The precise extent to which the Treaty of Lisbon will accelerate a greater generalisation of the doctrines which underpinned the constitutionalised (EC) Treaty will depend largely upon the happenstance of references for preliminary rulings coming before the Court of Justice from national courts in relevant cases" (p 64).
117. Dr Anthony also drew attention to the broadening of the ECJ's jurisdiction. It would, he said, "have jurisdiction in respect of all matters save those concerning common foreign and security policy" (p 11; see also Professor Tridimas p 77). He argued that this "need not *per se* have implications for the internal workings of the UK Constitution, as its focus is on the balance of powers at the supranational level and on strengthening the rule of law", though he also noted that it "remains to be seen whether the ECJ will return to a more activist role in developing EU law, as that may result in a body of case law that crosses boundaries within the EU's existing and proposed structures" (pp 11–12).
118. Professor Chalmers added that "The central changes to the European Court of Justice's jurisdiction are that policing and judicial cooperation in criminal matters have been incorporated into the structures associated with the EC Treaty and that decisions of the European Council will now be subject to review by it". He told us that that in this field, the Court's judgments "will not be binding on the United Kingdom insofar as they relate to instruments into which it has not opted in" but "the potential for cases within the field of area of freedom, security and justice to take a high proportion of the Court of Justice's docket is considerable, particularly as the preliminary reference procedure has been amended to give preference to references where one party is in detention. This will affect the United Kingdom insofar as the type of work done by an institution invariably affects its nature and this work sidelines other references" (p 15).
119. Dr Mitsilegas also highlighted the changes to the Court's role in relation to criminal matters, which he viewed as "enabling a meaningful dialogue between national courts and the ECJ on matters which, as has been demonstrated by a number of cases (in particular those relating to the European Arrest Warrant), may have fundamental constitutional implications for both the Union and Member States" (p 60).

120. Professor Tridimas explained that “Article 276 [of the Treaty on the Functioning of the European Union] provides that ... the ECJ has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”. He argued that while national courts “have the final say”, “since these areas fall within the scope of Union law, in exercising their power of judicial review, national courts must do so applying the principles of Community law, e.g. the principle of proportionality and respect for fundamental rights as recognised by Community law. In other words, the limitation of Article 276 [of the Treaty on the Functioning of the European Union] is only jurisdictional and not substantive in scope” (p 78).
121. Professor Dashwood was “not aware of changes envisaged by the [Lisbon Treaty] that would significantly alter the existing relationship between UK courts and the European judicature, which has always been a model of cooperation and mutual respect” (p 18).
122. **Many of the issues we have examined in this report—including the competences of the EU, the interpretation and application of the Charter, and the detailed working-out of the consequences of the UK’s opt-outs and opt-ins (particularly in relation to the area of freedom, security and justice)—will be shaped by the European Court of Justice’s adjudications in the years to come. Insofar as the European Union is an organisation based on the rule of law, there can be no complaint that this is so, even if from time to time the developments introduced have taken Member States by surprise.**
123. **In order for Parliament to be fully informed of the European Court of Justice’s interpretation and application of the Lisbon Treaty provisions, we recommend that the Government lay before Parliament an annual report on their assessment of the impact of the Court’s rulings on the United Kingdom. In interpreting and applying the Charter, the European Court of Justice will increasingly refer to the case law of the European Court of Human Rights and so the relevant rulings of that Court ought also to be covered in the Government’s annual report.**
124. **The provision of such an annual report would complement Parliament’s efforts in recent years to seek greater information about the operation of the United Kingdom courts through, for example, the requirement of the Constitutional Reform Act 2005 for the Supreme Court to make an annual report and the Lord Chief Justice’s proposed regular reports on the courts system in England and Wales.**

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

Introduction

125. Our approach to the Lisbon Treaty is different to that of other committees: we are concerned exclusively with the changes that may be brought about to the workings of the UK constitution rather than the operation of the EU's institutions and processes. We also make comments and recommendations on Parliament's control over amendments to the treaties governing the EU.
126. There has been considerable debate over how different the Lisbon Treaty is compared to the abandoned Constitutional Treaty. We do not enter into that debate. Our focus in this report is on the changes that the Lisbon Treaty would make to the arrangements currently in force.

Parliamentary Control of Future Alterations to the European Union Treaties

127. We welcome the requirement created by clause 5 of the Bill that the Government must seek parliamentary approval before ratifying any future amendments to the founding Treaties made under the "ordinary revision procedure". However, we call upon the Government to explain and resolve the relationship between the new requirement created by clause 5 and the existing requirement under section 12 of the European Parliamentary Elections Act 2002 for parliamentary approval of treaty amendments which enlarge the powers of the European Parliament.
128. We welcome the specific requirement contained in the Bill for parliamentary approval prior to Government agreement to amendments made under the simplified revision procedure. These provisions of national law would reinforce the controls contained in the Treaty on European Union itself.
129. We broadly welcome the provisions in the European Union (Amendment) Bill which would establish parliamentary control over Government decisions to agree to changes under the *passerelle* mechanisms. There are, however, two ways in which the procedure could be strengthened so as to ensure proper scrutiny. We recommend that the Government lay an explanatory memorandum or make a written statement when tabling a motion seeking approval for support of a specified draft decision; and we further recommend that the Bill be amended to ensure that Parliament is given sufficient time to scrutinise the proposals in respect of *passerelles*.
130. Whilst we accept that some *passerelle* mechanisms have existed in earlier EU Treaties, we are not convinced that this fact alone provides a cogent justification for the Bill's omission of a comprehensive list of *passerelle* and similar enabling provisions both in the Lisbon Treaty and in previous treaties. We call on the Government to provide a list enumerating all these provisions in order to allow Parliament to consider during the passage of the Bill whether each one should or should not be subject to parliamentary control under clause 6.
131. Clearly, Parliament will wish to pay particular attention to initiatives brought under Article 352 of the Treaty on the Functioning of the European Union in its role of scrutinising compliance with the principles of subsidiarity and proportionality.

The Lisbon Treaty and the UK Constitution

A lasting settlement?

132. Constitutional stability is a desirable characteristic. We note that the Government view the reforms that would be brought about by the Lisbon Treaty as providing a lasting settlement. We therefore hope that, if ratified, the Treaty will provide a period of stability in the institutional framework of the EU and we urge the Government to use their influence to ensure that this is the case. This, in turn, will enable the UK constitution to develop further the procedures needed to ensure that the Government are properly accountable for the exercise of their powers in the sphere of the European Union, with effective roles for the United Kingdom Parliament and the governments and legislatures of Northern Ireland, Scotland and Wales.

Defining the European Union's competences

133. Questions of distribution of power are inherently complex. In the United Kingdom, devolution and membership of the European Union have the combined consequence that the United Kingdom Government and Parliament operate in a system of multi-level governance: for practical purposes they have such powers as have not been conferred on the devolved administrations and legislatures or the European Union. With this in mind, we welcome the Lisbon Treaty's attempt to set out with greater clarity the demarcations of responsibility between Member States and the European Union. These demarcations will continue to be open to interpretation by the European Court of Justice.
134. The articulation of categories of competence in the Treaty on the Functioning of the European Union would be a useful step in clarifying the distribution of powers between the European Union and the Member States.

People's rights and responsibilities

135. We conclude that the change in status of the Charter from political document to having the force of a treaty would be less of a radical step than at first it may appear. This is because the Charter is declaratory of rights already recognised as existing in law by the courts and therefore currently available to the UK citizen.
136. We agree with the European Union Committee that Protocol 7 clarifies the application of the Charter rather than operating as an opt-out.
137. In our view, the European Union's accession to the European Convention on Human Rights should have no impact on national law, and therefore no constitutional implications.

Citizenship

138. We conclude that the continued existence of citizenship of the European Union in and of itself has no constitutional implications for British citizenship. Although it remains to be seen whether the new formal procedures for citizens' initiatives at European Union level will have any significant practical impact (in addition to their symbolic aspirations), they can be seen as complementing proposals contained in the Government's *Governance of Britain* programme for

citizens' "calls for action" at local authority level and the development of online petitions on the Number 10 Downing Street website.

139. We urge the Government to clarify whether they envisage taking a formal or informal position on any such citizens' initiative, and whether this would entail making representations at the European Union level. If the Government do expect to play such a role, they must explain how they intend to keep Parliament informed and how they envisage remaining accountable to Parliament in the exercise of this function.

The United Kingdom Parliament and parliamentary supremacy

140. We welcome the enhanced role for national parliaments proposed by the Lisbon Treaty. In order to make the most of these new opportunities, it is essential that both Houses should work together to develop complementary scrutiny procedures, particularly in respect of the role of select committees. It would also be desirable for Parliament informally to seek the earliest possible involvement in the policy-making processes at the European level.
141. We agree with the House of Lords European Union Committee that the Treaty of Lisbon does not subject the United Kingdom Parliament to legal duties.
142. We conclude that the *Lisbon Treaty* would make no alteration to the current relationship between the principles of primacy of European Union law and parliamentary sovereignty. The introduction of a provision explicitly confirming Member States' right to withdraw from the European Union underlines the point that the United Kingdom only remains bound by European Union law as long as Parliament chooses to remain in the Union.

Nations and regions

143. There is a clear need to develop and enhance cooperation between the United Kingdom Government and the devolved administrations on those aspects of European Union policy that are devolved or have implications for the devolution settlement. Frequent meetings of the Joint Ministerial Committee (JMC) on Europe are essential in this regard. Moreover, cooperation between the different administrations ought to be undertaken in as open and transparent manner as possible. We therefore recommend that information relating to meetings of the JMC on Europe should be made much more widely available.
144. There is a clear need for cooperation between the United Kingdom Parliament and the devolved legislatures on European Union matters, particularly the 'yellow card' procedure for policing the principle of subsidiarity. We therefore suggest that the respective legislatures give further consideration to a formal mechanism for improved cooperation on these issues.

The Area of Freedom, Security and Justice

145. We conclude that the importance of how the opt-ins and opt-outs are used is such that Parliament must be fully involved in their use. We therefore recommend that the European Union (Amendment) Bill be amended so as to require the Government to obtain approval from both Houses of Parliament before using opt-ins or opt-outs in any policy area. This would be

consistent with the Bill's policy to require parliamentary approval of the use of the Simplified Revision Procedure and *passerelles*.

Courts and the judiciary

146. Many of the issues we have examined in this report—including the competences of the EU, the interpretation and application of the Charter, and the detailed working-out of the consequences of the UK's opt-outs and opt-ins (particularly in relation to the area of freedom, security and justice)—will be shaped by the European Court of Justice's adjudications in the years to come. Insofar as the European Union is an organisation based on the rule of law, there can be no complaint that this is so, even if from time to time the developments introduced have taken Member States by surprise.
147. In order for Parliament to be fully informed of the European Court of Justice's interpretation and application of the Lisbon Treaty provisions, we recommend that the Government lay before Parliament an annual report on their assessment of the impact of the Court's rulings on the United Kingdom. In interpreting and applying the Charter, the European Court of Justice will increasingly refer to the case law of the European Court of Human Rights and so the relevant rulings of that Court ought also to be covered in the Government's annual report.
148. The provision of such an annual report would complement Parliament's efforts in recent years to seek greater information about the operation of the United Kingdom courts through, for example, the requirement of the Constitutional Reform Act 2005 for the Supreme Court to make an annual report and the Lord Chief Justice's proposed regular reports on the courts system in England and Wales.

APPENDIX 1: LIST OF WITNESSES

The following witnesses gave evidence.

Professor Mads Andenas

Dr Gordon Anthony

Professor Damian Chalmers

Professor A A Dashwood

The Foreign and Commonwealth Office (FCO)

Professor Andreas Follesdal

Dr Valsamis Mitsilegas

Professor Jo Shaw

Dr Eleanor Spaventa

Professor Takis Tridimas

Professor John A Usher

APPENDIX 2: GLOSSARY

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

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

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

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

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

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

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

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

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

European Union: the European Union was created by the Treaty of Maastricht. It consists of three "Pillars". The First Pillar comprises the pre-existing European

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

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

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

MEP: Member of the European Parliament.

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

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

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

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

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

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

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

Written Evidence

Memorandum by Professor Mads Andenas, University of Leicester and Norwegian Centre for Human Rights, University of Oslo and Professor Andreas Follesdal, Norwegian Centre for Human Rights, University of Oslo

THE REFORM TREATY, NATIONAL CONSTITUTIONS AND LEGITIMACY

The outline of a reformed treaty (ORT) (Annex, European Council 2007) seeks to bring the EU out of its two-year hibernation since two referendums rejected the Constitutional Treaty (“CT”) in 2005. This note addresses what ORT resolves in the relationship to national constitutions and of the longer term legitimacy crisis of the EU?

The note argues that the CT as well as the ORT takes several valuable steps to ensure that the European Union becomes more trustworthy and comes “closer to the people”. The simplification and increased transparency are great improvements. In addition, ORT contains three interesting responses: a new subsidiarity mechanism; increased opportunities for representative and “participatory” democratic accountability (Smismans 2004, Kohler-Koch 2007); and an increased focus on human rights.

Section 1 provides some fragments of the history of the European Union, to justify the diagnosis that it needs increased levels of trust and arrangements for trustworthiness among Europeans and their political leaders. Section 2 argues that the European Union has certain federal elements that require four peculiar forms of “balancing”. Section 4 discusses the increased need for trust among Europeans. Section 4 addresses the role of the Charter on Fundamental Rights as a trust building mechanism. Sections 5 to 7 address how the CT and the ORT contribute or detract from each of these three forms of balancing. The conclusion is that certain elements of the CT and of the ORT would help European institutions create and maintain their own support among European citizens and officials.

1. THE BACKGROUND SETTING

The recent summit discussions served as a thought-provoking reminder of the horrid background to which the European Union was a response. The seeds of what we now call the European Union were sown after the War of 1939–45, when French and German politicians agreed to take steps that would prevent future wars on European soil. On May 9, 1950, Robert Schuman, Foreign Minister of France, announced that the two countries would put their coal and steel production under a common authority. This would make it impossible for either country to arm for war against each other. Several developments in the EU have created quite new challenges.

Deepening and widening European integration

In the intervening fifty years European integration has “deepened” into more extensive cooperation, and “widened” to include many more countries than the original six:

The populations had largely acquiesced in the early forms of cooperation, but at least three features—increased interdependence, diversity and the ambitions of the central authorities—changed popular attitudes toward the project of European integration. The citizens and their member states became increasingly interdependent, which required more trust among the citizens and elites. The common arrangements had to accommodate a greater diversity of institutions, rules and legal and cultural practices. Finally, the objectives of the cooperation became more ambitious, ambivalent and contested. They came to include not only peace, but also economic growth to be secured through the free movement of goods, services, persons and capital, and a common monetary policy among some. These new objectives were not as uncontested as peace: They require trade offs, they create distributive conflicts, and at least some citizens see them as threats to domestic welfare arrangements rather than prerequisites to maintaining them, as many politicians would argue.

Popular and Legal Challenges, Expansion

The Treaty on European Union agreed in Maastricht 1991 met with strong protests in Denmark and France. In Germany and Denmark the Treaty ratification was also challenged on legal grounds. The result was that national and European political elites understood that popular and legal support for the EU was at risk. In the late 1990s it became clear that the EU would have to change to accommodate the large number of new members from formerly Eastern Europe. The sheer number of applicant states would require fundamental changes in how to make decisions. In addition, with the partial exception of Poland these were predominantly small countries, poorer than existing member states, and without a recent, well established strong democratic political culture.

Weakened domestic democracy

European integration has increased executive power and decreased national parliamentary control. To quite an extent, governments can effectively ignore their parliaments when making decisions in Brussels. Hence, European integration has meant a decrease in the power of national parliaments and an increase in the power of national executives. The directly elected European Parliament is weak, though it gains some power with the CT.

Human rights in the EU

Finally, the treaty basis and substantive human rights policies of the EU have often been accused of being patchy, even inconsistent. The German Constitutional Court in particular made clear that human rights must be more explicit in the EU.

This is not to deny that the EU has also been committed to the pursuit of human rights since the beginning—at least in a diffuse sense, in that the Rome Treaty of 1957 speaks of the commitment to “preserve and strengthen peace and liberty”. The European Court of Justice and the European Council has often underscored the need to respect human rights, and the Treaty on European Union mentions human rights (Art 6). Furthermore, all agreements on trade or cooperation with third countries since 1992 stipulate that human rights are essential in the relationship. In particular, the trade and aid pact with developing countries—The Cotonou agreement and the European Initiative for Democracy and Human Rights—holds that trade concessions and aid programs can be affected if the government violates human rights.

These were some of the factors that motivated political leaders to agree the “Convention on the Future of Europe” that first met February 28, 2002, to recommend how to make the Union more democratic, more transparent and more efficient. In 2004, European and national politicians had hoped that a new “Constitutional Treaty for Europe” (CT) would help solve what has become known as the “Legitimacy Deficit” or the “Democratic Deficit” of the European Union.

But in May and June 2005, a majority of voters at referendums in two member states rejected the proposal. The rejection in France and the Netherlands left many questions unanswered—such is the nature of referendums by unaccountable citizens. Why did so many vote “no”? Were they dissatisfied with how the revised European Union would work, or are they mainly frustrated about how they thought it already operated—or were they protesting their domestic politicians? Would they rather have no such “constitution” for Europe, or would they want some changes to the Constitutional Treaty? Some of these questions have not been resolved, but the heads of state have sought to interpret and respond to these challenges by agreeing in June 2007 to the ORT. What are we to make of it? In particular, is the ORT likely to resolve the legitimacy deficit and secure a stable EU? In order to assess the ORT, we must consider some lessons and challenges from federal thought.

2. FEDERALISM

For our purposes, a federation is a political order where competences are constitutionally split between sub-units and central authorities. By this modest definition, the EU clearly has strong federal features—insofar as it has a constitution at all, see the discussion by Andenas, Mads and Gardner, John 2001. This split of competences is made more clear in the CT—and is kept in the ORT. Articles I–12—I–18 lay out areas of exclusive competence of the Union institutions, and other exclusive competences for the Member States. Furthermore, central decisions are explicitly placed beyond the control of any single sub-unit. The CT shifts the default procedure of decisions in the Council of Ministers from unanimity; and the European Parliament gains certain new powers. This is not to deny that Member States remain influential and exercise control,

especially since they participate in central decision-making bodies typical of “interlocking” federal arrangements. They also retain veto on future treaties.

These federal features are not affected by the terminological changes introduced in the ORT. And they are compatible with many other claims about the EU. Considered as a federal political order, Europe remains quite *decentralised*. Even with the CT it would lack a common defence policy typical of federations,—even though it might “frame” one (Art I–16; McKay 2001, 3; Moravcsik 2001, Moravcsik 2002). And the ORT includes a phrase that “national security remains the sole responsibility of each Member State.” (Annex 1, 4).

Nor does the fact that many competences remain shared between sub-units and central authorities make it less of a federation. And the federal nature of the EU does not imply more centralisation—though the Preamble seems to envision such a “post-federal” future since it describes the peoples of Europe “united *ever more closely*, to forge a common destiny” (My emphasis).

The Union also has important confederal elements (Meehan 2001). An example is the right of member states to withdraw, confirmed in the CT (Art. I–59) and in the ORT (16). Yet some features are clearly beyond standard accounts of “confederation”, and exhibit elements typical of federations. For instance, the Union’s subjects are citizens and not only member states (*Van Gend en Loos v. Nederlandse administratie*, Case 26/62 [1963] ECR 1. cf. Weiler 1996). And common decisions need not be unanimous.

The agreed ORT will lead to a treaty that to a large extent codifies rather than overhauls the present “operating system” of the EU. Still, the new treaty would strengthen some of the federal features of the future European political order: The allocation and division of authority—“competences” becomes clearer, between member states and union organs. This makes it even more appropriate to draw lessons and standards from federal thought. This federal perspective has several implications for assessing the legitimacy and the sustainability of the ORT.

The comparative study of federations suggests that their institutions must achieve and maintain four complex forms of “balancing” or stability at the same time:

- Between the Member States and the Union institutions;
- Among the Union institutions;
- Among Member States *within* the Union institutions, since the members partake of the common decision making authority—a characteristic of “interlocking” federal institutions;
- And, importantly, stable institutions must foster trust and “dual loyalty” among the citizenry and officials, sufficient to ensure willing support both for the institutions of their member state and of the Union. Thus citizens must balance two political loyalties.

3. TRUST

Trust and trustworthiness among citizens and officials faces special challenges in political orders with federal elements if they are to remain “balanced” in the senses of maintaining their federal features and creating their own support.

To understand the significance of trust-building measures, a brief aside on trust among “contingent compliers” is necessary.

The need for trust and trustworthiness arises under circumstances of complex mutual dependence. Shared expectations of others’ future compliance is central for the long-term stability of a just political order. Such trustworthiness is crucial to foster willing support and “overarching loyalty” among Union citizens, not only toward compatriots of their own member state but toward the union citizenry and authorities as a whole. This challenge, of building an “overarching loyalty”, is especially demanding in the EU. That union consists of well-established Member States that could in principle exist independently, and who hence are prepared to bargain even harder about many particular choices (Filippov, Ordeshook, and Shvetsova 2004, 315). A European party system which could foster such cross cutting loyalties is drastically under-developed (*ibid* 321).

Yet trust and trustworthiness have become increasingly important among increasingly interdependent Europeans, and even more so with elements of the CT that will survive. The Reform Treaty will replace unanimity with another default legislative procedure. It will require a double majority in the Council (Art I–23), and involve co-decision by the European Parliament and the Council together. This change removes the safety valve of unanimity, and increases the need for trust and trustworthiness among individuals and among their representatives. Each person must to a greater degree be prepared to adjust or sacrifice their own interests—or those of their electorate—on any single issue, for the sake of other Europeans. A unanimity rule offers protection to citizens of one Member State that they will not be forced into an arrangement contrary to their own interests. However, the multiple veto points of unanimity which protect each member state also

leads to deadlock and stagnation. The result in the EU was to prevent common action even when obviously in the interest of all. Majority rule, or qualified majority rule, promises more decisive decision making. But stable popular support for such qualified majority procedures requires a well-developed trust in other Europeans and officials (Nicolaidis 2001). It is therefore unsurprising that the default qualified majority procedure does not apply in a number of key cases urgent for national sovereignty. In particular, the agreed ORT assures national control over foreign policy.

The CT and the ORT would maintain and bolster at least two institutional mechanisms for preference formation toward an “overarching loyalty”: interlocking federal arrangements, and increased opportunities for contestation among political parties. Both of these are aided by increased transparency. We submit that the need to develop and maintain such mechanisms for trust building outweigh criticisms that transparency, interlocking arrangements and political parties also contribute to less effective and efficient problem solving procedures.

We now turn to consider how the EU can be made more trustworthy with regard to human rights, and the three forms of balancing that the EU must secure.

4. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE UNION

Federations and human rights have a long, ambivalent and contested relationship. Some argue that federations and human rights are mutually supportive. Federal structures safeguard human rights at both sub-unit and central levels, and visible human rights constraints render federations more legitimate and trustworthy. Others hold that federations threaten human rights and vice versa. The complex web of centre and sub-unit authority in federations is more likely to lead to intentional or accidental violations of human rights. Central authorities might also ignore citizens’ human rights with impunity, while sub-units may enjoy immunity for mistreatment of their citizens, contrary to human rights requirements. Sub-units are also more likely to secede when human rights standards allow them to plead mistreatment from the centre.

The CT would reduce citizens’ fear of such abuse, since the “Charter of Fundamental Rights of the Union” was to constitute Part II of the CT. This Charter was agreed in 2000, but was not given legal force at the time. It was not intended to introduce new rights, but rather to recognize, systematize and give increased visibility to the various existing human rights obligations. As part of the CT the Charter would provide added assurance to citizens that their rights would indeed be protected within the EU. Article I-9 also stated that the Union should accede to the European Convention for the Protection of Human Rights. It would make the union accountable to the European Court of Human Rights, and this would grant Union citizens further assurance. The CT also revises a mechanism intended to foster human rights compliance within member states (Art. I-59). The procedure—which will be kept in the Reformed Treaty—addresses suspicions that a member state engages in systematic violations of the Union’s values. It includes fact-finding, and now includes dialogue—an arrangement that allows the target government to give an account of its policies to the EU. That element of required dialogue was notoriously absent in the “Reactions against Austria.”

The ORT will change the role of the Charter (provision 9). It will be referred to and given legally binding value within its specified scope of application, but it will not be included in the new Treaty. The ORT states that the Charter does not create new justiciable rights, and that these would especially not be applicable to the United Kingdom. These statements may serve different purposes and also perhaps reflect that the ORT will not add or detract much to what follows from previous Treaty amendments and the case law of the European Court of Justice, the European Human Rights Court and national supreme and constitutional courts.

In conclusion, the Charter on Fundamental Rights and other human rights provisions of the Reformed Treaty, however expressed, will provide some assurance to citizens that their human rights would be protected,—an assurance of great value for contingent compliers.

5. BALANCE BETWEEN MEMBER STATES AND UNION INSTITUTIONS: SUBSIDIARITY

All federations experience long term trends toward centralising—and decentralising -decision-making that can hardly be avoided (Weiler 1999, 318; Dehousse 1994; Tushnet 1996). A crucial issue is how to halt and reverse such drifts, and maintain a federal rather than a unitary political order. Safeguards must be in place to reduce the risk of undesired, creeping centralisation of all competences, and safeguards may also have to prevent secession by one or more sub-units. Yet such arrangements must not unduly threaten the effectiveness and efficiency of the political order.

The CT—and the Reformed Treaty—will help secure this balance to some extent, and give increased assurance about it, in at least two ways. Firstly, as mentioned above, the CT and the ORT increases transparency and clarifies the allocation of different kinds of competences between the Union and the member states—exclusive,

shared, complementary and co-ordination (Articles I–12—I–18). These measures may help reduce such unintended drifts, and thus enhancing trustworthiness. Judging from the history of federalism, the proper allocation of such competences will remain a crucial concern. Competing versions of the Principle of Subsidiarity all address this contested issue (cf. Follesdal 1998b).

Secondly, it is important to have institutionalised “centrifugal” forces that prevent the EU from turning into a unified, “post-national” political order with no constitutional role for Member States (Nicolaidis 2001; Craig 2003). This concern is even more pressing with the reduced scope of unanimity, and with it a diminished ability of any one Member State to prevent or modify European wide policies.

The CT would maintain Member States’ influence in many areas, and grant some new roles. The European Council would maintain a role in nominating the Commission President for European Parliament approval, rather than having the President being elected solely by the Parliament. The CT would also give several new powers to national parliaments, eg. as laid out in Protocol 1. They would gain broad access to the Council’s legislative work.

One central set of institutional actors to prevent centralisation are national parliaments, that will be specifically mentioned in a new Article (ORT, Annex 1 7). A potentially important mechanism to prevent creeping centralisation is the role of national parliaments in monitoring the application of Art. I–11 of the CT about subsidiarity, confirmed in ORT (11). The Principle of Subsidiarity requires that

... in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The national parliaments may voice reasoned objections against draft legislative acts that they think violate subsidiarity (Protocol 2). If enough parliaments agree, the draft must be reviewed. This may help protect against some “Competence creep”, though it is worth noting that the mechanism gives perhaps undue weight to the status quo. Fritz Scharpf has shown that the decision procedures favour “negative integration” in the form of removal of obstacles to free trade, and hinder “positive” integration in the form of new European regulations (Scharpf 1996, 13). The new subsidiarity mechanism does not affect this institutionalized preference for market deregulation.

6. BALANCE AMONG UNION INSTITUTIONS

The second form of balancing concerns how the Reform Treaty will allocate authority among central Union institutions. This balance must over time satisfy normative conditions of legitimacy concerning procedures and outcomes. (Smismans 2004). The CT would provide that the Union’s institutions “shall practise mutual sincere cooperation” (Art I–19).

Among the important objectives that should be secured is that no institution should dominate the function of any other, to provide requisite scope for public deliberation about the opportunities to cooperate, and to prevent abuse of public power. “Demos-constraining” elements to prevent domination and abuse must somehow be squared with the “demos-enabling” arrangements to ensure that the EU can achieve its legitimate objectives. Two changes are worth noting in this regard. Firstly, the Commission President, will be proposed by the European Council and elected by the European Parliament. This increases the role of the European Parliament, and may spur much needed political contestation about Union policies among political parties.

A second quite contested issue is due to France, who succeeded in removing “undistorted competition” from the objectives of the EU—objectives that the Commission traditionally has sought to promote. These two issues intertwine.

We submit that there is hardly a consensus about the nature of the EU as a political project. Witness the British protests against France’s success in removing “undistorted competition” from the objectives of the Union. And in the absence of such a consensus, we may ask with what authority does the Commission proclaim and pursue these ends of Europe to the detriment of other concerns? Neither the CT nor the ORT details the nature of this political project. To be sure, both documents provide a list of goals. The CT lists the objectives of the Union (Art. I–3): peace, the well-being of its peoples, freedom, security, a single market, sustainable development, a social market economy, aimed at full employment, combating social exclusion, promoting solidarity and respecting cultural diversity, contributing to international free and fair trade . . . and so on.

Even after France succeeded in removing the objective of “undistorted competition” from this list, the list is unordered and vague: The all-important details, weights and limits remain obscure. Moreover, they are contested, and are typically the stuff of political contestation among parties and ideologies within Member

States, in the Council of Ministers and in the European Parliament. The appropriate weighing might well differ among Member States, as well as between these sub-units and the Commission institutions.

Yet Art. I–26(1) lays down that “The European Commission shall promote the general interest of the Union and take appropriate initiatives to that end.” A central issue is how the Commission should deal with the disagreements concerning specification and weighing of these objectives. The increased role of European Parliament in selecting the Commission President allows for politicized contestation of precisely these topics, and that should be welcome. This contestation contributes to make the Commission more legitimate, and may also foster overarching loyalty over time.

Still, there is a danger that the Commission will overstep its mandate. The “general interest of the Union” is presumably a sub-set of the legitimate interests of individuals—Europeans and others. Member States may legitimately pursue other objectives than the common European interest. The “general interest” of the Union should not always override the policy preferences of Member States in the way that is likely when the Commission has monopoly on proposals. This is because citizens’ interests are to be pursued both by Union institutions, and by the institutions of the Member States. Obviously, citizens’ preferences as expressed by their governments may conflict with proposed Union policies in several ways. But it is not obvious that the Union’s policy choices should always outweigh those of the Member States, since the latter may legitimately be pursuing equally urgent interests of citizens. So member states that refuse to pool sovereignty, or who vote against Commission proposals, need not be doing this from “egoistic” motives, nor are they thereby pursuing national interests in an inappropriate sense. Given the mandate of the Commission, it is open to doubt that it will keep the proper objectives of the Member States, and all interests of citizens, clearly in mind when making its proposals. Thus, its monopoly risks abuse.

This issue may create quite new conflicts in the aftermath of a Reform Treaty, given the reduced salience of unrestrained competition—traditionally an important source of contestation between the Commission and Member States.

7. BALANCE AMONG MEMBER STATES: VOTING WEIGHTS

In many federal political orders the sub-units vary drastically in population size. In the EU in particular, member states with small populations enjoy powers beyond what the principle of “one person one vote” seems to warrant. This outcome is typical of the bargains small units secure when consenting to a union where they otherwise are likely to find themselves in the minority on many decisions. From this perspective, small states should continue to wield power irrespective of population size. In later stages, when federations come of age, citizens of more populous regions often frown upon such agreements (Pinder 1993, 101). To equalize influence of citizens, institutional reform could increase the powers of the European Parliament, adjusting the electoral bases of the seats to equalize representation. State votes in the Council of the European Union could reflect population size.

This disagreement was the immediate and most visible cause of the failure of the Draft Constitutional Treaty at the IGC. It also appeared to be the main issue preventing agreement to an ORT at the summit in June 2007.

Can over-representation of small and medium states be defended, consistent with the commitment to equal respect for all citizens? We submit that one such justification is to maintain citizens’ and politicians’ trust in these arrangements over time.

One line of defense for skewed voting weights denies that majority rule is normatively appropriate for populations divided in majorities and minorities along cultural, ethnic or other cleavages. In such societies individuals face different risks of ending in the minority on important issues (Barry 1991; Follesdal 1998a; Lijphart 1999; McKay 2001, 146–47).

In brief, the challenge for institutional designers is to grant each citizen, across Member States, a fair influence on the steering wheel, and a fair influence on the brake, of the EU. Arguments that explicate this “fairness” may draw the various sorts of individuals’ liberties to be secured—non-interference, non-domination, or enhanced capability sets—or a combination of these (cf. Dobson 2004), or the normative claim to respect for expectations created by existing political units (Follesdal 1996). A central consideration is how institutions can promote the trustworthiness of the authorities in a population deeply divided on political issues.

One upshot of such arguments is that what is “proportional” voting weight is not only a mathematical issue, but one that rests of substantive normative premises. It would hence be premature to eg criticize Poland for their refusal to back down from the voting weight agreement of the Treaty of Nice, to more “equal” or “proportional” distribution of votes in the CT. Several issues may be normatively important for citizens: either to have a roughly equal opportunity to be part of a “winning” coalition sufficient to determine the direction of various policies in pursuit of one’s conception of the common interest. Or to have a roughly equal

opportunity to be part of a “blocking” coalition, to prevent decisions regarded as unacceptably harmful to the common interest. Or, yet again, the normatively legitimate distribution of voting weights might seek to combine the two, eg to equalize citizens’ net “political opportunity”, expressed as the probability of ending up in a winning coalition minus the probability of ending up in a losing coalition (Midgaard 1998) The ability to pursue interests may also be weighed more or less than the ability to block decisions. These choices of “proportional” voting weight are clearly not solely the expression of a value-free notion of proportionality. They require careful reflection on the objectives of democratic decision-making and institutions’ roles in facilitating sufficient trust, especially among Member States with different historical experiences of their interaction.

8. CONCLUSION

The Outline of a Reform Treaty strengthens several federal features of the future European political order. It would promote important forms of balance, between the Member States and the Union institutions, among the Union institutions, and among Member States within the Union institutions. Several of the changes from the Nice Treaty are much needed improvements in these regards, see the discussion in Andenas, Mads and Usher, John (eds) 2003. Among the most significant changes are increased transparency and simplicity, more visible human rights constraints, enhanced opportunities for political contestation, and the increased role of national parliaments.

Some opportunities may be explored even further in the process of writing the actual treaty. The risk of creeping centralisation typical of federations may be reduced even more if national parliaments can appeal an even broader range of Union applications of the principle of subsidiarity. Critics might argue that such mechanisms may reduce or slow the Union’s ability to promote the general interests of the Union. Yet I submit that the effectiveness and efficiency of the European political order as a whole might not suffer, for at least two reasons. Firstly, interpreting the European political order as a federal system entails that the “national interests” can not legitimately be dismissed as unbecoming a “post-national” political order. Member State protests and appeals to “national interests” may be normatively legitimate, and should not always be overruled by “the general interest”. Effectiveness and efficiency can only be determined on the basis of the complex mixes of legitimate “European” and “national” interests. Secondly, an overriding concern must be to not only secure short term effectiveness, but also reliable effectiveness, which requires trustworthy institutions—even if such accountability mechanisms are somewhat more time consuming and complex.

The balance among Member States within Union institutions remained an extremely contentious normative issue, expressed in the Summit contestation about voting weights. The IGC discussions and the summit that agreed to the ORT underscored that the draft constitutional treaty did not bring closure to this important topic. One strategy to reach not only consent but reasoned consensus may be to explore further the claims for voting weights, be it the concern for protection or for influence—or a combination of these.

The CT, and hopefully the Reform Treaty, may strengthen some “self-sustaining” mechanisms that may over time promote citizens’ and authorities’ willing support. These include new opportunities for contestation among political parties both at the national and Union level, about European level policies.

These arguments based on comparative federal studies and the political theory of federalism suggest that the Reform Treaty would go some distance toward a legitimate and self-enforcing federal European political order. These changes proposed in the CT, and in the ORT, would facilitate trust and trustworthiness among Europeans. Such a revised European political order may also come to *merit* such increased trust.

BIBLIOGRAPHY

Andenas, Mads and Gardner, John 2001, “Can Europe Have a Constitution” (2001) 12 King’s College Law Journal 1.

Andenas, Mads and Jacobs, Francis 1998, *European Community Law in the English Courts*, Oxford University Press, Oxford.

Andenas, Mads and Usher, John (eds) 2003, *The Treaty of Nice and Beyond*, Hart Publishing, Oxford.

Barry, Brian, 1991, Is Democracy Special? In: Brian Barry: *Democracy and Power*, Oxford University Press, Oxford, pp 24–60.

Craig, Paul, 2003, What constitution does Europe need? The house that Giscard built: Constitutional rooms with a view, The Federal Trust: Constitutionalism Papers 2003 no, 26, http://www.fedtrust.co.uk/uploads/constitution/26_03.pdf

- Dehousse, Renaud, ed., 1994, *Europe After Maastricht: an Ever Closer Union?* Munchen: Law Books in Europe,
- Dobson, Lynn, 2004, Conceptions of Freedom and the European Constitution, in: Lynn Dobson and Andreas Follesdal, eds., *Political Theory and the European Constitution*, Routledge, London, pp. 103–21
- Filippov, Mikhail, Peter C, Ordeshook, and Olga Shvetsova, 2004, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions*, Cambridge University Press, Cambridge.
- Follesdal, Andreas, 1998a, Democracy, Legitimacy and Majority Rule in the EU, in: Albert Weale and Michael Nentwich, eds. *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, Routledge, London, pp. 34–48.
- Follesdal, Andreas, 1998b, Subsidiarity, *Journal of Political Philosophy* 6 (2): 231–59.
- Follesdal, Andreas, 2005, Towards a *Stable* Federal Finalité? Forms and Arenas of Institutional and National Balances in the Constitutional Treaty for Europe, *Journal of European Public Policy—Special Issue: Towards a Federal Europe?* 12 (3): 572–89.
- Kohler-Koch, Beate, 2007, “The Organization of Interest and Democracy in the European Union,” in: Beate Kohler-Koch and Berthold Rittberger, eds., *Debating the Democratic Legitimacy of the European Union*, Rowman and Littlefield, Lanham, pp. 255–71
- Lijphart, Arend, 1999, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, Yale University Press, New Haven.
- McKay, David, 2001, *Designing Europe—Comparative Lessons From the Federal Experience*, Oxford University Press, Oxford.
- Meehan, Elizabeth, 2001, The Constitution of Institutions, in: Kalypso Nicolaidis and Robert Howse, eds., *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, Oxford University Press, Oxford, pp. 403–12.
- Midgaard, Knut, 1998, Consensus, Majority Decisions, Power and Autonomy: Fragments Related to the European Union, *ARENA Working Paper* 1998 no. 10,
- Moravcsik, Andrew, 2001, Federalism in the European Union: Rhetoric and Reality, in: Kalypso Nicolaidis and Robert Howse, editors, *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, Oxford University Press, Oxford, pp. 161–87
- Moravcsik, Andrew, 2002, In Defence of the “Democratic Deficit”: Reassessing Legitimacy in the European Union, *Journal of Common Market Studies* 40 (4): 603–24.
- Nicolaidis, Kalypso, 2001, Conclusion: The Federal Vision Beyond the Nation State, in: Kalypso Nicolaidis and Robert Howse, eds., *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, Oxford University Press, Oxford, pp. 439–81
- Pinder, John, 1993, The New European Federalism: the Idea and the Achievements, in: Michael Burgess and Alain-G, Gagnon, eds, *Comparative Federalism and Federation: Competing Traditions and Future Directions*, Harvester Wheatsheaf, New York, pp. 45–66,
- Scharpf, Fritz W, 1996, “Negative and positive integration in the political economy of European Welfare states, in: Gary Marks, Fritz W, Scharpf, Philippe C, Schmitter and Wolfgang Streeck, eds., *Governance in the European Union*, Sage, London, pp. 15–39.
- Smismans, Stijn, 2004, The Constitutional Labelling of “The Democratic Life of the EU”: Representative and Participatory Democracy, in: Lynn Dobson and Andreas Follesdal, eds., *Political Theory and the European Constitution*, Routledge, London, pp. 122–138.
- Tushnet, Mark, 1996, Federalism and Liberalism, *Cardozo Journal of International and Comparative Law* 4: 329–44,
- Weiler, J, H, H, 1996, European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order, in: Richard Bellamy and Dario Castiglione, eds., *Constitutionalism in Transformation: European and Theoretical Perspectives*, Blackwell, Oxford, pp. 105–21.
- Weiler, J, H, H, 1999, *The Constitution of Europe*, Cambridge University Press, Cambridge.

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INTRODUCTION

1. This paper offers a short analysis of the implications that the EU Reform Treaty may have for the UK Constitution. Its central point is that there are very few *direct* implications for the domestic Constitution, largely because EU law has long adopted an essentially “neutral” position in respect of the internal constitutional arrangements of its Member States¹ (which position is retained under the Reform Treaty²). On the other hand, it will be suggested that there are some *indirect* implications that may follow from ratification of the Treaty and that these are not without importance for UK law. These relate primarily to the issues of fundamental rights and the role of the “national” Parliament in the EU decision-making process.
2. The paper takes its structure from the questions listed in the Constitution Committee’s original “Call for Evidence”. It also refers throughout to the Treaty Article numbers that are used in the consolidated version of the Treaty that is available on the Foreign and Commonwealth Office’s website.³

OVERALL ASSESSMENT

3. The Reform Treaty appears to have three principal objectives, *viz* (1) to make the EU more democratic and efficient; (2) to ensure that the EU safeguards rights and values and related notions of freedom, solidarity, and security; and (3) to enable the EU to play an increasingly effective role on the global stage.⁴ To this end, the Treaty contains a number of important institutional developments that will reshape, in part, the “political” face of the EU. These include, most notably, the creation of the position of a “permanent” President of the European Council.⁵
4. It is clear that such developments will mark a further maturation of the EU’s institutional forms and processes. However, it is equally clear that the resulting institutional forms should not be regarded as final, or as key to any lasting settlement. Hence future amendment of the Treaties remains possible under Article 48 TEU; and the Treaty now also provides, for the first time, for the possibility of Member State withdrawal from the EU.⁶

PEOPLE’S RIGHTS AND RESPONSIBILITIES

5. The most important parts of the Treaty as relate to rights and responsibilities concern (1) the giving of legal effect to the *Charter of Fundamental Rights of the European Union*⁷ and (2) the EU’s future accession to the European Convention on Human Rights.⁸ The significance of (1) for the UK is, of course, greatly reduced by the Protocol in respect of the UK and Poland, which states that “The Charter does not extend the ability of the [ECJ], or any court or tribunal of [the UK], to find that the laws, regulations, or administrative provisions, practices or action of [the UK] are inconsistent with the fundamental rights, freedoms and principles it reaffirms”. However, while this will clearly limit the justiciability of Charter rights in UK courts, it might still be said that the Charter will have an indirect influence on the UK Constitution. UK courts have, for instance, previously had regard for unincorporated international law when developing common law fundamental rights standards⁹, hearing cases concerned with the reach of the ECHR under the Human Rights Act 1998¹⁰, mapping the lawfulness of executive discretion¹¹, and determining more general matters of public policy.¹² While House of Lords authority would thus entail that the Charter cannot be argued directly in proceedings¹³, it may still enjoy an analogical force in cases concerning common law fundamental rights, rights arising under

¹ See A Evans, “Regionalist Challenges to the EU Decision-Making System” (2000) 6 *EPL* 377.

² Art 4 TEU reads: “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.” (Emphasis added).

³ http://www.fco.gov.uk/Files/kfile/FCO_PDF_CM7310_ConsolidatedTreaties.pdf

⁴ See http://europa.eu/lisbon_treaty/glance/index_en.htm

⁵ Art 15 TEU and Declaration 6.

⁶ Art 50 TEU, as read with Arts 218(3) & 238(3)(b) TFEU. They can also apply to rejoin: Arts 49 & 50 TEU.

⁷ Art 6(1) TEU. For the Charter see http://www.europarl.europa.eu/charter/default_en.htm

⁸ Art 6(2) TEU.

⁹ *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1988] 3 All ER 545, 660 (Lord Goff).

¹⁰ *A & Ors v Secretary of State for the Home Department* [2005] 2 AC 68.

¹¹ *R v Secretary of State for the Home Department, ex p Norney* [1995] Admin LR 861, 871 (Dyson J).

¹² *Kuwait Airways Corporation v Iraqi Airways Corporation* [2002] 2 AC 883.

¹³ *R v Home Secretary, ex p Brind* [1991] 1 AC 696 and *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189.

the Human Rights Act 1998, and/or those that may be found in any future Bill of Rights for Northern Ireland.¹⁴

6. In terms of (2)—EU accession to the ECHR—it is axiomatic that any resulting body of Strasbourg case law will become a part of UK municipal law under section 2 of the Human Rights Act 1998 (albeit that the courts do not regard ECHR case law as a template to be applied in all domestic disputes¹⁵). In many cases, the corresponding principles of human rights law will likely be little different from those developed in respect of State obligations, and accession may for that reason be regarded as unremarkable. Nevertheless, it might also be said that accession could result in legal standards interacting in a manner that transcends UK government preferences in respect of the Reform Treaty. The point here is simply that the ECtHR has already referred to the *Charter of Fundamental Rights of the European Union* when delimiting the content of some rights under the ECHR¹⁶, which approach is consistent with the ECtHR's more general willingness to draw inspiration from other international standards.¹⁷ Consequently, while EU accession will not (of course) mean that the ECtHR will gauge EU actions and inaction with first reference to the Charter, challenges may lead to an increased consideration of the relevance of Charter standards *vis-à-vis* those of the ECHR (which is regarded as a “living instrument”¹⁸). Under those circumstances, UK courts may subsequently “take into account” a body of Strasbourg case law that will allow the Charter to have a further influence on the domestic Constitution.

CITIZENSHIP

7. EU citizenship, as originally conceived, was intended to complement, rather than replace, national citizenship.¹⁹ While the content of EU citizenship has been developed under the Reform Treaty, Article 9 TEU (re)states that “Citizenship of the Union shall be additional to national citizenship and shall not replace it”.²⁰ Cast in these terms, there is thus nothing to suggest that developments in EU citizenship should prevail in—or arguably even inform—ongoing debates about British citizenship and “Britishness”.

POWERS AND NATIONAL SOVEREIGNTY

8. The issue of competences is hugely complex and is beyond the scope of a paper of this kind.²¹ It can, however, be said that the delimitation of competences within the Reform Treaty marks a very definite move towards a clearer allocation of power between the EU and its Member States (the EU's powers being based upon the principle of “conferral” and constrained by the principles of subsidiarity and proportionality²²). Moreover, the inclusion of the UK government's “red lines” would appear to have safeguarded, or closed-off, particular areas of UK national interest. This, of course, is at one with the more general development of a “multi-speed” Europe since, most obviously, Maastricht.²³

9. One related point that can be addressed under this heading concerns the primacy of EU law. Declaration 17 that is appended to the Treaty of Lisbon states that, “in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”. This corresponds with the long-held opinion of the ECJ²⁴, although it does not address the competing normative perspectives that may be held by Member State courts. For instance, several of those courts have previously contested the very constitutional basis for the ascription of primacy to EU law²⁵, and UK courts have more recently posited that primacy in the UK domestic order follows not from the demands of EU law but rather

¹⁴ As has been said in the Administrative Court in England and Wales, the Charter might “properly be consulted” when courts are considering the content of common law and ECHR guarantees, at least “insofar as (the Charter) proclaims, reaffirms (and) elucidates the content of those human rights that are generally recognised throughout the European family of nations”: see *A and others v East Sussex County Council* [2003] All E.R. (D) 233 at [73] (Munby J). See also Munby J's judgment in *R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2003] 1 FLR 484. And see *eg, Coppard v Customs v Excise Commissioners* [2003] 3 All ER 351 and *Sepe v Secretary of State for the Home Department* [2003] 3 All ER 304.

¹⁵ See, *eg, R v Lyons* [2003] 1 AC 976, 996–7, para 46, Lord Hoffman.

¹⁶ See, *eg, the use of the Charter in Goodwin v UK* (2002) 35 EHRR 447, 480, para 100.

¹⁷ For *egs of references* see K Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, 1999) pp 162–163.

¹⁸ See, *eg, Cossey v UK* [1991] 13 EHRR 622, 639, para 35 and *Ireland v United Kingdom* [1979–80] 2 EHRR 25, 103, para 239.

¹⁹ See P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2007, 4th ed), p 847ff.

²⁰ See too Art 20 TFEU.

²¹ For consideration of some of the pre-existing complexities see P Craig, “Competence: Clarity, Conferral, Containment and Consideration” (2004) 29 *ELRev* 323.

²² Art 5 TEU.

²³ On which see R Harmsen, “A European Union of Variable Geometry: Problems and Perspectives” (1994) 45 *NILQ* 109.

²⁴ See Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64, *Costa v ENEL* [1964] ECR 585; and Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

²⁵ Most famously the German Federal Constitutional Court: see *Internationale Handelsgesellschaft mbH v Einfuhr und- Vorratstelle fr Getreide und Futtermittel* [1974] 2 CMLR 540.

from the invention of the common law.²⁶ Primacy may therefore have been reasserted by a Declaration in the Reform Treaty, but the questionable legal status of such Declarations may mean that the doctrine can only ever continue to lack an agreed basis.²⁷

OUR NATIONS AND REGIONS

10. It has been suggested above that EU law adopts an essentially neutral approach to questions of the internal constitutional balance of Member States. That approach has been retained under the Reform Treaty²⁸, and there is thus no reason to anticipate that EU law *qua* EU law will impact upon the constituent parts of the UK.

11. On the other hand, it is also true that the UK's devolution settlement has long sought to accommodate the realities of EU membership and its decision-making processes. At the level of the devolved administrations and participation in the Council, co-operation between the central and devolved governments has thus taken form around Concordats that have addressed issues of representation, the flow of information, and liability for breaches of EU law.²⁹ While it might be questioned whether those Concordats work effectively and/or are appropriate to the UK's current constitutional structures³⁰, such questions remain essentially internal to the UK. The Reform Treaty does not impact directly upon them.

OUR NATIONAL PARLIAMENT

12. The principal issue here appears to be how far—if at all—Parliamentary procedures should be adapted given the enhanced role to be played by national Parliaments in the EU process.³¹ This, again, is a complex issue that would require a much fuller analysis than is possible here.³² However, one point that might be made—and which complements the above—concerns the relationship between the national Parliament and its devolved counterparts. While the above-mentioned Concordats already pursue close co-operation at the executive level, links between Parliamentary committees and the like are less well-established (albeit that EU law matters can be discussed by representatives in, for instance, the forum provided by the British-Irish Council³³). It may therefore be that more formal co-operation among the legislatures would be desirable insofar as this would complement the “national” Parliament's role in the broader EU process where that process has implications for the work of the devolved institutions. However, should such increased co-operation be forthcoming it is to be emphasised again that this would be an indirect consequence of the Reform Treaty. It would not be required by EU law itself.

13. In terms of any implications for the doctrine of Parliamentary sovereignty—which issue is listed in the “Call for Evidence”—it is highly unlikely that the new Treaty will add anything to debates on the effects of EU membership.³⁴ Those debates have long centred on the normative justification for the existing limitations on Parliament's powers, and the courts have recently explained that any limitations follow from the common law's reading of the European Communities Act 1972 rather than from the demands of EU law itself.³⁵ It is, in the result, unlikely that domestic debate will need to progress much beyond this point, particularly as primacy has been reasserted in the form of a Declaration (see paragraph [9]).

COURTS AND THE JUDICIARY

14. It is apparent from the Reform Treaty that the ECJ—to be renamed the Court of Justice of the European Union³⁶—will have jurisdiction in respect of all matters save those concerning common foreign and security policy.³⁷ This broadening of its jurisdiction need not *per se* have implications for the internal workings of the UK Constitution, as its focus is on the balance of powers at the supranational level and on strengthening the

²⁶ *Thoburn v Sunderland CC* [2003] QB 151; and see M Elliott, “Embracing ‘Constitutional’ Legislation: Towards Fundamental Law?” (2003) 54 *NILQ* 25.

²⁷ On the status of Declarations see TC Hartley, *The Foundations of European Community Law* (Oxford University Press, 6th ed 2007) p 87ff.

²⁸ N 2 above.

²⁹ See http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf

³⁰ The leading critique remains R Rawlings, “Concordats of the Constitution” (2000) 116 *LQR* 257.

³¹ See, eg, Art 12 TEU.

³² For earlier analysis see A Cygan, *The United Kingdom Parliament and European Union Legislation* (Kluwer, 1998).

³³ See Strand Three of the Belfast Agreement (Cmnd 3883).

³⁴ On which see A Bradley, “The Sovereignty of Parliament—Form or Substance?” in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution*, Oxford University Press, 6th ed, 2007.

³⁵ See further n 26 above.

³⁶ Art 13 TEU.

³⁷ Art 24 TEU. The exclusion of jurisdiction is subject to a proviso in respect of measures complying with Art 40 TEU and Art 275(2) TFEU.

rule of law. On the other hand, it remains to be seen whether the ECJ will return to a more activist role in developing EU law, as that may result in a body of case law that crosses boundaries within the EU's existing and proposed structures. The point may be particularly true of the out-workings of the new Treaty provisions on competence.

LEGAL PERSONALITY

15. Much of the Treaty is regarded as consolidating principle and practice that was already prevalent in the EU, and the ascription of legal personality to the EU³⁸ is consistent with that.³⁹ This, in turn, sounds more on the role of the EU on the global stage, and it is difficult to identify any direct implications for the UK Constitution.

February 2008

Memorandum by Professor Damian Chalmers (London School of Economics and Political Science)

1. OVERALL ASSESSMENT:

The overall scale and character of the changes that will be brought about by the Treaty. Whether the Treaty is likely to be a lasting settlement or should be seen as an interim measure.

Treaty reforms can be measured along three parameters—the new symbols and icons they introduce; the new powers, capacities and competencies they provide for the Union (eg what the Union does); and institutional reform (how it does what it does). With the exception of the Treaty of Nice, the Treaty of Lisbon is the most modest of all the treaty reforms. To take the three parameters in turn:

- The iconography of the Constitutional Treaty has been almost completely removed;
- With one exception, there are no new significant new powers conferred on the Union. It is arguable that Article 11 TFEU (intellectual property) and Article 194(1)(a) TFEU (energy supply) confer powers that may not be presently there, but even this is contestable. The abolition of the pillar system grants greater supranational powers over policing and judicial cooperation in criminal matters. This is important but the United Kingdom can choose to exercise its opt-in here. The only significant exception is Article 352 TFEU, the successor to Article 308 EC. It has a wider remit as it acts as a flexibility provision to the Union now and not the EC. This is particular significant given the frequent usage of Article 308 EC, about 30 time pa.
- In terms of institutional reform, the growth of Qualified Majority Voting has been greater overplayed. The policies where its use has been extended allow for UK non-participation, notably Economic and Monetary Union and Freedom, Security and Justice. The main areas of law-making affecting the United Kingdom are freedom of movement for workers (social security arrangements); freedom of establishment; humanitarian aid; implementing rules for transport; implementation of the Common Commercial Policy. This is very minor compared to previous treaties. More significant is the growth of the co-decision procedure and the assent procedure into significant fields. At the moment consultation is still the most invoked procedure (364 times in 2004–2006 compared with 320 for codecision). There are no statistics but agriculture and Article 308 EC probably account for nearly half of this. One is thus probably moving to a world therefore where Parliament can veto or assent to over 80% of all EU legislation, rather than about 45%, as at the moment. The significance of this is not clear, as since the 2004 enlargements a new state of play has emerged in the co-decision procedure whereby almost everything is agreed after first reading (prior to 2004, the norm was after second reading). This disadvantages the European Parliament as it does not have the resources to mobilise itself to the same extent as national administrators at that stage and the fluidity of the process in the trialogue often trump its subsequent procedural rights (on Parliament concerns see <http://euobserver.com/9/25612>).

It is too speculative to determine whether this is a definitive settlement or not. I do not anticipate, notwithstanding the murmurings of a few, that there will be any further treaty reforms for a while. The central

³⁸ Art 47 TEU.

³⁹ On its existing personality see Craig and de Búrca n 19 above pp 170ff.

ones were accompanied by a big project—the single market, EMU, the area of freedom, security and justice and constitutionalism. I see no new big idea on the horizon with the possible exception of Turkish membership.

2. PEOPLE'S RIGHTS AND RESPONSIBILITIES:

The likely impact of the Treaty on the fundamental rights of people in the United Kingdom and how those rights are enforced. How the Charter of Fundamental Rights will relate to other rights instruments (including the European Convention on Human Rights, the Human Rights Act 1998, the proposed Bill of Rights for Northern Ireland and the proposed Bill of Rights and Duties announced as part of the "Governance of Britain" agenda). The significance, for the United Kingdom constitution, of Protocol 7 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom. The significance for the United Kingdom of the EU's accession to the European Convention on Human Rights.

EU fundamental rights law has bound national governments and national legislators since the beginning of the 1990s with the *Wachauf* (Case 5/88 *Wachauf v Germany* [1989] ECR 2609) and *ERT* (Case C-260/89 *ERT v DEP* [1991] ECR I-2925) judgments. There is very little evidence of its disrupting the British constitutional settlement in any way, and when I researched this last year I could find only one judgment, the *Akrich* judgment Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607 which seemed to have any implications for United Kingdom law. With regard to the future, there seem to be two possible developments. On the one hand, the provisions of the Lisbon Treaty, whilst enunciating a broader explicit catalogue of rights, do have greater constraints than previously to limit judicial activism. Article 6(1) TEU makes clear that the Charter cannot be used to extend EU competencies. The Charter also provides that its provisions will bind Member States implementing Union law (article 51) rather than the current test of "within the field" of EC law, although the Explanatory Memorandum of the Secretariat does refer to the tests being synonymous. There is furthermore Declaration 53 to the Treaty of Lisbon by the Czech Government which states that the Charter cannot cover non-implementing measures adopted independently by Member States. On the other hand, Union law covers a wider remit than traditional applications of EC law. It is likely that immigration, asylum, and extradition law will be governed fairly extensively by EU fundamental rights law and that it will also touch some aspects of family and penal law. This has not yet happened if one looks at British case law.

The practical import of this for the United Kingdom is unclear. The reason for this is that the same standard binds the Human Rights Act and the EU Charter on Fundamental Rights, and that is the European Convention on Human Rights. Article 52(3) of the Charter requires it to be interpreted in line with the Convention, and where the Court of Justice has recognised the Charter, it has, in my view, slavishly followed the case law of the European Court of Human Rights or provisions of the Convention in its interpretation of the substance of the right (Case C-540/03 *Parliament v Council* [2006] ECR I-5769; Case C-432/05 *Unibet v Justitiekanslern*, Judgment of 13 March 2007; Case C-275/06 *Promuscaie*, Judgment of 29 January 2008). The difficulty is therefore not the Charter but the increasing importance of the European Court of Human Rights and its unaccountability in our human rights law. I see nothing in its methods of appointment or reasoning which justifies such an elevated position.

I am very sceptical of the formal legal effects of Protocol 7 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom in creating a differentiated position for these States. Article 1 states that the Charter does not extend the power of the Court of Justice to strike down national measures in these States. The Court of Justice would, first, almost certainly state that provision is otiose in the light of Article 6(1) TEU which states that the Charter does not extend Union competencies. Secondly, insofar as the provision is concerned with judicial activism, the Court of Justice would resist an image of itself as extending rather than interpreting provisions. Finally, almost every provision of the Charter codifies other international treaties. If a court cannot rely on the Charter it will just use these to reach the same result. With regard to the stipulation in article 1(2) of the Protocol concerning the non-justiciability of Title IV rights except insofar as they are provided in national law, it is true that this provision might stop the Court of Justice for setting up these rights as self-standing points of judicial review. Yet there is nothing to indicate it will do that. In the recent *ITWF* judgment (Case C-438/05 *ITWF v Viking*, Judgment of 11 December 2007), it noted therefore the right to strike as a fundamental right, but stated it was one which could be subject to certain restrictions, most notably it was to be protected in accordance with Community and national law.

3. POWERS AND NATIONAL SOVEREIGNTY:

The manner in which the Treaty confers and delimits the competences of the EU. The extent to which the conferral of competences represents a change from current arrangements. The likely impact of the Treaty on the capacity of the British Government to control policy in respect of the following: labour and social legislation, an independent foreign and defence policy, protection of the UK's common law system and police and judicial processes, protection of the UK's tax and social security system, and national security (the so-called "red lines").

There has not been a change in any fundamental sense (see my comments above). All the red lines have been respected and in some cases reinforced. No new competence has been added in the field of labour and social legislation, and Article 6(1) TEU requires that Charter rights can not be used a justification to establish a new resettlement here. The TEU indicates that the Union is to have no legislative competencies in the field of foreign and security policy, and it is unclear, as a consequence, how it could have therefore a treaty-making power in what is now the second pillar. To be sure, new organisational processes will develop around the High Representative, but is that so different from NATO or the WEU? The opt-in with regard to freedom, security and justice is, in my view, watertight, and those who argue the contrary view have to explain why they have not been able to provide a single example from practice under Title IV EC Treaty which is the model for the opt-in. With regard to national security, the Treaty of Lisbon added a new important proviso in the last sentence of Article 4(2) TEU that it is to be the exclusive responsibility of Member States. Tax and social security have to be treated differently. On tax, the United Kingdom Government has a veto over all the central provisions. It is to be noted that the veto is exercised rarely, and that EC law governs a significant part of our law, most notably in the field of VAT. On social security, the remit of EU law is more peripheral, and I do not believe it touches on significant parts of social security. There is provision for QMV here, but there is also the new brake provision which should allow the British Government to put its foot down if any significant measure were to be proposed.

4. OUR NATIONAL PARLIAMENT:

The likely impact of the Treaty on the role of the United Kingdom Parliament in relation to EU matters. Whether changes ought to be made within the United Kingdom on the role and powers of Parliament in relation to EU matters. How the principle of parliamentary sovereignty is affected by the Treaty.

Nothing in the Treaty significantly changes the relationship between the supremacy of EC law and Parliamentary sovereignty, and my understanding of the relationship is that it will continue to be conditioned by the *Factortame* case law. With regard to the position of the United Kingdom, Article 12 TEU and the Protocols on the role of national Parliaments in the European Union and that on the application of the principles of subsidiarity and proportionality evince an intention for national parliaments to have a more proactive role in the law-making process and to be more active guardians of the subsidiarity principle.

With regard to the former, I think the challenges have been under-estimated. The eight week period given to national parliaments is very little when one remembers that most legislation is adopted at first reading so that it is essentially eight weeks between notification and the measure being adopted, incidentally the same length of time as for private parties under the Commission's pre-legislative consultation responsibilities. It strikes me as insufficient. There are two ways of meeting this challenge, in my view.

First, national parliaments must require the Commission to involve them in its initial pre-legislative consultations (eg before the formal proposal) and it must, in particular, pass on to them its impact assessments for comments. This would extend the time frame, but, more crucially, would national parliaments to be more closely associated with the policy-formulation and agenda-setting. Secondly, the United Kingdom parliament might consider whether it might want to move to a "mandate" system for certain sensitive fields of EU policy-making, such as anything that touches on or near the so-called "red lines". If the British Government were serious about respecting these, putting in place this mechanism would maintain a credibility about its commitment to them. Both these reforms would, of course, require additional resources.

I am pessimistic about the Protocol on the principles of subsidiarity and proportionality. This is not because the EU Institutions will not listen to national parliaments if a sufficient number express concerns. It is because the nature of the subsidiarity debate has been misconceived, as it is based on the idea of a measurable trade off between integration and autonomy with a debate only about where the balance should be struck. It is more untidy than that. Most subsidiarity-based concerns are highly particularist in nature. They relate to a particular law, practice or institution that has especial resonance for that Member State (eg the

Reinheitsgebot, snus, Imperial weights and measures). It is very difficult for a member state to make alliances with other member states in such circumstances as the latter are usually bemused about the fuss. The best to hope for is a plea for exceptionalism rather than that there should be no Union measure.

5. COURTS AND THE JUDICIARY:

The extent to which the powers of the European Court of Justice, and other judicial powers, are changed by the Treaty and the likely impact of any such changes on the United Kingdom constitution. The implications of the Treaty for the constitutional principle of the rule of law.

The central changes to the European Court of Justice's jurisdiction are that policing and judicial cooperation in criminal matters have been incorporated into the structures associated with the EC Treaty and that decisions of the European Council will now be subject to review by it. With regard to the first point, it is worth observing that it already has a limited jurisdiction by virtue of Article 35 TEU, and that its judgments will not be binding on the United Kingdom insofar as they relate to instruments into which it has not opted-in. That said, the potential for cases within the field of area of freedom, security and justice to take a high proportion of the Court of Justice's docket is considerable, particularly as the preliminary reference procedure has been amended to give preference to references where one party is in detention. This will affect the United Kingdom insofar as the type of work done by an institution invariably affects its nature and this work sidelines other references. With regard to the second point, the central vehicle for challenging acts of the European Council is through challenges by the Commission, Parliament or individual member States under Article 263(2) TEU. One would expect this to be quite rare, and the Court to exercise considerable caution here. The idea of an act unanimously agreed by 27 Heads of State being struck down is an unusual and highly powerful. It is certainly a victory for the rule of law.

Insofar as the question is raised about the implications for the rule of law, I have to say I am confused by this. In European Union law, it is rarely a choice between the rule of law or not but rather between two systems of law both of which operate under the principle of the rule of law. Other than the point in the preceding paragraph, I see no further implications for the rule of law in the Treaty of Lisbon.

February 2008

Memorandum by Professor A. A. Dashwood, University of Cambridge

I shall respond to the questions in order, while dealing with some of them only briefly. The numbering of Articles is that found in the text signed on 13 December 2007. The Treaty establishing a Constitution for Europe will be referred to (where occasionally relevant) as "the Constitutional Treaty".

1. OVERALL ASSESSMENT

(a) *The Treaty and Union structure*

1. The Treaty of Lisbon (TL) will reorganise the existing Treaty on European Union (TEU) and EC Treaty (to be renamed "Treaty on the Functioning of the European Union" or TFEU). The evident intention is to place within the amended TEU the provisions that define the essential character of the EU, while consigning to the TFEU the legal bases for concrete policies, as well as more detailed institutional and procedural provisions. This may be seen as contributing to the transparency of the Union's primary law. However, the symmetry of the design is somewhat compromised by the retention in Title V TEU of detailed provisions relating to the common foreign and security policy (CFSP); the explanation doubtless lies in the wish to emphasise the particularity of the CFSP. In contrast, the provisions relating to police and judicial cooperation in criminal matters (PJC), which are presently found in Titles VI TEU, are to be transferred, with amendments, to Title IV of Part Three of the TFEU.

2. The Union is described in Article 1 TEU, as amended, and in Article 1a TFEU as being "founded" on the TEU and the TFEU, which are to "have the same legal value". The EURATOM Treaty is the subject of a Protocol, which leaves it with an uncertain status—not a foundational Treaty, though subject to the same institutional arrangements, and the same ordinary amending procedure and accession procedure, as the TEU and the TFEU.

3. A significant change is that "the Community method" will no longer enjoy primacy in the system of the amended Treaties. The reference in the present Article 1 TEU to the Union's being "founded on the European Communities" will disappear. So too will the references in the present Articles 2 and 3 TEU to "building upon the *acquis communautaire*". Article 25b TEU makes clear that CFSP competences and the Union's other

competences are to enjoy equal protection against mutual encroachment. Contrast the present Article 47 TEU, which has been interpreted by the European Court of Justice (ECJ) as preventing the Union's competences under that Treaty from encroaching upon the Community's competences under the EC Treaty.

4. In broad terms, it can be said that the TL will reduce the "three pillars" of the Union's present structure to two, while reinforcing the particularity of the Second (CFSP) Pillar.

(b) *Whether the TL is a "lasting settlement"*

5. This is a political rather than a legal question. The reference to "ever closer union among the peoples of Europe" is preserved in the second paragraph of Article 1 TEU, as amended. So the European integration process retains its dynamic character, in principle. However, there can be no further step towards a closer union without amending the Treaties. The TL will not remove Member States' control over such developments: the "simplified revision procedures" in Article 48 (6) and (7) of the TEU, as amended, respectively require unanimity in the European Council or give each national parliament a veto.

2. PEOPLE'S RIGHTS AND RESPONSIBILITIES

6. The fundamental rights enjoyed by individuals in the United Kingdom under the common law and the Human Rights Act will not be affected by the TL. This follows from the preservation as sources of rights, by the new Article 6 (3) TEU, of the European Convention and Member States' constitutional traditions, which are to be protected as general principles of EU law.

7. I have published a short article in the February 2008 issue of *Parliamentary Brief* (pp. 9 to 10) on my understanding of the implications of conferring the status of primary Union law on the Charter of Fundamental Rights, and of the significance of the Protocol on the application of the Charter to Poland and the UK. I argued that the change in the Charter's status was unlikely to amount to much more than a formality. The European Courts can be expected to refer to the Charter more regularly than at present, but only by way of confirmation, once the existence of a right has been established in the traditional way, by pointing to the European Convention or to constitutional traditions common to the Member States. On a true view of the Charter, interpreted in the light of the "horizontal provisions" contained in its Title VII, and with due regard to the officially recognised "Explanations", there would not be any need for the Protocol. It has been provided just in case the paper tiger, that is the Charter, should acquire teeth through an aberrant interpretation treating its provisions as capable in themselves of giving rise to enforceable rights. In that unlikely event, the United Kingdom would be able to invoke the Protocol, to resist any challenge to its law or practices.

3. CITIZENSHIP

8. In my opinion, the expansion of the rights associated with Union citizenship is set to continue in the case law of the Court of Justice, but this will have little or nothing to do with the TL. I cannot see that the Treaty will have any impact on present or future trends in the notion of British citizenship or Britishness.

4. POWERS AND COMPETENCES

(a) *The EU as "a constitutional order of sovereign States"*

9. The TL will do nothing to change the *sui generis* nature of the EU. I characterise the Union as "a constitutional order of sovereign States", or in bolder moments "a federation of sovereign States", to bring out the paradox on which it rests. On the one hand, the Member States of the Union retain their character as sovereign States (as distinct from the States of the USA or the German Lander): nobody questions their standing as full subjects of the international order; while they remain the principal focus of their citizens' collective loyalty and the principal forum of their citizens' democratic political activity. On the other hand, the Member States have come together in a constitutional relationship which obliges them, during membership of the Union, to accept the discipline of acting under the institutional and procedural arrangements established by the Treaties, and in accordance with the rules resulting from them.

10. I would point to the following novel elements of the TL as indicating, even more clearly than the present Treaties, that the Union has no vocation to become a State:

- The addition to Article 1 TEU of the phrase “on which the Member States confer competences to attain objectives they have in common”. This asserts the primacy of the Member States in two ways: they are the source of the Union’s competences; and the Union exists to enable them to pursue common objectives.
- The statement in Article 3a (1) TEU, as amended, which is repeated in the definition of the principle of conferral in Article 3b (2) TEU, as amended, that “competences not conferred upon the Union in the Treaties *remain* with the Member States” (emphasis added). The use of the indicative mood shows that this is a statement of fact. Member States do not derive their competences from the Treaties but from their own sovereignties.
- The statement preserving Member States’ “national identities”, which is more muscular than the statement in the existing Article 6 (3) TEU.
- The express right of withdrawal that will be recognised in Article 49a TEU, as amended. Under the existing Treaties, there would be no way of preventing a Member State from withdrawing from the Union. However, explicit acknowledgement that this is a right Member States enjoy in accordance with their own constitutional arrangements underlines the fact that the measure of sovereignty that was pooled, as a result of accession to the Union, is in principle fully recoverable.

(b) *Categories of Union competences*

11. The main categories of the Union’s competences—exclusive, shared and supporting—are usefully defined by the new Title I TFEU. This is by way of a clarification: the definitions reflect distinctions found in the detailed provisions of the present EC Treaty. It would have been misleading to have provided a catalogue of Union competences, without highlighting these distinctions. Particularly striking is the limited range of competences that are *a priori* exclusive (Article 2b (1) TFEU).

12. The Protocol on the Exercise of Shared Competence cures an ambiguity that existed in the Constitutional Treaty. It makes clear that the curtailment of Member States’ competence resulting from the adoption of a Union act in areas where competence is shared, as provided for by Article 2a (2) TFEU, “only covers those elements governed by the Union act in question and therefore does not cover the whole area”.

(c) *Primacy of Union law*

13. The TL has no provision corresponding to Article I–6 of the Constitutional Treaty, which stated that “[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States”. That provision could have been read as extending the principle of primacy (and, by implication, that of direct effect) over the whole field of Union law, including to the CFSP. The omission of the principle from the TL means that primacy remains a principle developed in the case law of the ECJ, which has only a very limited jurisdiction in CFSP matters.

(d) *UK powers in respect of labour and social legislation*

14. There has been concern that new “social rights” derived from the Charter of Fundamental Rights, once it acquires the force of primary Union law, may undermine relevant UK law, especially regarding collective action by trade unions. For the reasons indicated in paragraph 7, above, and in the article there cited, I do not share that concern. The relevant provisions of the Charter preserve any limitations imposed by national law, as the ECJ recently acknowledged in its *Viking* judgment.

(d) *An independent foreign and defence policy*

15. I do not believe that the changes in the organisation of the Union’s external relations, which are envisaged by the TL, would be liable to inhibit the United Kingdom in pursuing an independent foreign and defence policy. Decisions on new policy initiatives in the CFSP framework can only be taken by the Council acting unanimously; QMV remains confined to implementing decisions, except where a proposal is made by the High Representative in response to a specific request by the European Council, acting for this purpose by consensus.

16. If, as is hoped, the new-style High Representative succeeds in promoting more effective external action by the Union, the scope for independent action by the UK will only be restricted in a given situation, because the Government judges it to be in the nation's interest to proceed collectively, in that instance.

(e) *Protection of "red lines"*

17. The opt-in/opt-outs secured by the Government in the area of justice and home affairs are, in my view, perfectly adequate to prevent any damaging encroachment on the common law, as a result of the "communitarisation" of the Third Pillar". A system, which has proved unproblematic since it was brought in by the Amsterdam Treaty, is to be extended to the new chapters of Title IV of Part Three TFEU on criminal law and police cooperation.

18. On taxation, so-called "own resources" must still be established by a unanimous Council decision and ratified at Member State level (Article 269, second paragraph TFEU); while tax harmonisation will also still require unanimity (Article 93 and re-numbered Article 95 TFEU).

5. OUR NATIONS AND REGIONS

19. I can think of no way in which the internal organisation of the United Kingdom will be affected by the TL.

6. OUR NATIONAL PARLIAMENT

20. One of the key reforms introduced by the TL will be the enhanced role of national Parliaments in the legislative process of the Union. This is to be achieved by improving the flow of information from the Union institutions and by the new "subsidiarity mechanism", which will provide a way of forcing reconsideration of legislative proposals on matters that should arguably have been left for the Member States to deal with. The two relevant Protocols create real opportunities for national Parliaments, if only they are willing to grasp at them, to strengthen democratic accountability in the EU.

7. COURTS AND THE JUDICIARY

21. I am not aware of changes envisaged by the TL that would significantly alter the existing relationship between UK courts and the European judicature, which has always been a model of cooperation and mutual respect.

8. LEGAL PERSONALITY

22. Under existing arrangements, the Community has legal personality explicitly conferred by Article 281 EC, and international capacity in the matters for which competence has been conferred on it; while the Union has *de facto* legal personality (accepted in practice by our principal international partners, including the United States), and international capacity for the matters covered by Titles V and VI TEU. The replacement of this strange dual personality by a single legal personality for the EU will be a purely technical change having no effect on the division of competences between the Union and the Member States.

19 February 2008

Memorandum by the Foreign and Commonwealth Office (FCO)

LISBON TREATY

The Government welcomes the Committee's inquiry into the nature of the impact of the EU Reform Treaty upon the Constitution of the United Kingdom. The Government would like to offer the following comments in response to the Committee's questions.

1. OVERALL ASSESSMENT

The overall scale and character of the changes that will be brought about by the Treaty. Whether the Treaty is likely to be a lasting settlement or should be seen as an interim measure.

The Government's overall assessment of the changes that will be brought about by the Treaty is set out in the December 2007 Explanatory Memorandum (EM) on the Treaty of Lisbon as amended by a Written Ministerial Statement of 20 February 2008 (attached—Annex A).

As the Government set out in the EM, ratification will allow the EU to move on from debates about institutions to creating the outward-facing, flexible Europe needed to meet the fundamental challenges of globalisation.

All 27 Member States agreed at the December 2007 European Council that:

“the Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable future, so that the Union will be able to fully concentrate on addressing the concrete challenges ahead, including globalisation and climate change”.

And the preamble to the Treaty states that the Member States have drawn up the Lisbon Treaty in order to:

“complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action”.

2. PEOPLE'S RIGHTS AND RESPONSIBILITIES

The likely impact of the Treaty on the fundamental rights of people in the United Kingdom and how those rights are enforced. How the Charter of Fundamental Rights will relate to other rights instruments (including the European Convention on Human Rights, the Human Rights Act 1998, the proposed Bill of Rights for Northern Ireland and the proposed Bill of Rights and Duties announced as part of the “Governance of Britain” agenda). The significance, for the United Kingdom constitution, of Protocol 7 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom. The significance for the United Kingdom of the EU's accession to the European Convention on Human Rights.

The impact of the Charter of Fundamental Rights is covered by the paper at Annex B.

Lisbon Treaty article 1(8)(2) provides for the Union to accede to the European Convention on Human Rights (ECHR). This will make the EU directly accountable to the Council of Europe's European Court of Human Rights for the rights contained in the ECHR. It would thus reinforce harmony between the EU's legal order and the ECHR—as interpreted by the European Court of Human Rights. EU accession to the ECHR must be agreed unanimously by all Member States and approved in accordance with their constitutional requirements.

All EU Member States are themselves parties to the ECHR. The Government has sought and achieved a legally binding Protocol that confirms that EU accession to the ECHR will not affect the situation of Member States in relation to the Convention—including the Protocols in which they participate, national derogations and reservations to the ECHR; nor increase the EU's competences. This states that:

“ . . . accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof”.

3. CITIZENSHIP

The development of the concept of EU citizenship in the Treaty and how this is likely to relate to current and future trends in the concept of British citizenship and “Britishness”.

The concept of EU citizenship, introduced by the Maastricht Treaty, is not changed by the Lisbon Treaty. Article 17 of the EC Treaty, which becomes Article 20 of the Treaty on the Functioning of the European Union, continues to confirm that EU citizenship does not replace national citizenship and is additional to (the current Treaty says “complements”) such citizenship. The same language is used in Article 9 of the EU Treaty.

In addition, Article 17 has been expanded to illustrate the key rights, already provided for elsewhere in the Treaties, enjoyed by EU citizens.

Given that EU citizenship does not replace, and is additional to, national citizenship, we do not see any implications for current and future trends in the concept of British citizenship and “Britishness”. It will continue to be a matter for Member States to determine who are their citizens and who thus, on this basis, enjoy the status of EU citizens. Just as membership of the European Union is an important and valuable aspect of the political and economic identity of the United Kingdom, British citizens will continue to enjoy the complementary status, and benefits, of EU citizenship.

4. POWERS AND NATIONAL SOVEREIGNTY

The manner in which the Treaty confers and delimits the competences of the EU. The extent to which the conferral of competences represents a change from current arrangements. The likely impact of the Treaty on the capacity of the British Government to control policy in respect of the following: labour and social legislation, an independent foreign and defence policy, protection of the UK’s common law system and police and judicial processes, protection of the UK’s tax and social security system, and national security (the so-called “red lines”).

The Lisbon Treaty sets out—for the first time—definitions and lists of the Union’s competences, setting out clearly the areas where EU can act. The Treaty underlines that the EU can only act within the limits of the competences conferred on it by the Member States. It also recognises that competences can be transferred back to Member States. The Treaty explicitly confirms for the first time that national security remains the sole competence of Member States.

The categories of EU competence reflect the current position but bring out more clearly those areas where the EU action is limited to supporting, co-ordinating or supplementing the action of EU Member States. The Treaty provides for new legal bases for EU action, or extends existing legal bases, in a limited number of areas. These are set out in the annex to the attached letter from the Minister for Europe to the Chairman of the House of Lords European Union Committee (attached at Annex C). In a number of these cases, the EU can already taken action in these areas using existing legal bases.

The impact of the Lisbon Treaty on the four red lines is set out in the attached papers:

- Annex B: labour and social legislation;
- Annex D: independent foreign and defence policy;
- Annex E: protection of the UK’s common law system and police and judicial processes;
- Annex F: protection of the UK’s tax and social security system.

5. OUR NATIONS AND REGIONS

The likely impact of the Treaty on the regions and constituent parts of the United Kingdom (in distinction to the whole United Kingdom). The role of the devolved administrations in relation to EU matters.

The role of the Devolved Administrations in relation to EU matters—and the current arrangements governing the UK Government’s relationship and engagement with the Devolved Administrations—will be unchanged by the Lisbon Treaty. The Memorandum of Understanding between UK and DA Ministers, including the Concordat on Co-ordination of European Union Policy Issues, remains in force.

The Lisbon Treaty also includes a new provision, Article 3A(2), explicitly stating that the Union must respect each Member State’s national identities inherent in their political and constitutional structures and including regional and local self-government.

The Protocol on Subsidiarity and Proportionality (see response to question 6, below) notes that is for national Parliaments to consult, where appropriate, regional parliaments with legislative powers in the application of Article 6 of that Protocol.

The same Protocol provides also that, in certain circumstances, the Committee of the Regions may challenge before the ECJ a draft legislative act on the grounds that it does not comply with the principle of subsidiarity.

6. OUR NATIONAL PARLIAMENT

The likely impact of the Treaty on the role of the United Kingdom Parliament in relation to EU matters. Whether changes ought to be made within the United Kingdom on the role and powers of Parliament in relation to EU matters. How the principle of parliamentary sovereignty is affected by the Treaty.

The Lisbon Treaty gives national parliaments a direct role in the EU's law making for the first time. The Government supports this strengthening of the role of national parliaments. Under the Lisbon Treaty, all national parliaments must be notified by the EU institutions of proposed EU legislation and be given eight weeks to comment.

National parliaments also gain the power to oppose a proposal if they consider that it would breach the principle of subsidiarity. If one third of national parliaments oppose a proposal on subsidiarity grounds, the EU institutions would have to reconsider and decide whether to maintain, amend or withdraw their proposal [yellow card]. If a majority of national parliaments object, and the Council and European Parliament agree, the proposal would fall [orange card].

The Protocol on Subsidiarity and Proportionality sets out in detail how national parliaments can express opposition to draft legislation, including the provision that in a bicameral parliamentary system such as ours, each of the Chambers has one vote.

How the "yellow/orange" card procedure is used is a matter for Parliament. The Government is committed to ensuring that the new provisions in relation to National Parliaments in the Treaty operate effectively, and will work with both Houses of Parliament to ensure that they do so.

The existing Treaties contain provisions to revise certain aspects of the Treaties without an Intergovernmental Conference ("passerelles"). The Lisbon Treaty extends these provisions, including the introduction of two new general amending provisions. Each general provision requires unanimity and is subject either to approval in line with national constitutional arrangements or to a veto by national parliaments.

Clause 6 of the European Union (Amendment) Bill (attached at Annex G) requires advance approval by both Houses before the Government can support use of either general passerelle or any passerelle to move to Qualified Majority Voting or co-decision. This is the first time that legislation will give Parliament direct control over the use of passerelles and follows the Prime Minister's commitment given to the House of Commons on 22 October 2007.

In addition, Clause 4 requires approval by Act of Parliament of any amendment of the EU Treaties using the ordinary revision procedure.

The Lisbon Treaty has no effect on the principle of parliamentary sovereignty. Parliament exercised its sovereignty in passing the European Communities Act 1972 and has continued to do so in passing the legislation necessary to ratify subsequent EU Treaties.

The UK Parliament could repeal the European Communities Act 1972 at any time. The consequence of such repeal is that the United Kingdom would not be able to comply with its international and EU obligations and would have to withdraw from the European Union. The Lisbon Treaty does not change that and indeed for the first time includes a provision explicitly confirming Member States' right to withdraw from the European Union.

7. COURTS AND THE JUDICIARY

The extent to which the powers of the European Court of Justice, and other judicial powers, are changed by the Treaty and the likely impact of any such changes on the United Kingdom constitution. The implications of the Treaty for the constitutional principle of the rule of law.

As at present, the European Court of Justice will have responsibility for ensuring that the law is obeyed in relation to the interpretation and application of treaty provisions over which it has jurisdiction.

This jurisdiction is explicitly excluded from the Common Foreign and Security Policy with two limited exceptions. As now, the ECJ can monitor the boundary between CFSP and other EU external action but will also be able to ensure that CFSP cannot be affected by other EU policies as a distinct and equal area of action. In addition individuals subject to CFSP sanctions will be able to challenge these in Court. Individuals can already challenge economic sanctions to which they are subject and the Government welcomes this closing in the gap in the judicial protection of the individual which will help to ensure that EU sanctions regimes are robust and credible.

The ECJ will acquire full jurisdiction over the provisions on police and judicial co-operation in criminal matters subject to the transitional arrangements set out in Article 10 on Transitional Provisions. This also removes the existing restrictions on the referral of preliminary references by national courts. The Lisbon Treaty stipulates that where such cases relate to a person in custody the Court is to act with the minimum of delay. Clarifying points of law quickly, without extending the ECJ's powers, is strongly in the UK interest. Where there is uncertainty as to the correct interpretation of EU law, the ability for any court to refer to the ECJ will enable us to reach decisions much faster.

The UK's participation in both existing and future measures in this field is subject to its opt-out arrangements in Article 10 and its opt-in in relation to Justice and Home Affairs as a whole. The Lisbon Treaty also maintains the exclusion from the Court's jurisdiction of the review of operations by the police or law-enforcement services in exercising Member States' responsibilities for internal security.

The Lisbon Treaty extends the Court's jurisdiction to review acts or failure to act by bodies, offices, agencies of the Union and by the European Council. The Government again welcomes these changes in ensuring adequate judicial control within the Union. It is important to be clear that the conduct of bodies, offices and agencies is subject to judicial control given the increasingly important role that they play in delivering Union policies. Equally, under the Lisbon Treaty, the European Council acquires an even more important and prominent role in formal decision-making with the Union, reinforcing the position of Heads of State and Government, and it is right that insofar as its formal decisions in areas subject to ECJ jurisdiction have legal effect that these are subject to judicial control.

The Lisbon Treaty extends the right of natural or legal persons to bring legal proceedings to a "regulatory act which is of direct concern to them and does not entail implementing measures". This limited extension of the rules on standing is again part of reinforcing judicial protection within the Union. Equally the Lisbon Treaty underlines the fundamental role of national courts in stipulating that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The Lisbon Treaty establishes an advisory panel of experts to provide opinions on the suitability of candidates for the Court. This initiative was strongly promoted by the United Kingdom in order to reinforce the high quality of judicial appointments. The Treaty also enables the establishment of specialist courts and the amendment of the Court's Statute (other than Part I and Article 64) to be effected by qualified majority voting—something which should assist in the adoption of measures aimed at improving the efficiency of the Court and the speed with which it is able to dispose of cases.

The Treaty reinforces the arrangements for imposing fines on Member States which fail to implement EU law by dispensing with the need for a further round of proceedings in cases where a Member State has failed to comply with its obligation to notify implementing measures. The United Kingdom was a strong supporter of the introduction of fines in order to ensure the effective enforcement of a level playing field across all Member States and similarly supports this reinforcement of the fines procedures in this particular case.

The Government welcomes the above changes in reinforcing the existing role of the Court in upholding the rule of law within the European Union. They do not however alter the current relationship between the European Union and the United Kingdom, or between the ECJ and UK courts, and do not therefore impact on the Constitution of the United Kingdom.

8. LEGAL PERSONALITY

The consequences, if any, for the United Kingdom constitution of the Treaty conferring legal personality on the EU.

The Government set out its position on the Lisbon Treaty's provision for the European Union to have legal personality in the December 2007 Explanatory Memorandum (paragraphs 41–44). It has no consequences for the United Kingdom constitution.

Legal personality is a characteristic of nearly all international bodies from the United Nations, the World Trade Organisation and the International Criminal Court, to the Universal Postal Union.

The European Community has had express legal personality since its establishment in 1958. On this basis, it has concluded hundreds of agreements with third countries and organisations across a wide range of areas (such as trade and development). The EU also has legal personality to the extent that it has the power to conclude international agreements, which it has done in some hundred cases.

In authorising the conclusion of international agreements, Member States currently decide the negotiating mandate by unanimity or QMV—depending on the policy area in question, and approve any final agreement on the same basis. The method of tasking the EU to negotiate on behalf of the Member States will not change under the Lisbon Treaty.

The Lisbon Treaty explicitly states that the EU has legal personality and merges the EC with the existing EU. This will be simpler than the existing situation and will therefore allow the EU to act in the international arena in a more coherent and effective way.

This does not create any new powers for the EU. The Lisbon Treaty contains a Declaration by all Member States stating explicitly that “the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or act beyond the competences conferred upon it by the Member States in the Treaties”.

This will not impact on the independence of Member States’ foreign policies. The IGC Mandate also includes a Declaration stating that nothing in the Treaty affects the responsibilities and powers of Member States in foreign policy.

Foreign and Commonwealth Office

March 2008

LIST OF ANNEXES

A—December 2007 Explanatory Memorandum (EM) on the Treaty of Lisbon as amended by a Written Ministerial Statement of 20 February 2008.

B—Paper on the Charter of Fundamental Rights.

C—Letter from Minister for Europe to the Chairman of the House of Lords European Union Committee.

D—Paper on an Independent Foreign and Defence Policy.

E—Paper on Protection of the UK’s Common Law System and Police and Judicial Processes.

F—Paper on Protection of the UK’s Tax and Social Security System.

G—European Union (Amendment) Bill.

Annex A

Explanatory Memorandum on the Treaty of Lisbon (17/12/07)—as amended by Written Ministerial Statement (20/02/07)

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

Command Paper Number: 7294

INTRODUCTION

1. The Treaty of Lisbon is an amending Treaty, in the tradition of previous amending Treaties such as the Treaties of Nice, Amsterdam and Maastricht. It amends the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), which it renames as the Treaty on the Functioning of the European Union (TFEU). It also makes consequential amendments to the Euratom Treaty.

THE TREATY

2. The aim of the Treaty of Lisbon is to reform and streamline the enlarged EU’s institutions and decision-making. The preamble to the Treaty states that the Member States have drawn up this Treaty in order to:

“complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action”.

3. Ratification will allow the EU to move on from debates about institutions to creating the outward-facing, flexible Europe needed to meet the fundamental challenges of globalisation.

4. The Government set out its principles for a new Treaty in the then Minister for Europe’s Written Ministerial Statement of 5 December 2006. These principles were:

- pursuing British interests;
- modernisation and effectiveness;
- consensus;

- subsidiarity;
- use of existing Treaties; and
- openness.

5. The Treaty provides for institutional reforms, in particular: an end to the six-monthly rotation of the Presidency of the European Council; the merger of the two current posts of High Representative for Common Foreign and Security Policy and the Commissioner for External Affairs to create a High Representative of the Union for Foreign and Security Policy; a simplified voting system in the Council; a smaller Commission; new powers for national Parliaments to ensure that subsidiarity is respected; and streamlined decision-making through Qualified Majority Voting (QMV).

6. At the same time, the Government secured protections to safeguard our national interests. Ahead of the June 2007 European Council, the Government set out four conditions (“red lines”) which any new Treaty would have to fully reflect. These were:

1. Protection of our existing labour and social legislation;
2. Protection of our common law system, and our police and judicial processes;
3. Maintenance of our independent foreign and defence policy; and
4. Protection of our tax and social security system.

7. The Treaty of Lisbon fully respects these red lines.

CHANGES MADE BY THE TREATY OF LISBON

Full-time President of the European Council

8. Under the current Treaties, the President of the European Council is a rotating, six-month post held by the Head of State or Government of the Presidency country. The Treaty makes this a full-time post, with a two and half year term (renewable once).

9. The Treaty provides that the President of the European Council will be appointed by qualified majority voting by the members of the European Council (national Heads of State and Government). The President will be accountable to them. This will bring greater coherence and consistency to the strategic direction of the enlarged EU and provide Member States, through the European Council, much greater capacity to give direction and momentum to the EU’s agenda.

The Presidency system

10. The Treaty provides for a “Team Presidency” system. Teams of three successive Member State Presidencies will chair the sectoral Councils over an 18-month period. Separate arrangements will apply to the Foreign Affairs Council (which will be chaired by the High Representative). An 18-month Presidency system is already effectively in operation; Germany, Portugal and Slovenia have been delivering an 18-month programme since January 2007. The new Team Presidency system provides a longer-term, more stable perspective to help deliver policy outcomes through the sectoral Councils.

A smaller Commission

11. The Treaty streamlines the Commission from 2014. The number of Commissioners will be reduced to two-thirds of the number of Member States, selected from all Member States on a basis of equal rotation. In an enlarged EU, a smaller Commission will allow for stronger and more effective decision-making.

European Parliament

12. The Treaty strengthens the role of the European Parliament, primarily by increasing the number of policy areas subject to co-decision and so requiring the agreement of both the Council and the European Parliament. The Treaty also limits the size of the European Parliament. The number of MEPs decreases from 785 currently to 751. The UK currently has 78 MEPs and will have 73 under the new Treaty.

New powers for national parliaments

13. National parliaments are given a direct say in the EU's law-making for the first time. The Treaty gives national parliaments the new power to send proposed EU legislation back for review if they consider that it is not in line with the principle of subsidiarity.

14. Under the new mechanism, all national parliaments will be notified by the EU of proposed EU legislation and provided with the power to challenge them. If one-third of them consider that a proposal would breach the principle of subsidiarity, the EU institutions would have to reconsider and decide whether to maintain, amend or withdraw their proposal. If a majority of national parliaments object, and the Council and European Parliament agree, the proposal falls.

15. Under the Treaty national parliaments have the right, but are not obliged, to contribute to the work of the Union.

Qualified Majority Voting

16. The Treaty extends qualified majority voting (QMV) in a total of 51 articles. A full list is attached. 16 of these do not apply to the UK or only apply if the UK agrees. 20 offer faster decision-making in areas where the UK wants to see much more effective EU action, for example: energy; providing aid to third countries; and strengthening the EU's research and innovation capacity through establishing a European Research Area. Other areas, including CFSP, remain based on decision-making by unanimity. The other moves are essentially technical.

17. Overall, the impact of QMV under the Treaty is significantly less than, for example, under the Single European Act and the UK will retain ultimate control in key areas of justice and home affairs, social security, tax, foreign policy and defence.

A simpler voting system

18. The Treaty will also introduce a new, simpler voting system for calculating Qualified Majority Voting (QMV). The new system of Double Majority Voting (DMV) will make agreement to EU legislation more representative of Member State populations. Under DMV, 55% of Member States (ie currently 15 out of 27 Member States) representing 65% of the EU's population will need to support a proposed law in order for it to pass. However, if Member States representing at least three-quarters of either of those figures indicate their opposition to a proposal, the Council must delay a decision and do all in its power to reach a satisfactory solution.

19. DMV will become fully operational between 2014 and 2017. DMV will be a clearer, simpler and more democratic voting system. This should lead to greater transparency and more effective decision-making. The UK's share of votes in the Council of Ministers will increase.

Common Foreign and Security Policy

20. The Treaty strengthens the EU's ability to deliver foreign policy messages where we have agreed a policy with the rest of the EU. The Treaty does this in particular by creating a "High Representative of the Union for Foreign Affairs and Security Policy".

21. He or she will be appointed by the European Council by qualified majority voting and will carry out the Union's CFSP "as mandated by the Council" (Article 9E TEU⁴⁰). This new role merges the two existing roles of High Representative for the Common Foreign and Security Policy and the External Relations Commissioner.

22. The High Representative will be supported by a European External Action Service. The service will be established in line with a unanimous Council decision on its composition and functioning.

23. **Maintenance of our independent foreign and defence policy is a UK red line.** The Treaty (Articles 10c to 28E TEU) sets out the scope of CFSP in the same terms as are already used under the earlier Treaties. 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 Treaty on European Union 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

⁴⁰ This memorandum uses the numbers of articles in the TEU and the TEC as they appear in the text of the articles of the Treaty of Lisbon. The numbers are to be renumbered in accordance with Article 5 and the Annex to the Treaty.

encroachment by non-CFSP matters by the improved provisions of Article 25b TEU. 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 European Parliament participation. In particular, it is clear that legislative acts cannot be adopted, and that ECJ jurisdiction is excluded, other than in two defined areas.

24. The Treaty confirms that CFSP remains defined by Member States and that unanimity in decision-making will remain the norm. Two Declarations confirm that all 27 Member States agree that provisions on CFSP will not affect the responsibilities of the Member States, as they currently exist.

25. The Treaty meets UK objectives on the development of a flexible, militarily robust and NATO-friendly European Security and Defence Policy (ESDP). The Treaty preserves the principle of unanimity (and therefore the UK veto) for ESDP policy decisions and for initiating missions, and fully maintains the prerogatives of Member States for defence and security issues (in the same way as it does for foreign policy). Article 28A TEU sets this out clearly.

26. The Treaty recognises the provision in the UN Charter that Member States may come to each other's assistance in the face of armed aggression. The Treaty introduces "Permanent Structured Cooperation", which will provide for an inclusive process focused exclusively on the development of military capabilities, a key UK objective. The requirement for a unanimous Council decision to trigger enhanced cooperation in this area ensures that the UK will always be able to protect its interests.

Justice and Home Affairs

27. The Treaty brings the provisions on police and judicial cooperation in criminal matters (currently "third pillar measures") into the Treaty on the Functioning of the European Union. As a consequence of this change, Qualified Majority Voting and co-decision will apply as the general rule to Justice and Home Affairs.

28. **However, the Government was clear that protecting our common law system and police and judicial processes is a UK red line.**

29. The UK's current opt-in arrangements for cooperation in asylum, immigration and civil justice will be extended to the areas of police and criminal judicial cooperation, giving the UK the right to choose whether to opt-in to any Justice and Home Affairs measures on a case by case basis. The amendments to the Protocol on the position of the UK and Ireland extend the UK's existing Title IV opt-in Protocol to cover all justice and home affairs matters.

30. The Treaty Protocol on transitional provisions sets out the legal arrangements for measures agreed under the existing third pillar following the entry into force of the Treaty. Article 10 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. The Article allows the UK to decide to opt out en bloc of all remaining "third pillar" measures that are unamended (ie have not 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.

31. The amendments to the Protocol integrating the Schengen acquis into the framework of the European Union guarantee that the UK has the right to decide whether or not to participate in 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.

32. The Treaty will also enable certain proposals for laws in criminal matters to be referred to the European Council for decision if they would affect fundamental aspects of a Member State's legal system (the so-called "emergency brake").

Charter of Fundamental Rights

33. The Treaty (Article 6(1) TEU) will make the Charter of Fundamental Rights, with the additional safeguards agreed in 2004, legally binding on the EU and on Member States when implementing EU legislation.

34. The Charter records existing rights by which EU Member States, including the UK, are already bound when they implement EU law, as provided for in Article 6(2) of the present EU Treaty and as established in the case law of the European Court of Justice. The existing rights and principles recorded in the Charter will continue to have effect as they always have done for EU institutions and Member States when implementing

EU law. The Charter creates no new enforceable rights, and does not extend the circumstances in which individuals can rely on those rights.

35. Protection of our existing labour and social legislation is a UK red line. The Government was determined to guarantee 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 Treaty via a package of safeguards:

- Improved “horizontal” Articles in the Charter setting out its precise scope and application.
- A clear provision in the Treaty stating that the provisions of the Charter do not extend the competences of the Union in any way.
- A clear provision in the Treaty stating that courts, including the ECJ, must have due regard to the “horizontal” Articles in the Charter and to the “Explanations” detailing the sources of the rights contained in the Charter when interpreting its provisions.
- A specific UK Protocol 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.

Tax and social security

36. **Protection of our tax and social security system was a UK red line.** 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 secured in the Treaty through a strengthened “brake” mechanism. 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. A Declaration to the Treaty (agreed by all Member States) confirms that any decision taken by the European Council under the brake must be by consensus. So, once the brake is activated, any Member State can block a proposal and it falls—effectively therefore it amounts to a veto power.

Simplified Treaty revision

37. Procedures to revise the Treaties without an Intergovernmental Conference already exist, and can be found in the Single European Act and the Treaties of Maastricht, Amsterdam and Nice.

38. The Treaty will extend these amending provisions including to allow for changes from unanimity to qualified majority voting, or from other legislative procedures to co-decision, or for changes to the details of EU policies in certain areas, without a formal IGC. Any such moves will require unanimity (ie the UK has a veto).

39. In particular, the Treaty introduces new general amending provisions that allow for simplified Treaty revision procedures. Each provision requires unanimity and are subject either to approval in line with national constitutional arrangements, or to a veto by national parliaments.

Exit clause

40. The Treaty recognises a Member State’s right to withdraw from the European Union and sets out procedures providing for such an eventuality.

Legal personality

41. The Treaty explicitly provides for the European Union to have legal personality. The Treaty will allow the EU to act in the international arena in a more coherent way. This should lead to streamlined procedures for negotiating agreements through the EU.

42. This will be simpler than the existing situation whereby two parts of the EU—the European Community and Euratom—already have express legal personality. In particular, this enables them to act at the international level, including the capacity to make treaties. The EU, when it acts in respect of CFSP and JHA, currently has a degree of “functional” legal personality by virtue of its power to make international agreements (as does the United Nations, for example). On this basis, the EC and the EU already conclude numerous agreements with third countries in a wide range of areas (such as trade and development).

43. Member States currently decide the negotiating mandate by unanimity or QMV, depending on the policy area in question, and approve any agreement on the same basis. The method of tasking the EU to negotiate on behalf of the Member States does not change under the Treaty. Nor will legal personality create any new powers for the EU or impact on the independence of Member States' foreign policies.

44. There is also a Declaration by all Member States setting out that legal personality will not authorise the Union to legislate or act beyond the competences conferred upon it by Member States in the Treaties.

Definition of competences

45. The Treaty includes a definition of the Union's competences, setting out where the EU can and cannot act. The Treaty explicitly provides that the EU has only those competences conferred on it by the Member States and recognises that competences can be transferred back to Member States. The Treaty provides for specific new competences for EU action in areas including space policy (measures to promote joint initiatives and research), energy, tourism, civil protection and administrative cooperation.

Accession to the European Convention on Human Rights

46. The Treaty provides for the EU to accede to the European Convention on Human Right (ECHR). EU accession to the ECHR would have to be approved by all Member States and ratified by all national parliaments.

National Security

47. The Treaty explicitly provides that national security remains the sole responsibility of each Member State.

Enhanced cooperation

48. The Treaty revises the existing procedures for "enhanced cooperation" which allow a group of Member States to work together without affecting those that do not want to. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it.

49. Enhanced cooperation must work towards the EU's objectives, in a way that does not undermine the single market. Those countries undertaking cooperation in this way must also be open to others who want to join in at any time. Unanimity is still required for any such cooperation in the fields of foreign policy or defence.

Simplification of Treaty numbering

50. The Treaty provides for a comprehensive simplification of the numbering of Treaty articles, as the Treaty of Amsterdam did.

RATIFICATION

51. The Treaty of Lisbon must be ratified by all 27 Member States in accordance with their respective constitutional requirements before it can enter into force. Before the UK can ratify the Treaty, legislation is required to give effect to the Treaty in UK law.

PROTOCOLS

52. There are 11 Protocols to the Treaty of Lisbon which will be annexed to, and are an integral part of, the existing Treaties. Two other Protocols amend the existing Protocols to the Treaties.

DECLARATIONS

53. There are 65 Declarations attached to the Final Act of the Intergovernmental Conference. 50 Declarations have been made unanimously and represent the political commitment of all Member States. There are also 15 Declarations made by some, or one, States. Declarations are not part of the Treaty itself. They represent a political commitment on the part of those making them and in some cases are relevant for the purposes of interpreting the Treaty.

CONCLUSION

54. The Government set out its objectives for the Intergovernmental Conference and the Treaty of Lisbon in a White Paper on 23 July 2007. The Treaty marked changes to allow the enlarged EU of 27 Member States—and beyond—to work more effectively.

55. There will not be a transfer of power away from the UK on issues of fundamental importance to our sovereignty. The Treaty ensures that our existing labour and social legislation remains intact; protects our common law system, police and judicial processes, as well as our tax and social security systems; and preserves our independent foreign and defence policy.

MINISTERIAL RESPONSIBILITY

56. The Secretary of State for Foreign and Commonwealth Affairs has overall responsibility for matters relating to the European Union.

FINANCIAL IMPLICATIONS

57. The amendments to the EU Treaties resulting from the Treaty of Lisbon will not fundamentally change the objectives and activities of the European Union and will not, therefore, have significant implications for the EU budget. There will be no substantive change in the EU budgetary system, and no commitment to the provision of new resources.

RESERVATIONS AND DECLARATIONS

58. The United Kingdom made three unilateral Declarations, on citizenship, Gibraltar and the franchise for European Parliament elections.

TERRITORIAL

59. The Treaty extends to the whole of the United Kingdom.

SUBSIDIARITY

60. The Treaty significantly strengthens subsidiarity through new powers for national parliaments. See paragraphs 13 to 15 above.

Presented to Parliament

December 2007

Annex

MOVES TO QUALIFIED MAJORITY VOTING IN THE TREATY

The Treaty extends qualified majority voting in a total of 50 articles of the Treaty establishing the European Community and the Treaty on European Union. 16 of these do not apply to the UK or only apply if the UK agrees. 20 offer faster decision-making in areas where the UK wants to see much more effective EU action.

The full list is as set out below.

1. Immigration and frontier controls (UK opt-in).
2. Judicial co-operation in criminal matters (UK opt-in).
3. Minimum rules for criminal offences and sanctions (UK opt-in).

4. Eurojust (structure, operation, field of action and tasks) (UK opt-in).
5. Police co-operation (data sharing and training) (UK opt-in).
6. Europol (structure, operation, field of action and tasks) (UK opt-in).
7. Social security (measures to facilitate free movement of workers) (emergency brake including a veto power).
8. Co-ordination of provisions for self-employed persons (measures to facilitate self-employment in other Member States).
9. Transport (removes existing limited derogation).
10. Culture (incentive measures to promote cultural awareness and diversity).
11. Appointment of European Central Bank (ECB) executive board (UK opt-out).
12. Comitology (rules enabling Member States to oversee the Commission's exercise of its implementing powers).
13. Financial regulations (rules on budgetary and accounting procedures).
14. Specialised courts (establishment of specialised first instance courts).
15. European Court of Justice (ECJ) statute.
16. Amendments to certain parts of the statute of the European System of Central Banks.
17. Presidency of Council configurations (arrangements for rotation).
18. Use of the euro (UK opt-out).
19. Measures relating to the broad economic guidelines and excessive deficit procedure (applicable only to eurozone members) (UK opt-out).
20. Border checks (establishment of integrated management system for external borders) (UK opt-in).
21. Mechanism for peer review of Member States' implementation of policies in the Justice and Home Affairs (JHA) area (UK opt-in).
22. Crime prevention (UK opt-in).
23. Implementation of own resources decisions.
24. Provisions enabling repeal of the aspects of an Article related to state aids policy and the effect of the past division of Germany.
25. Procedure for entry into the euro.
26. Provisions enabling repeal of an Article on transport policy as it affects areas of Germany affected by its past division.
27. Authorisation, co-ordination and supervision of intellectual property rights protection.
28. Services of general economic interest (clarification of EU rules/principles applying public services).
29. Diplomatic and consular protection.
30. Humanitarian aid operations.
31. Energy (measures on energy markets, energy security and energy saving).
32. Tourism (promotion of competitiveness and best practice).
33. Civil protection (assistance to prevent or protect against natural or man-made disasters).
34. Implementation of solidarity clause (assistance, if requested, in the event of a natural or man-made disaster).
35. Urgent financing of Common Foreign and Security Policy (CFSP) measures (start up measures for "Petersberg" tasks).
36. Urgent aid to third countries.
37. Aspects of the Common Commercial Policy (definition of general framework for its implementation).
38. European Research Area (removal of barriers to free flow of research).
39. Space policy (measures to promote joint initiatives and R&D).
40. Sport (incentive measures to promote sport).
41. Administrative co-operation (capacity building measures).

42. Membership of structured co-operation in defence (procedural issues relating to its establishment).
43. Election of European Council President.
44. Appointment of High Representative of the Union for Foreign Affairs and Security Policy.
45. Council review of general rules on composition of the Committee of the Regions and European Economic and Social Committee.
46. Citizens' initiatives (petition procedure).
47. Principles of European administration (staff regulation measures).
48. Negotiation of withdrawal agreement.
49. Judicial appointments panel (composition and operation).
50. Role of the High Representative of the Union for Foreign Affairs and Security Policy in CFSP implementing measures (measures proposed by the High Representative following a specific request from the European Council).
51. The statute, seat and operational rules of the European Defence Agency (EDA).

Annex B

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 Lisbon Treaty concerning the Charter of Fundamental Rights.

A reference to the Charter in the Lisbon Treaty (new Article 6 TEU) will make the Charter legally binding once the Lisbon 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 Lisbon Treaty reference to the Charter sets out how the ECJ should use them to interpret the Charter. Furthermore, the Lisbon Treaty also includes 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.⁴¹ 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).

⁴¹ 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>

- 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.⁴² 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.

INCORPORATING THE CHARTER INTO THE TREATIES

Article 1, point 8 of the Lisbon 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 does not however form part of the Lisbon 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.

⁴² 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.

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

17 January 2008

Lord Grenfell
European Union Committee
Committee Office
House of Lords
London
SW1A 0PW

I am replying to Susannah Street’s letter of 4 January requesting additional evidence on the impact of the Lisbon Treaty on EU Institutions, following my appearance before the Committee in December. Please find attached the replies, which I hope you will find helpful.

During the evidence session I promised to provide you with information on the number of FCO staff seconded to the Commission. There are currently 5 FCO Seconded National Experts to EU Institutions, only one of whom is seconded to the Commission. There are 112 Seconded National Experts in total in all EU Institutions from all Whitehall Departments.

Finally, the Government will publish a consolidated version of the EU Treaties as amended by the Lisbon Treaty later this week, following your request. I hope this will help the Committee's inquiry into the impact of the Lisbon Treaty on the EU Institutions.

Jim Murphy MP
Minister for Europe

REPLIES TO THE LORDS EU SELECT COMMITTEE ON THE INQUIRY INTO THE IMPACT OF THE LISBON TREATY ON THE EU INSTITUTIONS

QUESTION 1

How comprehensive are the lists of competences provided by the Lisbon Treaty amendments? Are the lists a matter of codification?

The Lisbon Treaty for the first time provides a clear and explicit classification and list of the EU's competence. The categorisation of competences reflects the rules and practices under the current Treaties and provide helpful clarification—for example, by making clear that the EU may cease to exercise shared competence, and setting out as a distinct category competence areas where EU action is limited to supporting, co-ordinating and supplementing the action of Member States.

The lists of competences are comprehensive. They reflect the current position under the Treaties together with the limited extensions provided for in the Lisbon Treaty. In almost all of these areas, the EU already takes action under other legal bases.

A list of the extended competences is set out below.

New competences or extensions to competence established by a new Treaty Article

Energy

The Article creates a distinct legal basis for shared competence on energy policy although measures in the sphere of energy is already listed as part of the Community's activities and the EU has already agreed a number of pieces of legislation in this field (from energy efficiency and renewables to market liberalisation).

Member States retain the right to determine the conditions for exploiting its energy resources, its choice between different energy sources, the general structure of its energy supply and all measures of a fiscal nature.

Tourism

Tourism is already listed as an area of Community activity under the current Treaties, and existing EC action has taken the form of encouraging training for staff working in the tourism sector and Communications, studies and publications highlighting, for example, national good practice on sustainable tourism.

This Article creates a specific legal base for EU support for Member States action to promote competitiveness and best practice in the tourism sector. The EU's competence is limited to supporting, coordinating or supplementing the action of Member States. EU support can complement national action, for example on upgrading skills in the tourism sector and building links between national or regional tourism initiatives.

Civil Protection

This creates a specific legal base for EU action to encourage co-operation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural and man-made disasters. The EU's competence is limited to supporting, coordinating or supplementing the action of Member States.

The existing Treaties already list civil protection as an area of EU activity. EU action to date in this area has primarily involved measures to enhance EU disaster response by facilitating information sharing and financial support within the EU.

Space policy

This Article creates a new shared competence to draw up a European space policy and—potentially—a European space programme. It would promote joint initiatives, support research and technological development, and co-ordinate the efforts needed for the exploration and exploitation of space. The treaty also explicitly states that the exercise of EU competence does not prevent Member States from exercising their own powers in this area.

Administrative Co-operation

This Article creates a new competence to introduce measures to improve the administrative capacity of Member States to implement EU legislation—it is implicitly aimed at the newer Member States. This competence is again limited to supporting, coordinating or complementary action to Member States' activities. There is no obligation on Member States to make use of EU support, and any harmonisation of laws and regulations is explicitly excluded. Action envisaged would include information and staff exchanges, and training schemes.

European Research Area

The Treaty includes in the existing provisions of the EC Treaty dealing with activities in the area of research and technological development, the objective of achieving a “European research area”. The treaty also explicitly states that the exercise of EU competence in the area of research and technological development does not prevent Member States exercising their own powers in this area.

Sport

The Lisbon Treaty includes the promotion of European sporting issues in the existing provisions on education, vocational training and youth. The EU's competence in these areas is limited to supporting, coordinating or supplementing the action of Member States.

Travel and residence documents

The Lisbon Treaty extends the current provision for the adoption of legislation necessary to facilitate the exercise of the rights of free movement and residence to cover provisions on travel and residence documents and social security and social protection.

Common safety concerns in health

Article 152 TEC provides for the adoption of measures in certain areas of health policy. The Lisbon Treaty adds that such measures must be adopted “in order to meet common safety concerns”. The changes to Article 152 (“Public Health”) of the Treaty clarify, in summary, that:

- Measures may be brought forward, under co-decision procedures, which will enable the EU to seek to harmonise standards of quality and safety in relation to medicinal products and devices.
- Proposals may be brought forward, under co-decision procedures, in relation to cross-border health threats and the protection of public health regarding tobacco and alcohol. Such proposals would be “incentive measures” to protect and improve human health, but would not involve harmonisation of Member State laws in relation to these areas of public health policy.

New proposals in relation to the above areas of public health will therefore be brought forward in accordance with existing QMV procedures.

Intellectual property

The EC has already adopted a range of measures on legislation on intellectual property using existing powers. The Lisbon Treaty provides a specific legal basis for measures in relation to European intellectual property rights.

Crime Prevention

The Lisbon Treaty provides for EU measures to promote and support Member State activity on crime prevention.

SGEIs (Services of General Economic Interest)

This Treaty provides a specific legal base for legislation defining the general EU-level principles and conditions, which apply to the provision of services of general economic interest. This can already be done on a sectoral basis under the existing Treaty.

Diplomatic and Consular Protection

The current Treaties provides for Member States' missions in third countries to assist each others' national on the same conditions as they would their own nationals and to establish necessary measures amongst themselves. The Lisbon Treaty enables the EU to adopt coordination and cooperation arrangements to facilitate such measures.

Solidarity Clause

The Lisbon Treaty includes a "solidarity clause" providing for action by Member States and the Union in the event of a terrorist attack or natural or man-made disaster. Provision is made for the Council to adopt a decision defining the implementation arrangements by the Union.

Humanitarian Aid

The EC can already adopt measures relating to humanitarian aid under existing development cooperation and other powers. The Lisbon Treaty introduces a specific legal base for humanitarian aid. The treaty also explicitly states that the exercise of EU competence in this field does not prevent the Member States exercising their own powers in this area.

Common Commercial Policy

The Lisbon Treaty amends the existing provisions on the common commercial policy to refer to foreign direct investment.

QUESTION 2

Why does the Treaty apply the yellow and orange card procedures to subsidiarity but not to proportionality?

Subsidiarity involves the assessment of whether the objectives of a particular measure can be sufficiently achieved by Member States, either at central level or regional and local level. It is therefore particularly important, and appropriate, that National Parliaments are given a direct role in relation to this assessment.

Compliance with the principle of proportionality is assessed and enforced on the same basis of other general principles of EU law.

QUESTION 3

Will any decision by the EU to sign an international agreement or treaty have to be taken by unanimity under the amended Treaties, or will Qualified Majority Voting apply in policy areas other than the CFSP?

As at present, the voting rules for the negotiation and conclusion of international agreements will be determined by the subject-matter of the agreement concerned.

Unanimity will apply where the agreement covers a field for which unanimity is required for the adoption of EU measures as well as in certain other cases such as Association Agreements. Unanimity is not therefore limited to agreements relating to the Common Foreign Security Policy.

In other cases, qualified majority voting applies. For example, as now, agreements relating to international trade in goods under the common commercial agreement will continue to be concluded by QMV.

QUESTION 4

Do the new arrangements on Permanent Structured Cooperation in defence mean that the UK will be faced with the prospect of either being outvoted under Qualified Majority Voting if it did join a group of countries making use of this facility, or be left on the sidelines of EU defence if it did not decide to join such a group?

The Permanent Structured Co-operation (PSC) is a new provision that only addresses capability development as set out in the Protocol on PSC which is an integral part of the Treaty on European Union as amended by the Lisbon Treaty. It provides a mechanism to help develop more effective military capabilities amongst EU Member States and is in line with UK objectives for improving the capabilities available for EU-led operations.

Article 28E of the Lisbon Treaty sets out when the Council would adopt a decision by QMV:

- establishing PSC and determining the list of participating Member States (QMV amongst the whole of the Council);
- confirming participation of a Member State that subsequently wishes to participate (QMV amongst those members of Council already participating in PSC); and
- suspending participation of a Member State should it no longer fulfil the criteria or its commitments (QMV amongst those members of Council already participating in PSC excluding the Member State in question).

The use of QMV is therefore in UK interests since it prevents an individual Member State from blocking PSC establishment, from blocking another Member State from subsequently joining or from blocking the suspension of a non-performing Member State.

Since improved capability development amongst Member States is a key UK objective, and because the UK already provides a significant proportion of European capability, it is likely that we would hope to launch PSC as soon as practicable after the entry into force of the Reform Treaty, in co-operation with other like-minded Member States. If the UK were to decide not to be in the first wave of PSC members, QMV would help to ensure that any another Member State could not block any subsequent UK application. Any decisions regarding the substantive implementation of PSC would be by unanimity of those Member States participating in PSC.

QUESTION 5

Do you expect that under the new Treaty arrangements, the Political and Security Committee will prepare for meetings of the Foreign Affairs Committee, and COREPER will prepare for meetings of the General Affairs Council?

Once the Lisbon Treaty comes into legal force, the revised Article 16(7) of the Treaty on European Union and Article 240 of the Treaty on the Functioning of the European Union will set out that COREPER shall be responsible for preparing the work of the Council in its various formations. This includes the General Affairs Council and the Foreign Affairs Council.

Article 38 of the Treaty on European Union states that the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of crisis management operations.

We therefore expect the Political and Security Committee's role to remain broadly the same as it is now. COREPER will have overall responsibility for preparing the work of all Council formations, but where the dossiers have a European Security and Defence Policy focus, the Political and Security Committee will do the bulk of the detailed preparation.

QUESTION 6

Does the article on mutual assistance in case of armed attack imply that the EU is becoming a military alliance? What is the exact difference between the mutual defence obligations introduced by the Lisbon Treaty and those contained in the North Atlantic Treaty and the Brussels Treaty (art. 5)? Will this clause reduce the relevance of NATO in the long term?

The mutual defence provision is in accordance with Article 51 of the UN Charter, which recognises the inherent right to individual and collective self-defence. The provision reflects the reality that EU Member States would come to the aid of other Member States in the unlikely event that they were the victim of armed aggression on their territory. EU Member States who are not also members of NATO are now committed to the defence of their fellow Member States, to the potential benefit of the UK.

The provision does not provide a basis for the development of an EU collective defence organisation to rival NATO. The obligation to provide assistance falls on individual Member States, not the EU. It goes on to provide that for Member States which are also NATO members, NATO remains the foundation of their collective defence and the forum for the implementation of the mutual defence provision. It therefore confirms NATO's role as Europe's only collective defence organisation. It provides furthermore that commitments and co-operation under this provision shall be consistent with NATO commitments and that the provision does not prejudice the specific character of the security and defence policy of Member States, which are also NATO members.

It should be recalled that the parties to the Brussels Treaty decided, shortly after the creation of NATO, that NATO would be responsible for the implementation, in military terms, of the mutual defence commitment of the Brussels Treaty.

The Lisbon Treaty clause only refers to armed aggression on the territory of a Member State, ie a limited and relatively unlikely scenario. NATO's Article 5 commitment ("... an attack against one or more... shall be considered an attack against them all...") is more extensive in its applicability, as demonstrated by its invocation following the 9/11 attack.

QUESTION 7

What is the rationale for the creation of a European External Action Service, and how will the Service be structured? Will it work closely with the diplomatic services of the Member States?

The External Action Service (EAS) will support the new High Representative for Foreign Affairs and Security Policy. So the rationale is the same as for the High Representative—the change will mean better, more coherent policy implementation and delivery of all of the EU's external policies.

As set out in the Lisbon Treaty, the EAS will bring together staff currently working on external issues in the Council Secretariat and the Commission—it is therefore a sensible rationalisation of existing machinery. The Lisbon Treaty also sets out that the EAS will benefit from some additional expertise from Member States' secondees. It also states quite categorically that the EAS will work in 'cooperation with the Diplomatic Services of the Member States', and it is in everyone's interests that this is a close cooperation.

The Treaty leaves all further details on the organisation and functioning of the EAS to a decision of the Council, after the Treaty comes into force. And there have not yet been any detailed discussions on the EAS in preparation for that decision. We anticipate that these discussions will take place under both the Slovenian and French Presidencies of the European Union. We will keep Parliament informed of their progress. The council decision will be subject to Parliamentary scrutiny in the usual way.

QUESTION 8

Can you explain to us the significance, in legal terms, of adding, for the first time, a specific section on Energy in the Treaty?

The EU already has an energy policy, but a specific energy article removes the need to make use of other articles such as 95 (approximation of laws for the internal market) and 175 (environment) to achieve that policy. Differences between the new energy article and the articles that have previously been used for energy related matters mean that the new energy article is likely to have resulted in some small and technical extensions of EU competence and qualified majority voting. For example, some measures in relation to security of energy supply have been based on article 100(1) which is limited to measures appropriate to the

economic situation, in particular if severe difficulties arise in supply. There is no such limitation in the new energy article, thereby potentially lowering the threshold for EU action.

The inclusion of a new Title on energy in the Treaty will help to ensure that policies on energy markets, energy security and energy efficiency are coherent and mutually reinforcing. It also makes clear that measures adopted shall not affect a Member State's right to determine the conditions for exploiting its own energy resources. The UK Government welcomes the inclusion of the provision, which reflects the growing importance of energy as a political and economic issue in the EU and of the connected policy areas of climate change, sustainability, and the environment.

QUESTION 9

How will the Protocol on Services of General Interest impact on the making of EU policy in this area?

The Protocol on Services of General Interest (SGI) confirms the existing position in relation to services of general interest.

The first article confirms the (existing) principles applicable to services of general economic interest.

The second article confirms that the Treaties do not effect in any way the competence of Member States in relation to non-economic services of general interest.

QUESTION 10

To what extent is it important that the EU's commitment to "undistorted competition" is contained in a Protocol rather than as part of the Treaty itself?

There is no change to the legal position under the existing Treaty. The substantive Treaty provisions setting out the powers and rules governing regulation of competition in the EU remain the same.

The words used in that Protocol are substantively the same as the words used in the current EC Treaty. Paragraph 1(g) of Article 3 of the current EC Treaty lists one of the Community's activities as "a system ensuring that competition in the internal market is not distorted". Article 3 is not retained in the amended Treaties. Instead, Article 2 (renumbered 3) of the amended Treaty on European Union provides for the establishment of an internal market. The Protocol states that this reference to the internal market "includes a system ensuring that competition is not distorted". The Protocol is legally binding and an integral part of the Treaty.

In addition, the new list of EU competences in Article 2B (renumbered 3) of the Treaty on the Functioning of the European Union includes "the establishing of the competition rules necessary of the internal market". The substantive Treaty provisions setting out the powers and rules governing regulation of competition in the EU remain the same.

The Commission, as the guardians of the Treaty, have explicitly confirmed that the position remains unchanged.

"To avoid any risk of uncertainty as to settled law and to make fully clear that competition will continue to be one of the main policies aiming at the good functioning of the internal market, the European Council decided to provide for the protocol . . . which paraphrases the current EC Treaty provisions . . . a protocol forms an integral part of the Treaty to which it is annexed and has the same legal value as Treaty provisions".

QUESTION 11

What view does the Government have of the implications of the Treaty for the UK labour market if the Protocol on the application of the Charter of fundamental rights of the European Union to the UK (and Poland) had not been included?

The Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom is annexed to the Treaty of Lisbon.

The Charter simply reaffirms the rights and principles, which apply to the EU institutions and to Member States when implementing EU law. The Charter creates no new enforceable rights and provides no new basis for challenging UK legislation including that relating to the UK labour market.

The UK Protocol puts that matter beyond doubt for the UK guaranteeing, in particular, that the Charter does not extend the powers of any court—European or domestic—to strike down UK law.

QUESTION 12

In written evidence submitted to our inquiry, the Scottish Parliament European and External Relations Committee expressed concern that in the Government's White Paper and July Explanatory Memorandum (11625/07) there was no reference to discussions of the UK Government with the devolved administrations, or reference to a separate Scottish legal system or to the fact that aspects of justice and home affairs are devolved. The Scottish Government was unable to explain why the UK Government did not make explicit reference to the representations that it had made or the interests of the devolved administrations. What is the Government's response?

The Devolved Administrations were involved in discussions on the preparation of the UK position for the IGC legal group, as the Scottish First Minister recognised in a letter to the Foreign Secretary of 23 July. The Scottish Executive were also consulted on the Government's 23 July White Paper on the IGC, along with Whitehall Departments.

Agreement on extending the UK's Justice and Home Affairs Protocol (the opt-in) takes into account Scotland's distinctive legal system. The Treaty will also recognise the role of regional and local self-government in Member States for the first time. On both these issues, the Government has supported—and secured—the concerns of Devolved Administrations.

The issue of fisheries has also been raised by the Scottish First Minister. The Treaty of Lisbon makes no substantive changes to the allocation of competence for the Common Fisheries Policy or the conservation of marine biological resources under it. Community competence over fisheries is shared with Member States, except for conservation measures, where it has been exclusive since the UK's Treaty of Accession to the EC. The Treaty of Lisbon does not change that.

Europe Directorate
Foreign and Commonwealth Office

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Annex D

COMMON FOREIGN AND SECURITY POLICY

Red line: maintenance of the UK's independent foreign and defence policy

Lisbon 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.⁴³ 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.

⁴³ 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 Lisbon Treaty, Article 1, Point 34), Point 46) and Point 49).

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.

Lisbon 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.

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.

Lisbon 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.

Lisbon 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 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.

Annex E

JUSTICE AND HOME AFFAIRS

Red line: protection of the UK's common law system, and our police and judicial processes

Lisbon 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.

Lisbon 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 3 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.

Lisbon 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 8,” 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.

Lisbon 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.

Lisbon Treaty Declaration 39c 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- \sqrt 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”.

Lisbon 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 4 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.

Lisbon 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.

Annex F

TAX AND SOCIAL SECURITY

Red line: Protection of the UK’s tax and social security system

Social Security brake (Lisbon 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.

Memorandum by Dr Valsamis Mitsilegas, Queen Mary, University of London

INTRODUCTION

1. Thank you for your invitation to submit written evidence on the impact of the ratification of the Reform Treaty upon the UK Constitution.⁴⁴ My contribution will focus primarily on the issue of powers and national sovereignty. I will attempt to highlight the potential impact of the Reform Treaty upon UK sovereignty by examining the far-reaching changes brought about by the Reform Treaty in the field of criminal law.

INSTITUTIONAL CHANGES REGARDING EU CRIMINAL LAW

2. The abolition of the pillars by the Reform Treaty will have far-reaching consequences for EU action in Justice and Home Affairs, in particular as regards action in matters currently falling under the third pillar. The application in principle of the “Community method” of decision-making into third pillar matters will change the way in which Member States operate as EU legislators in the Council as regards EU criminal law (with the move from unanimity to qualified majority voting) and grant the role of co-legislator to the European Parliament addressing to some extent the democratic deficit in the field. The extent to which this fundamental constitutional change will have an impact on the volume and content of the measures adopted in the field of EU criminal law remains to be seen. However, the move to the “Community method” of decision-making coupled with a number of substantive criminal law provisions in the Reform Treaty as well as the relevant transitional arrangements seem to provide, as will be seen below, a fresh impetus for a number of new, extensive legislative initiatives in EU criminal law.

3. Along with any impact on decision-making, the Reform Treaty will have far-reaching consequences for the development of EU criminal law in terms of its interpretation and enforcement. The Court will in principle assume full jurisdiction on matters currently falling under the third pillar, with restrictions on national courts regarding sending preliminary references to Luxembourg being lifted—thus enabling a meaningful dialogue between national courts and the ECJ on matters which, as has been demonstrated by a number of cases (in particular those relating to the European Arrest Warrant) may have fundamental constitutional implications for both the Union and Member States. Moreover, the Court will assume jurisdiction on infringement proceedings brought by the Commission against Member States for deficient or non-implementation of current third pillar matters. This change, along with the potential direct effect of legislation in these matters, strengthen considerably both the centralised and the decentralised enforcement mechanisms of EU criminal law.

THE REFORM TREATY AND EU COMPETENCE TO LEGISLATE IN CRIMINAL LAW AND PROCEDURE

4. The competence of the European Union in the fields of substantive criminal law and criminal procedure has been clarified, if not extended, by the Reform Treaty. However, a degree of vagueness remains in the text, in particular when this is read in the light of the concessions granted to the UK with regard to the application of EU criminal law in its domestic legal order. The analysis will focus on the changes brought about by the Reform Treaty regarding criminal law competence, in the light of their specific impact on the position of the United Kingdom.

SUBSTANTIVE CRIMINAL LAW

5. The recent ECJ rulings on the environmental crime⁴⁵ and ship-source pollution⁴⁶ cases clarified to some extent, but not fully, the extent of the Community competence to adopt criminal law. The definition of criminal offences (but not the imposition of specific criminal sanctions) falls currently under Community competence if Community action is necessary for the protection of the environment, deemed by the Court as an essential Community objective. However, it is not clear whether Community competence extends to other Community objectives or policies if the latter do not include the objective of environmental protection. At the same time, the provisions constituting the legal bases for EU criminal law under the third pillar (in particular Articles 29 and 31 TEU) are characteristically vague and have resulted in a number of different interpretations regarding the extent of Union competence in the field. The Reform Treaty attempts to clarify EU competence in Article 69B (and in the provisions on criminal procedure in Article 69A—see below). Its first paragraph contains a strict delimitation of Union competence in adopting *minimum rules* which relate to the definition

⁴⁴ Following the call for evidence, the term “Reform Treaty” will be used here instead of the term “Lisbon Treaty”.

⁴⁵ Case C-176/03, *Commission v Council*, judgment of 13 September 2005, [2005] ECR I-7879.

⁴⁶ Case C-440/05, *Commission v Council*, judgment of 23 October 2007.

of both offences and sanctions in a number of areas of crime (relating mostly to transnational crime) which, at least in the English version of the Treaty, are exhaustively enumerated. The EU competence in the field thus appears narrower than the current EU competence under the third pillar. However, Article 69B(2) extends EU competence in the field of criminal law approximation “proves essential” to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures (explicitly allowing the adoption of criminal offences and sanctions).

6. There are a number of elements that are unclear in Article 69B(2). First of all, what is the meaning of “essential” to ensure *effet utile*. The concept is not clear and is highly likely to be the subject of ECJ litigation. Secondly, it is not clear which institution will “prove” that a criminal law measure is essential in this context. Will for instance the case-law of the Court be taken into account in this context? Again, the wording is a prime candidate for litigation, as it is highly likely that there will be disagreements between the Council on the one hand and the Commission and the Parliament on the other on what will “prove essential” in this context.

7. It is also not clear whether Article 69B(2) is a sufficient, self-standing legal basis for the adoption of criminal law or whether a dual legal basis (in conjunction with the specific EU sectoral provision) will be necessary in this context. Such legal classification may be important to determine the position of the UK, in particular the scope of the UK “opt-out” from EU criminal law. Under a renegotiated Protocol on the UK position with regard to Title IV measures (which now include criminal law), the UK may choose not to participate in EU criminal law measures. The question thus arises: is it possible for the UK not to participate in an EU measure on substantive criminal law when such measure is justified as essential in order to achieve the implementation of a general Union policy (where the UK participates and no legal possibility of an “opt-out” exists). The Court’s case-law and Article 69B(2) of the Reform Treaty indicate that criminal law is treated not as a self-standing Union policy, but rather *as a means to an end* with the ultimate aim being the effective implementation of a Union policy.⁴⁷ If this is the case, then the answer must be that a Member State which has participated in and is bound by the underlying Union policy is also bound by measures adopted under Article 69B(2). Otherwise the effectiveness of Union law may be seriously jeopardised.

CRIMINAL PROCEDURE

8. The Reform Treaty contains an express legal basis in Article 69(e)(2) for the adoption of minimum rules in a number of areas of criminal procedure, including rules on the mutual admissibility of evidence (a measure that may be deemed a useful corollary to the European Evidence Warrant) and rules on defence rights. The Reform Treaty thus addresses the current controversy regarding the existence and extent of such competence in the third pillar, vividly demonstrated by the ongoing negotiations for a Framework Decision on the rights of the defendant in criminal proceedings. A proposal for such a measure was tabled by the Commission in 2004, but agreement has not been reached with a number of Member States arguing that the current Treaty contains no legal basis allowing for the adoption of a measure on criminal procedure. However, it must be noted that under the Reform Treaty Union competence in the field of criminal procedure applies only *to the extent necessary to facilitate mutual recognition* of judgments and police and judicial co-operation in criminal matters—with mutual recognition being elevated by the Reform Treaty as the basis for judicial co-operation in criminal matters in the EU (Article 69A(1)). While the potential of the Reform Treaty to result in the adoption of protective measures for the individual is welcome, it must be noted that criminal procedure measures—and the human rights implications which they may have—are clearly subordinated to the efficiency logic of mutual recognition. Moreover, and similarly to the provisions on substantive criminal law, Article 69A(2) may lead to extensive litigation on the interpretation of whether EU criminal procedure rules are “necessary” to facilitate mutual recognition. The link between criminal procedure rules and the facilitation of mutual recognition is not always straightforward or direct.

9. The subordination of EU criminal procedure measures under the logic of mutual recognition may have significant implications with regard to the participation of the United Kingdom in such measures. To take the example of EU standards on defence rights: currently the UK Government is opposed to the adoption of a legally binding measure in the field, and has tabled as an alternative a non-legally binding resolution. At the same time, the UK has been an enthusiastic supporter of the European Arrest Warrant, a prime example of mutual recognition which the defence rights proposal aims partly to complement. As said above, the United Kingdom has under the Reform Treaty the option of not opting into Title IV measures, including measures on criminal procedure. The position is not clear however in situations where the UK has participated or wishes to take part in mutual recognition measures (such as the European Arrest Warrant) but does not wish to participate in criminal procedure measures (such as the rights of the defendant) which are deemed necessary to facilitate such mutual recognition. While the letter of the law indicates that the UK has the option not to

⁴⁷ On criminal law as a means to an end in this context, see V. Mitsilegas, “Constitutional Principles of the European Community and European Criminal Law”, in *European Journal of Law Reform*, vol.8, 2006, pp.301–324.

participate if the Government so wishes, the political and practical repercussions of such a decision may be significant. In the case where the EU has adopted minimum standards on the rights of the defendant and the UK has not opted into this measure, the viability of the operation of the European Arrest Warrant in the UK may be seriously questioned.

DIVERSITY OF THE DOMESTIC LEGAL SYSTEMS AND THE “EMERGENCY BRAKE”

10. The opening provision of Title IV of the Reform Treaty states that “the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States” (Article 61). The emphasis on respect for domestic legal systems and traditions reflects concerns in a number of Member States regarding the potential impact of the institutional changes brought about by the Reform Treaty in EU criminal law (most notably the loss of the national veto in decision-making in the Council) on the domestic criminal justice systems. These concerns are also reflected in the provisions granting the EU competence to legislate in the field of criminal law and procedure: these introduce a so-called “emergency brake” procedure (Articles 69A(3) and 69B(3)), whereby where a Member State considers that a draft directive in the field “would affect fundamental aspects of its criminal justice system”, it may request that the draft directive be referred to the European Council. Negotiations will be suspended while the proposal is discussed by the European Council. In case of consensus, within four months of this suspension the proposal is sent back to the Council of Ministers for the resumption of negotiations. In case of disagreement, within the same timeframe, authorisation for Member States who wish to proceed with the proposal under enhanced co-operation (if at least nine Member States wish to proceed) is deemed to be granted. In this manner, reluctant Member States which may be in the minority may ensure that they do not take part in the measure, while allowing those in favour of the measure to proceed with its adoption. The emergency brake—which is a primarily political mechanism—was introduced as a safeguard for a number of countries (including the UK) in the Constitutional Treaty. It remains to be seen whether and how often it will be used in practice. As far as the United Kingdom is concerned, the Government may prefer to use the possibility not to opt into such measures in the first place, under the Protocol negotiated in the framework of the Reform Treaty.

THE MANAGEMENT OF INVESTIGATIONS AND PROSECUTIONS

11. Another effect of the Reform Treaty may be to create the momentum for new EU legislation on Eurojust and Europol. The Treaty contains specific and detailed legal bases outlining the future development of these bodies (Articles 69D and 69G respectively). This appears to pre-suppose the need for a change in the mandate and role of these bodies. As far as Eurojust is concerned, the debate is centered on whether the body should be granted powers to oblige national judicial authorities to initiate investigations and prosecutions. At present Eurojust can only ask such authorities to do so, but its requests are not binding. A parallel debate concerns the extent to which Eurojust should co-ordinate national investigations and prosecutions, in cases where more than one Member State can claim jurisdiction (this is particularly the case for transnational offences). At present such co-ordination is happening on an informal basis, with Eurojust having established a series of indicative criteria for the allocation of jurisdiction in such cases. The debate on the role of Eurojust becomes increasingly relevant in the construction of an “area” of freedom, security and justice, where freedom of movement and the abolition of internal frontiers is matched by an attempt to ensure effective co-ordination between national authorities.

12. The Reform Treaty may result in significant changes in the nature and powers of Eurojust and the impact of its action on domestic criminal justice systems. According to Article 69D(1), the Parliament and the Council will determine (in accordance with the ordinary legislative procedure) Eurojust’s tasks. These may now include “the initiation of criminal investigations” (69D(1)(a)). This is a major change to the current Eurojust powers. It is not clear whether this will mean that Eurojust will be able to act itself, as a College, in national criminal justice systems and initiate prosecutions, whether its national member for the respective member state in their capacity as national public prosecutor would do this, or whether this would be translated to a binding request from Eurojust to the national criminal investigation authorities. The Treaty does not give to Eurojust an equivalent power to initiate prosecutions (this being limited to proposing the initiation of prosecutions). However, Article 69E of the Reform Treaty provides the legal basis for the future establishment of a European Public Prosecutor’s (EPP) Office “from Eurojust”. This provision may be seen a triumph of the Eurojust model of investigative and prosecutorial co-ordination over for instance OLAF. The EPP’s Office will be responsible for “investigating, prosecuting and bringing to judgment” perpetrators associated with fraud offences and will “exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences” (Article 69E(2)).

13. The challenges that the future role of Eurojust and the EPP if established to state sovereignty have been the focus of the debate regarding the future of judicial co-ordination in criminal matters, and have resulted in a number of exceptional provisions as far as the establishment of the EPP is concerned. Along with the issue of the precise role of Eurojust or the EPP in the national criminal justice systems, another element which may cause tensions extends to cases of positive conflicts of jurisdiction: where co-ordination from above might in practice lead to situations where a Member State may be *refused* the right to prosecute in cases where another Member State having jurisdiction is deemed by Eurojust better placed to prosecute.⁴⁸ In this context, a less highlighted issue has been the impact of such co-ordination on the rights of the defendant. A particular concern in this context is whether the granting to Eurojust of a potential monopoly to decide on where to prosecute will lead in practice to a kind of “forum shopping” resulting in choosing to prosecute in the jurisdiction where a conviction might be secured more easily.

TRANSITIONAL PROVISIONS AND STATE SOVEREIGNTY

14. A temporary safeguard for state sovereignty in the field of EU criminal law is introduced by Protocol No 10 of the Reform Treaty on transitional provisions. According to Article 10 of the Protocol, the limited jurisdiction of the Court of Justice under the provisions of the current third pillar⁴⁹ will remain the same for measures adopted before the entry into force of the Reform Treaty (Article 10(1)). This “transitional” provision will cease to have effect five years after the entry into force of the Reform Treaty (Article 10(3)). With regard to existing third pillar measures, this transitional period may cease even at an earlier stage if these measures are amended (for instance, if the Framework Decision on the European Arrest Warrant is amended via a Directive) (Article 10(2)).⁵⁰ However, there is a further concession with regard to the United Kingdom: at the latest six months before the expiry of the five year transitional period the UK may notify the Council that it does not accept the extension of the Court’s jurisdiction (and the Commission’s powers to institute infringement proceedings). If such notification is made however, *all* third pillar acts adopted before the entry into force of the Reform Treaty will cease to apply to the UK from the date of the expiry of the transitional period (Article 10(4)). The UK may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it (Article 10(5)). In this manner, the UK can choose the extent to which it wishes to apply the extended jurisdiction of the Court to third pillar measures which it has agreed under the current Treaty.⁵¹

15. This concession might be viewed by some as an important safeguard for UK sovereignty with regard to EU criminal law and another instance of vindication of the UK “pick-and-choose” approach towards EU home affairs matters. However, the potential consequences of the compromise reached in the transitional (and the “opt-out”) Protocol for the development of EU criminal law and the position of the UK should not be underestimated. The emphasis on the possibility of amending existing third pillar law (which accompanies the transitional provisions)⁵² may create a significant momentum towards the adoption of *more* EU criminal law, and prompting a series of amendments to important third pillar instruments, such as the European Arrest Warrant and the Eurojust Decision. As far as the UK is concerned, the legal and political consequences in the light of such developments may be considerable. Take the issue of UK participation in legislation *amending* the European Arrest Warrant (which would trigger the extension of ECJ jurisdiction): if the UK chooses not to take part in the amended measure (in order to avoid the Court’s jurisdiction, and/or certain provisions in the amended text), it is highly likely that the application of that measure will be rendered, according to the wording of the UK and Ireland “opt-out” Protocol “inoperable” for other EU Member States. In this case (which is particularly likely if for instance the amended EAW text *itself* contains provisions on the rights of the defendant), the UK will be obliged to notify the Council of its wish to participate in the measure- if there is no such notification, the *existing* measure (in this case the EAW Framework Decision currently in force) will no longer be binding and applicable to the UK. The extent to which the UK will wish to stay out of important developments in EU criminal law in the light of these provisions remains to be seen. In an increasingly

⁴⁸ Article 69D(1)(b) includes in Eurojust’s tasks the coordination of investigations and prosecutions. Moreover, Article 69D(1)(c) calls for the adoption of rules on preventing and settling conflicts of jurisdiction between Member States.

⁴⁹ No jurisdiction on infringement proceedings brought by the Commission against Member States for non- or inadequate implementation of EU law; and limits to national courts’ powers to send questions for preliminary rulings on the interpretation of Union law to Luxembourg (the UK has made use of this latter option and not made available the preliminary reference procedure for third pillar matters to its courts).

⁵⁰ According to Article 9 of the Protocol, the legal effects of the acts of the institutions, bodies and agencies of the Union adopted prior to the entry into force of the Reform Treaty will be preserved until those acts are repealed, annulled or amended in implementation of the Treaties.

⁵¹ The UK will have the right not to participate in legislation amending existing criminal law measures adopted after the entry into force of the Reform Treaty.

⁵² See also the Declaration concerning Article 10 of the Protocol on transitional provisions, where EU institutions are invited to adopt, in appropriate cases and as far as possible within the five year period set out in the Protocol, legal acts amending or replacing existing measures.

integrated “area of freedom, security and justice”, the UK “pick and choose” approach on EU home affairs may prove much harder to sustain.

5 February 2008

Memorandum by Professor Jo Shaw, Salvesen Chair of European Institutions, University of Edinburgh

INTRODUCTION AND OVERALL ASSESSMENT

1. This Evidence concentrates on just two aspects of the overall impact of the Treaty of Lisbon on the UK Constitution:

- The development of the concept of EU citizenship;
- The development of the scope and nature of the EU’s competences under the Treaty of Lisbon and the consequences of the definition of categories of competences.

2. In order to put the discussion in context, it is important to note that the appropriate starting point for an assessment of the *future* impact of the Treaty of Lisbon on the UK Constitution must be a sober assessment of the *current* impact of EU law and the EU Treaties on the UK Constitution. This impact is rather greater, and more systemic in character, than is generally acknowledged in official UK government documentation. This tends to emphasise the extent to which the UK “controls” the process and progress of EU integration, rather than focusing on how intergovernmental agreements such as the Treaties of Maastricht or Amsterdam sometimes result on legal developments which were not entirely predictable at the time when the agreements were made. The approach of the Court of Justice in cases such as *Pupino*,⁵³ which imposed a duty on national courts to interpret national law in the light of relevant Framework Decisions in the field of police and criminal justice cooperation, is a case in point. A similar point could be made about the judicial evolution of a limited competence to enact criminal law sanctions under EC Treaty competences, at least in the sphere of environmental policy.⁵⁴ On the other hand, as is frequently noted, when the UK acceded in 1973 to what were then the European Communities, the basic “constitutional” architecture of European Community law, comprising doctrines such as direct effect and supremacy, the concept of implied powers, and notions of fundamental rights protection within the sphere of EC law, was already in place. These doctrines and concepts were therefore part of the original *acquis communautaire* to which the UK undoubtedly consented when the government of the time signed the Treaty of Accession and introduced the European Communities Act 1972. These constitutional effects for the UK may have been amplified over the years as a result of further judicial interpretations; they have not changed in their essential character.

3. The Treaty of Lisbon contributes in substantial ways to spreading these so-called “communautaire” doctrines of the constitutionalised (EC) treaty across a wider range of policy areas, suggesting that only foreign and security policy can be expected to be (almost completely) insulated from the effects of doctrines such as the interpretative obligation, direct effect and state liability which grant to national courts a central role in the enforcement of EC law obligations. This Treaty must therefore be recognised as having an important impact upon the UK Constitution. Subject to the complexities engineered by the UK opt-out in relation to justice and home affairs matters, it is to be anticipated that at least after a transitional period of five years there will be an almost complete assimilation of the fields of police and criminal justice cooperation to what has historically been called the “Community method”, both in terms of law making and law enforcement. It is ironic that this historic re-unification of the legal order of the European Union under the heading of a barely modified Community method takes place just as the Heads of State and Government decided to abolish the term “Community”, by renaming the EC Treaty as “the Treaty on the Functioning of the European Union”. The precise extent to which the Treaty of Lisbon will accelerate a greater generalisation of the doctrines which underpinned the constitutionalised (EC) Treaty will depend largely upon the happenstance of references for preliminary rulings coming before the Court of Justice from national courts in relevant cases.

DEVELOPMENTS IN THE FIELD OF EU CITIZENSHIP

4. Relatively few changes have been introduced to the EU and EC Treaty provisions which affect the nature and scope of EU citizenship. For the most part, what changes there are stem from the structural changes to the Treaty framework which have been introduced. These concentrated on remodelling the Treaty on European Union (TEU), to ensure that it would essentially fulfil the same function and comprise the same core elements as Part One of the ill-fated Constitutional Treaty. Thus one might have anticipated a bare

⁵³ Case C-105/03 *Pupino* [2005] ECR I-5285.

⁵⁴ Case C-176/03 *Commission v. Council (Environmental Crimes)* [2005] ECR I-7879; Case C-440/05 *Commission v. Council (Ship Source Pollution)* 27 October 2007.

statement of the existence of EU citizenship in the TEU, with further amplification in what will be the Treaty on the Functioning of the European Union (TFEU) (ie the EC Treaty, reworked and renamed). In fact, in the July 2007 version of the Treaty⁵⁵ the text of the provision which will become Article 9 TEU⁵⁶ contained only a reference to democratic equality of citizens, and no reference to citizenship of the Union. In fact, there was no reference at all to “citizenship” in the TEU, although there were manifold references to “citizens”, without these being defined. In contrast, Part One of the Constitutional Treaty did contain such a reference (Article I–10 CT).

5. After amendment, Article 9 TEU will provide that “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.” It is understood that this text was included in the Treaty of Lisbon at the insistence of the European Parliament representatives in the IGC.⁵⁷ The parliamentarians adopted citizenship of the Union as a political priority because of its symbolic importance. The text in Article 9 TEU is then repeated verbatim in Article 20(1) TFEU, although the latter provision also encompasses the sonorous statement: “Citizenship of the Union is hereby established.” It is obviously clumsy to have textual repetition between the TEU and the TFEU, and for the most part in other fields this has been avoided.

6. The major difference between the EC Treaty provisions and the Lisbon Treaty provisions concerns the wording of the relationship between national citizenship and EU citizenship. This is now articulated as “additionality” rather than the earlier formulation of “complementarity”. The inclusion of this change was insisted upon by the Member States, in order to reinforce the point that EU citizenship can only *add* rights, and cannot *detract* from national citizenship. Conceptually speaking, this makes the point that the development of different layers of citizenship entitlements is not a zero sum game, in which rights given at one level must necessarily detract from those given at another level. Legally speaking, it seems unlikely to make a substantial difference to the trajectory of EU citizenship. Thus far, the cases in which the Court of Justice has placed weight upon the status of EU citizenship, from *Martnez Sala* onwards,⁵⁸ have in no way detracted from the status of national citizenship. Moreover, since EU citizens and the citizens of the Member States (*pace* some of the UK’s peculiarities in this area which have been in place since the UK accession) are exactly the same people, the constant references to “citizens” in both the TFEU and, especially, the TEU retain a nice ambiguity as to whether what is referred to here is specifically citizens in their *EU* guise or citizens in their *national* guise. Even so, as noted in para. 9, it is the political aspect of citizenship that the Treaty of Lisbon appears to affect to the greatest degree, and consequently the question is inevitably going to be raised whether this can impact, even indirectly, upon the national level.

7. Erroneously, the FCO document which purports to offer a systematic comparison between the pre- and post-Lisbon Treaties⁵⁹ states, in its annotation of Article 20 TFEU, that this provision “draws on Article 17 TEC, but . . . the reference to ‘duties’ is removed.” This is incorrect. Article 20(2) picks up the text of Article 17(2) TEC providing that “citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.” However, in terms of both legislative or normative implementation, little attention has been paid to the “duty” dimension of EU citizenship hitherto.

8. Article 24 TFEU contains an important legislative power, permitting the European Parliament and Council, acting by co-decision, to adopt the provisions necessary to implement the new “citizens’ initiatives” which allow citizen power, especially via the internet, to be channelled into seeking specific legislative initiatives to be put forward by the Commission. Citizens’ initiatives were originally included in the Constitutional Treaty (allegedly at the behest of Giscard d’Estaing himself), and they were retained in the new TEU provisions on “democratic principles” (Article 11(4) TEU). Under the TFEU, the European Parliament and the Council must together define what constitutes a “significant number of Member States”, for the purposes of determining the minimum standard of cross-EU representativity for any citizens’ initiative which is to be taken up in legislative format. These initiatives may develop into interesting cases of *transnational* popular democratic pressure, without as such detracting from the powers of national parliaments.

9. When reviewing the citizenship provisions of the TEU and the TFEU, the conclusion should be drawn that it is linking of citizenship to the provisions on democratic representation in Title II of the reworked TEU which is the most important innovation of the Treaty of Lisbon. However, emphasising once again that political representation, like identity, does not have to involve a zero sum game where rights at one level detract from

⁵⁵ See proposed amendments to Article 8 TEU in CIG 07/1, 23 July 2007 at point 12;

⁵⁶ Reference is made throughout this Evidence to the numbers of the TEU and the TFEU as they will be after the entry into force of the Treaty of Lisbon, and the consolidation and renumbering exercise has been completed. For the purposes of ascertaining these numbers, the consolidated version of the Treaties and the table of comparisons produced by the FCO in January 2008 (Cm 7810 and Cm 7812 respectively) have been used.

⁵⁷ See the interviews at <http://www.taurillon.org/IGC-on-the-Reform-Treaty-Interview-with-MEPs>.

⁵⁸ Case C–85/96 *Martnez Sala v. Freistaat Bayern* [1998] ECR–I 2691.

⁵⁹ Cm 7812, at p7.

rights at other levels, there seems no reason to fear that an enhanced political citizenship within the European Union will have a damaging effect upon *national* political citizenship.

10. It is important to link these Treaty developments to the judgments of the Court of Justice in the *Gibraltar* and *Aruba* cases.⁶⁰ It is implicit in the Court's important judgments in these politically sensitive cases about the scope of voting rights in European Parliament elections that the European citizens have a right, as a matter of democratic principle, to vote for "their" parliament. This emerges especially clearly from the *Aruba* case. While the provisions of Article 22 TFEU (ex Article 19 TEC) only provide explicitly for an *equal treatment* right, whereby nationals of the Member States resident in *other* Member States have the right to vote in European Parliament under the *same conditions* as nationals, hitherto there has been no text in the EU Treaties which states, in terms, that "the citizens of the Union shall elect the members of the European Parliament." What is important about the conclusion in the *Aruba* case that citizens of the Union cannot be deprived of their right to vote in European Parliament elections if the national legislation which excludes them from the franchise fails a basic rationality test,⁶¹ is that this amounts to a recognition that the right to vote in European Parliament elections is indeed a normal incident of EU citizenship, even if this is not explicitly stated in the Treaties. In fact, the Advocate General explicitly made this point in his joint Opinion on the two cases and he argued that the right to vote in European Parliament elections is *the most important* EU citizenship right.⁶² This explicit recognition is given a stronger basis in the Treaties by the text of Articles 10(2) and 10(3) TEU, which make the link to democratic principles of universal suffrage rather more effectively than does the current text of Articles 189 and 190 TEC. Thus Article 10(2) TEU provides that "Citizens are directly represented at Union level in the European Parliament" and Article 10(3) TEU states that "Every citizen shall have the right to participate in the democratic life of the Union."

11. It is important to reiterate that these provisions linking citizens and the European Parliament will only have a constitutional impact upon the Member States within the confines of the principle of "additionality" as laid down in Article 9 TEU and Article 20(1) TFEU. This is all the more evident when they are viewed in the light of the strengthening of the role of national parliaments in EU decision-making instituted by the Treaty of Lisbon.

THE SCOPE AND NATURE OF EU COMPETENCES UNDER THE EU TREATIES

12. Right back in 2000, in the Declaration on the Future of the Union appended to the Treaty of Nice, the Heads of State and Government committed themselves to pursuing what they called "a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity". This theme reappeared in the Laeken Declaration of December 2001 which set up on the Convention on the Future of the Union, and was pursued with enthusiasm by the members of the Convention when they started meeting in 2002. The result was a set of texts which have been substantially reproduced in the Treaty of Lisbon. These focus in part on sharpening up what is clumsily entitled the "principle of conferral" (Articles 4 and 5 TEU) and in part on identifying the facets of three "categories" of competences:

- exclusive Union competence;
- competence shared between the Union and the Member States;
- and Union actions to support, coordinate or supplement the actions of the Member States.

13. The principle of conferral, along with the enhanced provisions on subsidiarity and proportionality as well as the rules involving national parliaments in decision-making, is primarily intended to ringfence national competences against so-called "competence creep", namely the perception or reality that EU competences are inexorably eating away at national competences. It is not clear how the new principles which have been instituted will in fact provide any more effective protection of national competences than exists at present. The provisions are doubtless more concerned with sending signals containing certain symbolic messages about European integration to key national interests, not only those in the UK, but also in other Member States.

14. The decision to include a definition of competences in the Treaty, and to ascribe different fields of activity to those categories as defined, has been widely welcomed by many commentators. It is said to make EU law simpler to understand. However, there are a number of difficulties attendant upon the introduction of these categories of competence, not least because this has been done without in fact changing the existing conceptual basis upon which powers are attributed and defined, under the legal basis system of the existing Treaties. Thus

⁶⁰ Case C-145/04 *Spain v. United Kingdom* [2006] ECR I-7917; Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.

⁶¹ At issue was a national rule which excluded Arubans from voting in EP elections so long as they were resident in Aruba, but allowed them to vote under general Netherlands expatriate voting rules when they moved to a third country.

⁶² Opinion of AG Tizzano of 6 April 2006, para. 67: "it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union."

the categories will co-exist with the principle of legal basis, whereby an action cannot be undertaken under the Treaties if it does not have an adequate legal basis. This legal basis determines the legislative procedure to be followed and also the types of instruments to be adopted. It also co-exists with the limited attempts which the Court of Justice has made, notably in the sphere of external economic action, to define a distinction between shared and exclusive competences. This does not ultimately appear to offer the promised simplification for the benefit of citizens.

15. One by-product of the creating of these categories, is that the drafters of new treaties (in this case the drafters of the Constitutional Treaty, as these texts have been lifted verbatim from the earlier instrument) searched high and low across the existing Treaties to find examples to place in each box. It was the exclusive competence box which proved particularly hard to fill, and as a result two cases of exclusive competence under Article 3 TFEU have proved particularly controversial:

- The first case concerns “the establishing of the competition rules necessary for the functioning of the internal market”. Here it is hard to support the allocation of this competence to the exclusive competences box on the basis of evidence derived from the case law of the Court of Justice on competition law. It is hard to see how the co-existence of national and EU level competition laws can be neatly sub-divided in such a way as to state with possibility of refutation that *all* instances where the latter apply are focused on the creation of the internal market and *all* those where the former apply are not. On the contrary, in practice national competition rules substantially support the maintenance of the internal market, by creating norms which mirror in important ways the EU competition rules themselves.
- The second case concerns “the conservation of marine biological resources under the common fisheries policy.” Here there is stronger support from the case law for making such a determination to start with. Yet there remains an important question whether these are matters which should be dealt with “constitutionally” through a rule in the treaties, or matters which should be dealt with in the realm of ordinary politics, where judicial rules are able to evolve in order to reflect changed legislative and regulatory circumstances. It is interesting to reflect whether, in the event that this “categories of competence”-approach had been created twenty years ago rather than in 2007, agricultural policies might have been placed in the box marked “exclusive”, rather than the box marked “shared”. This could have been said to accurately reflect the then style and pattern of regulation. Yet such a conclusion could have impeded the ongoing reform of the Common Agricultural Policy to a very great extent. The point to be made here is that it is not clear that what the Union really needs such a constitutional settlement determining different categories of competence. On the contrary, it may be that it simply needs more urgently a strengthening of the political mechanisms which can ensure that “optimal” policy outcomes more often actually occur.

February 2008

Memorandum by Dr Eleanor Spaventa, Durham University

PRELIMINARY REMARKS

For ease of reference, I will use the new numbering as per the Consolidated Version of the Treaties published by the FCO available on: http://www.fco.gov.uk/Files/kfile/FCO_PDF_CM7310_ConsolidatedTreaties.pdf

In line with the new Treaty I will refer only to the European Union and will not distinguish between Union and Community unless necessary. The Treaty on the European Union is referred to as TEU; the Treaty on the Function of the European Union as TFEU. For reasons of space I have limited my analysis to the following issues: Fundamental Rights in the European Union, including the effect of the Charter of Fundamental Rights and Accession to the European Convention on Human Rights; Citizenship; and Police and Judicial co-operation in Criminal Matters.

PEOPLE’S RIGHTS AND RESPONSIBILITIES

How fundamental rights as general principles of Union law are enforced in the European Union

1. Fundamental rights have long been recognised to be part of the general principles of Union law and respect for fundamental rights is a precondition for the legality of acts enacted by the European Union. In order to identify which fundamental rights are recognised by Union law, the European Court of Justice (hereinafter “the Court” or “ECJ”) has drawn inspiration from the common constitutional provisions of the Member States as well as from international Treaties, and in particular the European Convention on Human Rights

(ECHR).⁶³ Union Fundamental Rights can be invoked by individuals in front of the European Court of Justice or national courts in the following cases:

- (a) To challenge the legality of acts adopted by the Union;
- (b) To challenge the legality of national law that implements harmonising Union law;
- (c) To challenge the legality of a national rule when the situation falls “within the scope” of Community law, ie when the Member State is imposing a limitation on one of the rights conferred upon individuals by the Treaty (in particular in relation to free movement rights).

(a) and (b) are dealt with in relation to the Charter of Fundamental Rights below.

Fundamental rights and situations which fall within the scope of Community law

2. The Court has ruled that when a Member State limits one of the rights conferred upon individuals by the Treaty, then the rule which limits such a right must comply with fundamental rights as general principles of Union law.⁶⁴ In instances where the standard of fundamental rights protection in the EU differs from that of the Member State, the higher standard is always applicable and the Court usually leaves it to the national court to determine the correct balance between competing rights.⁶⁵ This doctrine does not confer upon individuals a free standing right; thus fundamental rights can be relied upon only insofar as the claimant has a right in Community law and therefore falls within its scope. This case law is unaffected by the Reform Treaty.

The impact of the Charter of Fundamental Rights on national law

3. The Charter is not included in the Treaties; Article 6 of the new TEU provides that the Charter of Fundamental Rights⁶⁶ has the same legal value as the Treaties, whilst reaffirming the fact that the Charter does not extend the competences of the Union.

4. The Charter applies only to the Union Institutions and the Member States when they implement EU law. The Charter does not apply to the Member States when they are acting within the scope of Community law (see above para 2). The Charter is therefore primarily directed at the European institutions to ensure that when they legislate or take any other action they are bound by fundamental rights. Whilst, as said above, the European Court of Justice has long held that the European Union institutions are bound by the general principles of Community law (including fundamental rights),⁶⁷ the Charter provides a more transparent and clearer catalogue of rights.

5. Furthermore, it should be stressed that according to the Charter’s own Preamble, the Charter is not “innovative”. In other words, the Charter does not create “new rights”, it merely codifies existing rights. For this reason, and even though the Charter is not yet officially “in force”, the institutions consider themselves bound by it,⁶⁸ and it is now common to find references to the Charter in the Preamble of EU legislation. As far as Member States are concerned, and as stated above, the Charter applies to them only when they are implementing EU law. For instance, when Member States implement a Directive, and such a Directive leaves some discretion to Member States, that discretion must be exercised consistently with the Charter. It should be stressed that this reflects long standing case law.⁶⁹ Here a slight confusion might arise in relation to the Charter’s explanations. The explanation to Article 51 of the Charter refers to the Charter applying when the Member States act within the scope of Union law; this would suggest a broader application of the Charter than provided for in the Charter itself. However, even though according to Article 6 TEU the Charter is to be interpreted with due regard to the explanations, those explanations are merely a guide to the interpretation of the Charter. Therefore the explanations should not be used to go against the express wording of the Charter. For this reason, the Charter should apply to Member States only when they implement Union law.

⁶³ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁶⁴ See eg Case C-260/89 *ERT* [1991] ECR I-2995; Case C-368/95 *Familiapress* [1996] ECR I-3689.

⁶⁵ See eg Case C-260/89 *ERT* [1991] ECR I-2995; Case C-368/95 *Familiapress* [1996] ECR I-3689; but see Case C-60/00 *M Carpenter* [2002] ECR I-6279.

⁶⁶ The Treaty refers to the 2007 version of the Charter (2007 OJ C 303/1) which however does not substantially differ from the previous Constitutional Treaty version. It should be noted that the Constitutional Treaty version partially differs from the original Nice 2000 version in that the former provides for the express differentiation between rights and principles. According to Article 52(5) principles may be implemented through legislative action and are judicially cognisable only in relation to the interpretation of such acts and in the ruling of their legality.

⁶⁷ Consistent case law; see eg Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁶⁸ See eg Communication from the Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals*, COM(2005) 172 final.

⁶⁹ E.g. Case 5/88 *Wachauf* [1989] ECR 2609.

6. Therefore, the Charter does not change the current situation in relation to fundamental rights protection in the European Union but for the fact that it makes citizens' rights clearer. This is especially important in relation to acts adopted at Union level, where there is no possibility of drawing a comparison with established national fundamental rights.

Relationship between the Charter and other Human Rights instruments

7. The relationship between the Charter and other fundamental rights instruments is dealt with in Articles 52 and 53 Charter.

8. Article 52 provides that when Charter rights correspond to rights recognised by the European Convention of Human Rights, the "meaning and scope" of those rights shall be the same as that provided for in the Convention, although it is open to the Union to provide more extensive protection. Article 53, on the other hand, makes clear that the protection afforded by the Charter cannot fall below the protection guaranteed by the European Convention. Thus, the Convention will continue to serve as a "minimum floor" of rights for the European Union (this was arguably the case before the Charter due to the case law of the European Court of Justice).

9. In relation to domestic fundamental rights instruments, Article 52 provides that when the Charter recognises rights recognised in the Member States' constitutional traditions, the Charter rights shall be interpreted in "harmony" with those rights; and Article 53 provides that the Charter shall not adversely affect fundamental rights as guaranteed by the Member States' constitutions. The relationship between Charter and national instruments is not altogether clear. However, it should be stressed that this is unlikely to be of great significance for two reasons.

10. Firstly, the field of application of domestic fundamental rights is different from the field of application of the Charter which, as mentioned in para 4 above, is primarily aimed at the European Institutions. The only possible conflict would arise in relation to Union acts when the Court's interpretation of a right granted by the Charter differs from the interpretation of the same right given by national courts.⁷⁰ However, it is accepted that the Union is governed by its own general principles (including fundamental rights) so that in case of such a conflict the European Court of Justice would be the final arbiter as to the fundamental rights standard that must be complied with by the Union Institutions. In any case, it should be remembered that the protection guaranteed by the Charter cannot fall below that guaranteed by the ECHR.

11. Secondly, in those cases in which discretion is conferred upon Member States in the implementation of Community law the applicable standard of fundamental rights protection would be either that provided by the Charter or that provided by national law whichever is the higher.

Protocol 7 on the application of the Charter to the United Kingdom

12. The Protocol has the same status as the Treaties and the Charter. Article 1(1) of the Protocol clarifies that the Charter does not extend the ability of the Court of Justice to review national legislation. However, it should be noted that this is the case regardless of the Protocol since nothing in the Charter extends the jurisdiction of the Court of Justice beyond what is provided for under the current Treaties as interpreted by the Court. Furthermore, it should be borne in mind that the Charter does not apply to national law, unless the Member State is implementing Union law (see above para 4).

13. On the other hand, when the Member State is acting "within the scope of Union law", ie when for instance the Member State is limiting one of the Treaty free movement rights, the Charter does not apply and if a conflict with fundamental rights should arise this would be dealt with in relation to the general principles of Community law and the fundamental rights recognised therein. This interpretation should be considered the preferred one regardless of the confusion arising out of the different wording used in the Charter's explanations (highlighted above in para 5).

14. Article 1(2) clarifies that "nothing in Title IV of the Charter [which deals with Solidarity—ie social rights] creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law". This article again represents a clarification of the status quo: in particular, and aside from the considerations mentioned above as to the scope of application of the Charter, most of the provisions of Title IV expressly refer to national law and practices. Thus, for instance, even though the Charter recognises the right to strike, the modalities for the exercise of such a right are those provided for in national law.⁷¹ Furthermore, several of the provisions contained in Title IV are "principles"

⁷⁰ See eg the *banana litigation* where the ECJ's view of the proportionality of Community law differed from the view of the German Courts, Case C-280/93 *Germany v Council* [1994] ECR I-4973.

⁷¹ See also the Explanations relating to the Charter of Fundamental Rights, 2007 OJ C 303/17, at page 26.

and as such do not in any event constitute justiciable rights, but are intended to guide the interpretation of Union law, and to provide possible grounds for review of such legislation.

15. Article 2 of the Protocol states that “to the extent to which a provision of the Charter refers to national law and practices” it applies to the UK “to the extent that the rights or principles are recognised in the law or practices” of the UK. Thus, Article 2 intends to guarantee that if a Member State does not recognise a right, and the Charter expressly refers to national law and practices, the Member State should not be under a Union law obligation to recognise such a right. Broadly speaking this is very likely to be the case in relation to “principles”, ie those provisions of the Charter that are not to be considered as free standing rights. For instance, the right to social and housing assistance contained in Article 34 is not a free standing right, *and* it is regulated according to Union law rules (when there is competence) and national law and practices. In this respect, the Protocol makes even clearer what is already recognised in the explanations and seeks to preserve the UK system of fundamental rights from the “infiltration” of Charter rights in those areas which are recognised as falling within the Member State competence (eg family law, but also rules regulating the modalities for the exercise of a right such as the right to strike).

Significance for the UK of accession to ECHR

16. There should not be any particular effect on national law deriving from the Union’s accession to the ECHR. Rather accession would remedy a peculiar situation. Thus, whilst ratification of the Convention is a precondition for accession to the European Union; and whilst Article 7 TEU provides for a sanction mechanism for Member States which fail to fulfil their fundamental rights obligations, the European Union itself is not part of the Council of Europe, and has not ratified the ECHR. As a result, and even though the ECJ ensures that fundamental rights are guaranteed, in relation to Union acts the European Court of Human Rights has very limited jurisdiction.⁷² The arrangements for the jurisdiction of the European Court of Human Rights, as well as the other institutional arrangements, are a matter for negotiation with the other members of the Council of Europe.

17. However, the Protocol on accession to the Convention makes clear that the agreement on accession must ensure that the Union’s Accession does not affect the situation of the Member States in relation to the Convention, including the possibility of derogating from it and the reservations made by the Member States. Furthermore, according to Article 218(8) TFEU, the agreement on accession has to be adopted by unanimity and the agreement enters into force only after it has been approved by the Member States according to their constitutional requirements.

CITIZENSHIP

18. The new Treaty does not substantially affect the existing citizenship provisions. Thus it restates that Union citizenship does not replace national citizenship, but it is additional to it.⁷³ The “additional” nature of Union citizenship is confirmed by the fact that Union citizenship can only be acquired through nationality of one of the Member States, and cannot be autonomously gained. Thus, for instance, the Court has held that it is solely for the Member States to determine the conditions for acquiring citizenship; in the case of the United Kingdom the Court has held that Union citizenship does not affect the immigration status of Citizens of the United Kingdom and colonies who do not have the right of abode in the United Kingdom.⁷⁴ Similarly, the Court has held that the United Kingdom’s decision to extend electoral rights for the election to the European Parliament to Commonwealth citizens residing in Gibraltar was compatible with Community law.⁷⁵ Thus, there is no reason why Union citizenship should have any effect on British Citizenship or on notions of Britishness.

⁷² Although the European Court of Human Rights has accepted that in certain circumstances it has jurisdiction to hold the Member States collectively responsible for a breach of the Convention perpetrated by the Union Case *Matthews v UK* European Court of Human Rights appl. No. 24833/94, decided 18/2/99; and *Bosphorous v Ireland* (application no. 45036/98).

⁷³ The Lisbon Treaty amends current Article 17 EC in that the latter provided that Union citizenship “complemented” national citizenship. However, the change in the wording merely reflects the evolution of Union citizenship and the fact that Union citizens derive from the Treaty directly enforceable rights, Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

⁷⁴ Case C-192/99 *Kaur* [2001] ECR I-1237.

⁷⁵ Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917.

POWERS AND NATIONAL SOVEREIGNTY

Protection of the UK common law processes and police and judicial process.

19. This is one of the areas in which the Reform Treaty will bring about very significant changes. Legislation in this field will, by and large, be adopted through the ordinary legislative procedure (co-decision and qualified majority voting) and will be subject to the full jurisdiction of the European Court of Justice.

Pre-existing Acts

20. In relation to existing acts (ie those acts which have been adopted under the current Title VI TEU also commonly referred to as Third Pillar) there is a five year stand-still provision. Thus, the Court does not have jurisdiction in relation to Acts that have been adopted before the entry into force of the Treaty of Lisbon until either (i) the relevant piece of legislation is amended; or (ii) five years have elapsed. Six months before the expiry of the transitional period the United Kingdom can notify the Council that it does not wish to accept those acts, in which case they will no longer be applicable to the UK. Thus, in 5 years time the UK will need to decide whether to opt out of the existing legislation. If it opts out it must opt out from the entire body of legislation but it can then opt back in on a case by case basis (see below para 21).

Acts adopted after the enter into force of the Lisbon Treaty

21. In relation to acts which will be adopted after the Treaty has come into force, the United Kingdom is in principle excluded from this area unless it decides to “opt in” on an ad hoc basis. The decision to “opt in” can be made both at the stage of proposed legislation; and at a later stage when the act has already been adopted. Once the UK has exercised its right to opt in, it is bound by the relevant legislation as well as by the institutional provisions, ie qualified majority voting if the UK has exercised its right to opt in at proposal stage; and the jurisdiction of the European Court of Justice applies also to the UK for those acts (but only for those acts) that the UK has opted into.

Emergency Brake

22. It should be noted that the Treaty also provides for an emergency brake mechanism so that a Member State might ask the matter to be referred to the European Council. In such a case, the European Council must decide by consensus whether to refer the proposal back to the Council. The emergency brake mechanism ensures that even though, normally, qualified majority voting applies, the proposal might be dropped should a Member State strongly object to it. Therefore, if the United Kingdom exercised the right to opt in at proposal stage and found that the end result of the drafting process is unacceptable to it, it could trigger the emergency brake mechanism. The other Member States could then (de facto) adopt the proposal without the participation of the United Kingdom.

Effect in national law

23. Legislation in this field does not entail harmonization but rather approximation mainly in the forms of co-ordination and mutual recognition. Furthermore, legislation adopted in this area has very limited effects unless the Member State has transposed such legislation into its domestic system. Thus, long standing case law of the Court has established that Community law cannot be relied upon to impose or aggravate criminal liability. This means that if a Member State has failed to implement (or has not implemented correctly) a directive, such a directive cannot be relied upon to affect in a negative way the position of a defendant.⁷⁶ However, should the directive confer directly effective rights which do not entail the aggravation of criminal liability of other individuals, it will almost certainly be possible for individuals to rely on it in national courts (against the State). Furthermore, the national court is under a duty to interpret, insofar as possible, national law in accordance with Union law. This duty of consistent interpretation cannot be relied upon in order to aggravate criminal liability.⁷⁷

15 February 2008

⁷⁶ E.g. Case C-387/02 *Berlusconi and others* [2005] ECR I-3565.

⁷⁷ Case C-105/03 *Pupino* [2005] ECR I-5285.

Memorandum by Professor Takis Tridimas

This submission contains a brief overall assessment of the impact of the Lisbon Treaty and more specific comments on the following areas: the changes made in the Area of Freedom, Security and Justice; the question whether the Treaty of Lisbon is likely to provide a lasting settlement; the EU Charter of Fundamental Rights; the UK Protocol on the Charter; the role of national Parliaments; the principle of subsidiarity; and the jurisdiction of the Court of Justice in matters of Common Foreign and Security Policy and in the Area of Freedom, Security and Justice.

OVERALL ASSESSMENT

The Treaty of Lisbon is substantially similar to the aborted Treaty establishing a Constitution for Europe and makes a number of significant changes to the Treaty on European Union (TEU) and the Treaty establishing the European Community (EC Treaty). It abolishes the European Community which is succeeded and replaced by the European Union as the single vehicle of European integration.

The Union is founded on the TEU, as amended, and the Treaty on the Functioning of the European Union (TFEU) which organises the functioning of the Union and contains more detailed provisions for the delimitation and exercise of its competences, effectively replacing the current EC Treaty. The TEU and the TFEU have the same legal value.⁷⁸

The Treaty of Lisbon abolishes the three pillar structure of the EU but retains the distinct nature of the Common Foreign and Security Policy (CFSP). The existing third pillar becomes part of the Area of Freedom, Security and Justice, which also retains some distinct features in relation to other Union policies.

Overall, the changes made by the Treaty of Lisbon should be seen in a positive light and receive a cautious welcome. Whilst, inevitably, its provisions give rise to problems of interpretation and leave grey areas, they modernise the Union institutions, provide for more efficient and democratic decision-making structures, have the potential to enhance democracy and accountability, and increase legal certainty, whilst providing for reasonable safeguards for national sovereignty.

The Treaty extends the jurisdiction of the ECJ to third pillar matters, which enhances judicial protection and, on this basis, is to be welcomed. It codifies the general principles pertaining to the division of competences between the EC and the Member States, which have been developed in the case law. This increases transparency by making the rules more visible and, to some extent, increases legal certainty but does not avoid intricate problems of interpretation nor does it necessarily provide bright lines between the powers of the Union and those of the Member States.

The most important changes made by the Treaty of Lisbon pertain to the institutional architecture. They provide for a smaller, streamlined Commission, formalise the role of the European Council, establish the office of the President of the European Council, and also provide for the office of the High Representative of the Union for Foreign Affairs and Security Policy.

TRANSFER OF SOVEREIGNTY AND UK ARRANGEMENTS IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

The Treaty of Lisbon effects some further transfer of sovereignty from the Member States to the European Union. It does so mainly through the introduction of qualified majority voting in areas in which under the existing treaties decisions are taken by unanimity. Qualified majority voting is introduced, in particular, in the field of freedom, security and justice which is expanded to include cooperation in criminal justice and police cooperation.

The effect of these changes on the United Kingdom is heavily conditioned by two legal mechanisms in the form of an opt-out and an opt-in.

Under a Protocol attached to the Treaty,⁷⁹ the provisions of Title V of Part Three of the TFEU and measures adopted under them are not binding upon or applicable in the United Kingdom unless the Government agrees to be bound under the procedure provided therein (opt-in mechanism).

Furthermore, under the Protocol on transitional provisions, in relation to Union acts in the field of police cooperation and judicial cooperation on criminal matters which were adopted before the entry into force of the Lisbon Treaty, the Commission will not enjoy the power to bring enforcement proceedings and the powers of the ECJ will be governed by the existing Treaties. This transitional arrangement will cease to have effect five years after the entry into force of the Lisbon Treaty. Within five years from the entry into force of the

⁷⁸ See TEU, Article 1, para 3, and TFEU, Article 1(2).

⁷⁹ See Protocol on the position of the United Kingdom and Ireland in respect of their Area of Freedom, Security and Justice.

Treaty of Lisbon, the United Kingdom may notify the Council that it does not accept the powers of the Commission and the ECJ in relation to the above acts in which case such acts will cease to apply to it from the date of the expiry of the transitional period (transitional opt-out mechanism).⁸⁰

The extent to which an incumbent government will avail itself of these possibilities is obviously a matter of political discretion. The Government has already declared that it intends to opt-in in relation to measures for the prevention of terrorism under Article 75 TFEU.⁸¹

IS THE TREATY OF LISBON LIKELY TO PROVIDE A LONG-LASTING SETTLEMENT?

In the last 30 years, the Community Treaties have been amended no fewer than nine times. There have been five waves of accessions and four substantive changes.⁸² In addition, there have been three major constitutional developments in the form of the EU Charter for the protection of Fundamental Rights, the unsuccessful Constitutional Treaty, and the Lisbon Treaty. There is no precedent of a nation state having amended its constitution with such frequency within such a short period of time. This shows the quest for optimum structures of government at the European level and may not augur well for the longevity of the Lisbon Treaty in its current form. However, whilst it is impossible to second guess political and legal developments in the medium to long term, it is not unreasonable to suggest that the Treaty of Lisbon has a higher life expectancy. This is for the following reasons.

First, it introduces reforms which are further reaching than those of the Treaty of Amsterdam and the Treaty of Nice and, most notably, it overhauls the institutional structure and the decision-making procedure of the Community making the most important institutional reforms since the establishment of the EEC in 1958. The intention is therefore to provide a long term settlement. This is countenanced by the fact that some amendments do not in fact come into force until 2014 or 2017.⁸³

Secondly, as the troubled history of the Constitutional Treaty suggests, agreement for further changes in sensitive areas such as the composition of the political institutions and voting arrangements will not be easy to reach.

Thirdly, the Lisbon Treaty introduces flexible procedures, including a new simplified procedure for the amendment of the Treaties,⁸⁴ through which adjustments can be made within the overarching constitutional framework of the TEU and the TFEU without the need to convene an intergovernmental conference.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Article 6(1) TEU, as amended by the Lisbon Treaty, makes the Charter legally binding and grants to it the same legal value as the Treaties. It is submitted however that, contrary to widespread perceptions, the Charter is unlikely to be a major threat to national sovereignty or a vehicle for the introduction of social legislation. This is for the following reasons:

First, it is expressly stated in the Treaty itself and the Charter that the Charter does not extend in any way the competences of the Union as defined by the Treaties.⁸⁵ The Charter therefore may not by itself confer competence to the EU nor may provide the legal basis for the adoption of Community legislation.

Secondly, insofar as provisions of the Charter seek to recognise rights which do not exist under the European Convention for the Protection of Human Rights or under existing Community law, it is highly uncertain whether they create enforceable rights. This applies in particular in relation to Charter IV of the Charter which, under the title solidarity, provides for social and economic rights.

Finally, in any event, the UK Protocol has a limiting effect on the capacity of the Charter to provide enforceable rights.

⁸⁰ See Protocol on Transitional Provisions, Article 10.

⁸¹ See Declaration No 65 added to the Final Act accompanying the Treaty of Lisbon.

⁸² These are the Single European Act, the Treaty on European Union, the Treaty of Amsterdam and Treaty of Nice.

⁸³ See the provisions pertaining to the calculation of qualified majority voting in the Protocol on Transitional Provisions.

⁸⁴ See Article 48 discussed below.

⁸⁵ See Article 6(1), subparagraph 2, TEU; Charter, Article [II-111(2)]; the same point is made once more in the Declaration concerning the Charter of Fundamental Rights of the European Union (Declaration No 1) annexed to the Final Act accompanying the Treaty of Lisbon.

The following point may further be made in relation to the Charter.

Article [II–111(1)] provides as follows:

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”.

Article II–111(1) gives rise to problems of interpretation as regards the scope of application of the Charter on national measures. On the face of it, it suggests that the Charter applies on Member States only when they implement Union law. This makes its scope of application narrower than the application of fundamental rights as developed by the ECJ since, under the case law, Member States are bound to respect fundamental rights not only when they implement Community law but also when they act within its scope of application, a condition which the Court has progressively interpreted more broadly.

Insofar as the Charter and the case law protect the same rights, the limitation of Article [II–111(1)] is ineffective since, by virtue of the case law, these rights apply to a wider category of national measures. This is countenanced by Article [II–113] which states that the protection afforded by the Charter may not fall below the protection guaranteed by other provisions of Community law. Insofar as the Charter incorporates rights not expressly acknowledged in the case law, by virtue of Article [II–111(1)], such rights will have a narrower scope of application. This will give rise to inconsistency and confusion. In any event, given that the Charter and the case law draw inspiration from the same sources, it is possible that the ECJ might endorse a new right provided for in the Charter as a general principle of law, assuming that there is a sufficient degree of support in the constitutions or other laws of the Member States, in which case it will apply to all national measures falling within the scope of Community law.

THE UK PROTOCOL ON THE CHARTER

On the assumption that the Lisbon Treaty comes into force, Article 6 TEU in its new version will be included in the definition of “Treaties” in section 1(2) of the European Communities Act 1972 and, thus, the provisions of the Charter will become enforceable under UK law as a measure “arising by or under” one of the Treaties.

In accordance with the terms of section 2(1) itself, the extent to which the provisions of the Charter will be directly enforceable will then be a matter of interpretation of the relevant Community instruments, ie Article 6 TEU, the Charter itself and the UK Protocol on it. The ultimate arbiter of such questions, in accordance with section 3 of the 1972 Act, will be the ECJ.

Article 1 of the Protocol states as follows:

“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.

“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.”

Article 1(1) is intended to ensure that the Charter does not directly or indirectly expand the jurisdiction of the ECJ or of the UK courts in so far as they are applying its terms. The expression “The Charter does not extend the ability” suggests that the Protocol does not seek to reduce or curtail the ability of the ECJ or UK courts to assert a fundamental rights jurisdiction by reference to the provisions of the Charter. This is fully in conformity with Article 6 TEU, which remains binding on the UK, and the preamble to the UK Protocol. It thus remains open to the ECJ and UK courts to develop the fundamental rights jurisprudence of Community law, taking into account the terms of the Charter. A UK court may have recourse to the Charter in order to inform the interpretation of a provision of Community law or a general principle of Community law.

The Charter however may not expand the scope of fundamental rights jurisdiction of the ECJ or UK courts beyond the scope of application of Community law.

Article 1(1) of the Protocol may also be taken to mean that the provisions of the Charter may not produce direct effect in relation to the United Kingdom. Given, however, the general jurisdiction of the ECJ in relation to fundamental rights under Community law and its jurisdiction to apply general principles of Community law, which are fully binding on the UK, it is not easy to see what is the practical significance of this limitation.

Article 1(2) is more limited in scope, simply stating that Title IV of the Charter does not create rights justiciable in the United Kingdom “except in so far as the United Kingdom has provided for such rights in its national law”.

Title IV, Articles [II–87] to [II–98], concerns a number of economic and social rights, the inclusion of which has proved particularly controversial in the United Kingdom. The effect of this provision is clearly intended to be to preserve the autonomy of the United Kingdom in this field.

Article 1(2) is more peremptory than Article 1(1) and excludes the possibility of independent reliance on Title IV in respect of the United Kingdom in any legal proceedings. Whereas Article 1(1) does not suggest that the Charter is non-justiciable in relation to the United Kingdom but merely curtails the powers of the ECJ and the UK courts and tribunals, Article 1(2) renders Title IV rights non-justiciable without UK implementation. Notwithstanding this legal distinction, it is not easy to envisage circumstances in which Article 1(2) would be likely to make a practical difference. Article 1(2) does not appear to exclude reliance on the Charter as an aid to interpretation.

The derogation of Article 1(2) is subject to the qualification “except in so far as the United Kingdom has provided for such rights in its national law”. “National law” in this context includes Community law: this follows from the European Communities Act 1972. Thus, to the extent that the provisions of Title IV are incorporated into Community law either by secondary legislation or as a guide to interpretation of the Treaties themselves, the United Kingdom will be bound by those provisions as an integral part of Community law.

ROLE OF NATIONAL PARLIAMENTS

A novel feature of the Lisbon Treaty is that it strengthens the role of national Parliaments in the governance of the EU and, especially, in monitoring compliance with the principle of subsidiarity.⁸⁶ Article 12 TEU (Article 8C of the Lisbon Treaty) provides for a number of ways by which national parliaments contribute actively to the functioning of the European Union. It is supplemented by two protocols attached to TEU and the EC Treaty by the Final Act, namely, a Protocol on the role of national Parliaments in the European Union and a Protocol on the application of the principles of subsidiarity and proportionality.

The provisions of the Lisbon Treaty on national Parliaments derive from the aborted Constitutional Treaty and implement one of the key objectives of the Constitutional Convention which was to increase democracy by enhancing “the contribution of national Parliaments to the legitimacy of the European design”.⁸⁷ Essentially, the Lisbon Treaty provides that national parliaments are to be consulted in relation to proposed Community legislation, may monitor compliance with the principles of subsidiarity and proportionality, may block certain decisions, and participate in monitoring certain Union bodies in the exercise of their functions.

The following points may be highlighted.

National parliaments are involved, *inter alia*, in exercising political monitoring of Europol activities, evaluating the activities of Eurojust and evaluating the mechanisms for the implementation of Union’s policies in the area of freedom, security and justice.⁸⁸

The Treaty of Lisbon introduces, in addition to the ordinary procedure for the revision of the Treaties, simplified revision procedures in relation to certain aspects of the founding Treaties.⁸⁹ Under Article 48(7), where the TFEU or Title V of the TEU, which contains provisions on external Union action and CFSP, provides for the Council to act by unanimity, the European Council may authorise it to act by qualified majority. This covers all areas of Community internal policies and external action, save for decisions with military implications or those in the area of defence.

Also, where the TFEU provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

It is clear that these provisions are far reaching since they enable decisions which are taken by unanimity, and in which therefore national Governments retain the power of veto, to be taken in the future by majority without the need to go through the full procedure for the revision of the Treaties.

The safeguards which are provided for this transfer of sovereignty are the following: the European Council must act by unanimity, after obtaining the consent of the European Parliament. In addition, any initiative taken by the European Council to employ the simplified revision procedure of Article 48(7) must be notified

⁸⁶ See Article 5(3), sub-paragraph 2. This derives from Article I–11(3) of the aborted Constitutional Treaty.

⁸⁷ See the Preface to the Constitution.

⁸⁸ Article 12(c) TEU.

⁸⁹ See Article 48(6) and 48(7) TEU.

to the national Parliaments. If a national Parliament makes known its opposition within six months the European Council may not adopt a decision.

The power of a national Parliament to block a simplified revision of the Treaties is an important one. Member States enjoy discretion as to how national Parliaments may exercise that power. In particular, it will be up to each Member States to decide whether a decision to oppose a Treaty revision should be taken by a simple or any other kind of majority.

SUBSIDIARITY

The Protocol on the application of the principles of subsidiarity and proportionality gives to national Parliaments both political and judicial means to challenge Commission legislative proposals.

Political control is exercised collectively by all national Parliaments acting through a novel voting system. Any national Parliament, or any Parliamentary chamber in the case of countries which have a bicameral system, may object to a Commission legislative proposal by submitting a reasoned opinion stating why it considers that the proposal does not comply with subsidiarity.⁹⁰ National Parliaments of Member States with unicameral parliamentary systems are allocated two votes whilst each of the chambers of a bicameral parliamentary system has one vote.⁹¹ Where reasoned opinions against a Commission proposal represent at least one third of all the votes allocated to the Member States' national Parliaments and their chambers, the Commission is required to review its proposal.⁹² After such review, the Commission may decide to maintain, amend or withdraw its proposal, giving reasons for its decision.⁹³

The Protocol does not specify the way by which the national Parliaments may take the decision to object to a Commission proposal. The majority required is for the national laws to determine as is the involvement of regional assemblies. On the latter issue, the Protocol merely states that it is for each national Parliament or each chamber to consult, where appropriate, regional Parliaments with legislative powers.⁹⁴

Judicial control is provided in paragraph 7 of the Protocol. This provision grants the Court jurisdiction to hear actions for judicial review on grounds of infringement of the principle of subsidiarity brought "by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber if it." Such actions can be brought against legislative acts of the Union in accordance with the rules of Article 263 (currently Article 230). A similar right of action is also granted to the Committee of the Regions as regards legislative acts for the adoption of which it must be consulted.

Although the language of paragraph 7 does not make it clear, the intention of the provision is to require Member States to make available the right of action to national Parliaments and not simply to allow them to do so. The Constitutional Convention Preasidium notes attached to the original Protocol suggest that the national Parliaments are given the right to challenge measures before the ECJ.⁹⁵ What is left to the Member States is to determine the arrangements for the exercise of that right, including the question whether it will be granted to each Parliamentary chamber in States with a bicameral system. These arrangements can be made by ordinary law and need not have the status of constitutional rules.⁹⁶

Thus, it is for each Member State to decide the proportion of votes by which the Parliament needs to act to authorise the initiation of litigation before the ECJ. Many models are here conceivable. A Member State may, for example, require the Parliament to act by majority in which case the democratic value of the right of action is considerably reduced. Where the government controls the majority, it is unlikely that the Parliament will vote for the initiation of litigation if the government itself does not consider it appropriate.⁹⁷ In such a case, the Parliament's right of action is tantamount to the right of action of Member States which is already granted under Article 263 EC. At the other extreme, national law may enable, say, a certain cross-party minority of parliamentarians to authorise litigation. Such an arrangement would enhance the power of the Parliament to question Union legislation, acting independently of the government's interests.

⁹⁰ Protocol, para 5. Under the Protocol, the Commission must transmit all its legislative proposals to the national Parliaments at the same time as it transmits them to the Union legislator. National Parliaments may submit their reasoned opinions within six weeks from the date of transmission by sending them to the Presidents of the EP, the Council of Ministers and the Commission.

⁹¹ Para. 6.

⁹² *Ibid.* The threshold of one third is lowered to a quarter in the case of a Commission proposal or an initiative emanating from a group of Member States under the provisions of Article 76 of the Constitution on the area of freedom, security and justice.

⁹³ *Ibid.*

⁹⁴ Protocol, para 5.

⁹⁵ CONV 724/1/03 REV 1, p. 144

⁹⁶ *Ibid.*

⁹⁷ Unless the government allows the issue to be put in Parliament on a free vote or a sufficient majority of the ruling party considers the issue to be worth a rebellion.

Granting to national parliaments their own political and judicial means to monitor compliance with subsidiarity may be seen as an indication of respect to representative democracy. The Protocol seeks to promote national Parliaments as centres of political power with a say in the exercise of Community competence independently of their national governments. These newly founded rights may in some cases bring national Parliaments in a collision course with their respective governments. But they also juxtapose the national Parliaments with the European Parliament. Now that the latter is elevated, at least in most areas, to a co-legislator with the Council, an action on grounds of subsidiarity initiated by a national Parliament is as much a denial of Community competence as a refusal to heed to the supremacy of the European Parliament.

These new provisions of the Lisbon Treaty may be seen as enhancing dialogue, democracy, and decentralisation. They view Community competence not as a bi-polar exchange between the Union institutions, on the one hand, and the Member States, on the other hand, but as a pluralistic dialogue among various political actors at national and Union level. It should be noted however that these rights are very likely to have more impact in Member States with weak majorities or coalition governments where it is easier for parliamentarians to assert themselves as a political force independent from the government.

What is the likely impact of the Parliament's new right of action? So far, the impact of subsidiarity on judicial review has been benign and indirect. In no case has the Court annulled a measure on the ground that it contravenes the principle. Where the Court has annulled measures, it has preferred to do so on grounds of competence or proportionality rather than on grounds of subsidiarity even though the principle may have influenced the judgment.⁹⁸ By increasing the number of potential plaintiffs, the Protocol increases the justiciability of subsidiarity. Clearly the Protocol brings the Court of Justice closer to the political game. By transferring to the courtroom what are essentially political issues, it risks the politicisation of the judiciary, not in the sense of making the Court a partisan institution but of involving it more directly in issues of European governance. Judicial control of subsidiarity is bound to become more complicated and possibly also more intense as the Court will have available at its disposal a lot more material from the Commission and national central and regional authorities on the basis of which to assess whether a measure meets the requisite test.⁹⁹

A final point relates to the scope of the action. It appears that, where an application for judicial review is made pursuant to the Protocol, the only ground that can be invoked is breach of the principle of subsidiarity. A national Parliament may not ask its Member State to challenge a Community measure on any other ground. This may give rise to problems since, in practice, some grounds of review may be closely intertwined. In the *Tobacco Directive case*¹⁰⁰ the Court annulled the contested directive on ground of lack of competence and formally, at least, did not address the argument of the German Government based on subsidiarity. Would the Court have reached the same result if it examined the issue on the basis of subsidiarity? Also, since the existence of Community competence is a condition precedent to its valid exercise, and therefore to the application of the principle of subsidiarity, can the ECJ examine arguments based on competence in actions brought under the Protocol? Such problems will not arise where a Member State brings an action not only on behalf of its Parliament but also on its own behalf under Article 263 of the Constitution, in which case all grounds of review are invocable.

THE JURISDICTION OF THE COURT OF JUSTICE UNDER CFSP

A result of the abolition of the three pillars is that the jurisdiction of the ECJ is extended.

The Treaty of Lisbon repeals current Article 46 TEU which imposes limitations on the jurisdiction of the ECJ in relation to matters covered by the TEU. The special preliminary reference procedures provided for by Article 68 EC for matters falling into Title IV and by Article 35 TEU for the Third Pillar are abolished, and the jurisdiction of the Court becomes unified. This is to be welcomed as the fragmentation of the preliminary reference procedure gives rise to problems and compromises the right to judicial protection.

This is not to say that the ECJ acquires full jurisdiction. Under the Lisbon Treaty, the Court's jurisdiction continues to be excluded from matters falling under the Common Foreign and Security Policy.¹⁰¹ Such exclusion applies both with respect to the provisions relating to the common foreign and security policy and "with respect to acts adopted on the basis of those provisions". It is not clear whether this provision excludes jurisdiction only in relation to acts adopted wholly under the CFSP or also in relation to acts adopted under a dual legal basis ie based both on the CFSP and another Union policy, for example, freedom, security and justice. Such dual basis may be used, for example, for anti-terrorist measures. Since restrictions on the right

⁹⁸ See eg C-376/98 *Germany v Parliament and Council (Tobacco case)* [2000] ECR I-8419.

⁹⁹ The Protocol views subsidiarity as a cost effectiveness exercise carried out on the basis of a detailed substantive and financial assessment of the Union-wide, national and regional implications of each proposal: see Protocol, para 4.

¹⁰⁰ Op.cit.

¹⁰¹ See Article 24(1) TEU and Article 275 TFEU.

to judicial protection are to be interpreted restrictively, it is more likely that the ECJ will be willing to review measures based partly on CFSP.

The above rule excluding the jurisdiction of the ECJ on CFSP matters is subject to the following exceptions.

1. The ECJ has jurisdiction to police the boundaries of CFSP, namely, to ensure that, in adopting measures under CFSP, the Union institutions do not exceed the bounds of their competence under Title V of the TEU and encroach upon the other competences of the Union.¹⁰²

Such jurisdiction to monitor the scope of CFSP powers already exists under the EU and EC Treaties as they are currently in force.¹⁰³ However, with the abolition of the three pillars, the rules which govern the separation between the CFSP and other Union policies under the Lisbon Treaty are different in a material respect. Article 47 TEU as it currently stands, grants priority to the Community pillar by stating that, subject to the TEU provisions which amend the Treaty establishing the EC, nothing in the TEU shall affect the EC Treaty or its subsequent treaties and acts modifying or supplementing them. By contrast, Article 40 TEU, as amended by the Lisbon Treaty abolishes this rule of priority and places CFSP and the other competences of the Community on an equal footing.

2. Pursuant to Article 275, second paragraph, TFEU the Court has jurisdiction to review the legality of decisions providing for restrictive measures against individuals or entities adopted by the Council under CFSP. The purpose of this exception appears to be to safeguard the right to judicial protection in relation to decisions imposing sanctions against individuals. Article 215(2) TFEU expressly grants the Council power to adopt restrictive measures against individuals on the basis of a CFSP decision. Although Article 215(2) is not clear on this issue, it appears that the Council may adopt both economic sanctions (eg freezing of assets) and non-economic sanctions (eg visa bans). Article 275 enables individuals to make a challenge only by way of direct action before the ECJ under Article 263 TFEU and subject to the conditions of that article. It follows that the applicant must overcome the hurdle of direct and individual concern. The possibility of an incidental challenge in preliminary reference proceedings is not expressly provided and it would seem that it is excluded.¹⁰⁴

If that is correct, English courts therefore would not be able to make a preliminary reference to the ECJ to rule on the validity of restrictive measures against individuals adopted under CFSP. This may create a gap in the right to judicial protection where a CFSP sanctions is adopted against a natural or legal person who is not able to prove direct and individual concern in relation to that measure.

JURISDICTION IN RELATION TO THE AREA OF FREEDOM, SECURITY AND JUSTICE

The Lisbon Treaty extends the presence of the ECJ in the field of freedom, security and justice. The jurisdictional restriction imposed by Article 68 EC in the fields of visas, asylum and immigration is not maintained. Thus, the ECJ now acquires jurisdiction to deliver preliminary rulings on matters pertaining to Title V of Part 1 of the TFEU on freedom, security, and justice which encompasses judicial cooperation on criminal matters and police cooperation, which are currently covered by the third Pillar of the TEU.

However, in the areas of judicial cooperation in criminal matters and police cooperation, judicial powers are restricted. Article 276 TFEU provides that, in those areas, the ECJ has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. Thus, Article 276(3) maintains the restriction on the jurisdiction of the Court currently provided by Article 35(5) TEU in relation to Third Pillar matters.

It follows that, in relation to the matters stated above, it is the national courts that have the final say. Still, it is submitted that, since these areas fall within the scope of Union law, in exercising their power of judicial review, national courts must do so applying the principles of Community law, eg the principle of proportionality and respect for fundamental rights as recognised by Community law. In other words, the limitation of Article 276 TFEU is only jurisdictional and not substantive in scope.

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¹⁰² See Article 24(1) TEU and Article 275 TFEU.

¹⁰³ Case C-170/96 *Commission v Council (Transit Visas case)*, 12 May 1998.

¹⁰⁴ Argument for this can be derived from Case C-354/04 P *Gestoras Pro Amnistia v Council*, judgment of 27 February 2007.

Memorandum by Professor John A Usher¹⁰⁵**1. OVERALL ASSESSMENT**

Whether or not the Lisbon Treaty will constitute a lasting settlement may be considered in the context of three issues: its structure, its institutional provisions, and its substantive scope.

So far as structure is concerned, while the Constitutional Treaty included all three “pillars” of the EU in a single Treaty (though Euratom would have remained separate), the Reform Treaty takes the form of amendments to the existing Treaties (Euratom still remaining separate). However, the Reform Treaty will rename the EC Treaty the “Treaty on the Functioning of the Union”, the word “Community” will be replaced by the word “Union”, and the European Union will have a single legal personality. While this effectively creates a single European Union, and to a large extent the same institutional processes will apply in the current first pillar (EC) and the current third pillar (police and judicial cooperation in criminal matters—subject to transitional arrangements, and to special arrangements for the UK, Ireland and Denmark), the current second pillar (Common Foreign and Security Policy) remains subject to distinctive institutional procedures, and for the most part continues to escape judicial review. This arrangement no doubt reflects the wishes of the current members of the EU, but it does leave scope for further Treaty amendments at some stage in the future.

However, while representation and voting rights may have been at the heart of the discussion which led to the Amsterdam and Nice Treaties, it may be suggested that the Reform Treaty does considerably reduce the need for future Treaty amendments with regard to these issues, by removing specific numbers from the Treaty texts. So far as qualified majority voting in the Council is concerned, once the transitional arrangements expire there will no longer be weighted numerical votes; instead, a qualified majority will be represented by 55% of the Council’s members representing 65% of the EU’s population. With regard to the Parliament and Commission, the Treaty sets out the parameters governing their membership, leaving the detailed decision to the European Council; other institutions (eg the ECJ and the Court of Auditors) comprise one member from each Member State, or have memberships set out in Statutes which can be amended without amending the Treaties (eg the CFI and the ECB), and the composition of the Economic and Social Committee and of the Committee of the Regions are to be determined by the Council. It may therefore be concluded that the relevant Treaty provisions will no longer require frequent amendment.

So far as the substantive scope of the Treaties is concerned, the Reform Treaty largely represents a consolidation of the current position, ie the position reached after the Treaties of Maastricht and Amsterdam. This in turn perhaps indicates that a plateau has been reached, though it is highly unlikely that there will never be a future issue which it is felt appropriate to deal with at Union level. However, the revised texts of what are currently arts.94 and 308 of the EC Treaty will continue to allow a considerable degree of flexibility even without Treaty amendments.

Overall therefore, it may be suggested that although the Reform Treaty should not be regarded as set in stone, it should considerably reduce the need for frequent Treaty amendments.

2. PEOPLE’S RIGHTS AND RESPONSIBILITIES

As under the Treaty establishing a Constitution for Europe, the Union will be given express power to become a party to the European Convention on Human Rights, although it may be suggested, as evidenced in the dispute between Spain and the UK over voting rights in European Parliament elections in Gibraltar, that the ECJ already recognises that obligations under the ECHR prevail over substantive EU law. On the other hand, whereas the Treaty establishing a Constitution for Europe included the text of the Charter of Fundamental Rights as part of the Treaty, the Reform Treaty article on fundamental rights contains a reference to the Charter, declaring it to have the same legal value as the Treaty, but not setting out its text. However, there is a special Protocol on its justiciability in the UK and Poland, under which the Charter does not extend the ability of the ECJ or of UK or Polish courts to find that UK and Polish laws and practices are inconsistent with its terms. It is further declared that nothing in Title IV of the Charter (entitled “Solidarity” and essentially concerned with social rights) creates justiciable rights in the UK or Poland except insofar as provided for in the national law of UK/Poland. Furthermore, references to national laws and practices only apply to the extent that they are recognised in Polish or UK law—which begs the question of what happens to national laws and practices which have evolved into general principles of EU law and therefore already have to be observed by the UK in the context of EU law.

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3. POWERS AND NATIONAL SOVEREIGNTY

Despite the more fanciful comparisons with the United States when the Treaty establishing a Constitution for Europe was negotiated, a fundamental difference from the US (whose civil war not just about slavery but rather about whether States could secede) is that the EC/EU has always allowed withdrawal (although the only example is that of the territory of Greenland), and the Reform Treaty will introduce an express provision enabling a Member State to withdraw from the Union—even if other Member States oppose it.

While the Treaty text will contain no express statement of the primacy of EU law, there will be a declaration recalling the existing case-law of the European Court of Justice on primacy. Indeed this case-law was well-known when the UK first became a member of the then EEC, and it was reflected in the drafting of the European Communities Act 1972.

With regard to “red lines”, in part these have been protected by obtaining special treatment for the UK. Indeed, far from being monolithic, the Reform Treaty not only retains the existing opt-outs from EU policies and opt-ins to EU policies but it takes the matter further: the Third Pillar provisions on police and judicial cooperation in criminal matters will be moved to the same part of the Treaty on the Functioning of the Union as the current title on asylum, immigration and visas, and will become subject to the same “opt-in” arrangements for the UK and Ireland—and indeed it is envisaged the Denmark will be able to opt-in as well (currently the relevant provisions are simply not binding on Denmark). However the relevant Protocol also deals expressly with the consequences of this extension with regard to Third Pillar legislation currently binding on eg the UK. It envisages both substantive and institutional issues which might arise. Substantively, existing measures continue, but if they are later amended, and the UK does not participate in the amendment, the Council may determine that this non-participation makes application of the measure inoperable for other MS, and the original measure will no longer be binding on or applicable in the UK. So far as institutional issues are concerned, the relevant Protocol to the Reform Treaty envisages a 5 year transition during which the existing 3rd pillar rules apply (ie a limited role for the Commission, and references to the ECJ only if the Member State concerned allows them). However, if a former 3rd pillar measure is amended during that period, the new rules apply (ie the normal institutional rules)—though the UK would only be affected if it opted-in to the amended measure. Six months before the end of the transitional period, UK may give notice that it does not accept normal powers of institutions with regard to “old” acts still binding on it. The result of this is that those acts will cease to apply to UK from the end of the transitional period—and Council (without the participation of the UK) will determine the consequences, including financial ones. Since the Third Pillar measures currently binding on the UK include matters such as the European Arrest Warrant, the consequences could be serious.

Other methods of protecting “red lines” involve ensuring the continuation of a requirement of unanimity in the Council, or simply ensuring that the treaty does not extend the EU’s powers, as in the case of taxation. However, it may be suggested that the failure eg to give the EU any express power to legislate in the area of direct taxation has a downside. In a series of recent cases, the ECJ has found that discriminatory national rules on direct taxation may breach the Treaty “freedoms”, notably freedom of establishment, freedom to provide services and free movement of capital, and such rules may also conflict with the provisions governing citizenship of the Union. Thus a Member State may be required to give tax relief for pension contributions paid in another Member State, or to give credit for tax paid on dividends in another Member State, or to give tax relief for losses made in another Member State, and it may be suggested that the situation has now been reached where it would be sensible to agree some basic rules at Union level. However, the Treaty gives the Union no competence in this area, other than through a broad interpretation of what is currently art 94 of the EC Treaty, allowing approximation of such laws as affect the functioning of the common market (to be referred to as the internal market under the Reform Treaty).

4. OUR NATIONS AND REGIONS

As someone who spent a total of 14 years working in Scotland, I had several discussions with SNP politicians as to whether Scotland would automatically remain a member of the EU if it became independent. Without getting involved in the niceties of State succession, a simple answer used to be that a new Treaty would have to be negotiated to deal with issues eg of representation and voting rights. However, it was suggested in the first section of this Evidence that the Reform Treaty considerably reduces the need for future Treaty amendments with regard to these issues, by removing specific numbers from the Treaty texts. To that extent, the Reform Treaty may be said to strengthen the arguments in favour of Scotland automatically remaining a member of the EU if it were to become independent.

5. OUR NATIONAL PARLIAMENT

In many respects the Reform Treaty, following the pattern set in the Constitutional Treaty, provides greater opportunities for national parliaments to play an active role in the EU context. They are given a formalized role in the context of subsidiarity, being empowered to ensure compliance with the principle of *subsidiarity*, in accordance with the procedure set out in the revised text of the Protocol on Subsidiarity and Proportionality. The Reform Treaty amends this Protocol, which was originally introduced by the Treaty of Amsterdam, so as to require the Commission to forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. It also requires the European Parliament to forward its draft legislative acts and its amended drafts to national Parliaments, and it states that the Council must forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank (and amended drafts) to national Parliaments. Furthermore, upon adoption, legislative resolutions of the European Parliament and positions of the Council must be forwarded by them to national Parliaments. It will however be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

Under art 6 of the Protocol, any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, or other EU institutions and bodies if the draft legislative act originates from them, are then required “take account” of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament.

It is further provided in art 7 that where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments, “the draft must be reviewed”. In calculating such a vote, each national Parliament would have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers would have one vote.

This threshold would be a reduced to a quarter of the allocated votes in the case of a draft legislative act submitted on the basis of art 68 of the Treaty on the functioning of the Union on the area of freedom, security and justice. After carrying out such a review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft, but reasons must be given for this decision.

National Parliaments are also given a *right of action*, before the European Court. Art 8 declares that the Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in art 230 of the Treaty on the Functioning of the Union (which governs actions for annulment) by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.

The national parliaments are also expressly involved in the revised text of the current *art 308* of the EC Treaty. It provides that if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set in the Treaties, and the Treaties have not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, may adopt the appropriate measures. However, a new art 308(2) then adds that using the procedure for monitoring the subsidiarity principle, the Commission must draw Member States’ national Parliaments’ attention to proposals based on this provision.

Similarly, the *Protocol on the Role of National Parliaments*., originally annexed to the Treaty of Amsterdam, has been considerably reinforced. In the version annexed to the Reform Treaty, not only must Commission consultation documents (green and white papers and communications) be forwarded directly by the Commission to national Parliaments upon publication, but the Commission must also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council. It would also be required that draft legislative acts sent to the European Parliament and to the Council must be forwarded to national Parliaments; “draft legislative acts” are defined as proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.

Art 3 of the Protocol then provides that National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft European legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality mentioned above.

Expanding the timescale of the original text, art 4 would require that an eight week period should elapse between a draft legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions would however be possible in cases of urgency, the reasons for which would have to be stated in the act or position of the Council. The Protocol would expressly lay down that save in urgent cases for which due reasons have been given, no agreement may be reached on a draft legislative act during those eight weeks. Furthermore, save in urgent cases for which due reasons have been given, a ten day period would have to elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position. Under art 5, the agendas for and the outcome of meetings of the Council, including the minutes of meetings where the Council was deliberating on draft legislative acts, would have to be forwarded directly to national Parliaments, at the same time as to Member States' governments.

There is however a direct link to what is termed the *simplified revision procedure* in art 6 of the Protocol, which provides that when the European Council intends to make use of the simplified revision procedure, national Parliaments must be informed of the initiative of the European Council at least six months before any decision is adopted. The simplified revision procedure would introduce a general power for the European Council, acting unanimously, to adopt a decision allowing the Council to move from acting by unanimity where it would still be required in a specific area to qualified majority voting in that area, without amending the Treaty, though it would still have to be approved by the Member States in accordance with their respective constitutional requirements. However, any initiative taken by the European Council on this basis must be notified to the national Parliaments of the Member States, and if a national Parliament made known its opposition within six months of the date of such notification, the European decision could not be adopted. It would only be in the absence of opposition that the European Council could adopt the decision. It may be observed that in this context no distinction is made between the parliament of eg Germany and the parliament of eg Malta or Luxembourg.

Finally, arts 9 and 10 of the Protocol take *inter-Parliamentary cooperation* beyond the previous version. It is provided that the European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union. Furthermore, what is renamed a "Conference of Parliamentary Committees for Union Affairs" may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference may in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy. However, contributions from the conference would not bind national Parliaments and would not prejudice their positions.

It may be suggested that these provisions considerably strengthen the position of national Parliaments in the EU legislative process, provided national parliaments have in place machinery to enable them to take advantage of these opportunities.

6. COURTS AND THE JUDICIARY

A notorious gap in the current system of judicial review under the EC Treaty is that it is virtually impossible for non-privileged litigants directly to seek the annulment of general legislation before the ECJ/CFI since the current art 230 of the EC Treaty requires applicants to show that the act is of individual concern to them. The Reform Treaty will alleviate this problem when applicants are challenging "regulatory" acts (presumably meaning implementing or delegated legislation), though the problem will remain with regard to acts adopted under a legislative procedure.

Two other jurisdictional issues will also be tackled. The first is that the requirement under the current Title IV of the EC Treaty that references from national courts to the ECJ for a preliminary ruling may only be made by courts of final appeal is abolished, though this is of concern to the UK only in so far as it opts in to Title IV measures. The second is that while references under the third pillar may currently only be made if a Member State decides to allow its courts to make such references (and the UK does not allow such references), they will in principle be subject to the normal rules on references under the Reform Treaty—though it must be said that although a UK court may not itself make such a reference, the House of Lords in the *Dabas* case last

year followed the case-law of the ECJ arising from references from other Member States. Be that as it may, this change is subject to the special arrangements for the UK discussed in section 4 of this Evidence: there will a 5 year transition during which the existing 3rd pillar rules apply but if a former 3rd pillar measure is amended during that period, the new rules apply (ie the normal institutional rules)—though the UK would only be affected if it opted-in to the amended measure. Six months before the end of the transitional period, UK may give notice that it does not accept normal powers of institutions with regard to “old” acts still binding on it. The result of this is that those acts will cease to apply to UK from end of the transitional period.

In essence therefore, the Reform Treaty will remove certain anomalies in the system of references, but these changes will be of relevance to the UK only to the extent the UK opts-in to the relevant legislation.

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