

HOUSE OF LORDS  
MINUTES OF EVIDENCE  
TAKEN BEFORE  
THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE E)

**IMPACT OF THE REFORM TREATY ON THE AREA OF FREEDOM,  
SECURITY AND JUSTICE**

WEDNESDAY 28 NOVEMBER 2007

PROFESSOR ELSPETH GUILD and MR FLORIAN GEYER

Evidence heard in Public

Questions 122 - 199

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WEDNESDAY 28 NOVEMBER 2007

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Present

Bowness, L  
Burnett, L  
Jay of Ewelme, L  
Lester of Herne Hill, L  
Mance, L (Chairman)  
O’Cathain, B  
Tomlinson, L  
Wright of Richmond, L

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Witnesses: **Professor Elspeth Guild** and **Mr Florian Geyer**, Centre for European Studies, examined.

**Q122 Chairman:** Professor Guild and Mr Geyer, thank you very much for coming to give evidence to the Sub-Committee. Perhaps I ought to say what I said before you came in: there are no declarations of interest except, possibly, that I have myself an interest, a rather remote one, as a member of the Lord Chancellor’s advisory committee on private international law, which has something to do with Title IV. The purpose of this session is to look at the proposed Treaty. As a first question I would like to ask about the UK opt-ins. The UK has a general opt-in in the area of freedom, security and justice, and it has a further opt-in provided under the protocol on the Schengen acquis, integrated into the framework of the European Union. Perhaps I should have offered you the opportunity of making a preliminary statement, but the first question I would like to ask when you have done that is what the effect of those opt-ins will be and how that may change the present position. If you would like to say something in opening, please do.

**Professor Guild:** My Lord Chairman, it is indeed a pleasure to be here and to appear before this Committee regarding the Reform Treaty. I understand that Professor Steve Peers gave evidence last week and I am sure that he has provided very substantial detail on the wording

of the various different aspects of the protocols. While I have not seen his evidence, I very much suspect that I would agree with the positions which he has taken. I would like to take a rather larger perspective on your first question, if I may. It seems to me that, in the opt-ins which we have, the objective of the UK Government in the negotiations and in respect of which it has succeeded is to obtain wider opt-outs and opt-ins than it had under the Amsterdam Treaty, so that the possible flexibility for the United Kingdom to participate or not to participate in the area of freedom, security and justice has become more flexible rather than less flexible – and, of course, the most important aspect is in respect of judicial cooperation in criminal matters/policing and civil cooperation. The objective, as I understand it, of the UK Government in the protocol to opt-in and opt-out in respect of the Schengen acquis was drafted very carefully in order to achieve the objective of avoiding the possibility of being excluded which has happened in respect, so far, of the European Union Border Agency. Taking these two objectives together – on the one hand, seeking greater flexibility and, on the other hand, the point at which the most substantial conflict has occurred in this area has been where the UK has not been able to participate – one wonders whether we need an awful lot more capacity to stay out when we really want to be more engaged in. Is it worth diminishing the negotiating capacity, regarding the form which Directives may take in the end, through insisting on this very wide capacity to opt in and out? Is it worth the effort, when in fact we want primarily to be in? Of course, in any negotiations, the more space which one party demands and the wider the rules have to be for that one party in comparison with the others, the less force the voice of that party is likely to have.

**Q123 Chairman:** I understand your point about the Schengen acquis and the solution of the problem raised by the current litigation, but it is not really a wider opt-out in respect of judicial cooperation in respect of criminal matters, is it? The present position is that they are

dealt with, largely, subject to the *Environmental* and *Ship Pollution* cases, under the third pillar, so that there is a unanimity principle anyway.

**Professor Guild:** Indeed. However, I would say that it is one thing to participate in a framework decision on an aspect of criminal law/judicial cooperation in criminal matters, the legal effect of which is perhaps more subdued than a Directive or regulation in the first pillar, in comparison with deciding, “We don’t think we will have anything to do with that” and opt right out of it, and that puts us in quite a different position in terms of our ability to participate generally in the field.

**Q124 Chairman:** You mean it is going to go ahead anyway under Title IV, and if we are seen as the one person who does not participate at all that will be detrimental.

**Professor Guild:** I think one could put it that way. I think there is also another angle on it that we will probably come back to a bit later, which is that, while there may not be agreement in the Council, it may be better for negotiations to go on longer to achieve agreement than for a small number of Member States to go ahead on their own. If there is not agreement, that means there are profound difficulties, that there are Member States that have positions which, for their own reasons, they see as being very important. It seems to me, as a principle of European law and the effectiveness of European law and its coherence, better to take a bit more time and to try to deal with the problems and resolve them and to wind up with legislation which all parties can agree with rather than to leave some Member States behind.

**Q125 Chairman:** Of course, very often – and we have not had a great deal of experience of not opting in – the purpose of not opting in is in fact to achieve a better deal into which you feel you can opt. That is clearly what is intended in relation to the current Rome I negotiations, for example. Is that not an effective approach?

**Professor Guild:** My Lord Chairman, whether something is effective depends upon the objective you seek to achieve. I am sure that is an effective approach in respect of certain objectives. In terms of the smooth operation of the European Union, it may be slightly less effective. It might be better to lower the sights of the overall proposal and decide on something which is perhaps less extensive in order to deal with the objections of one or two Member States.

**Q126 Lord Burnett:** Are you suggesting that the other members of the EU should lower the hurdle in order to achieve agreement with others?

**Professor Guild:** My Lord Chairman, I think that is how the European Union has operated. In order to achieve agreement among 27 Member States/25 Member States/15 Member States – or however many you have from five onwards – there are always some things that some Member States will want and to which others are opposed and it will always be a matter of negotiating to achieve an outcome which satisfies the parties which everybody can live with. If one says, “We don’t want to do that anymore. That’s too complicated, we can’t live by that rule anymore, and we are now going to say we will not participate in that” then one achieves a very different result and a different kind of European Union than if one proceeds by the traditional mechanism.

**Q127 Lord Burnett:** May I add one more point, My Lord Chairman on that. If we did adopt the proposal you are making and go through it in that way, could we be therefore bound by qualified majority rules to accept terms and conditions which we would find unacceptable?

**Professor Guild:** We do live in democracies and qualified majority vote is a lot more than 50 per cent. We have made a number of choices about how we want to proceed with lawmaking and there is always the possibility of insisting on unanimity in certain fields which are particularly sensitive, as has happened in a number of different areas.

**Q128 Chairman:** There is, of course, the “emergency brake” in the proposed criminal area, but, coming back to that point, there are still respects in which different European countries focus on different things and that is particularly true, perhaps, in the area of civil and criminal law. To take civil law, London is an international legal centre and we have interests – for example, in the derivatives markets and so on – which are perhaps not shared throughout Europe. Again drawing on the Rome experience, there were particular points which might not have met with sympathy on a majority basis. There is the other factor that the common law, although it is a very strong world legal system, is to some extent an odd man out in Europe: there are only three and a half common law countries and most of them are very small and perhaps some of our concerns are not fully understood. Is that not a valid reason for having quite a general opt-out with the intention of opting in whenever possible?

**Professor Guild:** My Lord Chairman, one and a half of those common law systems do not have any difficulty being part of the system. A second one probably would not if the UK was not having a lot of difficulty with it. So we are down to one really! On the basis, “Good grief, we do not want to be bound by anything coming from anywhere but our own Parliament,” one really ought not to enter into any international treaties at all.

**Q129 Lord Burnett:** Could I add to what My Lord Chairman said: there are certain financial industries and businesses which are not of important concern to our country but which are vitally important. I think you said that sometimes these things are not properly understood and the markets in which our City of London operates are not properly understood and there is not sufficient sympathy with them among many other members of the European Union. Or am I completely wrong about that?

**Professor Guild:** My Lord Chairman, I would certainly not suggest that Lord Burnett is wrong on anything! Certainly every Member State has terribly important interests which are central national interests and which they are very anxious to protect. We have seen this, for

instance, in telecoms. This has been a terribly sensitive issue. We have seen it again on the Directive on Services – the infamous Bolkenstein Directive – where very central issues of concern to the Member States in terms of protection of their services markets were at stake. In those two cases, the United Kingdom was on the other side of the fence, in saying, “Well, actually, we don’t think this is quite so central,” nonetheless, if we take the Services Directive as an example, the interests of those Member States which were particularly sensitive were, of course, taken into account. And perhaps we do not have a Directive that we wanted but we have a Directive that everyone can live with.

**Chairman:** I think perhaps we ought to move on. I want to give Mr Geyer a moment, but let us have Lord Lester’s question first.

**Q130 Lord Lester of Herne Hill:** I should just say where I am coming from. I, on the whole, favour as few opt-ins and opt-outs and as much integration as possible, so that explains my slightly strange question. You slightly dismissed My Lord Chairman’s question about protecting the common law, so I just want to give you one example, declaring an interest, because I was counsel for the Cyprus Government in a case called *Kyprianou* in the European Court of Human Rights which concerned the common law contempt jurisdiction – the kind of jurisdiction where you throw an egg at a judge and he or she is able to lock you up immediately. Out of the 47 judges of that court – and I suppose you would call them, in your idea, two and a half or three and a half – only four judges were from a common law background and the concern of Malta and of Ireland and of Cyprus and of the United Kingdom was that those judges would show very little regard for that common law jurisdiction. They all came in and made their representations in that case. Does that not indicate that there is a common interest among common law jurisdictions – including, for this purpose, Scotland because they also were affected – in a system which, if one is not careful, will adopt a strongly Napoleonic civil tradition and therefore we should pay attention to that?

I apologise for the length of the question but I wanted to give you a real example, albeit on the Strasbourg side and not on the Luxembourg side?

**Professor Guild:** There are a number of different legal traditions in the European Union. We have a strong Roman Dutch tradition in some areas; we have a Napoleonic code system in others; we have common law systems; and we have other parts of systems which have come in particularly with the newer Member States. From what I have seen so far, it seems to me that there has been tremendous respect for the different systems which apply and, certainly, if one looks at the decisions of the European Court of Justice on enforcement of, for instance, time limit systems by which legal systems operate, there has been quite substantial deference to the differences in the national systems. Yes, of course this is something of an adventure. It is a route we chose to go down, starting from about 1993 with increasing integration of our systems. Either we have confidence in our partners in this regard or we do not. I think that is the problem. At the moment we are saying, “We do and we don’t”

**Q131 Chairman:** Mr Geyer, do you have anything you would like to say on the subjects which we have been touching on?

**Mr Geyer:** My Lord Chairman, thank you very much. We had divided up the questions and we chose. It might be wise to leave Professor Guild the questions that are more related to UK specificities. I can only agree and join in with what Professor Guild said.

**Q132 Chairman:** Then perhaps we can move on. I think you touched on the effect of the new Treaty in relation to Schengen and the question of locking in and locking out. Would you move to consider the proposed new redefinition of the area of criminal competence and may I ask you to compare it to the existing jurisdiction under Title VI of the Treaty on the European Union. Do you see the grounds as differently expressed/more wide in the competence afforded?

*Mr Geyer:* When looking at the mere provisions in the new Reform Treaty one might get the impression that, in fact, there is an extension of the criminal law provisions and there are more detailed rules or more substantial rules. We have new elements in this Treaty, including the European public prosecutor. It seems as if there is something completely new coming up on the horizon. Especially when looking at the question on the substantive criminal law provisions, the harmonisation or approximation, or however one might define this process of finding common definitions and common sanctions of criminal offences, in the existing Treaty it is only mentioned that we can do that on terrorism; in trafficking in drugs; and in organised crime. This is 31e of the Treaty on European Union. When looking at Article 69f in the new Treaty, there is a much wider feel of possible criminal offences. However, when we look at what has been adopted already by Member States, and most often on the initiative of Member States as framework decisions under the third pillar, we see that we have a framework decision defining criminal offences and penalties in the areas of fraud and counterfeiting of non-cash means of payment; trafficking in human beings; unauthorised entry residence; private sector corruption; and tax on computer systems. All these are things where we have harmonisation and approximation contained in framework decisions which do not fall, under my understanding, in those three limited cases of drug trafficking; organised crime; or terrorism so that we have already this extension under the existing framework. The new Treaty does, however, make it clearer. It clarifies and structures this area which seems a bit broad and upright now and brings in checks and balances on top by involving more actors, by involving the European Court of Justice, by involving the European Parliament. In the end, a virtually uncontrolled area which has often been labelled as an interior minister's "playground" is in fact constrained and tamed and does not necessarily extend in substantive what has not been happening before.

**Q133 Chairman:** Could I suggest two possible differences which I would like your comments on. One is that the *Ship Pollution* case establishes that the determination of the type and level of the criminal penalties to be applied does not fall within the Community sphere of competence, the competence under the existing Title VI; whereas Article 69f of the proposed Treaty provides expressly that by a qualified majority in the areas you have mentioned – the core areas: terrorism, drug trafficking, visa crime – the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences **and** sanctions. Is that not an extension?

**Mr Geyer:** It is so far no extension. In those framework decisions we have also those penalties and sanctions. The main question we have in the *Ship Source Pollution* and in the *Environmental* case is not: Does it exist? The question is: Who is deciding on it? In framework decisions we have Member State governments under the EU Treaty agreeing on sanctions and penalties and the question is only: Is it the Community competence or is it the Union competence? It is only the question under which procedure and who, and not so much what.

**Q134 Chairman:** The answer is that my question is put on a false premise because it is not comparing like with like. Essentially what is happening under the third pillar at the moment is the setting of minimum sanctions, so this is a reproduction. The other question is in the opposite sense. The *Ship Pollution* and the *Environmental* cases show that there is a criminal competence under the first pillar, not extending to the setting of sanctions. Do you have a view as to whether that would now have to be exercised under Article 69f with the consequent right not to opt in or would this *Environmental/Ship Pollution* jurisdiction still continue independent of the opt-in?

**Mr Geyer:** This is one of the questions that is wide open to speculation. It is very difficult to predict how it will proceed. One might argue that with the coming into force of the new

Reform Treaty we have a specialised system, a special detailed ruling how this should happen: how it should happen that we provide criminal sanction and penalties in a field of, then, Union policy and, now, Community policy when it is harmonised, and this would provide an end to jurisprudence of the court.

**Q135 Chairman:** The argument is the *lex specialis*, that you have a special provision.

**Mr Geyer:** Exactly, we have a special provision so we do not have the supposed gap any more in the Treaties and we have to rely on the new provision. On the other hand, one might argue and say that it is still as you have mentioned, there is a difference between the court's jurisprudence and what will be written in the Treaty, so under the *Ship Source Pollution* and under the *Environmental crime* we have it limited mainly to the aspect of environmental policy. Even the *Ship Source Pollution* did not go along the way in opening up to all Community policies but took it from transport and said, "But in the end it is an environmental measure". We have the *Ship Source Pollution* not opening up the field, as many argued and as, also, the Advocate-General opined, we have it still limited to the environment, and we have, as you said, the missing criminal penalty provision, so one might argue that there is a difference and, as there is a difference, the case law can still continue to apply. The question would then be: Would it be wise, would it be practical and what would be the outcome with the opt-out?

**Q136 Chairman:** Theoretically, could you get a problem? If the matter was pursued under Title IV with an opt-in, could it be said that it should be pursued under the other provisions? Or would that argument no longer apply? The argument in the *Ship Pollution* case and the *Environmental* case was that it had to be pursued under the first pillar.

**Mr Geyer:** This is the point. If it has to be pursued under the first pillar and Article 175 is the proper legal base for doing this, then one might argue: Why should this stop being the

proper legal base in the future? We might see that limited and restricted to environmental policy, this case law will continue, but it will not be broadened out to the other fields. It might also not be advisable or practical to propose this because this case law has major faults. It does not provide for the specification of sanctions and it is limited. Therefore it might be that, even though there is a theoretical legal possibility to continue, in practice it will not be recalled upon by the Commission or other Member States when initiating new proposals.

**Q137 Baroness O’Caithan:** Is that because the case is going on at the moment?

**Mr Geyer:** The case has finished.

**Q138 Baroness O’Caithan:** If we did opt in under Article 69f and a similar case occurred, what would happen?

**Mr Geyer:** A similar case that is already existing or a new measure?

**Baroness O’Caithan:** A similar case to the one that has already finished on marine pollution.

**Lord Burnett:** But new circumstances.

**Q139 Baroness O’Caithan:** New circumstances. It would not be identical but similar.

**Mr Geyer:** My Lord Chairman, may I ask in which direction the question is going?

**Baroness O’Caithan:** The question is: If you go and opt in on this one, everything that has gone before would not apply? Is that right? You would not refer back to that case law. Is that it? I am trying to clear my own mind.

**Q140 Chairman:** I think the argument is as to whether the only means of legislating is now under the new provisions which provide for an opt-in or whether there is still a residual and, one might argue, a primary basis of legislation under the transport and environmental provisions which presently have been worked out in their scope by the European Court. The

European Court has spoken cautiously in each case and limited its observations to a pillar one jurisdiction in respect of environmental matters. Is that not the position?

*Mr Geyer:* As I said before, if there are future cases, they will be limited, I presume – but it is never able to predict it with full certainty – to environmental crime. It might be possible or we might see that it will be eliminating an opt-out in this case if the court is, let us say, strong enough or confident enough to say, “We have developed this under the old Treaty and, as we have not changed the environmental law substantially with the new Treaty, we have, in effect, the same provision which was good enough for criminal sanctions under the old system and it will continue.” But, as I said, I think it will be limited to this special field of policy.

**Q141 Chairman:** Just to sum it up, we may be in a position where the court is unlikely to eat its previous words but is unlikely to speak more widely and extend the jurisprudence, which, apart from the Treaty, it might well have done.

*Mr Geyer:* Yes.

*Professor Guild:* My Lord Chairman, I would like to add that the Commission has proposed a number of other measures now which include criminal sanctions in other fields. For instance, the one I am most familiar with is the employer sanctions for hiring irregular or undocumented aliens. There are a number of proposals out there that are on the table of the Council at the moment which do include the sanctions. It will be a question for the Council to decide in the negotiations in which the UK will participate – unless, of course, it opts out, as it looks like it is going to do on the employer sanctions one. It will be in those negotiations that that decision will be dealt with. If in a Directive in some other field of law beyond, for instance, environmental – let us say in working conditions – the Council agrees a measure which includes criminal sanctions, it would seem to me a bit odd then if the Court of Justice were to say, “Tut-tut ... No, no, we cannot possibly do that,” because we will have the political evidence in the form of the Directive that the Member States wanted to do it.

**Q142 Chairman:** Thank you. Shall we move on to another concept which we find for the first time in this area – correct me if I am wrong – and that is mutual recognition, Article 69e. What do you perceive Article 69e as meaning and how do you perceive it as applying?

**Mr Geyer:** It is very interesting to see that the principle of mutual recognition is making its way into the Treaty. It has been out there for quite a while, since the late 1990s. The most stunning aspect of the irony of history is that it was in fact the UK which was most eager and strongly promoted this principle of mutual recognition to be used and applied also in this criminal law because it would help in overcoming the different systems – common law, civil law – making it not so necessary to approximate procedures. It is interesting to see that now it will come into the treaties promoted by the UK, the UK chooses to get as far away as possible from those provisions, like a father who is seeking to avoid any responsibility for his child. The principle of mutual recognition has its pros and its difficulties. There are difficulties, highlighted, for example, by the Finnish Presidency last September, where they issued a paper to say, “We are facing problems with this principle. We thought it was a very good principle but we are having problems in the implementation,” and in June the Commission tendered for a study to assess this principle and what the future of this principle will be. It is very interesting to read the tender explanation because it is in fact a statement of all the things that do not go well under the principle of mutual recognition. It is in fact stated in this tender that there are different conceptions and understandings between Member States as to what it refers to and what it actually entails. We are in the situation right now that the principle of mutual recognition will be elevated from policy to hard treaty law but we see that there are still some misconceptions and difficulties in knowing what actually this new Treaty provision will entail.

**Q143 Chairman:** In language terms it embraces not merely recognising each other’s decisions but also, linguistically, it is expressed to include an approximation of the laws and

regulations of the Member States in certain areas, particularly the core areas of terrorism, drug trafficking, et cetera. Linguistically, it is a slightly all-embracing concept.

**Mr Geyer:** We do think we had already taken the position that mutual recognition might not work in its pure form. It always needs accompanying approximation of certain rules in order to allow us to make it happen, because this principle of mutual recognition, the concept of mutual recognition, is built on mutual trust. One judge trusts the other judge and the citizen has trust in the different systems and knows that his rights and safeguards are protected throughout the EU. This is why we can trust an order that is coming from Greece to Germany or from Spain to Italy, because we know that there are common rules. This is why we always said that the pure principle of mutual recognition will face difficulties because this trust cannot be imposed and implemented without the accompanying measures that show the professionals and the citizens that there are reasons to have trust in each other. We had some studies conducted. One is called *Too Different to Trust* which we will be publishing soon and one made a comparison and interviewed German judges and UK judges on the implementation of the European Arrest Warrant and the level of trust that they have. There it was seen that the further away legal systems are in their concepts, the less it is that judges and magistrates do practically work together. There is a good relationship between Germany and Austria because the systems are similar and the languages are similar but the further that moves apart the more difficult it will become to have this trust that is necessary.

**Q144 Lord Jay of Ewelme:** In the classic areas of the Treaty where mutual recognition has existed so far or has done for some time, like the single market, there is usually a combination, as I understand it, between mutual recognition based, as you say, on trust and a sort of minimum harmonisation in order, as it were, to encourage that trust among the Member States. Is that a concept which you can see as applying in the areas in Title IV or is that an area where one is going to have to look at this rather differently?

**Mr Geyer:** This is the idea where it comes from, but I think that Member States so far were quite eager not to try to have to agree on those underlying common principles, like toy safety. If we trust in a different product – alimentation, toys, liquids, chemicals, all those things – we trust each other because we have common standards of product safety. Exactly this is the problem in the field we are talking about now: we want to promote the principle of mutual trust but Member States have difficulties in finding common ground on those accompanying measures that would establish the common standards.

**Q145 Lord Jay of Ewelme:** What would be the process, as it were, of testing this system? Would it be coming forward with a proposal and then, as it were, testing it during the negotiation? Or would there be some kind of event before that to work out exactly what Member States meant by mutual recognition in the context of Title IV? What happens now, as it were, or will happen, assuming this goes through?

**Professor Guild:** If we take a couple of the really difficult chestnuts on the European Arrest Warrant, one is the elements of the crime. We have our list of the crimes for which there is no longer an obligation of criminality in two Member States. One of the difficulties which arises endlessly is: “Yes, but does robbery mean the same thing?” Are the elements of the crime the same in two different Member States or is this a completely different crime for which we are no longer required to have criminality which means that we have a fundamental problem. To resolve that, if we take one of the practical examples and one of the areas where there has been quite a lot of call in the legal world for further clarification to ensure that we know exactly what we are talking about when we are talking about mutual recognition for the purposes of the European Arrest Warrant, there would need to be a proposal. It would need to be a legislative proposal. It is almost inconceivable that it could happen through judicial decision making. If the system got so out of control that the European Court of Justice was

faced with the question: “What are the elements of the crime?” I think that indicates a failure on the part of the lawmaker to give sufficient clarity to the issue.

**Q146 Lord Lester of Herne Hill:** I wonder whether this makes any sense. It seems to me that in the German or the American system of government you have federal clients, federal courts, common standards as well as state courts. In the European system, we do not have that. We do not have federal crimes, we do not have federal courts, we have a very incomplete system. The European Court in Strasbourg is meant to ensure independence and impartiality in the determination of criminal and civil cases but its 47 judges have a backlog of over 100,000 cases and cannot really do that well. Among the Member States there are some who do not yet have properly independent and impartial courts, in my view. Therefore, when we talk about mutual recognition and other compromised mechanisms, is it not right to say that these are attempts with an incomplete system to do the best one can, given all the disadvantages I have just tried to summarise crudely and undiplomatically?

**Professor Guild:** One of the issues which we have raised again and again is that there have to be compensating measures. One of the great difficulties about going down the route of the European Arrest Warrant is that, if you do not have at the same time a measure on the rights of the defence and a measure on bail, you are going to get a highly inadequate system; that you cannot go down the course of route without also protecting the citizen against the course of power of the state. We see again and again an enthusiasm for abolishing the internal borders that constrain the coercive state among the Member States and a huge reluctance to abolishing those obstacles that borders form for the protection of the defence. Therefore, I think that your question, Lord Lester, is a very proper one.

**Q147 Lord Lester of Herne Hill:** You are talking about substantive safeguards built into the European legislation. I am trying to say that whatever safeguards you build in – and I

quite agree with the point you make – you have to have judges there to be able to give effective remedies. The problem is, looking at Europe as a whole, to see that there will be a common system of effective remedies, either among the Member States’ courts or among the two European courts. Therefore, when you are seeking mutual trust it makes it harder to do so if you are looking at it from the enforcement point of view, from the judicial determination point of view, whatever safeguards you build into the legislation.

**Professor Guild:** Indeed, but I think we need to be careful when we are looking at different systems and our concerns. Perhaps we can take the excellent study which the Council of Europe’s Committee CEPEJ did on criminal justice systems in the 47 Member States of the Council of Europe. They did a very wide ranging study on the criminal justice systems, looking at them from the perspective of how resources are allocated to them, and one of the things which I found particularly interesting is that there is one new Member State where a starting prosecutor is paid twice the salary of a starting judge and there is another Member State where a starting judge is paid twice that of a starting prosecutor. The first case is Sweden and the second case is Ireland. These are not self-evident. The ways in which our criminal justice systems work and the weightings which we give to different parts operate differently and perhaps the results are not as obvious as one would expect.

**Q148 Chairman:** Perhaps I could follow this line of thought a little. You have been talking about the criminal areas. I do not know whether you know, in the civil area, a case called *Eric Gasser v MISAT*, the Brussels regime. It is a case where the European Court effectively said that the fact that the Strasbourg Court has the backlog that Lord Lester has mentioned and the fact that the backlog is very heavily contributed to by Italian delays is irrelevant. The Austrian Court had to await the outcome of Italian proceedings. Even if there was a clear exclusive choice of law courts referring the dispute to Austria, the Austrian Court had to stay its hand until years down the line and the Italian Court eventually got round to saying, “This

is not for us.” This is a device which an Italian professor once described, I think in the 1970s, as the “Italian torpedo”: you commence proceedings in Italy in order to thwart them in the proper jurisdiction. I do not say that that was the facts in this case but it is a well-known device and the backlog is referred to in the CEPEJ study which you mentioned. You are saying that we need to have compensating measures if we are going to impose mutual trust on states: we have to try to ensure that the quality of justice is the same and that the standards are the same and therefore a degree of harmonisation should follow. Have I understood it right?

**Professor Guild:** My Lord Chairman, I am delighted to hear this Committee speaking in favour of harmonisation in criminal justice because I think that it is really quite a sensible approach!

**Lord Burnett:** I think that is going a little far actually, but, still ...

**Q149 Chairman:** I was putting it to you as a question, I hope – though I was much interested in Lord Lester’s question and your response to it.

**Professor Guild:** Perhaps I could add a little bit to that on a more serious note. Article 69e(1) says “The European Parliament and judiciary, acting in accordance with the ordinary legislative procedure, shall adopt measures to: (c) support the training of the judiciary and judicial staff; (d) facilitate cooperation between judicial or equivalent authorities of the Member States ...” It seems to me that we have at least there a glimmering of a competence to deal with some of the issues which are of concern to you which are very serious.

**Q150 Chairman:** Do you think that if the Community signs up to the European Convention on Human Rights it might take a greater interest in its jurisprudence in the Human Rights aspects of access to justice?

**Professor Guild:** One would certainly hope so!

**Q151 Chairman:** Perhaps we ought to move on. Would you make a comment on what you mentioned in passing in your opening remarks, and that is the dangers of different levels of integration via the enhanced co-operation provisions via opt-outs and opt-ins. That happens already. Why do you think it would be undesirable? It happens already, informally and in Schengen and so on.

**Professor Guild:** Yes, indeed, My Lord Chairman. I think our position is that if one looks at the Schengen experiment one sees a very unsatisfactory mechanism of lawmaking. It can hardly be a satisfactory situation but a whole treaty and all of these uncertain objects that are made – and I will not even glorify them with the name of “Acts” – suddenly get pumped into the EU system to be sorted out thereafter, as we did with the Amsterdam Treaty, and it has taken us more than five years to try to figure out what is the legal value of any particular issue. We still have tremendous incoherence throughout the Schengen system about how it operates and which set of rules. We have not managed to adopt a common visa code yet as a regulation. We do have a border code as a regulation. It is a very, very unsatisfactory way of going about things, which fails, in our opinion, to give proper voice to the correct concerns of the Member States. When a small group of Member States gets together and agrees something, the reason it is not agreed by the 27 is because not all 27 agree. Therefore, some have very substantial concerns. One can take the Treaty of Prüm and the concern of the Swedish Government regarding air marshals being armed on planes, which gave rise to a series of difficulties there. If a smaller number of Member States gets together and then seeks, as in the Treaty of Prüm, to set out in a treaty what the agenda is and then at the end of that treaty says, “And in two years we intend to make this EU law” they are effectively saying that the legitimate concerns of the Member States which had difficulty with certain provisions are not legitimate at all. That seems to me to be an extremely unsatisfactory way of going about lawmaking in a European Union of the 27.

**Q152 Lord Jay of Ewelme:** How would that make it European law? If there were only  $x$  number of states under the Treaty of Prüm, they cannot just say, “This is going to be European Union law”; there then has to be a process which the others agree.

**Professor Guild:** Indeed. This is what we thought and then the German Presidency put forward a proposal for a decision which would transform the majority of Prüm. I would like to say that the air marshals bit fell out in the process, but, nonetheless, the rest of it has all stayed in. They have proposed a decision – not even a framework decision, so it will not even go through the legislative process – to transform Prüm into a third pillar measure.

**Lord Wright of Richmond:** My Lord Chairman, can I help Lord Jay and say that if he looks at the European Union Select Committee’s Report on the Prüm Treaty, with which, I may say, Professor Guild was extremely helpful, you will see there an explanation of what the Germans were trying to do.

**Chairman:** Did they succeed in doing it? No.

**Lord Wright of Richmond:** Yes.

**Chairman:** They did. Under what provision is this? Under the third pillar?

**Q153 Lord Wright of Richmond:** It is well under way.

**Mr Geyer:** I think they reached a political agreement at one of the Council meetings. It is not yet hammered out completely but apparently it will be soon. In spite of it being transformed through the negotiating of the process into EU law, the old, the original, Prüm Treaty does not cease to exist, so it will be an international agreement between the seven original Member States and whoever wants to join in, continuing to exist on top of a Europeanised “blueprint”. This makes it very difficult for the judge and the magistrate who has to deal with it because exactly what we want to achieve with the common EU area is to make it more simple and more easy and to avoid a million systems ----

**Lord Jay of Ewelme:** I can see that. I can see that that comes in untidy and undesirable and unstructured and all that, but that seems to me a different point from the point we were on earlier. It seems to be rather an important point – which I have to say I had not quite focused on – that there was a risk that people who had reached an agreement outside the framework of the Treaty could in some kind of almost automatic way make that an instrument of the EU as a whole. That seems to be rather an important point.

**Chairman:** We are all grateful to Lord Wright for the reference and we shall study the report. Which Sub-Committee was it?

**Lord Wright of Richmond:** Sub-Committee F. It is a European Select Committee Report. I should say that there are also instances of six ministers getting together and taking decisions which, by implication, commit all the members of the European Union, in successive meetings on which this Committee has also reported at Stratford-on-Avon and Heiligendamm, meetings of Home Office ministers.

**Chairman:** We will ask our legal advisers to send us all a copy. They are going to do that. I think this is an important point.

**Lord Wright of Richmond:** My Lord Chairman, Prüm is being debated in the House of Lords next week.

**Chairman:** Yes, on 5 December. Lord Bowness, you had a question.

**Q154 Lord Bowness:** A very short question, My Lord Chairman. If we could just leave aside for the moment the desirability or otherwise of these opt-ins and opt-outs, could I just ask the witness whether they think the claimed opt-ins and opt-outs are effective in law.

**Professor Guild:** My Lord Chairman, I am the opt-in person, so I guess I had better try to answer that one. Are they effective in law? Well, the UK Government has chosen not to participate in all of the measures on legal migration and that means, for instance, that it does not participate in the long-term residence Directive; that means, for instance, that if

Americans who have been living and working in the UK for five years get a posting to Paris or to Frankfurt, they cannot go without going through the whole work permit scheme over there and starting all over again. Once again this has been dealt with in a report of Subcommittee F. Are they effective? Yes. To that extent we have prevented third country nationals in the UK from participating in that system.

**Q155 Chairman:** And vice versa, presumably.

*Professor Guild:* And vice versa.

**Q156 Lord Bowness:** Do you believe they will be equally effective under the new proposals?

*Professor Guild:* It would seem to me that those kinds of opt-ins and opt-outs will be equally effective. If one looks at, for instance, the third country agreements in the area of immigration and asylum, the UK has opted in to all the readmission agreements and out of all of these facilitation agreements. That seems to be piggy-backing for coercive measures and then refusing to accept the trade-off on the basis of which the third country agreed the coercive measures.

**Q157 Chairman:** Mr Geyer, time is short as far as you are concerned, or relatively short. Is there anything you want to add on this question which bears directly on the paper which we have read and thank you for?

*Mr Geyer:* On the enhanced co-operation question?

**Q158 Chairman:** Yes.

*Mr Geyer:* I think we always need to keep in mind just a very short remark, that the reason for judicial co-operation as it was perceived historically and within the Treaty is not an aim and a goal in itself but always accompanied or seen as a flanking measure of opening up

borders within the internal market. This makes a difference for the international co-operation, Interpol and the different measures – which may be seen as an aim in itself – but within the EU it was always a flanking measure: “As we may be losing security by opening up borders, we will enhance co-operation of judges and policemen and we will make it easier not to rely on borders as gatekeepers of security because we have made it more easy to operate across borders of policemen.” When we have a common area of free travel, and if we want to have this one area, then it is imperative that also within this common area we do not have different levels of these flanking measures. This is why, from this conceptual understanding, a differentiated treatment of flanking measures within a unified free travel area would lead to difficulties and to negativities.

**Q159 Chairman:** Can I move on, unless there are any questions on that, to a point on the new Article 24 of the Treaty of the European Union which in the area of foreign affairs requires unanimity in respect of the protection of individuals with regard to the processing of personal data, whereas in other areas there is no such requirement. What is the purpose of that provision?

**Mr Geyer:** On this question, My Lord Chairman, we would be most grateful for the possibility to find out among the governments of the EU 27 the purpose and the history of this provision, because we did not have it in the Constitutional Treaty. It is in fact an innovation of this new reform setting. It was agreed upon in June, when it was also decided that the idea of the Constitutional Treaty to have one common goal on data protection, notwithstanding the policy area, was divided up. We have a special declaration on data protection in the now third pillar; we have this special provision of Article 24 on data protection when we come to foreign policy. All this is surprising and there is no proper explanation given, at least in the open sources, so we would be most grateful if this would be an answer posed by your Committee to your Government and by the other parliaments to their governments because it

is very difficult to see. It seems to us that it might be linked to the considerable difficulties and considerably difficult questions in connection to the Extraordinary Rendition Report of the Parliament. It might be linked to the measures against financing terrorism, the listing cases, because all this involves sharing data and using data with third states, with third intelligence services, and it might be that in the Council and among Member States there was a certain kind of nervousness that new data protection rules that would apply to all fields would make them forced to open up things that they might better not want to open up.

**Q160 Chairman:** It is designed to increase the standard of protection of individuals, is it, in the area of foreign policy?

**Mr Geyer:** I think it is designed to have a special regime on it and to say: “We will adopt a special data protection rule” – which in my opinion certainly will not be higher than the others but which will have to be subject to the special sensitivities that we have in foreign policy and security measures. I think it is an excuse.

**Q161 Chairman:** It may move in the opposite direction, you are suggesting.

**Mr Geyer:** I do think so. I do think that the aim is to move it and to adapt it to the needs of the second pillar and to the special needs that exist there.

**Q162 Chairman:** There might even be an intention to give less protection to individuals.

**Mr Geyer:** It might do so and the parliamentarians, the MEPs who represented the European Parliament, Elmar Brock, Mr Duff and Baron Crespo, took this particular Article to say this is unacceptable and they have been highly critical of this move of the inter-government conference to move out the data protection standards in the second pillar. I think at a certain point they even threatened to say, “If this is in the Treaty, we will not sign.”

**Q163 Chairman:** Because they will not have a word in the setting of the standards under the EU.

*Mr Geyer:* Yes.

**Q164 Lord Lester of Herne Hill:** It seems to me, looking at Article 24, that the last sentence is rather worrying because it says that compliance with the rules will be subject to review by independent authorities, but that is not an effective safeguard for the individual of the kind that is required by the European Human Rights Convention, is it?

*Mr Geyer:* Exactly. It would add an independent authority of which kind? Is it the European Data Protection Supervisor? Is it the Article 29 Working Party? Will it be a special committee created newly to allow for a special in camera procedures? There is a fear that it might add another body/institution that has a special mandate and, as you say, will not live up to the data protection standards that we normally are reduced to.

**Q165 Chairman:** Although, to be fair, that is also a phrase which appears in Article 15a in the Treaty on the functioning of the European Union, so it is a common problem whether we are talking about foreign policy or not.

*Mr Geyer:* Yes.

**Q166 Chairman:** Could we move on then to a question about the changes introduced by the proposed Treaty as regards co-operation in relation to border checks, asylum and immigration. That is a comparison of the existing Article 63 of the EC Treaty with Article 69a of the new Treaty of the functioning on the European Union. Do you have any concerns about that?

*Professor Guild:* My Lord Chairman, our greatest concern or our greatest interest in respect of these changes is specifically the changes in respect of the competence and the jurisdiction

of the European Court of Justice. The extension of the court's competence to receive preliminary questions from courts at all instances we think is absolutely fundamental and the most important change which is taking place in this field and one which we very strongly support.

**Q167 Chairman:** Is that not going to carry with it risks of delay and overloading of the court, which is already overloaded and is perhaps not in its most familiar area dealing with this type of problem?

**Professor Guild:** Indeed, My Lord Chairman. This has been a very big question since 1999 (when we gave the court jurisdiction at all, and only from courts of final instance) but, if one looks at what has happened, we have only one reference to the court of justice from a court of final instance on an asylum issue on the Qualification Directive – I do not even think it has a number yet – whereas on judicial cooperation in civil matters there have been quite a number of references and even some judgments. It does not seem at the moment that the area of borders, immigration and asylum are going to overload the court but probably civil justice.

**Q168 Chairman:** Is this an area where you might also suggest alterations, changes, adaptation to meet the new European rules, not at the national level here but in the European Court of Justice itself.

**Professor Guild:** There is a proposal on the table which was put forward last year in December 2006 on changes to the procedures which seemed to be quite solid which are still sitting on the table but certainly are designed to address the question of how to deal with cases where there really is a tremendous need for expedition and this seems to me to be a very sensible approach. It does not seem to me to be necessary to start thinking about specialised chambers until one sees what kind of demand that is, until one begins to get the cases going. At the moment, there does not seem to be a tremendous demand. The Member State courts

seem to be dealing perfectly happily with interpreting the borders, immigration and asylum acquis.

**Q169 Lord Lester of Herne Hill:** My wife is an immigration and asylum judge, so I should declare that before asking this question. Obviously asylum and immigration cases are cases that need to be decided very quickly in some cases. Will the new opportunity to refer cases be subject to some accelerated procedure in terms of the European Court itself so as to ensure that there are no unnecessary delays in cases of real urgency?

**Professor Guild:** My Lord Chairman, every time there is a discussion of urgency in immigration and asylum cases sadly it seems that it is the Member States arguing that they are not going to be able to expel somebody as fast as they want and it is never concerns about, for instance, facilitating family reunification for children who are growing up far from their parents.

**Lord Lester of Herne Hill:** I am sorry to interrupt you but I was thinking precisely of that kind of case where someone has been hanging around for years and years and it is very urgent to get that sort of issue resolved.

**Chairman:** I am told that we are going to see next week the proposal you mentioned a moment ago on urgent preliminary references which is, I think, designed for this area.

**Lord Lester of Herne Hill:** In that case, I withdraw the question.

**Q170 Chairman:** I would like to move on to give Mr Geyer an opportunity to wind up with any points he wants to make before he has to leave, but I have a question on Article 65 of the existing Treaty on the European Community and Article 69d(2) of the Treaty on the functioning of the European Union. Both deal with co-operation in civil justice and family law in matters having cross-border implications but the existing wording is “in so far as necessary for the proper functioning of the internal market” and the revised wording will be

“particularly when necessary for the proper function of the internal market”. Would you give your view as to why there has been the change in wording and how significant it might be.

**Professor Guild:** My Lord Chairman, I will deal with your question on Article 65: Is “particularly” going to be particularly important? Clearly somebody thinks it is going to be particularly important. Some think it is going to be so particularly important that it is worth making an awful lot of noise about. Do I think it is going to be particularly important? I cannot say I really do. It does not strike me as the kind of thing that will be decisive if one gets to the European Court of Justice and the court is trying to decide whether it is “necessary for the proper functioning” or “particularly when necessary ....” Perhaps there is a change of emphasis but will it be substantial? Perhaps it will act as a good indicator to the lawmaker, to the Council and to the Commission not to propose things which are unnecessary, but, beyond that ....

**Q171 Chairman:** It does not say “when particularly necessary”; the “when necessary” is one example. It would be open, surely, to the European court to say that a requirement of relevance to the proper functioning of the internal market was irrelevant/no longer existed.

**Professor Guild:** Indeed. When we see the Reform Treaty in operation the way in which the internal market will be articulated with the area of freedom, security and justice and the slightly wider objectives of the European Union will take some time to adjust to. Perhaps I am too embedded in the traditional thinking where the internal market **is** the driving force and retains its centrality as the driving force. Perhaps I am too rapidly jumping to the conclusion that things will not change so dramatically as regards the perspectives. However, it still seems to me that one would need a good reason to proceed if one was going to take advantage of that slightly widened competence.

**Lord Jay of Ewelme:** It is on the face of it wider, is it not?

**Q172 Chairman:** I think everybody agrees it is on the face of it wider. Professor Guild is perhaps suggesting that we still have to find a reason for judicial co-operation in civil matters having cross-border implications. Since internal market has a very broad meaning anyway, on the face of it any judicial co-operation in civil matters having cross-border implications is likely to require some sort of link to the central purposes of the Union.

**Professor Guild:** Indeed.

**Q173 Lord Lester of Herne Hill:** If you think about harmonising divorce law, it is a strange notion that that is a full and proper functioning of the internal market.

**Professor Guild:** Indeed, My Lord Chairman, as divorce is illegal in Malta, I do not think we have to worry about that too soon!

**Mr Geyer:** Part of the internal market is the free movement of persons. It is directly linked. It is one of the four freedoms forming part of the definition of the internal market.

**Q174 Chairman:** There are already proposals in that area.

**Mr Geyer:** There are proposals and there are difficulties. Just to round this up: in family law, especially in divorce law, there still will be unanimity when adopting measures. This is one of the areas that was kept out of qualified majority voting and there will be unanimity requirements in family law.

**Q175 Chairman:** That is helpful. Perhaps we could move to Mr Geyer's question, before he goes, on transitional provisions which under the protocol restrict the jurisdiction of the court and the Commission's powers of enforcement over existing Title VI measures (criminal, et cetera) for a period of five years, unless the measure is amended. Is the five-year period going to be realistic, a real one? There is a qualification of unless the measure is amended.

Are the existing measures not going to be amended or renegotiated and will it be clear when they have been?

**Mr Geyer:** This transitional provision is enshrined in protocol 10. It is one of the other major interesting aspects of this new configuration that only came out after the October final negotiations. It was not included already in the IGC mandate. It seems to be that, for five years on, the old system shall apply as regards to infringement procedures, so the powers of the Commission to make the Member States do what they had agreed to do and signed to do, and also insofar as it concerns the court's competence. We will freeze what we have now for the Pre-Reform Treaty Acquis. It is important to see that it is for the old measures: everything that we experience now, we will have a freezing; we will have no sudden change. It is for the European Arrest Warrant, Eurojust – everything which is existing under the old measure – but, in fact, it is the question of the amendment which will be the crucial one and it will be mainly a strategic question, I think, of the actors involved as to what to do within this five year period as concerns amendments. There might be files and legislative acts which it would be very unwise to reopen by introducing an amendment. They were difficult enough to keep contained, and bringing in an amendment would make it wholly impossible to continue or to implement an existing measure. On the other hand, we have often seen, especially in this area, that there is no progress because Member States do not implement what they have signed up to, and so this theoretical power of the Commission as the watch-keeper of the Treaty to make Member States do their part and to implement framework decisions, et cetera, might prove necessary and might be an incitement to propose an amendment in order to get, before the collapse of the five-year period, this extra pressure on the establishment of this common system. For the citizens, it would be a clear advantage, in my opinion, if the court would have the powers it has under the normal treaties to step in, but, in the end, I think the Commission will do a careful assessment of each and every measure that exists, valuing

which ones are the sensitive ones and which ones need to be amended in order to make the procedure faster. I do not think there will be an overall approach in bringing in small amendments for each and every measure but it will be a very careful exercise on top of that. Also, Member States can bring in proposals still. There is still a shared right of initiative, which is important in this field. It is not only the Commission who can make legislative proposals, as it is now, but a shared initiative right. Any Member State can propose to bring in an amendment; it is not only the bureaucrats in Brussels.

**Q176 Chairman:** Under which provision is that?

*Mr Geyer:* It is 68 in the general introduction of the area of freedom, security and justice.

**Q177 Chairman:** We are going to move on now to the Charter of Fundamental Rights. What impact, if any, will Article 6 of the Treaty of the European Union in its new form have which declares the binding nature of the Charter of Fundamental Rights have on the protection of fundamental rights in freedom, security and justice measures?

*Professor Guild:* My Lord Chairman, in our view this will have a very beneficial effect. We think the Charter ought to have been binding from the very beginning. We think the constant references to it in the preambles to all the measures which have been adopted under Title IV have been particularly important and we would like the legal effect of that to be reflected in respect of all of the measures in the area of freedom, security and justice. Another great advantage of the Charter of Fundamental Rights is that it includes specificity going beyond the European Convention on Human Rights, including aspects of protocols of the European Convention on Human Rights, which will provide something of a backstop in some areas where we have not had progress, for instance, in the rights of the defence or the rights of suspects in criminal trials where there has not been agreement on the framework decision. We think that the impact will be excellent in terms of concentrating the minds of the

lawmakers and will be extremely helpful for the national courts at interpreting measures and also for the European Court of Justice.

**Q178 Chairman:** Having given that general answer, perhaps you could answer what the impact will be on and in respect of the United Kingdom – bearing in mind the protocol on the application of the Charter, which of course starts with a ringing recital that Article VI requires the Charter to be applied by UK courts strictly in accordance with the explanations in Article VI and then goes on to contain in the body a number of qualifications. What does all that mean? How will it be perceived?

**Professor Guild:** My Lord Chairman, it is very difficult for us to assess how this can possibly apply. We have read that protocol a number of times and it is not entirely clear exactly what the objective of the protocol is beyond some kind of statement about fundamental rights and their application in the UK and Poland. How will the impact work? We have the wording of the protocol which we can look at and we can dissect until the cows come home. Is there going to be a practical effect? What will that practical effect be? It needs to be tied in again with the opt-ins and the opt-outs. If the minds of the lawmakers are sufficiently focused on the necessity to comply with the Charter of Fundamental Rights, will this discourage the UK from opting into a measure in the area of freedom, security and justice? It is very difficult to say what the outcomes will be.

**Q179 Chairman:** These are ultimately legal questions which have to be viewed in some legal context. One can talk about domestic litigation, one can talk about litigation in the European court, one can talk about litigation in some other court involving the UK citizens, and in all those situations one has to ask whether in a concrete case this protocol means anything and, if so, what. You have not sought to make an analysis of that.

**Professor Guild:** One could argue this in a variety of different ways and come up with any answer you want on the basis of the wording of the protocol: that the protocol should not be applied; that the Charter of Fundamental Rights should not be applied by the UK courts; that judgments of the European Court of Justice which rely on the protocol should not have an effect in the UK. If we have a concrete case, how is this to make any sense at all? Does this mean that if we take, for instance, the Qualification Directive on Refugees and Subsidiary Protection, that if reference is made in a judgment of the European Court of Justice to the right to seek asylum in the Charter that that whole judgment will not be applicable in the UK? It seems to me it would be very difficult and very hard for the national judge who is looking for a common interpretation of, for instance, Article 15c on whether you have to have an individual fear of torture and inhuman or degrading treatment in a generalised situation of violence. How are you to interpret that if you are then denied the possibility of taking advantage of a decision of the European Court of Justice merely because a reference has been made to the right of asylum?

**Q180 Chairman:** Presumably a UK court in that situation would have to refer to the European Court of Justice the question whether, leaving aside the Charter of Fundamental Rights, the European Court of Justice's decision would have been the same.

**Professor Guild:** Indeed. That is one possible solution to that particular problem.

**Q181 Lord Lester of Herne Hill:** I share your bewilderment about the effect of the protocol at all. If one were arguing a case for a British court, in so far as the Charter simply embodies the international obligations by which the United Kingdom is already bound under the UN covenants or any of the other instruments, the presumption would be, anyway, that the UK statute or administrative decision should conform to our international Treaty obligations. That is quite clear. It seems to me that the only area in which this might create problems for

advocates or British courts is where the Charter goes further than existing international Treaty obligations binding on the UK. For example, we have not ratified the fourth protocol, the ECHR, as you know, and therefore one can imagine a situation there where it would really matter to the UK Government. However, it seems to me that in the main, in 99.9 per cent of cases, this is not going to make any difference. The national court will have been invited to construe domestic legislation, et cetera, in conformity and it cannot be inhibited by the protocol from doing that job if it chooses to do so. Is that right?

**Professor Guild:** Indeed, my Lord. That is why I used in my example the right to seek asylum in the Charter because of course it does not exist in any of the obligations to which the UK is bound other than the UN Declaration of Human Rights, which has a specific status, and the difficulties which apply there.

**Q182 Lord Lester of Herne Hill:** That is a very good and powerful example but it is not a typical example.

**Professor Guild:** One would hope it is not a typical example. One would hope those situations would be few and far between. Sadly, in this particular area that seems to be where we have the cluster of examples of unratified protocols and aspects which are likely to give rise to difficulties.

**Q183 Chairman:** Let us thank Mr Geyer, who has delayed as long as he possibly could before having to leave. We wish you a good return

**Mr Geyer:** Thank you very much. It was an honour and a pleasure to be here. I do apologise for having to leave.

**Q184 Lord Tomlinson:** What do you think the British Government was trying to achieve. You have talked about your views about the deficiencies in the protocol. What do you think

they were trying to achieve? Have they achieved anything other than what you appear to be saying is confusion?

**Professor Guild:** It would seem to me that in the UK we have gone through a period of great interest and support for human rights with the Human Rights Act, which Lord Lester was very instrumental in bringing into UK law. We went through a period of great support for the idea of human rights. We have perhaps passed into a period which is slightly more reticent about human rights and fundamental rights generally.

**Q185 Lord Tomlinson:** The British Government is not objecting to the part in the Reform Treaty about adhering to the European Convention on Human Rights. That is all there. There is no objection to that. It is really what additional to that you think the British Government was trying to achieve and what they have created.

**Professor Guild:** It would seem to me that it is no new obligations in human rights.

**Q186 Lord Lester of Herne Hill:** Could one not give the answer to Lord Tomlinson's question that it is political, in that by having the protocol in place one can deal with anti-European sentiments in this area by saying, "We have this in place." Therefore, in so far as tabloid journalisms or politicians seek to make capital out of all this, it provides some defensive material for Her Majesty's Government?

**Professor Guild:** Indeed, my Lord. This is a very political answer which sounds extremely persuasive to me.

**Q187 Lord Bowness:** My Lord Chairman, I am sorry to labour this particular point but it is quite important. I do not think we ought to get into discussions about whether we are in favour of this or against it. This inquiry is seeking to deal with the effect the Reform Treaty will have on the law as it stands. One example of the Charter of Fundamental Rights which is

much discussed and probably understood by a little more by most people than some of the other issues, and that is the Right of Collective Bargaining and Action. Article 28 of the Charter of Fundamental Rights talks about that right and workers having the right to take collective action to defend their interests, including strike action. The explanation makes it quite clear, and talks about the modalities and the limits of the exercise of: “Collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States.” That seems to me to be quite clear, unless you believe that words do not mean what they say. The question I really want to know is this: Do you think this protocol in any way changes either the Article or the explanation? Would it allow a court, European or national, to come to a decision about, for example, secondary picketing, which we believe it cannot come to under our existing legislation.

**Professor Guild:** It would seem to me, My Lord Chairman, that the question is: When different aspects of the Treaty come into conflict with one another how does one resolve the problem? There is of course the case from the European Court of Justice in the *Schmidtberger* case which was about the right to collective action versus the fundamental right in the EC Treaty to provide services, if I remember correctly. The Court of Justice had to find a way of dealing with that question. The exercise of collective rights will always of course interfere with some fundamental right to provide services or an aspect of the Treaty. It would seem to me that in those circumstances the ability to have reference to the Charter would assist in the clarification of that particular kind of dispute.

**Lord Bowness:** I have never believed that anybody can stop any court of any advocates anywhere referring to something. The question really is: If somebody were to seek – as a “for example” – a right to indulge in secondary industrial action – which is not legal, as I understand it, under our domestic legislation – whether this protocol would make it possible

for them to succeed in that. In other words, does the protocol work or not? Because the words are quite clear.

**Lord Lester of Herne Hill:** Could I, as it were, add to that important question?

**Lord Bowness:** Please – I am sure more eruditely than I.

**Q188 Lord Lester of Herne Hill:** To take that example: suppose that an individual sought to challenge the ban on secondary picketing in this country, in doing so they would rely upon the European Convention on Human Rights for a start and freedom of association – they would lose but they would rely upon it – and they would rely on the ILO Conventions by which we are bound and they would rely upon the UN Covenants by which we are bound, economic and social, as well. They would rely upon all of that in the UK court anyway as a source of interpretation and they would seek a declaration of incompatibility with the Human Rights Act and so on. Let us say they would lose and there could be a case in Strasbourg and there could be a case in Luxembourg as well. Whether the protocol works or does not work in a narrow sense, in legal terms it could not be like the court of King Canute and keep out all these other international instruments from being prayed in aid to seek to challenge the secondary boycott. I think the secondary boycott would not be successfully challenged but that is another matter. I do not see how the protocol would act as a real barrier in that case. Am I right or wrong?

**Professor Guild:** I would agree entirely with you, Lord Lester. We are looking at a framework of fundamental rights in which the Charter is only one piece, which has to be understood within the larger framework of international human rights law. It cannot be read out of context. The intention is to provide a coherent system of fundamental rights which apply in the 27 Member States and which take into account and which interpret and apply at the EU level correctly the international obligations of the Member States.

**Q189 Chairman:** It is the position, is it not, that the protocol, in particular in relation to Title IV of the Charter, is designed to say, “That cannot be the tipping factor”. One asks, looking at Title IV, whether it would anyway be the tipping factor because it does not say that you do have the right to take the collective action; it simply says that you have the right in accordance with Union law and national laws and practices. National laws and practices do not have all the rights and, unless you can find them elsewhere in Union law outside the Charter, it is not easy to see that Title IV would necessarily anyway be the tipping factor.

**Professor Guild:** Indeed. It would seem to me that this is quite the case. The objective of the Charter is not to create new rights *per se* but rather to permit them to apply correctly and properly within the European Union.

**Q190 Chairman:** The new Article 4(2) of the Treaty of the European Union contains a reference to national security remaining the sole responsibility of each Member State. As has been stated to this Committee, do you agree that goes wider than the current derogation for internal security matters under Article 64 of the Treaty of the European Community? What might be the result, if you do?

**Professor Guild:** This was an answer which Florian would have answered had he still been here. I shall seek to make a few comments about the new Article 4(2) in general. It has been worded differently and the intention is to make it wide. That seems to be self-evident from the wording of the two provisions. Of interest to me a bit beyond that is not so much the shielding of Member States intelligence agencies from the reach of the EU law but the widening of various aspects of EU law to include intelligence agencies – and here I would draw your attention in particular to the way in which the proposal to widen access, for instance, to the Eurodac database has been worded, the wording of who will have access to the VIS (visa information service), the wording of who will have access to the Schengen Information System II when it ever comes forward, and we see a continual widening of the

agencies which will have access to these different databases, not to police agencies but the wording has a tendency to be wider to include intelligence agencies, or, at least, to use wording which certainly leaves open the possibility that the Member States can interpret access as being made available to intelligence agencies as well. On the one hand, we may be concerned about Article 4(2) in terms of protecting national security. On the other hand, we see the gradual incorporation of powers for intelligence services in the question of information gathering, exchange of information and certainly in the Prüm Treaty and its continuation as well.

**Q191 Chairman:** Are you happy in that respect with the general provisions relating to the institution of data protection of individuals?

**Professor Guild:** This is the problem that we come back to: if we are going to allow the intelligence agencies access to all of the databases, then (a) we should have made a formal decision about it and (b) we should decide under what circumstances and how they are able to use it. Because, while we have fairly substantial rules which affect other of our coercive agencies, the police, et cetera, about how they have access and when they have access and what they can use information for, the intelligence services tend to be less carefully regulated, and that aspect is a matter of some concern as well as. It is not so much, “Are we shielding our intelligence agencies?” but “Are we bringing them in and are there consequences of bringing them in in respect of the information which is being made available to them?”

**Q192 Lord Lester of Herne Hill:** Long ago in a case called *Klass* in Germany the Strasbourg Court said that in this area there had been adequate safeguards against the use of the powers that are conferred. Are there built-in safeguards in the computer programmes and so on of the information systems that make it very difficult for abuses to take place, given that judicial remedies are not likely to be effective?

**Professor Guild:** Certainly we have the case of *Rotara v Switzerland – Klass* revisited – which concerned intelligence services refusing to correct incorrect data about an individual in a database. Clearly we do not have satisfactory mechanisms which protect the information about individuals in databases. Certainly, if we look at jurisprudence from the European Court of Human Rights, this has certainly been a very hot issue about the third pillar, with *sui generis* rules on data protection going into every single different provision creating a new database, and each time the provisions appearing to be less and less satisfactory.

**Q193 Chairman:** Is that because they are in general terms saying that adequate protection should be assured and really leaving it to individual national countries without some single European standard? Why is it that they are unsatisfactory?

**Professor Guild:** We are certainly getting the pushing down of the problem to the Member States themselves. If you look at the opinion of the European Data Protection Supervisor on the latest proposal on data protection in the third pillar, Mr Hustinx says that the level of data protection which is proposed in the third pillar now, in the proposed framework decision following the further watering down under the German Presidency, does not even meet the minimum requirements the Member States are required to comply with under Convention 108 of the Council of Europe on data protection and the creation of databases. Mr Hustinx himself is saying, “What is the point of this framework decision when it does not even comply with the minimum requirements of a 1981 Council of Europe Convention?”

**Q194 Lord Lester of Herne Hill:** My Lord Chairman, the question was predicated, I think, on the notion that there would be national remedies that might bite on this. My concern would be my name gets put into another Member State’s information system, is circulated on the Schengen Information System, is circulated across all the states, yet I have no real safeguard after the event in a national court of a European court because I do not know about

it in any event. The only safeguards could be built into the system itself, in the computer systems, to prevent inaccurate and unnecessary information being circulated without proper checks. My questions are really about – and, again, I am speaking from pure ignorance – is to what extent there has been focus on building in those kinds of machine safeguards as well as human safeguards.

**Professor Guild:** To take perhaps the most experienced of the databases at the EU level, the Eurodac database, which contains the fingerprints of everyone who has applied for asylum in a Member State of the European Union and those persons who have been apprehended irregularly crossing an external frontier, the database is a centralised database and therefore, unlike the Schengen database which tends to be a mishmash of national databases linked up, it is one database with an entry/exit system: fingerprints are sent in and answers are sent out. The Eurodac Regulation was very carefully drafted to permit access to the database only of authorised persons for the purposes of determining whether an asylum application had been made in the Member State. The criteria for the database when it was being set up were exactly those to fulfil that particular need. Under the German Presidency, a proposal was put forward, which is being sponsored very heavily, that this database now needs to be opened up to the law enforcement agencies, and the terminology seems to include also intelligence agencies, which will require a minor change in the gateways to access to that database. The fact that there needs to be an amendment to the regulation to do that indicates that the system has worked very well and if anybody else wanted that data they were not getting it. – or, at least, somebody was concerned that the legality of access to that data was correct. There have been two reports so far by the European Data Protection Supervisor of Eurodac and in neither of those reports has he indicated concern about unlawful access to the database. The database seems to work and, because it works, now it is going to be changed.

**Q195 Lord Lester of Herne Hill:** Thought not in relation to Schengen, which, as you say, is a mishmash of information coming from national databases.

*Professor Guild:* Schengen is a much less satisfactory database.

**Q196 Lord Tomlinson:** I always have great difficulty in reading Articles of Treaties and feel a bit intimidated by them as a non lawyer, but, if we look at Article 4(2) the language seems to have a certain precision of meaning. I am concerned about the relationship between Article 4(2) and the ensuing sub-Article 4(3), where, after the precision of Article 4(2), you then get words like “sincere co-operation”, “full mutual respect”, and “the Member State shall facilitate the achievements of the Union and refrain from any measure which could jeopardise the achievements of the Union’s objectives.” Do any of those things in Article 4(3) apply backwards to Article 4(2)?

*Professor Guild:* It would seem to me that Article 4 has to be read in the whole.

**Q197 Lord Tomlinson:** That is what I would have thought.

*Professor Guild:* Looking at the wording, as we speak, it would seem to me that the principle of loyal co-operation of the Member States to the European Union, as enshrined in Article 10, has been a particularly important one but it has never been used to my knowledge to defeat a legitimate claim to the safeguarding of national security. It would strike me as surprising should such a result ensue. It would seem to be very difficult ----

**Q198 Lord Tomlinson:** If that is the only thing that is really there in Article 4(2) why bother to have it at all if it is never used? It struck me as either seriously qualifying Article 4(2) or redundant.

*Professor Guild:* In so far as you were concerned about the safeguarding of national security, there is a series of objectives which are sought in Article 4(2) and Article 4(3), it seems to me,

is a provision which is seeking to ensure that Member States apply in a proportionate manner what one might call almost derogations of 4(2). Yes, the Union shall respect essentially state functions, including ensuring territorial integrity and maintaining law and order and safeguarding national security. 4(3) says that, nonetheless, there is the obligation of sincere co-operation.

**Lord Bowness:** It also says, My Lord Chairman, the matter of carrying out tasks which flow from the treaties, whereas Article 4(2) says national security is the sole responsibility of the Member State, so it does not flow from (2).

**Q199 Lord Burnett:** Can an individual apply to find out what is on the database concerning him or her? If it is wrong, can they apply for rectification?

**Professor Guild:** It depends on which database. There is certainly provision to receive information on what is on the database on Eurodac. There are also provisions to have an intermediary, for instance a national data protection authority, to ensure that information on an individual is correct in the Schengen Information System. Certainly in those two information systems there is the right for the individual, either directly or indirectly, to have verification that information is correct and, if the information is not correct, to have it corrected. When Lord Wright was chairing Sub-Committee F in the inquiry which looked at the Schengen Information System, we provided information from the Data Protection Supervisors in four of the Länder in Germany, from CNIL, the Data Protection Supervisors in France, as well as in the Netherlands. On their inspections, of the Schengen Information System as regards their data, in some cases up to 42 per cent of the data in the files which they were looking at were incorrect in one way or another or the information was being held illegally.

**Chairman:** It sounds as if it is an area which could merit some attention at a general European level, as I think you have been telling us.

**Lord Tomlinson:** I am always very happy to be corrected by Lord Bowness, but, after it talks about arising from the treaties, the Article goes on to say, “or resulting from the acts of the institutions of the Union” and in the next paragraph it goes on to talk about “could jeopardise the attainment of Union objectives”. All those seem to be very, very wide qualifications and that is why I really raised the question about 4(3). I do not intend to pursue it not but I just wanted to have that on the record.

**Lord Bowness:** For the record, My Lord Chairman, I would not presume to contradict my friend Lord Tomlinson just to have a different point of view.

**Chairman:** On that happy note of unanimity, we must all thank Professor Guild very much for her patience and for the very helpful and very clear way in which she has explained the position to us. Thank you very much indeed.