

TUESDAY 27 NOVEMBER 2007

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Present

Dykes, L  
Grenfell, L (Chairman)  
Kerr of Kinlochard, L  
MacLennan of Rogart, L  
Mance, L  
Plumb, L  
Roper, L  
Sewel, L  
Symons of Vernham Dean, B  
Tomlinson, L  
Wade of Chorlton, L  
Wright of Richmond, L

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Witnesses: **Mr David Heathcoat-Amory**, a Member of the House of Commons, **Lord Leach of Fairford**, a Member of the House, Chairman of Open Europe, and **Mr Neil O'Brien**, Director of Open Europe, examined.

**Q47 Chairman:** Before I formally welcome our witnesses, may I draw your attention to the declaration of Committee Members' interests that you have before you. Having dealt with that formality, may I say how pleased we are to see David Heathcoat-Amory, Lord Leach of Fairford and Mr O'Brien. We are also very happy that sitting behind them is Derek Scott, who is the Deputy Chairman of Open Europe. Mr O'Brien is the Director of course and Lord Leach is the Chairman. I should add that Mr Heatcoat-Amory is a distinguished member of the European Scrutiny Committee in the other place and he will be speaking in a personal capacity here this afternoon. This meeting is on the record. You will be sent a transcript for checking as soon as possible following this session, in the next few days. Thank you all again, for being with us. May I ask if any of you would like to make an opening statement before we go into questions?

*Lord Leach of Fairford:* I would like to say a word about Open Europe's approach to the Reform Treaty. It is guided by two main principles: that political structures should be built on democratic assent and that free markets are the key to competitiveness. The Laeken Declaration that launched the Constitution suggested addressing the democratic deficit by bring decisions closer to the people. In the event, however, the Constitution and its successor, the Reform Treaty, pursued the centralising course that had caused the democratic deficit in the first place. Additional competences are transferred to the EU; pillar compromise, some would say pillar collapse, puts the Union into policy areas once reserved for the Member States; and the ability of Member States to block legislation, though not to pass legislation, is reduced. The provisions to involve national parliaments are essentially a mere tokenist step towards devolution. The defining ingredient of democracy is reversibility – the right to replace legislators at elections and to repeal laws that prove defective. This ingredient is lacking in the Union's structure and the Treaty does not offer reform. Turning to free markets, the Community's golden economic period was when it was dismantling internal and external trade barriers. Recent times have seen a somewhat less liberal approach, with excessive regulatory harmonisation within the Union, accompanied by increasing protectionism abroad. The Treaty, with its symbolic downgrading of undistorted competition and its opening of new avenues for legislation, sends a regressive message to citizens already overburdened with regulation. The Government claims that our red lines protect us from some elements of the Treaty, but this ignores the lesson of history. From Van Gend en Loos in 1963 onwards, the Court of Justice has consistently taken an activist view of European law, expanding its scope beyond what can be derived directly from the text of the Treaties. Readiness and ability to circumvent our red lines are in the DNA of the Union. Remember the Working Time Directive, brought in through Health and Safety despite our opt-out. This brings me to a final principle, that electoral promises should be honoured. All the main

parties promised a referendum on the Constitution. The then Prime Minister said it was unthinkable, if it was defeated, to just change a few things and bring it back, but that is exactly what is now proposed. Research shows a 97-98 per cent identity between the Constitution and the Reform Treaty. The only reason the public is not to be offered a referendum is that the Government expects defeat. Such cynicism may buy a temporary reprieve for the Treaty, but it is another nail in the coffin of public affection for Europe and public confidence in our own political standards.

**Q48 Chairman:** Thank you very much. Before calling on Mr Heathcoat-Amory, may I just state that the purpose of our inquiry in this Select Committee is to look at the institutional reforms and what the impact is going to be. It would be fair to you for me to say right away that we are not planning to engage you in a discussion as to whether or not there should be a referendum. It is not in our terms of reference but that is in no way to suggest that you should not have had your say. I want to make that point clear at the outset.

**Mr Heathcoat-Amory:** I would like to extend a point made by Lord Leach about the Laeken Declaration because it was that that launched the reform process. The Heads of Government meeting in Laeken in 2001 required that the Convention on the future of Europe designed a Europe that was simpler and more democratic and “closer to the citizen”, an accordant phrase. In my judgement, neither the Convention nor the documents subsequent to it discharged that mandate, but at least the Constitutional Treaty did have one simplifying element in it, which was that it merged the two existing Treaties; that is to say the European Community Treaty and the Maastricht Treaty or European Union Treaty, and it merged them into a single text. Although it was fantastically complicated and far too long, at least its structure was an attempt at simplification. The Reform Treaty which we are now considering does not do that. It retains the two-treaty structure. When one hears people saying that the constitutional concept has been abandoned, that is true only in the sense that

a single unifying text had been abandoned. So the result is an attempted amendment of the existing Treaties. It is now fantastically complicated, a document that is really only accessible to lawyers and politicians. The instruction to bring in the public and engage them and get them to understand what is happening in Europe in my view has completely failed. Meanwhile, the substance and legal effect of the Reform Treaty is very similar to the Constitutional Treaty, as is easily shown by a comparative table of the Articles in the two Treaties. All the centralisation and the transfer of powers that I have long objected to are still present in the document we are considering. I think one reason for the complexity is actually the process whereby it was adopted this year. Just to remind the Committee, the European Council meeting on 21 June effectively decided the Treaty politically, but the document on which it did that was only available to Member States two days before, when the German Presidency produced the draft mandate on 19 June. Not only the public but all national parliaments were completely cut out of that process. If they had not been, I think there would have been more incentive, more pressure, on the drafters to make it accessible and comprehensible to at least parliamentarians. I think it is a failure of process as well as substance. My last comment, if I may, my Lord Chairman, is over the institutions because your inquiry is specifically about that. All of them gain powers under the Treaty. I saw the process at work myself in the Convention, which very rapidly became a kind of institutional bargaining session whereby well organised Commissioners and Members of the European Parliament tended to see the process in terms of their own institutions. The only group that was disorganised was my own, the national parliamentarians, because we did not know each other; we had no unifying agenda. Perhaps it is national parliaments that are the losers. Certainly all the institutions we will be considering soon I think are gainers, and the losers are national parliaments and, I am afraid, the public. My main point I would want to emphasise is that it is a very serious defect in any treaty that it is not understood by the people who are

bound by its provisions. I think we are beginning to slide into a system whereby the very legitimacy of the laws and directives will be under question because people not only do not understand it but they are still baffled by who makes these laws and to whom are they accountable.

**Q49 Chairman:** Thank you very much. One of the points that has been made I will just make a very brief comment on, and that is that you were mentioning the very unsatisfactory process that followed the IGC through with the very short timing allowed of 48 hours. I think that we fully agree with you there because we did in our interim report on this note that this should not be repeated in future IGCs, so we are at one on that. Would Mr O'Brien like to make an opening statement? You do not. We can go straight into questions. We leave it to you to decide who will answer the questions; one or all of you may do so, bearing in mind the fact that we have quite a lot of questions to get through and only just under an hour and a quarter in which to do it.

**Lord Leach of Fairford:** We will probably normally just reply with one of us so as to save time.

**Q50 Chairman:** That is very helpful. The first question that we have for you is on the restructuring of the Treaties and whether you think that the division into a Treaty of the European Union and a Treaty on the Functioning of the European Union has clarified or made more difficult our understanding of the Treaty. Secondly, do you feel that there is greater significance in the fact that the objectives are now all in the TEU and the Treaty on the Functioning therefore becomes subordinate to the TEU, and whether you have any comments to make on this structure.

**Mr Heathcoat-Amory:** I only comment that perhaps the most prominent change to the Treaty on the European Union, the successor to the Maastricht Treaty, will be the collapse of the

pillars. The pillared structure that came out of Maastricht will only persist in some form as regards common foreign and security policy. Matters of criminal justice and policing, which are at present in the third pillar, will go formally into the other treaty. This is important because those policies will therefore be subject to majority voting instead of unanimity at the minute, and also will come under the jurisdiction of the European Court, and the Commission will be able to launch infraction proceedings against Member States. In this very delicate and important area of criminal justice where we are talking about the coercive power of the state in its various forms, the definition of penalties and so on, I think it is a very big change that that should cease to be intergovernmental and should become a mainstream European Union activity.

**Mr O'Brien:** May I add a little to re-emphasise the practical importance of the collapse of the Third Pillar? It is simply to note that our own Government for a long time were opposed to giving the Court of Justice jurisdiction over the Third Pillar. Back in 2000, the Government argued: "The Government does not accept that we should agree to extend the full ECJ jurisdiction over the very sensitive areas covered by the Third Pillar. These raise sensitive issues relating to national sovereignty...." Even last November, November 2006, Geoff Hoon told the Lords European Union Committee: "There is clearly a risk that adding what is in effect an avenue of appeal at a very early stage in the process might be an opportunity for further complicating our existing asylum and immigration processes." So these are not just technical movements between pillars; they have very important practical effects for our criminal justice system and also our asylum and immigration system.

**Chairman:** Thank you very much. I think we will come back to that. Could we go on then to the question of the conferral of a legal personality on the Union?

**Q51 Lord Wright of Richmond:** Mr Heathcoat-Amory, you referred in your introduction to the legal effect of the Reform Treaty, and Mr O'Brien has just talked about practical effects.

Would one of you like to give us a view on the practical effect of conferring a legal personality on the Union, particularly in the area of foreign and security policy?

**Mr O'Brien:** This is something that the UK Government has traditionally always resisted. Back after the signing of the Amsterdam Treaty, Tony Blair made quite a point of having said that we had resisted this attempt to go for the single legal personality. He said: “Others wanted to give the European Union explicit legal personality across all the pillars of the treaty. At our insistence, that was removed.” Peter Hain said during the European Convention: “We can only accept a single legal personality for the Union if the special arrangements for CFSP and some aspects of JHA are protected.” I think the worry that the Government has had about this is that if the Union gets into the business of signing treaties in both the JHA and the CSFP pillars, that could have implications for internal competences as well, because of course if the Union is doing international deals in these areas, there is implied internal competence and that could have knock-on effects on our laws here. I suppose it also has practical implications in terms of the long-running debate about single external representations for the Union in various international bodies because if you have mixed competences at the moment, it is very hard to have a single representation, be it in the UN, the IMF or the World Bank. Those are the two main practical effects. You could have, for example, the Union making a treaty to do with justice and home affairs and that having internal implications in the UK.

**Q52 Lord Wright of Richmond:** Can I make a comment on the Annapolis conference that is going on at the moment in which both the EU and the United Kingdom are represented? It is an example where both can be properly and fully represented. I just make that point.

**Lord Leach of Fairford:** Could I just add one word here? This has always been regarded as a matter of immense symbolic importance. I am not sure it does not go back to Spinelli; it certainly goes back a very long way. It has always been resisted by some governments

including the British Government and been proposed by the most ardent integrationists. I do not believe one should overlook the symbolic effect, though I realise the question is specifically addressed to the practical effect.

**Q53 Chairman:** We are clear, are we not, that in any case where the European Union speaks with one voice in a multilateral institution, it can only do so where there has been a declared consensus amongst the Member States that that policy be enunciated by their representative?

**Mr O'Brien:** During the negotiations in the Convention, take the vexed issue of the Foreign Minister or High Representative who has the right to speak on the behalf of the UN: first during the Convention the Government tried to have that right to speak on our behalf on issues where the Union has defined a position deleted. Then when it failed to be deleted, the Government tried to get the wording changed so that it would say that the Union Minister for Foreign Affairs could request to speak on behalf of the Member States which had seats on the UN Security Council. That model of requesting to speak strikes me as a better one than that of automatically speaking. I think that is pretty clearly what the UK Government would really have liked. I think there is a difference between having the option of working together and being forced to have a single position, if you see what I mean.

**Q54 Lord Roper:** Would there not have to be unanimity in the Foreign Affairs Council before the European Union could receive a mandate to negotiate a treaty?

**Mr O'Brien:** One of the interesting questions about the Treaty that follows the Constitution is the whole issue of majority voting on proposals from the High Representative, as he is now known, because the way the process works is that by unanimity the Council asks the High Representative to make a proposal. Then when that proposal comes back, you are into majority voting on it. The problem there is that you as a Member State sign up in principle to

something, say a position on Darfur, but then when the proposal comes back, you do not like it but then you are into qualified majority voting and you could be out-voted.

**Q55 Lord Roper:** We are talking about the point you are making about the legal personality having the right to negotiate treaties. As far as this is concerned, would there not have to be unanimity in the Foreign Affairs Council before the European Union could start negotiating a treaty?

*Mr O'Brien:* It is not clear to me from reading the Treaty whether or not international agreements are one of the things you could do using this power of QMV on proposals from the Foreign Minister or not.

**Q56 Lord Roper:** The High Representative?

*Mr O'Brien:* I am sorry, the High Representative.

**Q57 Lord Roper:** But he could only bring those proposals forward if he had received a mandate from the Foreign Affairs Council to bring such a proposal forward, I think.

*Mr O'Brien:* I am not sure that that is true.

**Q58 Lord Roper:** I think you should re-read the Treaty.

*Mr O'Brien:* I am just giving you my honest opinion about this rather than trying to make a point.

*Mr Heathcoat-Amory:* I do not want to over-state the significance of the EU having a legal personality. After all, the EC has one at the minute. I think it has an important symbolic significance. It will encourage the European Union to be seen and to try and be seen on the international stage as a unit replacing Member States. It is quite interesting that Article 6 says that the European Union shall accede to the European Convention on Human Rights. At the minute, there is no provision for non-states to do that, so it is quite clearly foreseen that the

European Union shall accede to a body in that sense like a state. I think what is also significant is Article 3 of TFEU, which gives to the Union, or will give, exclusive competence for the conclusion of an international agreement in a number of eventualities, but including, “in so far as its conclusion may affect common rules or alter their scope”. It is not very good language but what this means is that where the Union has internal policies for things, shall we say, like climate change or alternative energy, it gives them not just a right but exclusive competence to decide international agreements on behalf of Member States in that policy area. So we would actually be prevented from signing international agreements on matters on which the European Union has domestic competence. I think that is actually quite a significant extension of its international part for which its legal personality will be more important.

**Q59 Baroness Symons of Vernham Dean:** Can I ask about what Lord Wright mentioned a minute or two ago, Annapolis at the moment? Is it in your view detrimental that we operate on the Quartet through the EU? There is currently an arrangement where on this occasion there is some representation of the United Kingdom too but when the Quartet meets over the Middle East Peace Process it meets as the United Nations, the EU, the United States and Russia. Is that arrangement something that you disapprove of or think is an ill-founded arrangement?

**Mr Heathcoat-Amory:** Speaking for myself, I am an internationalist and I believe that Britain must have a formal position in as many international bodies as we can and try to project ourselves internationally. In many cases it is extremely useful that we have an intense relationship with a number of continental European countries in order to assist this. It may well be that on occasion the European Union should come together and speak with one voice, but what the Treaty does is that it mandates this and it will progressively exclude the possibility of Britain having bilateral agreements over a range of policy matters with other

countries. I think this is a denial of choice and it is that choice that I think is very important if we are to have an independent foreign and security policy, which the Government assures us we will have, in parallel with working in the European Union. I think, frankly, the text of the new Treaty puts that in doubt.

**Q60 Chairman:** But does not the text make clear that states remain entirely free to conclude international agreements provided they are compatible with the agreements signed by the EU or within the EU's competence? So what you are saying is that if that is the case, then there may be occasions on which Britain may want to sign an agreement which is not compatible with one it has already signed which was agreed to by unanimity within the EU? It would seem a rather strange case to imagine.

**Mr Heathcoat-Amory:** Occasionally I want to make agreements which are incompatible with other people's views. I think this is the definition of freedom. Also, I instanced Article 3, which clearly gives the Union exclusive competence in international agreements. That does mean that we can therefore only have agreements if the European Union collectively agrees that we should. I think this is quite a big restriction on what is or should be an independent, free national policy.

**Q61 Lord Roper:** With respect, Article 3 is not referring to CFSP matters; it is referring to matters which at the moment are the responsibilities of the Community rather than of the Union. That is therefore presumably only a codification of what is the practice at the moment.

**Mr Heathcoat-Amory:** Yes. I am using foreign policy in its very general sense to include all international agreements because, after all, it could easily be said that in matters of climate change, it is a feature of our foreign policy that we do or do not sign Kyoto style agreements.

I do not wish our policy in that matter to be exclusively conducted through a policy which by definition we do not control.

**Chairman:** I think that has brought us well into the question of on competences. Maybe we can explore this a bit further.

**Q62 Lord Kerr of Kinlochard:** One of the bits that has certainly survived from the Constitutional Treaty, and from the Convention, is the articles making explicit the principle of conferral and classifying into three categories the various forms of competence. This was not particularly popular with all members of the Convention at the time: indeed it, was sharply attacked by what we might call the federalist wing of the Convention. Is it one survival from the Constitutional Treaty which you, Mr Heathcoat-Amory, are still happy to see, or have you gone off it?

**Mr Heathcoat-Amory:** My Lord Chairman, I defer to Lord Kerr's knowledge of a lot of this because he wrote the Constitutional Treaty of course, but on the matter of division of competences, I have never myself asserted that we have a federal system which is comparable or similar to, say, the American system. I always thought it was particularly bizarre when President Giscard likened himself to Thomas Jefferson. The systems are entirely different, except perhaps in this, that there was an attempt in the Constitutional Treaty, which is carried forward into the Reform Treaty, to divide and distinguish competences or, to use an English word, powers. That could be useful, which is why it is in essence constitutional, but in my view it fails because the division is really entirely on the terms of the European Union. To give an example, there is a very long list in the Treaty of shared competences. I did not welcome this because the definition of shared competences is that when the European Union legislates over one of them, the Member States lose their power to legislate in that area. So it is not a shared competence; it is rather that Member States will have a residual competence and that is not a welcome development.

**Q63 Lord Kerr of Kinlochard:** Forgive me, it is not exactly in that area that the position is clarified? To the extent that the Union has legislated, the Member States have agreed that they will on that specific subject and to that specific extent not pass laws in conflict with those of the Union, but in the rest of that area the competence will remain shared.

*Mr Heathcoat-Amory:* I hope that Lord Kerr is right on that. Referring to the text, it says: the Member States shall exercise their competence to the extent that the Union has not exercised its competence. The definition of “competence” seems to me to be very broad because the list of competences does not refer to individual legislation or directives but to areas as broad as internal market, social policy, economic social and territorial cohesion, environment, transport and energy.

**Q64 Lord Kerr of Kinlochard:** With respect, does that not prove my point? Nobody is saying that the United Kingdom cannot pass social policy legislation because the EU has for some time had a competence in social legislation.

*Mr O'Brien:* One of the practical uses of this division of competence is going to be in court cases, and the problem is it is going to be for the European Court of Justice to decide on these things. I think overall the whole issue of the division of competence is a good example of how good intentions at Laeken went bad. We wanted a division of competences in the UK in order to prevent competence creep but the way in which the sharing of competences has actually worked out was a long way out of line with the UK Government’s view of what the existing position is. As you will remember, during the European Convention, the UK Government made 12 separate unsuccessful attempts to change or delete elements of these Articles. For example, it complained that competition law is not an exclusive competence. It asked for various of the other shared competences to become national competences. It also objected to the fundamental structure. The UK tried to delete the whole idea of shared competences because they are potentially in the future more trouble than they are worth in

court. If you think about court cases in the future, like the Environmental Crimes ruling from October 2005, where the scope of the European Union Commission's ability to pass criminal laws is now really only determined by a view of where its competences are, it will be up to the court to decide what its competences are. It now has this whole ream of text, four sides of A4, explaining in very vague terms it will be for it to interpret what these competences are, and also the division of competences is set out in a way with which the UK fundamentally does not agree. Will these Articles have no effect whatsoever? I do not believe that they will not. I believe that these Article will increasingly be used by the Court of Justice in making quite contentious legal rulings. It is certainly clear to me that these Articles have been drawn up in a way in which the UK Government did not like.

**Q65 Lord Kerr of Kinlochard:** I was just going to ask Mr O'Brien if he has noticed the principle of conferral, which makes it absolutely explicit that where powers are not conferred on the Union, they remain with the Member States? This of course was always the case, always implicit, but now explicit. That principle will apply in what he is describing as an extremely dangerous grey area. I do not see the danger. And it seems to me the area is less grey because it is clearly defined, in that new classification, as an area where the powers of the Union are applied only to the extent that the Member States decide that they should be, on each of these listed subjects.

**Mr O'Brien:** All I can really say in answer to that is that you may believe that but the UK Government certainly did not believe that, and it objected and found the idea of these shared competences dangerous.

**Chairman:** It seems we have a difference of opinion on various shades of grey.

**Q66 Lord Sewel:** I am just seeking to clarify Mr Heatcoat-Amory's position on shared competences. Do I take it that what you are saying is that your proposition is that say in

social policy, if the EU decided to exercise its competence in the area of social policy on a minor inconsequential matter of policy, then the effect of that would be that Member States would lose all competence to act in the area of social policy?

**Mr Heathcoat-Amory:** Whether there is all competence in the area remains to be seen but certainly reading the text as it is, it does say that, “Member States shall exercise their competence to the extent that the Union has not exercised its competence”.<sup>1</sup> The word “competence” is very general. I would understand if the rules said that in a specific area if the Union had passed a law, you obviously cannot have a Member State passing incompatible laws – that is obviously sensible and longstanding – but I think this goes substantially further by reserving for the Union a wider area, they call it a competence. If you look at the definition of “competence”, it is very, very wide, and the list here of 11 policy areas is not exclusive; it only says “in the following principal areas”. There may be very wide areas of policy making which could be reserved for the Union if they moved into that area. Of course, we do not know; we are in the hands, as Mr O’Brien has said, of future judicial decision, but I think it is very dangerous in a document that is supposed to bring certainty and clarity. We are saying to the people we represent, “Here is a document that removes the ambiguities. There will be no more mission creep. This will show exactly who does what”, but in my view it does not because the ambiguities and the apparently wide areas could be reserved for Union activity in the future, in addition of course to the list of exclusive competences which themselves go rather wider than the status quo. We know, for instance, that the British Government objected to the inclusion of competition rules as an exclusive competence, but it is in the text.

**Q67 Chairman:** I notice that you have not referred to Protocol 8 when it was introduced at the insistence of the Czechs, which reads in relation to exercising shared competences: When

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<sup>1</sup> *Note by the Witness:* Article 2(2) TFEU.

the EU carries out an action in a certain area, the scope of its competence covers only the elements governed by the Act in question and does not therefore cover the whole domain. That would seem to clarify it.

**Mr O'Brien:** I think the problem with what the Czechs have got there is really just re-stating the problem because the idea of the area is not defined there in any way. The European Court of Justice has a very clear view on the Council acting within the scope of community law, and that includes things like derogating from Community law. So once again because the idea of area is ill-defined even in the new Czech thing, we still have the problem that it is up to the court to decide on the limits of competence, so we have the problem of who guards the guards.

**Chairman:** I take a rather different view, I am afraid. I think the Czech Protocol is very clear, that it makes a clear distinction between the Act in question and not covering the whole domain.

**Lord Mance:** I am going to ask whether the Lugano opinion in relation to civil jurisdiction and judgements was relevant in this connection. That is where the European Court said that because the Community had reached inside Europe a comprehensive scheme regulating civil jurisdictional judgments that external jurisdiction was a matter for the exclusive competence of the Community because there was an impact, one could argue I think quite a small impact, in a few areas on the internal scheme. So that individual states did not have a right to take part in negotiations. That might be an area where I could see a problem arising, once you got a scheme and then, if there is some small cross-relevance with a proposed external scheme, nonetheless it is exclusively a matter for the Community.

**Chairman:** Thank you very much. Lord Wade, would you indulge me: I think that we have probably covered competences.

**Lord Wade of Chorlton:** I was going to suggest exactly the same thing, my Lord Chairman. I think we have taken this matter as far as we can.

**Q68 Chairman:** We may proceed to the changes relating to the European Council and the rather problematic relationship between the President of the European Council and the presidency in the Council of Ministers. Would one of you three like to tell us what your thoughts are on that?

**Mr Heathcoat-Amory:** I will start off on the European Council. It is given an enhanced status. Indeed, it becomes a formal institution of the Union and it is in the Treaty that it will meet four times a year. It does do that already although it is only required to meet twice. It is given particular powers to lay down the general landscape of a Union foreign and security policy, but there has been no change in the Treaty to its working methods. I think this is a problem which goes back to what I said earlier about the opaque nature of European Union decision making. The European Council, the Heads of Government meeting together, publish no minutes. There is no published agenda. There are only conclusions published. It is not certain quite who draws them up. They are certainly not available to outsiders to scrutinise beforehand but they have in many cases a quasi legal status. Also of course the deliberations themselves are largely secretive. So you have the main supreme decision-making body making important decisions in private. I think this operates against transparency. We saw this in the 21 June European Council, which I mentioned, which effectively settled the text of the Reform Treaty only two days after the text was available. I think it really shows the weakness of process. That is all unreformed in the so-called Reform Treaty. As regards the Permanent President, it is often said this will bring continuity and cohesion to decision making but I think myself maybe at the expense again of public involvement. At least when the presidency circulates amongst Member States, it does occasionally come back to home. The decision making is literally brought closer to the citizen and for six months at least it exercises the

attention of the national media and public of the country concerned. I think all that will go if the Permanent European President becomes yet another full-time official in Brussels, rather remote, bigger and more powerful. In my view that will actually create a bigger gap between the EU and its citizens, in contradiction indeed of the instructions given in the Laeken Declaration.

**Q69 Chairman:** You do not think that the fact that the Council Presidency with the exception of foreign affairs issues will be managed by predetermined groups from three Member States for a period of 18 months will not do something to help the public understand what is going on? Presumably within their defined areas they will have something to say?

**Mr O'Brien:** I think this is yet another example of one of these areas in the Treaty where what exactly is going to happen is not clear, which I think is one of the problems with the Treaty. Many of the new institutions, for example the European External Action Service, are not properly defined in the Treaty. It is not quite clear what their powers or executive responsibilities are going to be. For example, will the new President of the Council be running 3,500 civil servants in the Secretariat of the Council? How is the President of the European Council going to be interacting with all these different team presidencies? I would agree with what Mr Heathcoat-Amory said before about how having an elected President does fundamentally change the nature of the legislative process in Brussels because instead of having a national leader with an obvious vested interest in the rights of Member States, you have yet another independent, free-floating Brussels institution interested in getting things done in Brussels, passing more legislation. The two other open questions I think are: firstly, the failure of the UK Government exclusively to rule out the merger of the Council President with the Commission President in the future. Until very near to the last draft of the Constitution, this was ruled out but at the last minute exclusive separation was dropped. That is something with which the UK Government was not happy but decided to put up with it.

The second question I think is the future of this institution, because we are setting up something now which is quite a federalist idea in itself, the idea of having an independent President. But of course it is going to develop in the future. It will gradually increase its powers and responsibilities. Various people, including Nicolas Sarkozy, have suggested that the EU President should eventually be directly elected. So we have to think if we are going to sign up to this Treaty about really where this institution is going to go in the long run.

**Q70 Chairman:** Is it usual to insert in a treaty the ruling out of something that does not exist in the first place?

**Mr O'Brien:** It is certainly something the Government wanted to happen. If it is something that we do not want to happen in the future, then we should explicitly rule it out now.

**Q71 Lord Sewel:** Having dealt with the President of the Council, let us move on to the impact of the Treaty and the role and function of the Council of Ministers generally and specifically in terms of the new system of qualified majority voting (double majority). Do you think that is likely really to be of significance in practice and what will the effect of the declaration document be on blocking minorities? Basically: how do you feel the Council and the Council of Ministers has been impacted?

**Mr O'Brien:** I think that the new voting system is one of the most significant things in the Treaty. When people talk about streamlining the European Union, what they mean is allowing it to pass even more legislation more easily, so that on the one hand you have lots of new moves to qualified majority voting in new areas, between 50 and 60, depending on how you read it, and of course you have the new voting system, which makes it considerably easier to pass legislation and considerably harder to form a blocking minority. I do not think that that point is contentious. Even the Foreign Office has acknowledged that it would be harder to block legislation that we disagree with. Even groups that would not agree with me, like the

Centre for European Reform or Business for New Europe, have acknowledged that it will be harder in the future to block legislation that we do not want. A fundamental question is: do we think that the EU needs to pass even more legislation than it does at the present? I personally do not believe for an instant that the European Union is grinding to a halt with the current number of Member States. In fact, there is a very good study from Sciences Po academics which shows that the EU is actually passing legislation about 25 per cent faster since the 2004 Enlargement. I do not think we need more legislation. If you look at the practical consequences, they are very obvious. In areas where the UK Government is currently assembling a blocking minority to block various things it does not like, whether that be the Working Time Directive and moves to restrict the individual opt-out, be it the Agency Workers Directive, or various of the pieces of the Financial Services Action Programme where the UK Government has relied on a small blocking minority to stop things we do not want, our position in all these areas is going to be jeopardised under the new voting system because it will be much harder for us to block legislation. There is a study for example by Feisenthal and Machover on the voting system which suggests that our ability to block legislation will be cut by about 30 per cent compared to the current rules. This is quite a big change and it will have important practical consequences.

**Q72 Lord Sewel:** Your emphasis is very much in terms of our ability to stop things. What about our ability to get things that we want?

**Mr O'Brien:** I completely acknowledge that this means that more things will pass. The question from a business point of view is: do you believe that there should be more regulations being passed or less? If you look at the opinion polls, there is a recent poll of one thousand chief executives in the UK which found that 54 per cent thought that the cost of new regulations from the EU now outweigh the benefits of the Single Market, which is quite

a striking and frightening finding. If you want even more EU legislation, then this Treaty is a good idea. If you are cautious about that, then this Treaty is perhaps not such a good idea.

**Q73 Lord Kerr of Kinlochard:** Do we agree that there should be a correlation between population and voting weight, or do you think that basically we should go back to unanimity and that Luxembourg or Malta should have equal weight with Britain and Germany?

**Mr O'Brien:** Certainly I am very sceptical about the further extension of qualified majority voting.

**Q74 Lord Kerr of Kinlochard:** I am asking about the double majority system in the Treaty, which brings a correlation for the first time between population and voting power. Is that what you object to?

**Mr O'Brien:** I think what I object to is the overall ease of passing legislation rather than the distribution of power within the different Member States.

**Q75 Lord Kerr of Kinlochard:** So your objection is to the threshold numbers. If they were high enough, if one needed to have 100 per cent, you would have no objection; perhaps at 99 you might just about agree, but 65 per cent and 55 per cent are too low? Is that right?

**Mr O'Brien:** I would not necessarily insist on 100 per cent 100 per cent of the time.

**Lord Leach of Fairford:** I think it is hard to object to the principle of recognising population in the voting system. Personally, I accept that. I think it is itself a move in the direction of greater democracy. You see in the American system that both concepts are reflected in their structure. I do not think that is at all undesirable. It is a question of where you strike the thresholds and how you deal with this flood of legislation which, as Mr O'Brien has said, is very serious. Gunter Verheugen has estimated the costs of legislation in the European Union are greater than that of the entire Dutch economy's GDP. That is an awful burden to bear

when you are trying to compete with China and India. For example, when you look at the Financial Services Action Programme, that is very expensive.

**Q76 Lord Kerr of Kinlochard:** One could argue that the Single Market broadly is a good thing and the Single Market would not have happened but for Mrs Thatcher's decision on the extension of qualified majority voting. There is nothing intrinsically wrong with being in a position where you prefer to get things done. If you want to break down the barriers and make a more open Europe, I would have thought it was quite a good thing to have qualified majority voting.

**Lord Leach of Fairford:** I think we will be here long after midnight if we were to discuss the Stuttgart Declaration and Mrs Thatcher and how the whole thing arose. I think there were profound misunderstandings about how it would develop between mutual recognition and harmonisation. Unless the Lord Chairman wants us to get into that, I think it would be a very interesting exercise in history.

**Q77 Lord Kerr of Kinlochard:** Do I interpret that, Lord Leach, to mean you are actually against the Single Market, you think the Single Market programme has been a mistake?

**Lord Leach of Fairford:** Of course not. What a question! To be against the Single Market to the extent that it brings greater freedom to trade, I think it would be bizarre to be against that, particularly with our open market philosophy, but there are different ways in which free trade can be consummated. One is by mutual recognition and by all the elements of a free trade area; the other is by harmonisation of a heavily regulated system. I do not think this was foreseen, as I understand it, in 1983 by Mrs Thatcher. That in fact was the way it went. The poll that Mr O'Brien refers to indicates that business is shocked by the degree of legislation which has come about through harmonisation, which is bringing about the Single Market,

with its good elements you referred to, through a mechanism that is rather self-defeating because of the very heavy burden of legislation or regulation.

**Chairman:** I would like to move on to the double-hatted post of High Representative.

**Q78 Lord Roper:** I wonder if you would like to comment on to the post referred to sometimes as double hatted but perhaps treble hatted because in fact the High Representative will also chair the Foreign Affairs Council in future. I wonder how you see that working.

**Mr Heathcoat-Amory:** Perhaps I can start. By any standards, the new post will be substantially more powerful than the present equivalent, who is a Council representative. He or she will “conduct” foreign policy; that is a new verb in the Treaty. They will be able to draw on the resources of the External Action Service. It is not clear exactly what that service will do. It is only sketchily described in the Treaty, but it is clearly intended to be an embryo foreign service for the European Union itself and could become very powerful. I think it is the double hatting that is particular controversial and of course that worried the British Government very much during the Convention which invented the post. I think one has to say that it is bound to undermine to some degree the inter-governmental nature of decision making. The British Government is adamant that they have preserved the inter-governmental system in the new Treaty. I have to say that is difficult, I think, to sustain, when the man/woman conducting the policy is also going to be not just a member but a Vice President of the Commission. The Commission of course has a culture and working methods that are supra-national, and indeed its members are forbidden by Treaty law from taking instruction or being influenced by national governments. Having one foot firmly in that camp I think must mean that the purity of inter-governmentalism will be changed. It will be something of an oddity having a Commissioner permanently chairing the Foreign Affairs Council. We do not know exactly how this will work out. Indeed, a lot of it is in the hands of future personalities and events. So it is very difficult to predict. Certainly it is a compromise. I do not believe

that the pillared structure which we have lived with since Maastricht can survive a High Representative who is clearly straddling the two institutions.

**Q79 Lord Roper:** Will it not give some greater coherence to the external actions? You were speaking earlier of the external activities on from the policy of the Union does not only comprise those things which are in CFSP but the other areas as well. Will this not ensure that there is greater coherence between those external relations aspects of the Commission's work and the inter-governmental work of the formal CFSP?

**Mr Heathcoat-Amory:** I think there is incoherence in the Commission itself at the minute between the Commissioners, four of whom have duties that touch on external policy – things like foreign aid and humanitarian relief. I would be more impressed by the reforming nature of the Treaty if informally and without a treaty that had been dealt with more impressively. So I am in favour of the informal working reform as a predecessor to setting up institutional structures which could become very inflexible and could bind us into a system that we may regret. Coherence is a thing that politicians like, but I think that the public are equally concerned about things like accountability, democracy, transparency. I am not clear that the structure we have invented here by eroding intergovernmentalism will give more comfort to critics of the European Union who believe that it is racing ahead with an institutional structure which is going far beyond the political will for co-operation. I strongly believe in working with other countries to achieve results. I do not believe that setting up powerful institutions is a substitute for the political will and success on the ground. For instance over the Iraq war, there was a terrible disagreement in Europe which would not have been solved, in fact I think could have been worse, if we had pretended that we had a foreign policy and a foreign policy activist and someone conducting it when there was no policy for him to conduct. He would be more like an impresario than a High Representative. Unless we solve those problems of

working together in Europe, I do not think the institution is going to solve them; it may even create them.

**Q80 Lord Roper:** If we do solve those problems, would this not be a better machinery to ensure that the different parts of the European Union's activities are co-ordinated?

**Mr Heathcoat-Amory:** In my view not. I think this puts an immense burden on a single individual because we are setting up potential conflicts between this person and the President of the Council, who will be a permanent figure, as we have discussed, the President of the Commission who will still be a powerful figure, and Member States who could find themselves drawn along or unable to change a policy perhaps after a change of government to which they are committed because of course there is a new obligation on Member States to comply with the decisions taken. Of course I readily agree that the initial strategic decision is taken by unanimity and that is a block or a handle that all Member States will have. Can we imagine a change of government in a Member State, really a different government, coming in with a new foreign policy it wishes to implement, bound by decisions taken by the previous government? I think that would start to negate the purpose of foreign policy promises made at general elections.

**Chairman:** We have 20 minutes left and we still have seven questions to go.

**Q81 Lord Sewel:** I was really concerned to ask two specific questions on the European Parliament. One is the effect of co-decision making in agriculture and fisheries and also on the amendments to the budgetary procedure. Having drawn attention to those two specific things, could you also give your views on the more general issue of the impact of the Reform Treaty on the European Parliament and how it will affect its legislative and other powers. I would like the answer to the specific points.

**Mr O'Brien:** In answer to the general point, there are a lot of new powers for the Parliament. One very significant one is the power to elect the Commission President. Again, that is something the UK Government objected to. Jack Straw said that the appointment would be caught up in the politics of the European Parliament. It is certainly likely to mean that in the future Commission Presidents are more likely to have a strongly integrationalist bent in line with the general opinion of the European Parliament. In answer to the specific question about the Parliament's new powers over the budget, I broadly do not see that as a good thing. Over the last couple of years, the Parliament has tended to be a brake on reform of the agricultural policy and the fisheries policy. For example, at the start of the year the Parliament used the powers that it currently has to stop modulation of more direct payments into rural development. The Parliament also resisted the sugar reform and the wine reform and helped to water those things down. Broadly speaking, the Parliament is less reformist, if you will excuse the expression, than the Member States in the Council, and so giving them the final say is not necessarily going to help us get reform of the CAP, which I think most of us in this room would like to see.

**Chairman:** I call on Lord Tomlinson, a former Member of the European Parliament.

**Q82 Lord Tomlinson:** My Lord Chairman, can I just follow up the answer to that question because I think, first of all, the witness slightly ducked the specific about agriculture and fisheries. In a system with qualified majority voting applying in those two areas, will not the process of reform become easier, particularly against the background where the distinction, which almost encouraged irresponsibility in the European Parliament, between compulsory expenditure and non-compulsory expenditure in the budget is now abolished by the proposed new Reform Treaty?

**Mr O'Brien:** I thought I was replying to that before. I think by abolishing the distinction between compulsory and non-compulsory, effectively you are giving the Parliament the final

say over the compulsory elements as well; you are giving the Parliament more power over this.

**Q83 Lord Tomlinson:** No, it is not the final say, is it? In the new Treaty it is an equal say between Council and Parliament. There has to be co-decision on the final say as there has to be on the annual financial perspectives.

**Mr O'Brien:** You would agree with me that certainly increasing Parliament's power over what it has now would be.

**Q84 Lord Tomlinson:** It makes it easier to get a reform agenda through the codifying process.

**Mr O'Brien:** You answered the question there.

**Q85 Lord Tomlinson:** The answer is that I do not agree with you because I think you are asking a different question.

**Mr O'Brien:** I think broadly speaking giving the Parliament this extra power will effectively give protectionist interests a second line of defence in the negotiations. So as well as being able to block things in Council, you will also be able to kill things off in the Parliament as well. If I felt that the Parliament was a wonderfully reformist institution, full of MEPs that were not on rural seats and not in favour of keeping the CAP, then I might be interested in giving it more power, but, as it is, I am not convinced that it is a good idea for pro-reformists.

**Q86 Lord Tomlinson:** Is that your view as well, Mr Heathcoat-Amory?

**Mr Heathcoat-Amory:** Could I make perhaps a comment on the budgetary procedure, which is also part of the question? I recall when I was a very junior Treasury Minister many years ago going to Brussels in order to negotiate about such matters. It always struck me that the European Parliament was always on the side of expenditure and, unless my memory is doing

me tricks, I think Lord Tomlinson might have had a formal duty connected with the European Parliament on the Budgetary Committee.

**Q87 Lord Tomlinson:** And always opposing an increase in the maximum rate.

**Mr Heathcoat-Amory:** If they had all been like Lord Tomlinson, there would not be the problem, but I think he would agree that his colleagues from other Member States, other MEPs, were almost always for bigger expenditure programmes, because, after all, they have the pleasure of spending without the pain of having to raise the taxes. I think giving them any further powers over the budget will probably be treated with considerable alarm in the treasuries of all Member States.

**Chairman:** I may take a rather naïve view of this but I am always impressed by the fact that the European Union manages to stay well under the cap that they have on expenditures and there is plenty of headroom still there. I do not think that can be entirely contradicted but that is only a personal view.

**Q88 Lord Wade of Chorlton:** May I ask very briefly: what will be the impact of the Reform Treaty on the role, functioning and membership of the European Commission and will the President gain power?

**Mr Heathcoat-Amory:** I can be brief on the European Commission. It will of course expand its role into those aspects which are presently intergovernmental, which will switch to the other Treaty, in the way I described earlier, as affecting criminal justice and policing matters. They will come under the purview of the European Court of Justice and also the Commission will have the right to bring infraction proceedings. To that extent, their role will expand. The President of the Commission will gain the ability to sack individual Commissioners. The Commission itself will get smaller and small Commissions probably mean more powerful Commissions because they will be less influenced by national influences, which are supposed not to exist but we know that they do. Every small Member State wants its own

Commissioner. That will end in 2014 when there will be a slightly smaller, perhaps more executive body. Indeed, the word “executive” is a new power and a new word that has gone into the Treaty. I think a smaller, more executive body with wider powers is envisaged. Crucially, and I am sure this was fought very vigorously by the Commission representatives on the Convention on the Future of Europe, the monopoly of initiative remains in the Treaty. My own position on this is that any self-respecting, democratic institution, as the EU sometimes holds itself out as, should not tolerate a situation whereby a group of non-elected people meeting in private have a sole right to initiate legislation or the repeal of legislation. That is not changed in the Treaty and I think that is a shame.

**Q89 Lord Wade of Chorlton:** May I just ask a follow-up? When we took evidence last week, the people who gave evidence indicated that they believed that the new Treaty would encourage more power and influence in the Parliament. They indicated that they believed that Parliament would probably become more politicised as time went on and that therefore slowly they would exert more influence over the Commission. Is that a view that you hold as well?

**Mr Heathcoat-Amory:** It is true that the Parliament will elect the President of the Commission. I believe that is new. It is stated I think in the Treaty formally for the first time that the Commission is accountable to the Parliament. I may have got the precise wording wrong. As regards which institution will end up ahead of the other, I am not in a position to judge that relatively. All I can say with some assurance is that they all get more powerful, which echoes a point I made earlier. In *Alice in Wonderland* the Dodo was asked at the end of the caucus race who had won and he said, “All have won and all must have prizes”. I think at the end of the Convention on the Future of Europe, they all got prizes except for national parliamentarians and the public.

**Q90 Chairman:** I am interested in your argument that a smaller Commission will be more powerful because, if I have got you right, national interests will be less deployed. Is not the corollary of that that you are in favour of a weaker Commission with more national interest influencing its deliberations?

**Mr Heathcoat-Amory:** My own personal position is that I would make the Commission into a secretariat, possibly based in somewhere like Helsinki, serving the interests of national parliaments and drawing up common rules and proposals where national parliaments agree that common action is required, but this, I am afraid, was never seriously considered.

**Mr O'Brien:** If I can just follow on from that, in terms of whether national interests are more strongly represented in the Commission where obviously not every country will have a Commissioner, it is pretty clear that the answer is “no”, because it will be more difficult for this country in times that it does not have a Commissioner to find out what is going on in the Commission. It is pretty clearly a step further away from the idea of a kind of European nation state towards a more federal Europe. The argument that is advanced for this that it will reduce bureaucracy in the European Union I can't really accept. There are 65,000 people working for the EU and its agencies now. Removing nine of them will not make a significant dent in that bureaucracy. All it will do is reduce our input over the process.

**Q91 Lord Mance:** I want to ask you first about the European Commission and the European Court of Justice and the expanded jurisdiction which arises with the collapse of the pillars and the expansion of the Title IV. You have already made some comments on the competences of the approach to the ECJ. Perhaps you could also feed into the answer the Protocol on transitional provisions and the five-year period in that?

**Mr O'Brien:** I think the whole issue of the Charter is one of the most significant things about the Treaty. The Government in its draft of 2000 promised that it would not be legally binding and never would be. It now clearly will be legally binding.

**Q92 Lord Mance:** Is not an answer the Charter?

*Mr O'Brien:* It is about the Charter.

**Q93 Lord Mance:** That was going to be the second limb of my question, but take it first.

*Mr O'Brien:* On their return from the European Council, the Government initially claimed that they had an opt-out from the Charter. Now they say very explicitly that they have not got an opt-out from the Charter, which is interesting. The Government's current argument seems to be that these are not new rights, either in the UK or in any other Member State. That begs the question to my mind: if these are not new rights, why have we spent the last seven years resisting them? If you look at the sources of these rights, it is pretty clear that they are new rights. For example, if you look at the text of explanations which comes with them, 13 of the Articles are based on the ECJ's own case law; seven are based on the ECHR but their scope has been widened; seven are based on the Articles of the European Social Charter, which the UK has not signed; two of them the Schengen Protocol; and some are very simply new rights and explicitly so in the Charter. Clearly, this will have an important impact. The attention on this in the UK is focused very much on other impact on our economy, on the social rights in Title IV but it has much wider implications because there are lots of new rights which will impact on our asylum and immigration system for example and also on the rights of criminal suspects as well.

**Q94 Lord Mance:** Could you just focus the answer a little on the Protocol because the Protocol is clearly designed to address some of the matters which you have been making?

*Mr O'Brien:* It seems to me that one of the many problems with the Protocol is that Tony Blair when he came back from the summit originally purported to read out the text of the Protocol and omitted the fact that it only says that Title IV of the Charter is supposed not to create any new rights in the UK, and even then, except in so far as those rights are already

provided for in national law – and of course it is up to the ECJ to decide whether those rights are provided for in national law or not. So it is a very interesting question, which I would suggest you certainly ask the Government. If, for the avoidance of doubt, we have said that one part of the Charter should not be read as creating new rights, does that not: (a) imply that there is a lot of doubt about whether the rest of the Charter does not create new rights; and (b) why does that piece of text not simply apply to the whole of the Charter? It seems to me that the Government does not have any answers to that.

**Mr Heathcoat-Amory:** May I comment on one aspect of that? There are new rights. I think it is helpful perhaps to mention just two of them. One is that scientific research should be free of constraint; that is Article 13. I am very interested in animal welfare and I am alarmed that there is an apparent right here to do scientific research which is free of constraint and may be relied on by scientists doing nasty things to animals in general. The significance of it is that that right does not exist. It is clear from the explanatory notes that it is not derived from existing European Charters of any sort. Also, there is the right of access to a free placement service. That again is an entirely new right. Indeed, Mr O'Brien said that if these rights were not new, nobody would worry about them. It puzzles me that the Government and others persistently say that there are no new rights in the Charter. There clearly are, which is why we have had to have this Protocol. Why I think the Protocol will not work is that it is not an opt-out from the Charter for the United Kingdom; it only tries to ensure that courts do not apply it in this country, but it certainly will be applied indirectly because one can imagine that a Directive applying throughout the European Union may be the subject of an appeal by another Member State to the European Court of Justice. That Court may decide that the Directive in question does not meet the requirements of the Charter and require an amendment or interpret it in a way that is compatible with the Charter. That would become binding on this country under the other provisions in the Treaty whereby we have to obey

European Union law and we have a mutual solidarity obligation and so on. So I think the Charter will come into British law not directly but indirectly. If the Government had wanted to prevent that, they would have said that the provisions of the Protocol should apply notwithstanding the other obligations in the Treaty. They have not achieved that, so I think they are extremely vulnerable to the Charter, including its new rights, applying indirectly to this country. I think, frankly, the Protocol is wafer thin. If you add to that a good measure of judicial activism, I think that fact that it will be legally applied renders us widely open.

**Q95 Chairman:** What you are saying is that the European Court could say that the Protocol is not effective in certain areas, that it does not apply?

**Mr O'Brien:** I do not think it is just a matter of the Court saying, “Your Protocol does not apply”. I think it is simply a matter for the Court to interpret that Protocol how it likes really.

**Q96 Lord Mance:** Really what you are saying is that without an opt-out, a right to opt in, this operates in a different way. Is there anything you want to say on the expanded jurisdiction of the European Court of Justice?

**Mr Heathcoat-Amory:** It might be appropriate to mention one very curious and new requirement of the Treaty, which is often not commented on, which is that the new Treaty lists the institutions of the Union, which of course include both the Commission, the Council, the European Central Bank, the Auditors and the Court of Justice. It then says that the institutions shall practise, “mutual sincere co-operation”.<sup>2</sup> I am not a lawyer but I find it alarming that the Court is mandated to co-operate not with Member States but with the other institutions. If I were a litigant going in front of a court, I would not be happy if the court had to practise mutual sincere co-operation with my legal opponent, but that I think will be the case because very often the Commission takes a Member State to court. The Commission

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<sup>2</sup> Note by the witness: Article 9(2) TEU.

will be an institution and therefore will receive the co-operation of the Court, but the Member State will not. I think this undermines the status of the Court and it will cease to be an independent arbiter between the rights of the Union and the rights of Member States.

**Lord Leach of Fairford:** I would be unhappy if any judiciary was obliged to act in sincere mutual co-operation with anybody. It seems to me that if we had here a constitution for Britain and the judiciary was told it had to act in sincere and mutual co-operation with the Government, it would not get very far with some of your learned Lordships. The whole principle is wrong.

**Q97 Lord Mance:** Can I just ask one follow-up? Was any consideration given to the extra workload which will fall on the Court and whether its existing working methods and internal structure needed any adaptation to meet that? For example, it is going to require expanding to criminal competence.

**Mr O'Brien:** I think you have put your finger on a very important point. For example, there are about 80,000 asylum appeals every year in the UK. All of these people will have the right to go to the Court because of the demolition of the limits on the rules on standing. You could find that the Court would suddenly be hearing a lot of very contentious cases, in criminal law and also asylum and immigration cases. There are provisions in the Constitution to allow the Court to set up new specialist tribunals. One of the problems with doing that is that you then get these very small courts with only three judges on and you are more likely to get very controversial rulings, but, yes, that is a clear consequence of the Constitution or the Treaty.

**Chairman:** I am going to allow this meeting to go on for another seven minutes but then we will really have to finish.

**Q98 Lord Kerr of Kinlochard:** Mr Heathcoat-Amory, you have twice said that the big losers were the national parliaments. I remember at the time you and I thought that

Mrs Stuart's working group on the role of national parliaments had done rather well, in particular in injecting national parliaments at a very early stage in the legislative process. They would be the first place where the text of a legislative proposal would go. Now I think in both our Houses we still have to work out just how we can make best use of this, but in what sense were the national parliaments losers? Perhaps you are saying everyone gains and national parliaments do not gain as much as everyone else - but I do not think you are saying that. You are saying that national parliaments are absolute losers. How come?

**Mr Heathcoat-Amory:** There were valiant efforts made, particularly by my colleague Gisella Stuart, to advance the interests of national parliaments. I think we had a sympathetic hearing from the Secretary-General at the time, but I have to say that the final outcome is rather disappointing. It boils down to the subsidiarity test whereby national parliaments get some additional influence over policing subsidiarity, but it does not add up to very much. It amounts to little more than requiring the Commission to think again. We can do that already. As has already been mentioned, I am a member of the European Scrutiny Committee in the other House. We can require or request that something is looked at again, but the Commission can still go ahead. That remains the case, we never succeeded in replacing it with a red card system whereby there would be a complete block, to my great regret. To be fair, it has been slightly strengthened since then, and there is now a complicated procedure whereby if a large number of national parliaments object, it can go to the European Council. Frankly, the bar is set so high that if it ever reached that, the proposal in question would fall for other reasons. There would not be a majority for it in the European Parliament or the Council. I think this is something of a disappointment. It is no real advance on our existing powers.

**Q99 Chairman:** We take note of the fact that there is now an orange card that does have a bigger impact and is more useful to the national parliaments than just the yellow card.

**Mr O'Brien:** Perhaps you should also note that you still cannot stop the Commission from going ahead with things. Even in the unlikely event that you cobble together a huge number of national parliaments all simultaneously voting against something on subsidiarity grounds within a very short window of time, the Commission is still going ahead with things at the end of the day.

**Q100 Lord Kerr of Kinlochard:** Surely it is rather unlikely that they would, because there would hardly be qualified majority voting in the Council if, as you say, an enormous number of national parliaments were against the measure?

**Mr O'Brien:** This is exactly the problem. Anything where it is likely to be relevant is very unlikely to ever happen, which is exactly the point I am making. If you look at what happened the first time this system was given a trial run, it was put out to national parliaments who did object on subsidiarity grounds and the Commission still went ahead with the proposal at the end of the day. So the trial run of the system does not give me any confidence that it will have a meaningful impact over the long term. If you compare that to what national parliaments are losing at the same time, for example through the new passerelle clauses, through the simplified revision procedures, so that the treaty change in the future does not necessarily involve the consultation of national parliaments, and all the other changes in the Treaty, clearly the net balance of a national parliament is hugely negative. This is clearly a further shift in power away from this place.

**Q101 Lord Kerr of Kinlochard:** Chairman, I think we should be clear, and if the orange card system is used by a sufficient number of parliaments, if we are talking about legislation, and the Commission nevertheless goes ahead it is inconceivable that the legislation in question will pass in the Council.

**Mr O'Brien:** As I understand the orange card, the Commission then has to explain why it has gone ahead. What a terrible thing to have to do?

**Q102 Lord Kerr of Kinlochard:** We are talking about legislation. What is your problem? The orange card comes up from the national parliaments: the Council discusses it. You are postulating a situation where the large number of governments necessary in order to get qualified majority voting would vote in Council the other way from the way their national parliaments already had. Is that not a rather unlikely situation?

**Mr O'Brien:** This is the problem with it. You have to have your national government allow all these national parliaments the parliamentary time to pass resolutions against something which they have just voted for. It is almost infinitely probable that it will never be used.

**Chairman:** I think this needs further explanation. Do you want to go further on that one or not?

**Lord Kerr of Kinlochard:** No. I give up.

**Chairman:** I think we have a difference of opinion as to what in fact the impact of the orange card is. We will explore this further in the course of our inquiry. So far, we have taken rather a different view from yours Mr O'Brien, on the effect of it. I think we should move on very rapidly because I do want to try to touch on some of the other issues.

**Q103 Lord Roper:** You have just raised this question of the passerelle. I only make two comments on it, one that there is a loss of power of national parliaments. Do you believe that is the case in the light of the statement made by the Prime Minister when he returned from Lisbon, in which case he made it quite clear that the Government would not allow a passerelle change to be made without parliamentary approval?

**Mr O'Brien:** When he made a statement to this House it was not clear to me whether he was proposing that it was only the Commons that would have this power, which was in the

European Union Bill last time round. It was proposed that only the Commons would get a say, not the Lords as well. I think the fundamental problem with the passerelles – sorry, the simplified provision procedure – is that it is a further move towards incrementalism in the European Union. One of the things identified as a problem by the Laeken Declaration was the step-by-step, salami slicing in incremental integration of the European Union. This clearly makes things worse. Jack Straw and the Government objected to these things and said they should not happen. Jack Straw said it would be awful if you got into a situation where at 3 in the morning we were all discussing that we would trade off further moves to majority voting for someone's increasing quotas in milk or something like that. So there is no doubt in my mind that this allows the treaties to be incrementally changed in the future with much less scrutiny. At the moment at least every five years when there is a new treaty, there is a major row about it; a package deal, it is very visible and there is a public discussion about it, whereas if you are gradually getting rid of all these national vetoes, or if you are gradually changing the text of the Treaties as you are allowed to do under the new Treaty, then all these things can happen with very little public scrutiny and the European Union will be able to advance further ahead in public opinion than it already is. It is something I find very worrying.

**Q104 Lord Roper:** If there is an opportunity for national parliaments, if they practise which the British Prime Minister has put forward and followed in other Member States, to take an explicit vote on the particular change, then in that case the national parliament would get rather more power than they do over a treaty, which they cannot amend.

**Mr O'Brien:** I think that is slightly disingenuous because you can get to a vote on the Treaty and you can say yes or no to it, and ultimately you get to say yes or no to the proposal that is going to come to you under this new mechanism. It is not like you have any more detailed

control. What is happening is that these large packages of changes are being broken down into much smaller and less visible streams of small changes.

**Q105 Lord Roper:** I am sorry, but do you not have more power if you have power over specific changes rather than over a package?

**Mr Heathcoat-Amory:** May I make the point that most of the passerelle clauses, and there are several in the Treaty as we know, do require parliamentary approval, but not all of them. There is one that is frequently overlooked regarding foreign policy. Article 17 will allow for additional instances of qualified majority other than those referred to in the Treaty; in other words that new types of decision making in foreign and security policy can be switched from unanimity to qualified majority voting, and there is no reference to parliamentary approval in Article 17. It may be that the British Prime Minister has made a promise that in his case Parliament will be consulted. Whether that will survive his passing from office or in different circumstances, I do not know. Certainly the Treaty does not require a parliamentary input. I think this is damaging because one of the way of people trying to sell this Treaty is that it puts us full stop on the escalator whereby more powers go from national parliaments and electorates to the centre without anyone really noticing. The very existence of passerelle clauses where the whole system becomes self-amending I think is damaging to that perception.

**Q106 Lord Roper:** Mr Heathcoat-Amory, just on the point that you have made about an assurance by the Prime Minister, is this not something which will be put explicitly into the legislation, and whereas we cannot amend the Treaty, we can amend the legislation to include an obligation to bring this to Parliament if a passerelle is to be used?

**Mr Heathcoat-Amory:** I would certainly support that amendment. I think we have a very useful alliance here to amend the Treaty.

**Q107 Lord Roper:** Not the Treaty but the Act.

**Mr Heathcoat-Amory:** I am sorry; I do apologise, the Act.

**Mr O'Brien:** I would caution, though, in thinking too much in terms of Parliament. The significance of this really is in terms of the public's interest and input into the process. It may well be that there is a vote here on a wet Thursday afternoon to change some particular detail. The problem is that it is no longer going to be visible in the same way that the Treaty is to the public out there, and they will certainly not have their opportunity for example to call for a referendum or complain about it in any other way. I am just thinking in terms of Parliament and also in terms of visibility and accountability to the public as well.

**Q108 Lord Sewel:** Very briefly, there was a bit of a hullabaloo about putting the reference to "free and undistorted competition" into a Protocol. Do you think that that move was significant and do you think it will have any practical effects that are removed in that Protocol?

**Lord Leach of Fairford:** It is hard to judge at this stage whether it goes much beyond symbolism. It may not. Clearly the situation in France was what dictated this. I think if it does go beyond symbolism, which is the second leg of the question, it would be very serious. Free and undistorted competition has been a principle within the European Union, the Community, since I believe the Treaty of Rome. We do live in an increasingly competitive world. My own business life is in the most competitive part of the entire world, trading on the coast of China in Hong Kong which is a very free market. When you see the impact of competition that the whole world has to face from Asia, not just China, not just India but all over, the idea of regressive steps would be very concerning. I have already alluded to the heavy burden of regulation. The Financial Services Action Plan is going to be a £19 billion cost to implement for the City of London. At first it was really hardly noticed in Britain and I think it was taken very lightly by the Government. And of course the City was riding very

high at the time. We had not had Northern Rock and the credit crunch and all those problems; £19 billion suddenly looks not a trivial sum but a very large sum. I believe that the downgrading of free competition is potentially very difficult. It is by no means clear, however, how great will be its practical effect. Do you have a different view?

**Mr O'Brien:** Only in the sense that some people hope it will have a different effect. Sarkozy says: "This may also give a different legal direction to the Commission; that of a competition that is there to support the emergence of European champions, to carry out a true industrial policy". There is certainly hope that this will shift the balance in terms of the less and free market approach. Whether it will, only time will tell.

**Lord Leach of Fairford:** If it were to do that, then the effects would be really serious. You would see them in external trade with increased protection. We have already had trade wars over textiles and leather and the jeopardising of the Doha Round, and internally you have this wave of legislation and regulation. It is potentially dangerous.

**Q109 Lord Tomlinson:** In the meanwhile, would you accept that the Protocol has the same legal forces as the rest of the Treaty?

**Mr O'Brien:** Yes. The argument, as I understand it, is being downgraded from an objective of the Union to a Protocol.

**Q110 Lord Tomlinson:** But it has the same legal force as the Treaty?

**Mr O'Brien:** That is the argument.

**Lord Leach of Fairford:** Why move it if it is no change?

**Chairman:** I think we have belt and braces here anyway. It is in Article 3 of the Treaty of the European Union as well. I want to give Baroness Symons the last word with the last questions.

**Q111 Baroness Symons of Vernham Dean:** Thank you, my Lord Chairman. I do not know that there is a great more to be said except that we have run through the litany of the ways you believe that just about every single institution in Europe is getting more power. We have been through the legislative reach, the European Council, the Council of Ministers, CFSP, European Parliament, the Commission and the Court of Justice. Which of these changes do you really think is going to have the most impact on this country? If you had to pick out something that you really do think is **the** issue that people should be really worried about or really cheerful about because we all know someone is going to be really worried, what would it be?

**Mr Heathcoat-Amory:** I am very reluctant to pick one because I think the whole Treaty advances on such a broad front that there is a general continuing transfer of powers and decision making from national parliaments and electorates to the centre, which contradicts the aim of bridging the gap between the two, in my view. If I did have to pick out one, I think the advance of the Union into the field of asylum, immigration, criminal justice and policing is what worries me. Of course the British Government has a claimed red line and a separate procedure for covering some of this, which may or may not be watertight. I think it is very dangerous when decisions affecting people's security and rights over them of imprisonment and punishment are transferred from a jurisdiction which they do understand, their own national parliament which can therefore be changed in accordance with their wishes at an election, to another jurisdiction which they not only do not control but they do not understand. I think this is eroding our powers of self-governance to a worrying extent, and I think the public understand this. I know we must not talk about referendums but I think it would be an outrage if they are not consulted on something which is so important that it really goes to the heart of any constitutional system. Indeed, if they are not consulted and the Treaty develops

in the way this is clearly intended to, I think that the European Union will face a crisis of legitimacy in a few years time.

**Q112 Baroness Symons of Vernham Dean:** You simply do not believe the statement that the Prime Minister made that the safeguards on those points, which are he says enshrined in legally binding Protocols to the Treaty, are indeed safeguards?

**Mr Heathcoat-Amory:** They did their best but it is putting sticking plaster over a text which has, lined up on the side of the Treaty, the Commission, the European Court of Justice and almost all other Member States. Against that, we have some very slender and I think legally deficient red lines. It is very unwise to decide and ratify a treaty and then hope that your red lines will protect you in future. I think in this area and others it is very dangerous, and certainly there are massive ambiguities. The final arbiter will be the European Court of Justice, which has a record of judicial activism and from which there is no appeal.

**Mr O'Brien:** In very short order, I say that the three significant things are: first, to make it easier to pass more legislation through all these moves to QMV and also through the new voting system; second, the new powers of the Court of Justice, and justice is a very serious problem with the UK's red line now in so far that if there are measures which amend currently adopted legislation and we do not want to opt into them, then we are thrown out of the whole thing. So our red line there has been even further undermined, and fundamentally our red line in that area is not strong because the European Court of Justice is getting jurisdiction over this, something the Government always said it should never have. The third

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**Q113 Chairman:** We asked for one and you have had two. Lord Leach?

**Lord Leach of Fairford:** I do not care to choose.

**Chairman:** We have run far over time, which shows the level of interest that everybody here, both witnesses and members of the Committee, have in this subject. I thank you very much indeed for answering our questions. You will receive the transcript in, I hope, a fairly short period of time. Thank you very much for participating in our inquiry.