

WEDNESDAY 9 JANUARY 2008

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Present

Blackwell, L.  
Bowness, L.  
Jay of Ewelme, L.  
Kingsmill, B.  
Lester of Herne Hill, L.  
Mance, L. (Chairman)  
Norton of Louth, L.  
O’Cathain, B.  
Rosser, L.

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Witnesses: **Ms Diana Wallis**, a Member of the European Parliament, **Mr Philip Bradbourn**, a Member of the European Parliament, **Mr Klaus-Heiner Lehne**, a Member of the European Parliament, **Mr Manuel Medina Ortega**, a Member of the European Parliament, **Baroness Ludford**, a Member of the House, a Member of the European Parliament, and **Mr Michael Cashman**, a Member of the European Parliament, members of JURI/LIBE Committee, European Parliament (European Parliament, ASP 7 F387), examined.

**Q387 Chairman:** Thank you very much for seeing us. I am Jonathan Mance, Chairman of Sub-Committee E. Perhaps I could invite the Members of the European Parliament to introduce themselves. Diana Wallis I am glad to know very well.

**Ms Wallis:** Thank you, my Lord Chairman. I am Diana Wallis. I am a member of the Legal Affairs Committee and also a Vice President of the Parliament.

**Mr Bradbourn:** I am Philip Bradbourn. I am the first Vice Chairman of the Justice and Home Affairs Committee. I am a Conservative member.

**Baroness Ludford:** I am Sarah Ludford. I am a member of the Civil Liberties, Justice and Home Affairs Committee and a Member of the House of Lords.

**Mr Cashman:** I am Michael Cashman, a Labour member of the European Parliament and a member of the Labour Party National Executive Committee. I am also on the LIBE Justice and Home Affairs Committee as well as being first Vice President of the Petitions Committee, which is the direct interface between the citizens and the institutions.

**Q388 Chairman:** I do not know whether any one of the members of the European Parliament here wishes to make a more general statement before we go to the questions. We have taken a good deal of evidence which we are proposing to feed into a report that the EU Select Committee of the House of Lords has asked us to make on the Treaty with a view to issuing that report before the House considers the bill which is going to go to Parliament to give effect to the Treaty. You can assume that we have looked at most of the issues in some depth already. The first thing we want to address is the scope of Chapter IV in the criminal justice and policing area and ask you to compare it with the scope of co-operation under the existing Title VI and identify any particular areas where you think there may be an expanded jurisdiction or where you think the new wording may have a real benefit or impact. We note that it is a more specific wording and a wording which no longer uses the French word *notamment* or “in particular” and therefore confines itself to specific areas but has the considerable benefit of clarity in that respect. Is there more to be said?

**Baroness Ludford:** I would not want to second-guess people like Steve Peers and Elspeth Guild who have given evidence to you. I think it is a bit of a curate’s egg. On the one hand the list of substantive areas of criminality has been expanded to ten from three, beyond terrorism, drug trafficking and organised crime, but on the other hand you have this apparent limitation of the need to facilitate mutual recognition, although that has been a strong theme anyway. It has been taken as read since the Treaty of Amsterdam, and in particular the Tampere Conclusions of 1999, and we have been assuming that we have worked within those parameters. On the other hand you have got the specific mention of harmonisation of certain

procedural rights, which I think some of us would strongly endorse because it is something that this Parliament has thought particularly important and, of course, there has been a failure so far to get agreement on that subject, so that is a good thing. Looking back over the last decade, one would say that probably the Council and Member States have not really felt the constraints. I am not aware of anything where they have said, “Oh, good heavens, we are straying outside the criminal law legal base” and were prevented from doing something, so I do not personally see that there is a huge change. One notes the difference in wording but I think it is quite marginal.

**Q389 Chairman:** Bearing in mind that qualified majority voting is now going to apply in relation to the specific areas, is this going to enable progress to be made, for example, in the field that you mentioned – rights of individuals in criminal procedure?

**Baroness Ludford:** One hopes so. I think we assumed that there would be a qualified majority on the framework decision, and, of course, there was strong support in the Parliament, so one would expect the Parliament to agree in co-decision.

**Mr Bradbourn:** Not by everybody.

**Baroness Ludford:** Well, strong majority support anyway, if not consensus, so my personal assumption is that yes, it would make life easier for progress on some of the more civil liberties measures.

**Mr Cashman:** Sarah referred to the issue of the curate’s egg. It was always going to be that because what we were looking at was 27 Member States trying to find a way of going forward, and hence the importance of the UK opt-in/opt-out, which I think is a brilliant position to have bargained. I do not think we have given enough credit to our negotiators in that those countries that wish to go ahead may go ahead and the UK will still have in JHA its ability to protect its own special interests where it feels appropriate, and also we have the luxury of opting in. Where I disagree with Sarah is perhaps a perceived greater influence of

the ECJ in these matters of individual rights. In so far as they refer directly to EU law, yes, but again one must look at the Protocol that the UK has achieved on the application of the Charter in relation to UK national law in that it does not create any new rights and rights cannot be struck down within the UK by the ECJ. In parenthesis, I am pleased about the whole role of QMV. Co-decision means that for the first time these matters will be debated openly in a directly elected parliament, the European Parliament, and that again enables us to work with the Council and ensure that deals that are reached are not reached as they are currently, behind closed doors, where votes and debates are held in secret. There will be direct reference to the debates, to the agreements in Council, in the Parliament and I believe that this will bring about greater accountability in our national parliaments, so I welcome the widening of the scope with, from the UK's position, the caveat of the UK opt-in/opt-out on the JHA measures.

**Q390 Lord Jay of Ewelme:** Can I just ask whether you think the Council will take the same view as to the relationship with you as you have just taken as to the relationship with them, ie, greater transparency, greater co-operation and a better result?

**Mr Cashman:** With all institutions, and the Council is an institution, the cultural changes happen osmotically. If they want an agreement with us on a first reading deal we will see a greater degree of openness and transparency, and, of course, we always have Regulation 1049/2001 on public access to all documents held, received or produced by the three institutions and the agencies set up by them, so that where there is a denial of openness and transparency between the institutions citizens themselves can access documents, agenda items, meeting notes, et cetera, which were made and produced for the Council. However, again, what I am anxious to do through this process is to make our electorate aware that all things European are not imposed by Brussels. They are agreed by democratically elected politicians as ministers in governments, and once we get that message firmly in the open

where we see the Council acting in conjunction with the Parliament more and more we will see Members of Parliament asking the minister or the secretary of state to explain why they agreed to a position that was not originally the UK's position – accountability, and I believe through this enhanced process we will get that.

**Baroness Ludford:** My Lord Chairman, Michael got on to the opt-outs. I do not know whether you want to come back to that later as it is a separate question, but I am glad to say that we are showing early our diversity of view because I would strongly disagree with Michael's position. I think it is very sad, and unnecessary, that the UK felt it necessary to extend the opt-out to the policing and criminal law side. I am not persuaded of the necessity for that, particularly as you have the possibility of the emergency brake, as it is called, where a Member State believes that a measure would affect fundamental aspects of its criminal justice system, and to the extent (which I personally believe has been overblown) that there have been threats to our common law system, or at least there would be under QMV, I would have thought that that would provide a serious level of protection, so I have not been persuaded that we need the opt-out. I think it has also not been made clear to the public that it is a double-edged sword in the sense that we can be pushed out as well as opting out. As Steve Peers, I think, made very clear in his evidence to you, if we do not sign up to an amended measure we can be shown the door on an existing measure if it becomes inoperable, and there are slightly different but reasonably similar provisions under both the Schengen Protocol and the so-called Title IV Protocol. It might have quite a high threshold, as I think Steve Peers said, but I think it is most likely to come in as something like a SIS III, a Schengen Information System III, where you could not expect all the other Member States to apply a third generation Schengen Information System among themselves and then apply a second generation one to the UK. The UK would be told, "I am sorry. It is not operable for you to stay in at the level of SIS II while the rest of us go on to a SIS III". There is a penalty

here; it is not just a one-way street. The other angle, which again perhaps we do not want to shout about too much within the Parliament but I just put down a marker and we may come back to it later, is the threat to the position of UK MEPs and Irish and any other opt-out MEPs, especially perhaps if you have an enhanced co-operation measure. What is going to be the position?

**Q391 Chairman:** The West Lothian question, is it?

**Baroness Ludford:** Yes, the West Lothian question.

**Mr Cashman:** We already have it.

**Baroness Ludford:** Last June was the first time it happened, when there was all the talk at the summit about the UK red lines and extending the opt-out. Nobody within the Civil Liberties Committee had ever suggested that my position as the rapporteur on the Visa Information System, which I have been since late 2004, was anomalous, and indeed both the shadow rapporteurs for the two main groups were Michael Cashman and Timothy Kirkhope, two other Brits, which was quite funny really considering that Britain was not opting into the Visa Information System.

**Mr Cashman:** That is a good reason to have us working on it.

**Baroness Ludford:** But last June for the first time a teasing but a slightly barbed teasing remark was made. It is something the Parliament is probably going to have to address. The constitutional theory, of course, is that we are all equal, but politically the idea of a UK MEP being rapporteur on a measure where the UK is not opting in, because that opt-out has now become so large and not just Schengen related -----

**Q392 Chairman:** It is one of the points that Diana Wallis makes right at the end of her submissions to us.

**Baroness Ludford:** Yes, and I think it is going to be not such fun for us on the Civil Liberties Committee.

**Q393 Lord Lester of Herne Hill:** Following that up, I asked a previous witness about the problem of the member of a club who says, “I want to have my cake and eat it at the same time, being a preferred member and an unpopular member”. If you think of, say, the procedural rights for the accused problem and the failure to reach agreement, unfortunately, on that, I would be interested to know whether our influence, within the European Parliament or the Council, is diminished or not in real terms by the existence of these very broad opt-outs. Obviously, we made a huge contribution in the European Human Rights Convention on procedural rights, in particular since Articles 5 and 6 are called the Anglo-Saxon provisions, so I would be very interested to know whether we are at risk of diminishing British influence in exporting good procedural rights across Member States because of the opt-outs or whether that is a highly theoretical problem and in practice unlikely to matter very much. It is really Mr Cashman, who gave such a lyrical and attractive account of the brave new world, that I would like to ask the question of because it seems to me there must be a price to be paid in real terms and I do not know how big a price it is.

**Mr Cashman:** First of all, I think the difference in relation to cake and eating it is that we are paying for the cake to be made. It is not as if we are asking for something and not contributing. The issue of fundamental human rights is expressly there, as you say, in Article 6 and in Article 7 and I just wish that we had the courage within the Council and within the Commission to enforce Article 6 and Article 7. I do not think our role is diminished or will be diminished. Indeed, going back to Sarah’s point and Diana Wallis’s point about the issue of will we as parliamentarians be diminished because of the so-called West Lothian question, through my aside I said that we already have the West Lothian problem here whereby we legislate and we interfere, we involve ourselves, in matters over which we do not have direct

competence within the Parliament. However, what I like to see in this place is that we build up a reputation based on our expertise and based on objectivity. It is interesting. Sarah referred to the Visa Information System. I was the Parliament's rapporteur on a co-decision dossier, which is the Schengen border code, the conditions of entry into and out of the Schengen area and the conditions upon which Member States re-impose their borders. One of the arguments that were put forward by those wanting me to have the dossier was that I would come to it with a really objective attitude because the UK is not in Schengen, so I do not feel that we are losing influence. Indeed, on the issues of opt-in and opt-out, the emergency brake, there are only so many times you can apply an emergency brake before it stops being an emergency brake; it merely becomes a brake that one Member State or another is continually using. I like the fact that we can look at each of these issues on a case-by-case basis, looking at operability, looking at whether it suits us or not, because every other Member State does exactly the same. The fact that we have moved to QMV in these very important issues means that increasingly we can decide to opt in or not. I do not see it as being negative; I see it as being positive, and if I give a lyrical analysis of a bright new world it is because I think it is a bright new world that has been in existence for over 50 years and is suddenly coming into maturity with real powers in the European Parliament. I do not want us to do anything in any Member State to diminish the enormous benefits that have been derived from the establishment of the European Community and the European Union.

**Q394 Chairman:** Can I just take everything out of order because I have ascertained that Diana Wallis has to go very shortly and I think she would like to say something on question 6.

**Ms Wallis:** I do apologise to colleagues but I would like to have the chance just to say something very briefly about opt-outs and civil law, though I am pleased to see that my colleague from the Legal Affairs Committee, Klaus, is also here. Very quickly on opt-outs, I have submitted some evidence in writing which I hope will enlarge upon what I am about to

say. I think there is a real problem, especially in the civil law area, and I would put it like this. We as parliamentarians are directly elected and we come from constituencies where we represent people. We are informed by those people's experience of the European Union – how it works, how it does not work, what their daily problems and experiences are, and we bring that experience to our legislative work here in the Parliament. That is how representative democracy works. How are we to make that system function if we are dealing with legislation which will not apply to our constituents? It is a nonsense. It drives a whole cart and horses through the idea of representative democracy. We are, as it were, doing our legislative work in a void because we are making law not for those that we represent, and I have a real problem with that, and what is more, as Sarah has already said, we are beginning to feel in some areas that our colleagues from other countries have a real problem with us taking reports where our country is not opting in. We have experienced a rash of these issues in the civil law area in the last year – Rome I, maintenance obligations, and Rome III, where the failure to opt in has been made as a choice by the Government. Again, I think this is problematic and it is problematic as we move forward into the future because once you are in the civil law area and you ask the question, “What will be the priorities for the Parliament in civil law in the future?”, certainly we will continue with the matrimonial/family law area, there is a huge agenda there to do with contractual law, company and commercial law, consumer law, road traffic law, all the issues to do with the internet and e-commerce will come up and face us again. What is the common theme there? The common theme is the relationship with the internal market. The internal law market is the part of the European Union that, as I understand it, the United Kingdom is very keen on, but if we fail to engage in the area of civil justice we begin to undermine our engagement in the internal market and, more importantly, the engagement of our citizens and our enterprises, and we spoil it not just for ourselves but indeed for other people trying to do business in our own country and hoping

to have the benefit of a common justice system that works throughout the internal market, so the price we pay for these opt-outs is potentially pretty huge. I am sorry; I am going to leave you.

**Q395 Chairman:** Just before you go can I just say this, and I ought to disclose that I have an involvement in a different capacity as a member of the Lord Chancellor's Advisory Committee on Private International Law and therefore I have seen through that the Rome I negotiations which you have mentioned. May it not be a bit unfair to say that the United Kingdom failed to engage in those? It did not opt in because it was so engaged and regarded its interests as so engaged, and as far as I can see it has been very engaged in the negotiations which have led to a conclusion. One cannot predict ministerial decisions about whether to opt in now but, having negotiated in good faith, a conclusion has been reached which appears to the negotiators to be satisfactory. I was not one of the negotiators, of course, but that is the alternative picture which might be put.

**Ms Wallis:** That is the alternative picture and that is the picture that I am sure Michael would present.

**Mr Cashman:** I would, yes.

**Ms Wallis:** The problem with that is that I think you can pull that trick once, if I can put it that way, but I do not think you will be continually able to do it as we progress, and if we keep doing that we are irritating and annoying our partners.

**Baroness Ludford:** You sort of negotiate and lobby from the outside. You say you are not opting in but you do a lot of lobbying, particularly of MEPs and stuff, and then you --- it is bizarre.

**Ms Wallis:** Rome I has raised all the issues and shown us the problems. We got away with it with Rome I. We will not get away with it again is my view, and I see one of my German colleagues is nodding. I really have to catch a train, having thrown my grenade!

**Q396 Lord Lester of Herne Hill:** I really want to say something, disagreeing and putting a question, before Diana leaves but if you have to leave now I will not.

*Ms Wallis:* I am sorry, I must.

**Lord Lester of Herne Hill:** You know what it is about – free speech and privacy and tort law and harmonisation. I just want to say that I think it is much more difficult and complicated than perhaps --- anyhow.

**Q397 Chairman:** Thank you very much for coming, Diana. I am sorry, Mr Bradbourn. I should have invited you to speak a long time ago.

*Mr Bradbourn:* I preface any remarks I make by saying that, obviously, you all understand that with the political perspective from which I look at these things most of the issues you are covering in this area I would almost reject out of hand. Having said that, we have to deal with the reality that we have in front of us and there are a couple of general points I want to make to follow up what Michael Cashman said initially in his comments and then perhaps a couple of points which appear to be tangential but I think do have a bearing on your basic approach to looking at these issues. First, I want to comment on Michael's initial reactions, and that is to do with the opt-outs and the protocols. I just wonder – and in a sense it is wondering aloud – whether these protocols that the UK has negotiated will be strong enough in the final result to withstand ECJ judgments. That is the problem and the difficulty I have. There has been a lot of talk, certainly around the general EU circles here about whether in some areas the protocols will not stand the strength of judgments down the line, so to speak. That is a more general comment. Specifically, the one big concern I have about a lot of the issues you are covering here is about data protection because that to me is key to where we see any co-operation, whether that be through the new Treaty or the existing Treaties, or indeed just through open intergovernmental co-operation. It is where we go with data protection. On that basis, if I can refer back to the Treaty of Prüm, which was, as we know, agreed last year

just before the agreement on the Lisbon Treaty, in the analysis that was done on the Prüm Treaty by the European Data Protection Supervisor, he drew attention to the fact that a lot of the requirements to exchange data undertaken through the Prüm Treaty did not provide sufficient protection to individual citizens. My carry-forward on that, if you like, is to say when and if we go down the road of police co-operation, judicial co-operation and so on, where are the safeguards for the individual from information being gathered from databases, be it DNA, be it personal computer data or whatever, to be able to check that data, to check its accuracy and to challenge when personal data is being exchanged which may not be directly pertinent to the matters being investigated? That is to me a crucial and key issue across the piste with all of this. The second point is this, and this is a tangential thing because one of your colleagues asked about the issue of where MEPs see their role could be enhanced or changed or improved in any way: When I look at some of the issues that we have now coming before us, the comment I would like to make is to do with our own procedures in Parliament, because we agreed some time back something called the comitology arrangement, that is to say how the institutions relate to one another post the legislative period. We have had a very difficult time trying to preserve our right to review existing legislation and to propose changes to that legislation because, of course, under the existing Treaties the Commission, as guardian of the Treaties, has the sole right of the initiative of legislation. What we have done in Parliament, and I make a personal comment here, is hamstringing ourselves because what we have said is that in exchange for this right to review we will give up our right to impose sunset clauses on legislation proposed by the Commission, and this to me is a backward step, not a forward step. Those are the initial comments I make.

**Q398 Chairman:** Can I just follow up the point about your role and comitology by focusing attention on question 3 which we raised and that in turn arose out of some comments by Tony Bunyan and Professor Steve Peers, which commented on the number of first reading deals

being reached in the area of Title IV, which is not a transparent arrangement. Is that going to continue?

**Mr Bradbourn:** I suspect it will grow.

**Baroness Ludford:** I thought a lot of that was fair comment, and indeed I think Tony Bunyan of Statewatch encapsulated that in a Statewatch paper from last September. Just this morning in our group Diana Wallis presented to us a working document and I have brought a copy that no doubt we can send to you electronically as well. There exists a working party in this House on parliamentary reform and they have produced a working document, number 12. I am quite anxious to see all the previous working documents, but this one is on co-decision and conciliation, and it does pick up the question about the potential lack of transparency and democratic legitimacy of first reading agreements. I confess that Tony Bunyan has been a little bit kind to me on the Visa Information System because he cited that as a bit of an exception, which is very sweet of him, but we did not have a committee vote on the Visa Information System before I went into negotiations with the Council. Within these four walls I might say -----

**Mr Cashman:** Is that on the record?

**Baroness Ludford:** ----- that that might have given me a certain degree of latitude which possibly led to a rather better deal that we got out of the Council. That is my word and I am sticking to it, but on the one that I am now doing, which is a sort of daughter of the Visa Information System and is the measure about how you handle the visa applications of outsourcing and the collection of the fingerprints and the biometrics, it was precisely because of my experience on the VIS that I very deliberately wanted a committee vote, which we had in November, before we had negotiations with the Council. I think, all things being equal, it is as well to try and deal with legislation as expeditiously as possible; therefore, if we think we can deal with it in a first reading and not spin it out to two readings and conciliation, that

is good, but first of all you have to make sure that your own colleagues are well informed, and I think we certainly did that under the Visa Information System by briefing both shadows and making regular reports back to the committees, and Michael is one of the shadows so it would be his judgment rather than mine which would have mattered there. However, there is an issue about the availability of documents because they do not tend to go on the website and I think personally that our committee needs to discuss this and discuss how we can improve our procedures and the transparency of them because the document which was the basis on which I went into discussion with the Council was my suggested amended report that would have gone forward to a vote in the committee, had there been one, but we stopped short of that and I was permitted by the committee to go and discuss it with the Council, but that document itself was never voted, only the final result was voted in the committee. That document was available to other members of the committee but it was not, for instance, on the Parliament website, so there is an issue there about transparency. Democratically this issue may be slightly different because I think the committee was well informed but transparency certainly is an issue.

**Q399 Chairman:** You used the phrase a moment ago “between these four walls”, but this is on the record.

**Baroness Ludford:** Oh, right, okay.

**Q400 Chairman:** Mr Cashman?

**Mr Cashman:** I have a couple of references – and I do not want to make it a tit-for-tat – to something that Philip said. Data protection is absolutely essential and that is why we need EU-wide data protection, so that if you go to one country the same standards, the same protections apply there as in the other, and I do not see anything that diminishes that. Indeed, the Prüm Treaty is not about the exchange of information; it is about whether information is

held. It is called a “hit/no hit system” – “Is information held by another national database?” “Yes, it is”, and again once it is communitised rights and provisions apply. I became excited by what Sarah was saying and by what Tony Bunyan had been saying about the whole issue of first reading on co-decision being less transparent. I would expect Tony to say that and I am pleased that he does say that and challenges us so fearlessly on these rights. If we have a first reading deal it is the decision of the committee. No rapporteur acting on their own can engage in a first reading negotiation with the Council and the Commission, so therefore it is upon agreement with those respective shadows, the shadows being those working in the other political parties on the same dossier. Indeed, when we generally go for a first reading deal, as Sarah said, there is continuous reporting back to the committee on the negotiations, but not in camera. These committee debates and these reports are in public. The documents are made available. There is widespread debate amongst the different political groups, so it is as transparent as it can be. However, of course, if you enter into the first reading deal it is generally because you are going to get a better deal from the Council than you would going to a second or a third reading. Again, it is the judgment that the rapporteur makes that she or he then puts to his or her committee, and then it is up to the committee in a full vote to decide whether they accept that or not. Equally, I do not want to blame the institutions. The rapporteur has the opportunity at any stage to go to the committee and say, “These are the amendments. Let us vote”, and indeed this happens on many occasions where you get the committee to vote, you continue negotiating with the institution, you take it through to the plenary, you have the first vote on the amended legislative proposal and then you refer the whole thing back to committee which gives you as the rapporteur the right to enter into negotiations. The reason you get first reading deals is generally because you feel you are getting a better deal for the citizen and for the institution than you would otherwise get. It is

not forced upon you. It is a decision that you personally make, taken in conjunction with your colleagues in the committee.

**Q401 Baroness Kingsmill:** I just quickly want to ask the MEPs for their practical understanding of how they think the emergency brake system would work alongside the enhanced co-operation aspect of things, because from a legal point of view it looks perfectly fine, but I suspect the realities of the politics of this might be a little different and I would quite like to understand how you thought it would work. It is like a mini opt-out, is it not, an emergency brake, triggering the four-month discussion, presumably, and at the same time the gang of nine or whoever get together and fight it out against the emergency brake instigator? I just wondered how you saw it working in practice. Is it going to happen? Is it an underpinning for those countries that do not have opt-ins and opt-outs?

**Baroness Ludford:** It has not happened so far.

**Mr Cashman:** I am certainly of that opinion.

**Baroness Ludford:** But they could have used enhanced co-operation provisions in the Treaty up to now and they did not. In the Treaty of Prüm it was not even Third Pillar. It was a pure international agreement, nothing to do with the EU whatsoever. Seven Member States got together and reached a purely international agreement. They did not use enhanced co-operation – I do not know why. It did not cross their minds – and then they put it through the Brussels machinery and it ended up as an EU decision with no co-decision, nothing, not even proper consultation, and no involvement of national parliaments practically except for national parliaments which had to ratify it as an international agreement and, as I said in a debate in the Lords a few weeks ago, I think the Bundestag had half an hour's discussion of it. The whole thing to me was a democratic scandal, the Prüm Treaty, and the way it could just get laundered through the Brussels machinery.

**Mr Cashman:** But that will not happen with co-decision.

**Baroness Ludford:** You ask me what I expect to happen. I suppose the answer is I do not know, but I know from the past that they have not used the possibilities in the enhanced co-operation provisions; in the past they used Prüm. They resorted to going outside the EU altogether, as they do with the whole G5 and G6 intergovernmentalism, which the committee has extensively commented on. Member States like that. It is cosy, it is secret, it is behind closed doors, as one of your reports was called, and it keeps the pesky MEPs out of the picture as well on the whole as national parliamentarians. That appears to have suited them in the past but I do not know whether this will be used.

**Q402 Chairman:** There was a numbers point, was there not, too? There were only seven at Prüm, which did not meet the minimum number for enhanced co-operation?

**Baroness Ludford:** Yes, that is true. In theory, if you have nine Member States going forward in enhanced co-operation the Parliament has full co-decision rights, which means the whole Parliament. I do not know; perhaps Mr Lehne might know the answer to that more than I. As I say, one has a certain wish not to debate this question because I do not want to set hares running, but what will be the position of those MEPs who come from, in this case, 18 countries which do not join in the enhanced co-operation measure? Will there be a move in the Parliament under the rules of procedure of perhaps, saying, “We want to exclude those MEPs whose countries do not take part”. In constitutional theory, I think, we are all equal, being a parliament, but our nationality might count against us.

**Q403 Chairman:** Certainly that is not a concept that is foreign to the United Kingdom, is it, at the moment?

**Baroness Ludford:** No.

**Mr Bradbourn:** Can I add to what Sarah said because this does actually give the example? Regarding the Prüm Treaty, when Parliament was effectively consulted on the issue, as you

say, there was no decision on this from Parliament. We had just about six weeks from start to finish to put our opinion forward. That is not proper democratic oversight from my point of view.

**Baroness Ludford:** But it is take it or leave it because it has been concluded as a Treaty anyway.

**Q404 Baroness Kingsmill:** Just getting back to my original question, are you saying that the Prüm experience is what is likely to inform the operation of this?

**Mr Bradbourn:** I suspect so.

**Mr Cashman:** My Lord Chairman, can I add what I said as an intervention, that, of course, co-decision will mean that the Parliament will no longer just be consulted when we have such important matters as these. There will be democratic oversight and engagement and that is again one of the reasons why I welcome the developments, not least in JHA.

**Q405 Chairman:** Can I ask in that context a follow-up which is really the last sentence of question 2? This is in relation to the question of criminal laws where Article 69B(2) now permits Member States under Title IV to define criminal offences and minimum sanctions in a particular area, bringing within Title IV, qualified majority voting, this jurisdiction, and leaving unspecified what the position is in relation to the existing Pillar I jurisdiction established by the environmental pollution and the ship source pollution cases. What would interest us to know is, if the Commission continued to advocate the jurisdiction established by the environmental pollution and ship source pollution cases, and indeed, if in particular it continued to seek to expand that, what would the European Parliament's attitude be likely to be? Would the attitude be that that was inappropriate and that one should deal with criminal matters now under 69B(2), which is a specific regulation? That is a purely legal question, is it?

**Mr Ortega:** We are discussing it at the Legal Affairs Committee and we do not know yet the answer. We are discussing it and we do not have a report, and in Parliament it is absolutely impossible to know what the Parliament will decide.

**Mr Lehne:** We have a personal opinion but that is different.

**Mr Ortega:** Everyone has an opinion.

**Mr Lehne:** I am very reluctant on this whole item because I personally believe that the European Union, not only because of legal reasons but also because of political reasons, should limit its activity in criminal law to a minimum. The simple reason for me is that just harmonising minimum and maximum penalties makes absolutely no sense because the question of criminal punishment is much more connected to the questions of measurement and enforcement, and this is so completely different in the Member States that harmonising just one small aspect of the whole system at the end does not really bring any effect; it only produces additional distortions. From that point of view I am personally absolutely against this but this is my personal opinion and my feeling is that the majority in the House are not of this opinion, but that is the way we are. We are discussing it in relation to the proposal of the Commission on the environmental criminal law and also we have to keep in mind the latest decision of the Court of Justice. They have changed their attitude a little bit and the Commission is reacting on this now and it is limiting the operation of this annex competence that they created in relation to internal market legislation.

**Q406 Chairman:** Does it follow from that that the focus may be on the jurisdiction to establish minimum rules relating to rights of individuals in criminal procedure, for example, if you are concerned about the actual operation of legal systems?

**Mr Lehne:** This is something different. On one side we are speaking about harmonising criminal law. In the area where we are not really harmonising it we are harmonising just some aspects, which in the end does not solve the problem. This is always the case. It is a

complicated subject and you are just harmonising certain aspects and leaving the others out. The result may be not more harmonisation but more distortion; that may be the result of all of this. We have this very often as well in discussions on company law, which has nothing to do with this, but at the end you can see that if your opportunities of harmonising are not enough, if they are concentrated on certain aspects, then it is politically better not to do it than going on, but at the end, if we now take a look at the Lisbon Treaty, it will be a political decision case by case, point by point, proposal by proposal, of the political institutions, Parliament and Council, whether they want to go on or not. This is the way it is. For example, you have now the experience within the Council that on certain aspects, for example, combating counterfeiting, probably the Council does not want to go on because they have made the political decision not to do it. They probably have the legal opportunities to do so but the political decision is not to be used as a legal opportunity and I personally believe that this is right.

**Q407 Lord Lester of Herne Hill:** My question follows from what Mr Lehne was just saying. As Diana Wallis was leaving I was trying to touch on something akin to this. Whether you are dealing with criminal law or what we call tort law you are dealing with sensitive issues about social policy and the ethical values that the criminal or civil law systems are reflecting. If you take a federal system, I can understand the notion that there are some offences that are so serious and cross-border that you have federal crimes, say, in the United States, but you also have state criminal systems which respect the differences in value of smaller units. The reason why what you say I find very important is that, to the extent that you move beyond what I call federal crimes or you widen the scope without doing the job properly, you begin to create unnecessary divisiveness within the whole European system, so that in the civil law area my problem has been that by trying to harmonise what we call tort

law in the area of free speech and privacy, where you contrast, say, the French and the British positions, you immediately arouse huge controversy unnecessarily.

*Mr Lehne:* That is the reason why we have taken it out of Rome II.

**Q408 Lord Lester of Herne Hill:** I know, but is there some lesson there for the future in the way that one approaches Lisbon?

*Mr Lehne:* I hope so.

*Mr Ortega:* We have come to the point where we are living in a common space, so if you commit a crime in one country and move to another you might escape jurisdiction. This is why we started with pollution, with the great sea accidents. Depending on the jurisdiction of where you are going to be tried it will be completely different. This is ignoring the fact that we are already living in a community in a sense where people can move easily from one place to another and can cause harm. This is the case with pollution but there are several areas, such as money laundering and all these things, international criminality.

**Q409 Lord Lester of Herne Hill:** Broadcasting.

*Mr Ortega:* So, obviously, we have to go into there to achieve it. This will be difficult but I cannot see how we could have a different criminal law from one country to another. There are many imperfections in the American system, but there are some general principles of common law but people can escape justice very easily in the United States. You can move from one state to the other, change your name and nobody can find you, and that does not make the United States very safe.

**Q410 Chairman:** Is not the primary solution to that a measure like the European Union arrest warrant?

*Mr Cashman:* Absolutely.

**Mr Ortega:** That is one minor instrument. Of course, I supported it; I am a socialist. We represent a different point of view, and I find that we need to move into there. I have lived in the United States and the United States is one of the most unsafe countries in the world, because you have a free area with not enough controls, and I do not see how we can use the American system as a model for the European Union Community.

**Q411 Lord Lester of Herne Hill:** Are you not running together several different things there? Obviously, there are some social evils so great that they can only be tackled on a cross-border basis. Pollution is a very good example of that, and I call those federal crimes. Obviously, even where they are not federal crimes the need to ensure that wrongdoers are brought to book across Member States requires something like the European arrest warrant in order to ensure that that should happen as a matter of jurisdiction to get your hands on the person and so on, but those are different questions, are they not, from an attempt to harmonise the whole of criminal law or the whole of what we call tort law, where what I am suggesting is that subsidiarity, apart from anything else, needs to be respected if you are to have the confidence of the citizens of Europe that their own national systems are being respected within the overall European system?

**Baroness Ludford:** Yes.

**Mr Ortega:** That is the question!

**Q412 Lord Lester of Herne Hill:** That is my question!

**Baroness Ludford:** I agree with that because I think we should firmly stick to the notion that what we are trying to do is make legal systems interoperable, not trying to create one single EU criminal justice system. It is difficult. It is an awkward match to make because, particularly when you do establish minimum rules on the definition of criminal offences and

sanctions, trying to fit that into 27 different sentencing structures, and I am not an expert in this but you are, -----

**Q413 Lord Lester of Herne Hill:** No, I am not.

**Baroness Ludford:** ----- must be quite a nightmare. I appreciate that it is very difficult to negotiate these things, which is why they have minimum and maximum, which is a pretty wide spectrum. Just to answer the Chairman's original question, I personally would have thought that once you have got this Article 69B, which is in the Lisbon Treaty and which provides for defining criminal offences and sanctions in areas like the environment, so you now have this new legal base, it would be difficult not to use that, -----

**Mr Lehne:** I think so too.

**Baroness Ludford:** ----- and difficult to go back and rely on the court jurisprudence, to use the other legal basis, the environmental transport policy or whatever legal basis, and I would have thought that, even if it were legally possible, quite honestly it would be politically unwise. Obviously, the difference it makes to the UK is that the UK can opt out of the former and not the latter, but I would not have thought that there was any particular interest in forcing the UK – and I am talking particularly about the UK here – to try and join in something about criminal measures when there is another legal base which is perfectly respectable, and indeed tailor-made. There might be some people in the Parliament who might want to but I do not honestly think it would be a very clever way to proceed.

**Q414 Lord Blackwell:** One of the things we have learned from previous Treaties is that you cannot just take the Treaty as it currently stands; you have to anticipate the way in which subsequent decisions may go on and evolve, and so we have language here which is rooted in dealing with cross-border crimes and cross-border co-operation in the most part, although 69C, for example, talks about crime prevention without any reference to cross-border. I think

some of the questions touch on what Mr Bradbourn was saying earlier, first, is there any political desire in the Parliament in Europe to use this as a basis to legislate beyond cross-border?

*Mr Cashman:* No.

**Q415 Lord Blackwell:** Secondly, even if there were not, is it practical to limit legislation so that it only impacts on cross-border without in a sense affecting the way legal systems have to work domestically, and, thirdly, even if that were the intent of the legislation can we stop the European Court of Justice interpreting the body of law here in a way that then transfers across to other countries?

*Mr Bradbourn:* Can I comment on that? You have identified absolutely what my biggest concern is with all of this, and that is what we term here Treaty-creep. In other words, we have a Treaty and then it is always pushed against the barriers to try and bring some new element into it that was never foreseen when the original Treaties were put together. That to me is a big concern. The other area where you have this is in terms of when there is a limitation, if you like, a principle accepted, as was described earlier, of subsidiarity. The subsidiarity argument is one that is almost dismissed, “Oh, well, we see there is a need to act”. Do not forget in this new Treaty you have the ability to self-amend the Treaty and that again is something which is a significant factor in how far you can push this.

*Mr Lehne:* I would like to try to answer this question. First, I believe it is quite clear it is a legal base. It is just giving the opportunity to solve cross-border situations; we can only act on this area, that is exactly what you said, so we can define those federal crimes. We can as well, as we have heard, harmonise certain aspects but I personally, because I do not think it is politically wise, would not like to do so. That is the way it is, but defining them for cross-border cases and telling the Member States, “Okay, you have to do something to make sure that no-one is committing such crimes”, makes sense and I personally believe is possible.

The second aspect is the problem of the legal base: is there no danger that we do more? I think now we have Article 95 on internal market legislation and that is also a question. We can use this in a good manner and in a bad manner but I think it is politically not wise to use it in a bad manner, and that is the reason why the Council and the Parliament are making serious use of this instrument and are trying to make good decisions. That is a situation that exists everywhere. Whatever the legal base you can do bad things and you can do good things. It is exactly the same here. It depends on the political process and the result of the political process where Parliament, Council and Commission are involved with the whole thing. The European Court of Justice – for the first time that is connected to a subsidiarity problem. With the Lisbon Treaty we have the opportunity of the national parliaments to go to the European Court of Justice and check if there is a subsidiarity problem in there or not. That is for the first time. There is no jurisdiction of the European Court of Justice on subsidiarity now. There is one simple reason. The only ones that could go to the Court of Justice are the Member States and the Member States were sitting at the table when they were making the decisions in the Council and no-one who makes a decision is going to go to court against his own decision. That is the simple reason why we do not have jurisdiction on this. This real change, which I think is a really high quality change, in the Lisbon Treaty gives the opportunity in future for each of the national parliaments to go to the European Court of Justice and then for the first time we will probably have a jurisdiction on questions of subsidiarity. If it is possible, if it fits into the system of subsidiarity if the European Union is doing the legislation, I personally believe that this is an advantage and for the first time we may have some changes on that aspect.

**Q416 Chairman:** Is perhaps an alternative view that the European Court of Justice has tended to accept the Community institutions' assertions about the need in the interests of the

internal market, et cetera, for particular legislation and, as you say, there is very little jurisdiction?

**Mr Lehne:** Tobacco and other examples, it is true.

**Baroness Ludford:** The Court would have to pay attention to the wording in Article 69B(1) which talks about particularly serious crime “with a cross-border dimension”. Secondly, yes, there is a danger of some spillover into domestic law and I think we have to try and limit that spillover. As I say, if you have got a Community instrument talking about minimum sanctions how does that fit in with the rest of your sentencing policy? I am sure there are difficulties there but we have to try and ring-fence it as much as we can because I personally do not want the EU harmonising all of our criminal justice system.

**Mr Cashman:** It is important to recognise that 69B(2) creates a specific Treaty base for criminal penalties and therefore will have to be used specifically. Let me just get on to this notion of Treaty creep. Where it has happened we have been very carefully reminded of our legal obligations under the Treaty, and indeed I will give a specific example – passenger name records, for which the proposal originally came from the Council under Pillar I, commercial activities. The Parliament challenged this. The European Court of Justice agreed on that and it had to go immediately to Pillar III over which the Parliament had no co-decision matters whatsoever, so there was a brilliant example, I believe, of us reminding the institutions that Treaty creep would be unacceptable even though arguably we suffered as a result of taking that action. Also, of course, this Treaty is not a self-amending Treaty. No Treaty is. It can only be amended by an IGC. We have to be very careful about the allegations that we make regarding the Treaty. Of course, we never know what the ECJ will do but I do know this, and thank God (and I say that as an atheist) I am not a lawyer, that one lawyer will give you an opinion and another lawyer that you pay will give you the contrary opinion. I believe that the

UK has negotiated its position brilliantly and thoroughly so that when we come to that point I believe our position will be thoroughly upheld..

**Q417 Chairman:** I have just one final question and I do not know whether any of you wish to say anything on it. One matter which has interested us is the expanded jurisdiction of the European Court of Justice and whether the European Court of Justice will in your view need to be the subject of consideration as to its method of operation, its constitution, matters perhaps as fundamental as the way in which judges are appointed, and in view of the expanded competence is this a matter which has been or is likely to be of interest to the Parliament?

**Mr Lehne:** I think so. I think at the end this is progress because we have now a kind of new system that guarantees a certain quality and I personally believe that this is a real improvement. It is not necessary that Parliament is directly involved in this whole process but I think it is not really acceptable that the heads of governments at the end are making their personal decisions and that is it, and so I personally believe this is good progress.

**Q418 Chairman:** You are referring, are you, to the committee of wise men which vets this?

**Mr Lehne:** Yes.

**Q419 Chairman:** What about more fundamental changes, possibly even a move away from the principle of one judge per nation, for example?

**Mr Lehne:** That will be difficult. I personally believe that because of the specific role of the European Court of Justice it is necessary that you have a representative from every Member State. That is necessary for the involvement of all different ways of legal fielding of jurisdiction, so I personally would prefer that every country has a judge in there, but on the other side it is also clear that if the European Court of Justice, in acting on this area, makes

decisions on cases in which one specific Member State is involved the specific judge coming out of that country should not be involved in the decision.

**Q420 Chairman:** What about the expanded competence? How do you ensure that there is within the Court skill in the criminal justice area if it is going to have substantial criminal justice competence?

**Mr Lehne:** That is up to the Court. I think they have enough judges; they can organise this. They simply have to make internal decisions as to how they handle this, and I personally believe that with so many highly qualified judges it should be possible to deliver specific qualifications on certain areas.

**Mr Cashman:** I agree with what my colleague has said. I think it is worth recalling that not only are they appointed but of course they are not appointed for ever. They are appointed for a fixed six-year term and have to be re-appointed, and will be re-appointed based, arguably, on the work they have done. I welcome the involvement of the ECJ in the broader scope. It would be inconceivable if they did not have competence within the broadened scope. However, it is worthwhile recalling that they have competence on EU law and not on domestic law.

**Q421 Chairman:** Are there any further points?

**Baroness Ludford:** I just want to say a word about data protection. Philip mentioned one aspect of data protection earlier. I just want to say that we have ambiguity in what the role of the European Parliament will be in international agreements on exchanges of data. You have the famous Article 25A in the Treaty which was put in at the last minute.

**Q422 Chairman:** Which is a derogation from the general rule?

**Baroness Ludford:** It is a derogation from the general rule and says that the Council can adopt a position on data protection rules in the area of common foreign and security policy. Given our experience on PNR, where indeed the Council ended up making an agreement with the United States on passenger name records under the CFSP provisions, which cut us out of the seam, and that was why some people said we had a Pyrrhic victory but I do not agree with that, I think we had to go to court on it, they do not even have to consult the European Parliament. My personal view is that I think the Parliament would argue that if you had an area like passenger name records or something to do with terrorism and crime which was a Title IV policy governed by the normal rules on data protection then Article 188N, where the Parliament has to consent to international agreements, should apply in conjunction with Article 16B on data protection, but I think it is ambiguous because I cannot see what the point of Article 25A is personally when you have 188 which is that Parliament has to consent. Obviously, the Council is hoping that that means that they can leave us aside but I think the Parliament will try and say, “Oh, no, you cannot. We have to consent to an international agreement which involves data exchange and data protection”. I think there is ambiguity there and the potential for considerable dispute, political if not legal, because you cannot review this. There is no recourse to the Court. If the Council invokes Article 25A there is no Court review there, but we would jump up and down, I imagine.

**Q423 Chairman:** That is very helpful, drawing attention to the way in which you might respond, and we will have that in mind.

**Mr Cashman:** May I just add that it would be worthwhile, given what Sarah has just said, referring to Treaty declaration 36, which states, “The conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters III, IV and V of Title IV of Part II in so far as such agreements comply with Union law”.

**Chairman:** Thank you very much for your participation and for meeting us. It has been very useful.