WEDNESDAY 9 JANUARY 2008

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.

Witnesses: **Ms Julia Bateman**, Justice and Home Affairs Policy, **Ms Jane Golding**, EU Committee, The Law Society, and **Mr Scott Crosby**, partner at Crosby, Houben & Aps, examined.

Q424 Chairman: Thank you very much indeed for coming. This is on the record and I know that Julia Bateman at least has given evidence before. We have had an extensive programme of evidence taking and this is with a view to feeding our report into a report by the European Union Select Committee which will be useful, hopefully, in relation to the bill to implement the Lisbon Treaty. You have seen the list of questions which we are going to take but I do not know whether there is anything you would like to say by way of introduction initially about yourselves or generally in relation to the subject.

Ms Bateman: Thank you, my Lord Chairman, for the invitation to appear before the Committee. If I may briefly introduce ourselves, I am Julia Bateman. I am the Law Society's EU Justice and Home Affairs Policy Adviser and currently acting head of the Brussels office. The Law Society of England and Wales represents over 120,000 solicitors and our Brussels office acts as the voice of the solicitor profession to the EU alongside the Law Society's EU Committee. I am joined by Jane Golding, who is a member of the Law Society EU

Committee and an experienced EU law practitioner, and Scott Crosby, who has gallantly agreed to step in at the last minute. Scott is a colleague of Jane from the law firm Crosby, Houben & Aps and is a member of the Advisory Board of the European Criminal Bar Association and a former member of the Law Society EU Committee.

Q425 Chairman: That is very helpful and I should have said that we are grateful for the written submissions which the Law Society has made. Is there any more you want to say generally on the topic we are discussing before I ask some of the specific questions?

Ms Bateman: Just a brief point, that the EU Committee has been working on an explanatory guide to the Treaty of Lisbon which is aimed at informing the solicitors' profession and we will also be hosting an event in the House of Commons around the ratification bill in order to take part in the process and the debate. Your invites and the guide will be winging their way shortly.

Q426 Chairman: I think they have been received.

Ms Bateman: They have come? Excellent.

Q427 Chairman: Unfortunately, I think they may clash with either a meeting of this committee or of the EU Select Committee, but otherwise I am sure that members will come.

Mr Crosby: My Lord Chairman, I should perhaps point out that I am here in my personal capacity entirely. I have no mandate to represent the Criminal Bar Association or the Law Society EU Committee.

Q428 Chairman: Thank you very much. The only matter that I might point out is that I have a different role as a member of the Lord Chancellor's Advisory Committee on Private International Law which had a lot to do with the Rome I negotiations, which have been recently concluded, but we may or may not get on to them. How do you see the new Chapter

IV with its detailed listing of areas of competence in criminal law in comparison with the current Title VII?

Ms Bateman: We have divided up the questions, my Lord Chairman, and this is one of the ones that falls to me. I do believe that Chapter IV does entail extension of co-operation in this area and clarifies and confirms through certain express references the competence of the Union to take action. If we look at the key provisions of the new Treaty, you have got, as you know, 69A and 69B split between minimum rules relating to procedure to underpin facilitation of mutual recognition and, in terms of 69B, the more substantive law rules focusing on offences and sanctions. As far as 69A is concerned, I would say the main development or extension is a specific reference to the rights of individuals in criminal law procedure. Whilst it was deemed that the EU had competence in this area under the current Treaty in terms of Articles 31 and 34, we welcome this express reference because it clarifies any debate over whether there is a legal basis in this area, again, with specific reference to victims of crime rather than a deemed competence under the current Treaty, and a further innovation, if I may call it that, is again an express reference to admissibility of evidence, which as far as I understand it was one of the major discussion points in terms of the European evidence warrant. Those terms of 69A I would flag up. In terms of the list of offences in the new 69B, to some extent this reflects and repeats broadly what is in Article 29 of the Treaty of the European Union. There is reference to sexual exploitation and a specific reference to money laundering or computer crime (cyber crime), but I doubt this is as significant and it might appear because the EU has already taken action in these areas anyway, although I think it is worth considering 69B(1) which refers to the identification of other areas of crime, and this may be a provision that the EU will rely on later in terms of future criminal law activity being subject to that. In terms of harmonised areas of law I will leave that to the next question.

Q429 Baroness Kingsmill: Those things itemised in the areas of criminal activity did seem, to me anyway, to have rather useful specificity, if you see what I mean, as opposed to what had gone before where there was *inter alia* or as well as or examples. It is quite useful, I would have thought, to have a clear definition of those areas which are going to be specific.

Ms Bateman: Absolutely. I think that is one of the benefits, as you say, of itemising the areas or clarifying that computer crime or money laundering or the sexual exploitation of children are identified in the legal basis.

Q430 Lord Norton of Louth: Can I just pursue the point made to clarify 69A(1)? I think you were saying the first paragraph potentially had the scope for extension but is it not qualified by the second paragraph?

Ms Bateman: Yes. It is not a broad extension of powers and certain criteria have to be met but it seems to me that this is a residual provision that may be relied on later where the Council agrees unanimously to introduce new areas of activity. You are absolutely right: it is qualified, but I think it is an important provision within the article.

Q431 Chairman: Can you help us on the second question? These provisions are described in terms of mutual recognition and in some contexts one can no doubt understand that readily if you are going to recognise a criminal penalty or for any purpose, including implementing it. If there is legislation providing for one country to implement the decisions made by another mutual recognition is an appropriate concept, but everything in 69A(2) relating to mutual admissibility of evidence, rights of individuals, rights of victims of crimes, is described as being "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation …". How is that limitation to be understood?

Ms Bateman: Broadly speaking, on the question of mutual recognition, this is the first time it has been expressly referred to in the Treaty. The principle of mutual recognition has long

been relied on in Commission proposals and recently in terms of judgments of the ECJ and I do think that in order to advance the concept of mutual recognition, there are minimum rules to underpin this, in a sense to facilitate mutual recognition, as you said, my Lord Chairman, such as mutual admissibility of evidence or rights of individuals in criminal procedure. It is taking the principle of mutual recognition but having minimum rules across the board to facilitate that.

Q432 Chairman: Let us take the case of a Briton who commits a crime in Spain or a Spaniard who wants to intervene in French criminal proceedings as a *partie civile*. There is no question of mutual recognition of a judgment or judicial decision. It is simply a question of what are the rights of an individual or the rights of a victim of crime. Would there be jurisdiction to cover that situation or is the limitation in paragraph 69A(2) perhaps in some respects rather odd?

Ms Bateman: I think on a strict reading of the article it would be limited to mutual recognition in certain cases in terms of a cross-border criminal law procedure, but I can imagine the situation in terms of the broad rules in the area of freedom, security and justice. You would want to have mutual recognition in terms of fair trial rights or safeguards or guarantees; rather than mutual recognition, actual minimum rules across the board.

Baroness Kingsmill: My Lord Chairman, do you think you would read 69A(2) and 69B(1) together, in the sense that it is those crimes for which you have to have mutual recognition of judgments and judicial co-operation and so on? Would it be in relation to those particular crimes, do you think?

Q433 Chairman: My reading would be on the face of it that 69A and 69B are entirely separate. In 69B there is pretty general power but in relation to 69A(1) I am simply raising the possibility that there might be an oddity about the apparent limitation, that it would have

to be worked out. Is there anything else you want to say on the subject of mutual recognition which now finds itself in crime as well as civil?

Ms Bateman: Just to the extent that it is a preferred mechanism of judicial co-operation and harmonisation and we have always supported that model. I think mutual recognition was a UK Presidency concept back in 1998, if I understand correctly. Just to add one point, if I may: the concern that the Law Society has about mutual recognition is the over-reliance on the concept of mutual trust that is deemed to underpin this. We have numerous examples and complaints from practitioners that mutual trust does not actually exist to the extent that the policy makers would have us believe and that there are practical day-to-day concerns. That is just the counterbalance to mutual recognition in that sense.

Q434 Chairman: Was there a point you wanted to add, Mr Crosby?

Mr Crosby: That was more or less my point. I think this is best construed as meaning that it is felt that it might be necessary to shore up mutual recognition. There is a certain amount of cynicism expressed about the real meaning of the term and whether it really exists.

Q435 Chairman: Perhaps I can ask a different question which arises under 69B out of evidence we have just heard. We heard a view expressed that in fact it is not very helpful to have a provision like 69B(2) which establishes minimum rules. They do not really do much for anyone, they do not help raise standards and, if anything, they may, since they are by definition minimum rules, depress them or suggest a rather depressed level.

Mr Crosby: If I may say so, the question is, is it plausible in the abstract? I think one would have to look at what actually happens and maybe at areas where in a given Member State the level of punishment, if you like, is either non-existent or very low, so as to mean that basically there is no deterrent whatsoever. It may be the case in certain specific situations that the minimum level will bring some Member States up, but if it is a minimum it means, of course,

that the court in any given case will go above the minimum in terms of sanction according to the judge's discretion.

Q436 Lord Rosser: When you said some states might be very low, are there any particular areas that you were thinking of?

Mr Crosby: You will forgive me. I was called in at the last minute and I have not really prepared myself as I would normally like to, but if I can make a couple of generalisations, in environmental law, for example, it is commonly known that in certain countries in the north of Europe, Scandinavian countries, for example, there is very strict law, and in certain countries going towards the Mediterranean there is a certain amount of laxity and if the laxity is such that there is basically no deterrent then this provision would fill the gap.

Q437 Chairman: Can I ask a different question arising out of 69B(1), which is the third question before you? Do you have any view as to how far it is either open to the Community or likely that the Community will in practice, if it is open to it, use the possibility of continuing to apply, advocate, possibly even expand, the jurisdiction under other provisions of the First Pillar established by the environmental pollution and ship source pollution cases?

Mr Crosby: My Lord Chairman, I think the answer to that is relatively simple. 69B(2) is a specific rule and specifically will be based in Community law. At least the rule of construction is that where there is a specific rule or a specific legal basis that prevents reverting to a more general basis. I think that is all we would really need to say. I think that 69B(2) is a *lex specialis*. It would be very difficult for the EU to justify using a more general legal basis. I think it would be extremely difficult, if not impossible, to sustain an argument supporting a different legal basis before the Court of Justice. I would feel happy pleading 69B(2). I would be rather uncomfortable pleading a more general legal basis.

Q438 Chairman: Thank you very much indeed. Can we move then to enhanced co-operation? If the emergency brake under 69B(3) is applied, where a country considers a fundamental aspect of its criminal justice system is involved or affected, the question asks whether this is a desirable development. Is exceptionalism to be deplored or is the Treaty, in that it allows the UK the opt-in and generally the emergency brake procedure, something that is acceptable and possibly even welcome?

Ms Bateman: Looking across the board at enhanced co-operation and the emergency brake and touching on the opt-in, the Law Society has stated previously that we agree that the proposals in police and criminal justice do have a particular resonance in terms of national law and procedure and we can see why this is seen to some extent as stepping on the sovereign toes, if I may call it that, of Member States and the introduction of the emergency brake procedure does appear to be a sensible mechanism to protect those national interests and offset some of the perceived danger in losing the national veto. In order to make progress, however, enhanced co-operation is an important model and, an important corollary to that, a logical step. These two options put together allow those Member States who have a problem, who wish to protect their national interests, to withdraw, but those who do not want to be prevented or held back can go ahead. To some extent there are problems with this and, as you say, is this a desirable development? The problems we would identify are really that you either have a two-speed situation or you have a patchwork of legal rights and obligations where nine, ten, 11 Member States are subject to a framework decision or now a directive and the others are outside of that, and similarly it does seem to undermine the overall coherence of law and procedure in this area and questions the goal of a single or a genuine area of freedom, security and justice, so in a sense there are benefits and disadvantages to this model.

Q439 Chairman: I want to come back to the UK opt-in, although I mentioned it a moment ago. Can I just take civil justice and family law measures, the fifth question? What are the

significant changes that you identify in these areas? One difference which we have noted is the change from the limiting words of Article 65, "in so far as necessary for the proper functioning" to the words of the new Article 65 envisaging adoption of measures "particularly when necessary for the proper functioning of the internal market". How do you see that and the matter more generally?

Ms Bateman: In general terms I think it is fair to say that provisions relating to civil justice and family law are those that have changed the least and restate much of what is in the current treaties in terms of civil judicial co-operation already being subject to qualified majority voting and co-decisions over the ordinary legislative procedure, as it is now termed. Of course, family law remains subject to unanimity and there is the new change of the role of national parliaments in terms of any mini-*passerelle*, to coin a term. In terms of the changes though, there are some that are worth highlighting. There is a specific reference to alternative dispute resolution and access to justice but to some extent this is window-dressing because the mediation directive has already been based on Article 65 of the current Treaty.

Q440 Chairman: Was that not under the alternative methods of dispute resolution provision and is that not in the existing Treaty? No, I think you are right. That was not. That is another new provision.

Ms Bateman: Exactly, my Lord Chairman. It is almost stating what has already gone ahead in terms of judicial co-operation. It is just the express reference because I believe this is something that is deemed a priority in this matter.

Q441 Chairman: But presumably now that one observes that they have added both "effective access to justice" and "the development of alternative methods of dispute settlement", "effective access to justice" is presumably supposed to add something to alternative ADR, is it not?

Ms Bateman: Yes.

Q442 Chairman: Have you any idea what it is? It could be interpreted widely; it could be interpreted narrowly, could it?

Ms Bateman: I think it is just using the opportunity in terms of redrafting an article to state the principles that have been relied on and pin them down into a Treaty article as opposed to a broad understanding.

Q443 Chairman: What about the change from “in so far” to “particularly”?

Ms Bateman: I think to some extent, again on a fairly strict reading of the provisions, “in so far as is necessary” could mean that the provision that is proposed has to be necessary for the good functioning of the internal market. “Particularly” suggests that this is a priority proposal or a particular angle, but I do not think we should be too alarmed by the change because to my mind the main development is cross-border implications. That has been spelt out in the first or second sentence, so whilst there is some extension in terms of the language used I think the provision is sound in terms of the impact in regard to cross-border litigation.

Mr Crosby: My Lord Chairman, if I may interject, all this process is subject to the principle of proportionality and the additional checks that Parliament will be allowed to make and subsidiarity.

Q444 Chairman: Did you want to say something, Ms Golding?

Ms Golding: Yes. I was going to go on and say that perhaps also the wording takes into account the fact that here we are also looking at cross-border family matters where there will not always necessarily be an internal market issue, or not a direct internal market issue.

Q445 Chairman: I think that sounds a very convincing possibility. What you are saying is that it is not a particularly appropriate phrase, "the internal market", in relation to family matters?

Ms Golding: Yes.

Q446 Lord Blackwell: My Lord Chairman, can I just ask a question which I raised in earlier discussions? To what extent do you think it is possible for the EU to legislate in some of these areas on cross-border civil law without it consequently becoming part and parcel of domestic law?

Ms Bateman: The issue of the cross-border implications I know is very politically sensitive, so I say this from my personal opinion. I think it is possible to the extent that the legislative provision that is proposed has to be based on cross-border situations and cross-border cases. However, there will have to be some tweaking, if you like, of domestic provision to allow those cross-border pieces of legislation to come into effect. For example, the European Enforcement Order or the European Payment Order are relating to cross-border situations but the civil procedure rules had to be amended to give effect to that, so it will touch on domestic procedure but only to give effect to the cross-border piece of legislation, if I can put it that way.

Q447 Lord Lester of Herne Hill: Can I perhaps ask on an example I make up myself? We know that questions of jurisdiction for divorce are now settled under EU law by a process which ensures that only one court has jurisdiction in some situations, all very sensible. Suppose you have a husband who does not want to pay his wife a lot of maintenance and under the law of state A it is much less generous to the wife than under the law of state B. At the moment that is not regulated, but in order to harmonise and ensure equal protection and equal treatment will it not be likely that the substance of that area of law will need to be

equalised so that the woman or the man can expect more or less equal treatment irrespective of the part of the European Union where he or she lives?

Ms Bateman: I will attempt to answer that. Exactly: it is the Brussels II Regulation that deals with jurisdiction in terms of parental responsibility and matters linked to that. As far as I understand it, there is essentially a race to court to claim jurisdiction and after that the applicable law rules in England would be the law of the forum. Other private international law rule systems in the other Member States would indicate what law would apply in those circumstances, and, of course, the Rome III regulation on applicable law and jurisdiction is trying to address the very situation that you are referring to. I do think personally that it is a complicated situation of on the one hand you are trying to harmonise, if you like, the applicable law rules to assist in this situation, whilst on the other avoiding any harmonisation of family law. From the perspective of an individual you might say you should have the same law around the European Union to offset the problems that you have identified in your case example. On the other hand, family law is so specific and particular to each Member State that that would not happen, and in my opinion should not happen, in terms of harmonisation.

Q448 Lord Lester of Herne Hill: But the problem still is, as you have just rightly said, that under Brussels II you get forum shopping still in a sense and there is a race to get your petition filed in the way that suits the spouse best, and therefore you get great inequality in outcome according to that rather arbitrary system.

Ms Bateman: I agree.

Q449 Chairman: And that is no doubt the basis on which there are current proposals for harmonising the proper law which would be applicable.

Ms Bateman: Yes, absolutely.

Mr Crosby: Perhaps I could add two words in picking up on Lord Blackwell's question. There is an issue which may come to the fore, and that is the recognition of civil partnerships. They are recognised in some countries, such as Britain, Belgium, -----

Q450 Chairman: Spain, I think.

Mr Crosby: ----- and in some countries they are not. What happens on death in terms of inheritance law? If one country recognises that there was a bond and another country does not, that can lead to all sorts of problems, and I think that is an area which has to be settled across our big happy family, but there are some countries which simply think that civil partnerships are immoral – not the partnerships but that the people who are in them are living immorally, assuming they are the same sex. If legislation ever went through enforcing mutual recognition for civil partnerships right across the Union then some countries would have to make quite considerable concessions in terms of the current law. I do not think Britain would be affected but others would be.

Q451 Chairman: Yes. There is no emergency brake in relation to family law. I see that, and I think the same problem arises perhaps in relation to matrimonial matters (opposite sexes) in relation to Malta, does it not?

Mr Crosby: Yes.

Q452 Chairman: I am not sure one can resolve that: if family law is a matter for unanimity.

Mr Crosby: Yes, quite.

Q453 Chairman: Thank you. Let us move on to the opt-outs generally, question 6. Obviously, we have heard a good deal of evidence about how they operate and we have identified the likelihood that, in relation to measures building on Schengen *acquis* to which we are party, the UK would have a wider opt-out than it has now. Are there other points

about the general opt-out, which of course applies now across the board to police and criminal matters, everything in Title IV, that you want to make? Do you see potential problems about the general opt-out? How do you see the matter working pragmatically? Would it be feasible pragmatically for the UK to refuse to opt in frequently? It has done so in three recent civil law matters and Rome I is the obvious example where there have been concluded negotiations.

Ms Bateman: I will steer clear of the Schengen protocol if I may because I do not feel confident in addressing that question. In terms of the general opt-in, as you say, the extension of the opt-in to all matters in the area of freedom, security and justice is a significant development under the Treaty. The question is whether it would adequately protect UK interests, and I think that "adequately protect" is probably too weak a notion. I think the opt-in option that the UK has secured strongly protects the UK interest and in a sense has an advantage that no other Member State, with the exception of Ireland, of course, has the privilege of. The opt-in arrangements do protect national interest and safeguard the legal systems in the UK, and obviously this particular common law interest or focus that goes with that. In terms of the problems, again I touch on the points I made in terms of enhanced co-operation and the emergency brake. You have some Member States that are party to provision and the UK and/or Ireland who are outside of it and that does again undermine the one area of justice goal or the goal of a single European area. Again, a marginally political point that I am also concerned about is that we have seen in terms of procedural safeguards legislation and the future European Supervision Order that these have not been widely welcomed by the UK, if I can put it that way, so my concern is that, having an opt-in option, the Government will choose to opt into more prosecution-focused and investigatory powers rather than those measures that assist in terms of procedural safeguards for individuals or

other matters in that field. That is the main concern that we have, that the pick-and-choose option is a good one but we are also concerned how that option will be exercised.

Q454 Chairman: I was interested to hear you suggest that the UK had not welcomed the proposed measure relating to supervision. I am not sure what that is based on.

Ms Bateman: I may stand corrected. I am very aware that I have been welcomed into the Permanent Representation! But I have been concerned that in terms of priorities or supporting an initiative those that have not become a top priority have been the European Supervision Order and the procedural safeguards proposal.

Q455 Chairman: Yes. We noted what you said about the procedural safeguards proposal, though the draft that this sub-committee saw represented, it might be thought, a fairly weak set of procedural safeguards which may have been felt not to add very much.

Ms Bateman: Certainly how the framework decision was at the end of the negotiation there was very little in that framework decision that would have had an impact in the UK, so it would not have raised any standards, but our focus has always been in terms of the other Member States in the European Union and the coherence, if you like, of procedural safeguards overall.

Lord Blackwell: My Lord Chairman, on the general opt-out point we have been told that for an existing Pillar III measure, if it is amended, the amendment will become part of the commoner Pillar I, as it were, and the Court of Justice and all the rest of it will apply, but the original base measure will remain in Pillar III, outside the scope and all that. In practical terms, if you look at the kinds of amendments that are made, is it realistic to think that you can have words added and sentences changed in existing legislation and still have it split between different procedures like that, and indeed the UK could opt out of the amendment and still stay in the base? Does that seem to you practical?

Q456 Chairman: Or we might ask whether you share the view that has been put. Is that your understanding of the Transitional Protocol?

Ms Bateman: The questions that we received were on the transitional provisions. We have not got any particular experience of this, so this is just an attempt to address your question. Transitional provisions are bound to be necessary in terms of the changes in relation to the ECJ and the legislative procedure and what-have-you and direct effect in terms of the ECJ, but I am not sure how, in terms of amending the legislation, that will take place. Your question referred to the speed at which the amendment might be made or in terms of whether there will be express reference to this as an amending provision. It does seem to be quite a convoluted process and one that I imagine is going to be fit with problems. I noted from previous evidence given to your committee that there was a discussion as to whether at the end of the transitional period the UK would have to opt in or pull out of all measures under the Third Pillar or again select, or elect, if you like, and I do not feel equipped to answer that, but that is an example of the kinds of problems that are going to come out of the transitional provisions, as you have mentioned.

Chairman: I think the question may have been directed to the precise language of the Transitional Protocol and what it meant when it said that measures should continue to have their existing legal effect unless amended. We can come back to it if need be.

Q457 Lord Lester of Herne Hill: Can I go back to the stance taken by the UK Government in relation to procedural safeguards? I have heard at a different occasion from one of the Commission people the allegation made – and it is no more than that – that the UK Government did not play a strong and constructive role at all, but on the contrary sought, surprisingly (or the officials thought it was surprising), to water down the safeguards. We will have the opportunity of asking the Minister about this but is there any evidence at all that you have (that is evidence and not just rumour) indicating what position was taken?

Ms Bateman: I would have to answer that question very carefully. I have been very involved in the proposal on the framework decision and the Law Society have worked for a long time on it. I think it is widely known that there were six Member States who were taking a certain position in terms of the framework decision and the 21 other Member States were wanting to go ahead and the UK was one of those six Member States, and as a strong Member State and a leading Member State I think was able to – "influence" is perhaps the wrong word – bring on board other Member States to their position, but I do not feel I am able to comment in terms of individual officials.

Q458 Lord Lester of Herne Hill: Thank you very much.

Mr Crosby: May I just come back to Lord Blackwell's question again? The question is that the UK may be governed by some Third Pillar measure at the moment but may be outside any amendment to that, so your question was what happens to the original Third Pillar measure.

Q459 Lord Blackwell: Yes, and can it be split between the amendment and the original?

Mr Crosby: Personally, I think it is a very peculiar arrangement. I can imagine all sorts of difficulties. I can imagine all sorts of difficulties in negotiating what happens. However, the point I would like to make is that it is not yet certain what is going to happen to Third Pillar measures once all this is adopted. They might all lapse. I am not saying they will; I am not saying they will not.

Q460 Chairman: When you say "they might all lapse", what do you mean by "lapse", because if they remain in force then at the end of five years the ECJ acquires jurisdiction over them, does it not?

Mr Crosby: The question in the Legal Service of the Commission is what happens when this Treaty comes into force: should all the Third Pillar measures be re-adopted as something else

or should they stay as they are? If they stay as they are there is no problem. If they are re-adopted there may be a gap.

Q461 Chairman: If they are re-adopted are you not concerned with Article 9 of the Transitional Protocol, which says that the legal effects of acts of the institution shall be preserved until those acts are repealed, annulled or amended, and one reading is that if they are repealed, annulled or amended they operate as new acts subject to the jurisdiction of the European Court of Justice.

Mr Crosby: That may be the answer.

Q462 Chairman: The alternative is the one that Lord Blackwell was putting to you, that if they are simply amended you have the situation where the original act is not subject to the jurisdiction but the amendment is, which is one view we have heard, which would be an interesting situation.

Ms Bateman: Tortuous.

Mr Crosby: Yes. I think it is one that in an ideal world one would wish to avoid.

Q463 Chairman: I do not know whether you have any view as to whether in practice existing measures are likely to be re-adopted, re-amended and made appropriate for being subjected to the jurisdiction.

Mr Crosby: I am not privy to that sort of information.

Q464 Chairman: Do you have a view about the jurisdiction of the European Court which will be expanded, at least at the end of five years, to cover all areas of freedom, security and justice and subject to the points you just made about the UK's right to opt out of everything and then opt back in to individual bits of the existing *acquis* if it chose to? The European

Court is going to have to have an expanded jurisdiction over a wider workload covering different areas from those it is already involved in. Does that create any problems?

Ms Golding: My Lord Chairman, I think this question falls to me to answer, and we have also taken views from other members of the EU Committee on it. I think that in terms of civil justice and judicial co-operation in civil matters, eg, asylum and immigration, it is important. It is good because in terms of consistency and interpretation there will be a change from the current situation where you have some Member States which have granted jurisdiction to the ECJ and others which have not. You therefore can have variances of interpretation between different Member States and also between Member States and the Member States' courts and the ECJ currently. We also generally think that it is an improvement in terms of granting similar treatment to cross-border litigation matters, such as taking of evidence in cross-border cases, service of documents, Rome I and Rome II, compared to the treatment that currently other areas of European law, such as employment and competition law, benefit from. Also, there is another advantage, we think, in terms of a unified judicial architecture. What I mean by that is that currently under the Treaty only courts of last instance must refer. This obviously would change.

Q465 Lord Lester of Herne Hill: What about the Protocol on Subsidiarity which allows either House of a bicameral Parliament like ours under Article 8 to refer to the Luxembourg Court a question as to whether a legislative measure complies with subsidiarity? Is there a danger, if that is used, of a high degree of politicisation of the political issue by a judicial body?

Ms Golding: That is a question that, I must say, we have not really considered.

Q466 Lord Lester of Herne Hill: Nor have I because I only discovered it this afternoon. It is in Article 8 on page 165 of the version we have got.

Mr Crosby: If I may interject, I believe that the principle of subsidiarity is, as we speak, justiciable.

Q467 Lord Lester of Herne Hill: I understand that, but nevertheless we know that if national parliaments, or one chamber of them, decide to argue about the matter and refer it to the court, although, of course, I perfectly understand that it is a legal question, it is a legal question with a high political content since it involves drawing a line between what is proper within competence on the basis of a very loose criterion. My only point is, when thinking about the jurisdiction of this court, should we not also have in mind this expanded jurisdiction? That is the point really. We may have to ask the Minister about that.

Ms Golding: It may be something that we can think about and come back to you in writing on as well.

Mr Crosby: If I may say so, the issue will only arise after the event. In other words, whether or not the principle of subsidiarity has been infringed can only be put to the court after the act in question has been adopted, so it is not going to delay the legislative process.

Q468 Lord Lester of Herne Hill: No. I am talking about the danger of politicising the court itself.

Mr Crosby: To an extent that it is not politicised already?

Lord Lester of Herne Hill: Yes.

Q469 Chairman: Does any of you have any view as to whether the Court needs itself any restructuring to cater for the enhanced, increased, expanded and different workload?

Ms Golding: I think, my Lord Chairman, that our general feeling was that we did not see the floodgates of cases being opened by this extension of jurisdiction.

Q470 Chairman: Even though one is having potentially references from first instance criminal courts from any country?

Ms Golding: I think perhaps, my Lord Chairman, that they may think quite carefully before they make the preliminary reference in view of timescale.

Q471 Chairman: It depends on the criteria. Unless the criteria are changed they may not have any option.

Ms Golding: Yes.

Q472 Chairman: We are very short of time, and, obviously, I want to thank you, but if there is anything you want to say on the final question, the Charter of Fundamental Rights, which is absolutely fundamental, then do. We are well aware of the complexities of the Charter, and indeed of the interpretation of the protocol.

Ms Golding: Again, it falls to me to answer this question and I have thought about it in quite a lot of detail.

Q473 Chairman: I do not think we will stop you, but be very quick!

Ms Golding: I will try to be as quick as possible. I believe that Article 6 will have an impact on the protection of fundamental rights in this area. Although in principle I could see that there ought to be little difference of substance since the Charter is a declaration of existing rights so it does not actually introduce any new substantive rights, the manner in which these rights will now apply in EU law will, of course, change because currently the ECJ can refer to the Charter for inspiration when interpreting general principles of EU law in the same way as it can refer, for example, to the European Convention on Human Rights, but the source of law remains the general principles, of course. What the Treaty of Lisbon will do is give the same status to the Charter as the Treaties and as such it will constitute primary law of the EU, and

this means the rights enshrined in it can be applied directly. They will be directly justiciable before the EU courts, and at the very least this will allow a body of case law to develop based on direct application of Charter rights, so I think perhaps there is not a change of substance but a change in the way the rights will be applied. It is quite similar to the position of the European Convention on Human Rights before the Treaty of Lisbon and post the Treaty of Lisbon. It is the same situation that currently the European Court can refer to the European Convention on Human Rights as inspiration for interpreting the general principles of EU law but cannot apply articles of the convention as such directly in EU law. For example, this difference was highlighted in the competition law field, which is an area in which I practise, in the *Mannesmannröhren-Werke AG* case, where the Court made it quite clear, when the applicant tried to raise two articles of the European Convention on Human Rights before the Court, that it was not possible to do so because the European Convention did not apply directly as such. I think that will be a change. We do not know exactly what effect that will have in the future but there will be a change in the application.

Q474 Chairman: So will the Protocol cut back the effect of that change in relation to the UK significantly or at all?

Ms Golding: As far as the opt-out is concerned, this in my view seems to be a case in which the UK wished to be 100 per cent certain that it had covered all the angles and that it was clear exactly how the Charter would be interpreted in UK law. We understand that there was some concern that certain general rights would be created as a result of recognition of the Charter as having the same status as the Treaties. The first point I would say about that is that it should be remembered always that the application of the Charter is limited to the activities of the EU institutions and also only where EU Member States are implementing EU law. I know that there was some concern that a general right to strike might be created under the Charter, but I think if one looks at Article 28 of the Charter, first of all, Article 28 itself does

not provide for a general right to strike. The right to strike is just one of the rights of collective action which are provided for in Article 28 and they are limited by the words that they should be interpreted "in accordance with Union law and national laws and practices", and there is extremely recent case law, which I had a look at before I came, decided on 11 December and 18 December 2007, two cases before the ECJ, the *ITWF* case and the *Laval un Partneri* case, which make it quite clear that Article 28 is subject to national laws and practices, so there is no general unlimited right to strike. That is one point. I do not know whether other rights were of concern but it is also worth pointing out that a number of the rights that might become important under the Charter are actually analogous to rights that exist in the European Convention on Human Rights and must be interpreted in accordance with it, so again there we do not see any great problems.

Chairman: Thank you very much. I think we ought to draw a line and thank you very much indeed for very clear evidence. If there is anything you want to add by way of afterthought when you have seen the transcript please do.