

WEDNESDAY 12 DECEMBER 2007

Present

Blackwell, L
Bowness, L (Chairman)
Jay of Ewelme, L
Lester of Herne Hill, L
Norton of Louth, L
Wright of Richmond, L

Witnesses: **Mr Stephen Hockman QC, Mr James Flynn QC and Professor Alan**

Dashwood, Bar Council, examined.

Q297 Chairman: Gentlemen, good afternoon. Thank you very much for coming to give evidence to us on the impact of the Reform Treaty on the area of freedom, security and justice. I should say at the beginning of this session that Lord Mance, Lord Lester and Lord Wright of Richmond have declared interests that are in the Register of Interests and available to any witnesses and members of the public who wish to see them. You have had an indication of the areas that we want to cover; is there anything you want to say before we move to the questions?

Mr Flynn: My Lord Chairman, perhaps I could say who we are and introduce us to the Committee. I am Co-Chair of the European Committee of the Bar Council and I am accompanied by Stephen Hockman on my far left, who is a former Chairman of the Bar and an experienced practitioner; and Professor Alan Dashwood, who is Professor of European Law in the University of Cambridge and who also has the rare distinction of being a practitioner in some of the areas that your inquiry will focus on, both as a former member of the Council's Legal Service and now at the Bar. I thought I should just say for the record, if I may, that the Bar Council is the governing body for the 15,000 barristers in independent and employed practice, and the European Committee is one of the representative committees of

the Bar Council, with a mandate essentially to follow what is going on in Brussels, if I could use that as shorthand, and respond to consultations, for which purpose we draw on specialist Bar associations and other expertise available within the Bar with the aim of providing practical input, with the interests of practitioners and the legal profession at the forefront of what we do. That is where we are coming from.

Q298 Chairman: We will move to the questions. Can we first look at the question of the United Kingdom opt-in that we have acquired in the general area and the further opt-in provided by the Schengen Protocol. Can you indicate how the position of the United Kingdom will differ, if the Treaty proceeds, from the present position; and do you foresee any problems in the various proposed protocols?

Professor Dashwood: I have been elected to deal with this question, Chairman. If I may begin with the Title IV Protocol, there are two significant changes that will be made in this. First of all, the extension of the Protocol to cover the subject matter which currently falls within Title VI of the Treaty on the European Union, the so-called Third Pillar, will have a broader scope than at present. The other change is one that goes to the issue of locking-in, which is referred to in question 3. It has been a question whether the United Kingdom's opting-in mechanism applies to proposals for the amendment of Title IV measures that it had previously opted into. It had always been the United Kingdom's position that the mechanism did apply, but it is believed that at least the Legal Service of the Council may not have been in agreement with that, although I am not aware of this ever having become an issue in practice. At all events, the new Article 4a of the Protocol will resolve that ambiguity by extending the opting-in mechanism to amending measures, but at a certain cost. Article 4a(2) will lay down the procedure where the Council determines that the United Kingdom's non-participation in the amended instrument makes that instrument inoperable for other Member States (page 61 in the October text, point 20 of Protocol 11). Article 4a states that the opting-in mechanism

will in the future apply to amendments, and then paragraph (2) is about what should happen if the Council judges that the UK's non-participation in the amendment would make the application of the measure in question inoperable for the other Member States or for the Union. It is believed that the word "inoperable" was intended to set out a high threshold, but of course that is a matter for interpretation; it will only be if the degree of inconvenience for other Member States passes that threshold that the Council will set in motion the procedure which, if the United Kingdom cannot be persuaded to opt into the amendment, will result in its exclusion from the original measure. Pursuant to paragraph (3) this could have the consequence of the United Kingdom's having to cover the direct financial consequences, if any, that would result from reorganising things so that they can be comfortably applied to 26 Member States or 25 Member States instead of 27.

Q299 Lord Wright of Richmond: Professor Dashwood, I think it is thirty years since we first met in Luxembourg!

Professor Dashwood: I think it must be, yes.

Q300 Lord Wright of Richmond: One of the people who have given evidence said the more integrated the area of freedom, security and justice becomes, the harder it may prove for the UK to sustain its "pick and choose" approach to EU home affairs, by which clearly they are referring to opt-ins and opt-outs. Do you have any comment on that?

Professor Dashwood: That is a political judgment of course.

Q301 Lord Wright of Richmond: Indeed.

Professor Dashwood: I suspect it may very well be true in the sense that a higher political price may have to be paid for not opting in. So far, the United Kingdom has opted into a significant proportion of the type of measures to which this mechanism applies but it can be

said - and this moves to the second part of the question as to whether the mechanism entails problems - that up until now the experience has been pretty satisfactory. I am not aware that the United Kingdom has encountered difficulties with its EU partners which means that they are finding us more than usually irritating on this account.

Q302 Lord Wright of Richmond: My second question relates to an organisation called Frontex. I do not know whether you have had any experience of it? It is the organisation based in Warsaw which tries to facilitate co-operation between the EU's external frontiers.

Professor Dashwood: This is the Border Agency.

Q303 Lord Wright of Richmond: Indeed, with which we have a rather anomalous relationship, which is to say that we participate quite fully both in its meetings and in its operations, but still do not have a vote on its management board.

Professor Dashwood: Yes.

Q304 Lord Wright of Richmond: So far as you understand the situation, will it change as a result of the Reform Treaty?

Professor Dashwood: I am afraid that it will not. I have been very concerned with Frontex, the border agency, because I have been acting for the United Kingdom in the litigation that relates to the border agency regulation and to passports.

Q305 Lord Wright of Richmond: I apologise for implying that you might not know what it was!

Professor Dashwood: Not at all. I always have to think carefully because, I do not think of it as Frontex, but civil servants I talk to do, so it takes me a moment to connect up with that. The Frontex issue is one that goes to the position of the United Kingdom under the Schengen Protocol, not under the Title IV Protocol. The litigation has arisen because the Council, on

the advice of its Legal Service, decided that the Border Agency Regulation and also the Passports Regulation were measures building upon the Schengen *acquis* and the Council and the Commission and a number of Member States, but not all of them, take the position that the United Kingdom is only entitled under Article 5 of the Schengen Protocol to opt into so-called Schengen building measures if it already participates in the underlying Schengen *acquis*. The Border Agency is regarded as something that is very closely connected with the management of the Schengen external border, and for that reason the UK was excluded from participating in the adoption of the Regulation and is therefore unable to be formally a member; although, as you rightly point out, it is informally involved in the running of the Agency, as indeed it was previously in the arrangements that applied before the adoption of the Regulation. We will only be able to get into the Border Agency if the United Kingdom wins its case, which at the moment, in a sense, it is half-way to losing, because the Advocate General has concluded against us.

Q306 Chairman: Would the position be better or clearer under the proposed Reform Treaty?

Professor Dashwood: It might conceivably. If I can move on to the Schengen Protocol, there are two provisions that specifically concern the United Kingdom: Article 4, which is the procedure for opting in to the Schengen *acquis*, the whole body of Schengen measures; and Article 5, which is about participation in Schengen building measures. Article 4, which relates to the Schengen *acquis*, requires a unanimous decision by the Council to let in the United Kingdom if we want to become a part of the *acquis*; and we have in broad terms opted into quite a lot of it - into the part of the *acquis* that relates to police and security matters and the aspects of the Schengen information service relating to those matters. (The United Kingdom has not got into the parts of the *acquis* concerning the abolition of controls at internal borders and the movement of persons.) We did that on the basis of a Council Decision that was taken in 2000. One of the provisions of that Decision related to the

procedure for the UK's participation in Schengen building measures. I will come to that in a moment. Under Article 5 of the Schengen Protocol - and there is a new version of Article 5 at 18(g) - paragraph 1 is substantially unchanged. That lays down the procedure for the United Kingdom's - I am trying to avoid the word "opting in" because it is procedurally distinct from the Title IV Protocol; the paragraph operates as a special form of enhanced co-operation. If the United Kingdom and Ireland do not notify their wish to participate in a Schengen building measure, that automatically triggers an authorisation to the other Member States to proceed by way of enhanced co-operation. Paragraphs (2) to (5) are new, and their purpose is to neutralise the provision that I referred to in the Decision of 2000, which said that with respect to measures building on the parts of the Schengen *acquis* which the United Kingdom had opted into, we are irrevocably deemed to have given notice under the first paragraph of Article 5. That provision of the decision, paragraph 8 of Article 2, locked the United Kingdom into any Schengen building measures relating to part of the Schengen *acquis* which we had opted into. The purpose of paragraphs (2) to (5) is to enable the United Kingdom to break out of that prison. Paragraph (2) says that, where the UK is deemed to have given notification pursuant to the Decision of 2000, it may nevertheless notify the Council in writing within three months that it does not wish to take part, and as from that notification the procedure for adopting the measure will be interrupted. The Council will see whether it can reach a decision as to any necessary adaptation of the decision authorising the United Kingdom's participation in the underlying *acquis*. If it cannot, then it is possible for the matter to be referred to the European Union Council. If the European Council is not able to reach a satisfactory decision, then the responsibility falls back on the Commission. It would be finally the Commission that would have to decide how the underlying *acquis* would need to be adapted to take account of the fact that the United Kingdom has decided not to participate in this particular building measure.

Q307 Lord Wright of Richmond: So it potentially gives the British Government more freedom of movement.

Professor Dashwood: It does, yes. It is rather similar in its operation to the new Article 4a of the Title IV Protocol, but there is nothing about inoperability.

Q308 Chairman: We move to criminal justice and policing. The new Chapter IV of the Treaty sets out the detailed areas of competence in criminal law. Can I ask our witnesses whether they think the scope for co-operation is wider under the proposed Treaty than under the existing Treaty?

Mr Hockman: My Lord Chairman, I think it is for me to try to assist you on this. Perhaps I could to some extent treat questions 4, 5 and 6 together because they do to a degree overlap. As you will be aware, the key provisions here are what you will have as Article 69(e) and 69(f), or in the December version 69(a) and 69(b). Broadly speaking, one might say that Article 69(e) deals with Community competence in procedural matters, and Article 69(f) deals with Community competence in substantive matters. If I can start with competence in substantive matters, which is 69(b) in the new notation, you will see that the Community will have the right to establish minimum rules concerning the definition of criminal offences and sanctions in the following areas - and there are two main ones, sub-paragraphs (i) and (ii). The first is the area of particularly serious crime with a cross-border dimension, and the areas are specified to include such matters as terrorism, drug-trafficking and so on; and then a second area is in the area where there have already been harmonisation measures, and the approximation of criminal law is necessary to ensure effective implementation of the policy underlying harmonisation. That is the regulatory area, the area previously covered by such cases as the two identified in question 6; that is the environmental area typically, where there has already been harmonisation and where the European Court of Justice has already said that it is permissible for the Community to legislate in relation to criminal measures in support of

the policy of harmonisation. Looking at that substantive area, perhaps one could add two specific comments. First of all, in answer to question 6, we take the view that Article 69(e)(ii) does resolve the question raised in those previous European Court of Justice cases, and does confirm the Community's right to legislate in those areas; and that probably, but perhaps not definitely, the power will now be contained in Article 69(e) rather than deriving from previous jurisprudence. I think that that was the advice you had the other day from Professor Shaw from Edinburgh, and we think that that is probably right, if only on the basis that it would seem rather odd if express provision is made in the Treaty but with safeguards, but then those safeguards could immediately be circumvented by returning to the previous jurisprudence, to which the safeguards do not apply. Whether if ever the matter came before the European Court, that sort of argument would ultimately prevail; there may be a slight question mark over that, but the authoritative view seems to be that Article 69(e) is now the defining source of this sort of power. A question that we posed to ourselves but perhaps did not definitively answer is this. In the ship-source pollution case it was said that when it comes to Community measures indicating what sort of penalties can be imposed, the Community can legislate in a broad way and can say that the penalties should be sufficiently dissuasive to ensure effective implementation of the harmonisation policy; but there was, so to speak, a self-denying ordinance in paragraph 70 of the judgment in which the court held that the determination of the type and level of criminal penalties did not fall within the Community's sphere of competence. I think everybody has regarded that as being an appropriate self-denying ordinance on the Community's behalf. A question could arise as to the meaning in this context of the phrase "establish minimum rules with regard to sanctions". Is that intended to convey the same sort of relatively limited power, or does it go further? Could the establishment of minimum rules extend to defining minimum or maximum penalties; or should that phrase be interpreted in the light of what the Court of Justice has said

in the ship-source pollution case? The answer to that question may not be quite so clear. I think I was disposed to say that it should be interpreted in accordance with the previous jurisprudence, but Professor Dashwood, to whom I defer on this and other matters, was a little less sure; so we flag that up as a possible area of concern without wanting to overstate the point. That is on the substantive side. On the procedural side, this is Article 69(e), where there is similar phraseology, establishing minimum rules in various procedural areas, and based, as you can see from 69(e)(2) on what is called “the principle of mutual recognition of judgments”. You asked the question, are Member States in agreement as to what the principle of mutual recognition involves. I am not sure that we know the answer to that. It is a difficult question because I am not sure that the concept of mutual recognition itself is a particularly precise one. If it means recognition of judgments and decisions of the courts in a fairly narrow and strict sense, which presumably is one meaning, then it occurred to us that the following issue might arise. We have asked ourselves: in what context would the recognition of a decision by a foreign court be relevant in a criminal context? Of course, under our current criminal law the previous convictions of an accused person are increasingly relevant because we recognise increasingly the relevance of the defendant’s previous convictions as being at least potentially relevant in some situations to the determination of his culpability. The question could arise, I suppose, as to whether a conviction is conclusive evidence of his guilt of a previous offence, or whether it is merely evidence which it is open to him to rebut. Under our law it is open to an accused person to say, “I may have been convicted of committing a rape five years ago, which you say is relevant to the charge that I face now; but I was not guilty of it and I dispute it.” That issue would need to be resolved by the court of trial. One would hope that that would be the situation and that it could never be suggested that the record of a conviction could be conclusive; but I do not know whether that risk might arise and whether it would be said that the minimum rules could include the possibility of

making the record of a conviction conclusive evidence; I think we here would find that a little surprising if that were to be suggested. Those are some initial comments. They may or may not go some way towards answering questions 4, 5 and 6.

Mr Flynn: The reference to mutual recognition of judgments is, as it were, an aspiration and that is the guiding principle, and that is what should be worked towards; but, obviously, there is a lot of legislation to be undertaken and probably some rather difficult discussions to be had under paragraph (a) of part 1 of Article 69(e).

Q309 Lord Lester of Herne Hill: I am not a criminal lawyer but I was looking at Article 69(e), paragraph 2. It tells us that the rules must take account of differences between legal traditions and systems of Member States; so they have, as it were, a common law tradition and Union inquisitorial systems and recognise that there is diversity. It then says: “They shall concern mutual admissibility of evidence and rights of individuals in criminal procedure” - and those are the first two examples. I take it that that means that in the law-making function of the Treaty, matters like hearsay evidence and rules about the admissibility of hearsay evidence as between a common law system and a civil law system would be in play; or say the rights of individuals in criminal procedure, where you have inordinate delay in a criminal trial - say ten years after the facts. In England the remedy would include quashing proceedings, stopping them because you cannot have a fair trial; but in France the remedy would not be that; it would be compensatory only, as I understand it. Therefore, would it be right to say that there would be some desire, to take those two examples, to harmonise across completely different legal traditions in those matters?

Mr Hockman: Yes. It seems to me that a lot may turn on what the phrase “establishing minimum rules” means. Implicit in what you are saying - and I respectfully agree - is that that phrase makes it quite difficult to apply it in the substantive context, but it is even more difficult to apply it in a procedural context. To take either the hearsay example that you give

or the delay example that you give, how can one find the lowest common denominator between the right to have the proceedings stayed for delay, and the right to have compensation? I respectfully agree that it is not at all easy to see what minimum you could arrive at in that situation. Hearsay might be slightly easier of course: our law increasingly recognises the possibility of hearsay being relied on, so a minimum standard there may be something that is easier to get at.

Q310 Lord Lester of Herne Hill: When it says “adoption of minimum rules referred to in this paragraph shall not prevent Member States from maintaining a higher level of protection”, it means that one looks at the lowest common denominator of mutuality but expects diversity to continue where, say, we give higher protection to the remedies for the effects of delay than some other systems will do; and therefore there will continue to be substantial diversity in aspects of criminal procedure between, say, our system and the French system?

Mr Hockman: That would certainly seem to be right, although that phrase presents more problems, does it not, in relation to the hearsay issue, I suppose? Once you have accepted that hearsay is admissible, then it is rather harder to see how you could go back on that and introduce a higher level of protection for an accused person.

Q311 Lord Lester of Herne Hill: The only way in which one could get, as it were, equal protection, would be if the Strasbourg Court of Human Rights, in a French case - to take my hypothetical example - were to require French procedure to conform to Article 6 of the European Convention in a similar way to compliance by the UK; in other words, the other European Court in Strasbourg could perform that kind of a function to raise the level of protection across State A and State B. It could not be done through this but it could be done to raise levels rather than to lower them presumably through the other European system!

Professor Dashwood: I would have thought that it would be possible for the Community to introduce a rule comparable to the Strasbourg principle that there is a right to a hearing within a reasonable time, and that beyond that point the proceedings should be stayed. That would be something that the Community would be empowered to do by this provision.

Q312 Lord Lester of Herne Hill: But we would not like it if the Charter of Fundamental Rights were used for that purpose in respect of the United Kingdom!

Mr Hockman: That issue may raise other problems.

Professor Dashwood: This drafting technique empowering the Council to adopt minimum rules and then allowing the Member States to go much further is actually used elsewhere in the Treaty as quite a familiar approach in the context of social policy, protection of the environment and so on. It may be more delicate in this context, but it is a similar logic.

Q313 Lord Blackwell: Can we move to enhanced co-operation and the interaction, if there is one, between these articles and the development of a European public prosecutor: to what extent will a European public prosecutor, if it evolves, act as a force for establishing procedures and rules of evidence that *de facto* become harmonised? Second, even if the UK does not participate in a European public prosecutor, would a European public prosecutor be able to use the European arrest warrant to arrest people and charge people in the UK?

Mr Hockman: I do not know how complete an answer I can give you to that question. I see from Article 69(2) that the public prosecutor's office is going to be responsible primarily for investigating prosecuting and bringing to judgment the perpetrators of certain offences, and I suppose the extent to which he or she engages in policy-making will depend a little bit on the individual. It may not be a very helpful point to make, but I do not know that our own Directors of Public Prosecution have seen it as their responsibility to engage very much in

policy-making: on the whole they have taken the view that that is not really their job, that they should remain reasonably objective and neutral in policy terms.

Q314 Lord Blackwell: Presumably they are not bound by any national prosecuting code because they are operating on behalf of the European Union, so they must in a sense evolve their own procedures.

Professor Dashwood: I am sure that must be right.

Mr Flynn: I think that is right, My Lord Chairman. If it is right, it is perfectly possible that the European prosecutor's office, if it set up the approach that is taken by that office to certain aspects of criminal procedure, would in effect become at least an incentive, a sort of benchmark for the national law. That is perfectly possible and perfectly foreseeable.

Professor Dashwood: It is worth making the point that the function of the European public prosecutor is very specific; it is to combat crimes affecting the financial interests of the Union. These will be defined by legislation. Paragraph (2) is the paragraph that talks about the office being "responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, perpetrators of and accomplices in serious crimes affecting more than one Member State and of offences against the Union's financial interests as determined by the European law." This regulation has yet to be adopted. The policy underlying this initiative, this innovation, is the sense that in some Member States at least the authorities have not been very diligent in prosecuting offences that have to do with the interests of the Union because they do not have an impact on national interests. The purpose of it is to ensure that there will be somebody whose job it is to get these cases before a judge.

Q315 Lord Blackwell: With respect, I am not an expert on this but paragraph 4 of the same article says that while it may be set up in that way, it may be extended to cover any crime.

Professor Dashwood: True.

Q316 Lord Blackwell: I realise it is more speculative, but to the extent that that became a broader prosecuting service, it seems to me that the effect would become a way of harmonising -----

Professor Dashwood: Of course, it would have a much wider scope. This could only happen as the result of a unanimous decision by the European Council.

Q317 Lord Wright of Richmond: Can I ask a general question? I do not know if any of you have views on the practical effects of all these provisions in the Reform Treaty? One of our witnesses has said that it seems to provide an impetus for more legislative initiatives in EU criminal law. Another actually said to us - although this was denied by a subsequent witness - that he or she foresaw a rash of asylum cases coming before the European Court of Justice.

Mr Hockman: For my part at least, it is necessary to keep one's feet on the ground in relation to this.

Q318 Lord Wright of Richmond: I will try.

Mr Hockman: Substantively there are two main areas. One is the use of the criminal law to back up regulatory policy, for instance in the environmental area. That is already extensively part of our law. It is saying it is not really the direct use of criminal sanctions against behaviour in the sense of behaviour that is contrary to the Ten Commandments and so forth; it is in areas where the activity is permissible but only with certain regulatory limits, and the criminal law is used to ensure that people comply with those regulatory limits. That is something that happens in our own jurisdiction very commonly already and it is something that was already authenticated in the European Court in two earlier cases, and on the face of it it ought not to have caused major practical problems. In the other area, one is dealing, as I read it, with particularly serious crime with a cross-border dimension. One can certainly see

why the Community would want to have confidence in those situations. Of course, if there is a rash of cross-border crime, then there may be a rash of cases, but I do not know that - you know, it will be driven by the need rather than anything else. That would be my at least partial answer.

Mr Flynn: I would remind ourselves, My Lord Chairman, since we have not used the phrase, that this is where the emergency brake comes in. For Member States to object to these proposals, they have their own measures in addition to the UK Title IV Protocol.

Q319 Chairman: That takes us very neatly on to enhanced co-operation and the fact that the proposed Treaty would facilitate closer integration through automatic authorisation for enhanced co-operation after the emergency brake had been used. Do you view that as desirable? When you are answering that question, could you deal with the question 188(1), the external competences of the Union and Member States that are not party to the enhanced co-operation?

Professor Dashwood: I think, My Lord Chairman, that if this were a problem it would be a relatively minor one. The emergency brake is likely to be used very infrequently. That has been the experience of these emergency brakes. In one form or another they have been present in the Treaty since Amsterdam, and they are hardly ever activated. I do not think this is an issue. The question of whether enhanced co-operation may be troublesome is a much wider question than in the context of the emergency brake. Unfortunately, it is a question that can only receive a speculative answer because although, again, in one form or another enhanced co-operation has existed ever since Amsterdam, it has never been used to date. The only real experience we have of the functioning of an enhanced co-operation mechanism are the Schengen and Title IV Protocols which are in a sense enhanced co-operation at the level of primary law. I suppose the cases that I have been involved with underline one kind of problem with enhanced co-operation, which is defining its boundaries and preventing spill-

over. By that I mean that a group of Member States establish an enhanced co-operation; and somebody comes forward with a proposal for a further measure which the members of the group believe to belong within the co-operation, whereas Member States that do not want to join the co-operation feel that they would like to participate in the measure. I think that is the kind of problem that would be encountered here, as in other areas where enhanced co-operation is used; but it is simply the consequence of adopting this flexible mechanism. If you are going to have differentiation, you are going to have to draw lines, and it is sometimes going to be difficult.

Q320 Lord Norton of Louth: Who would identify the sort of problem you have identified?

Professor Dashwood: It could only be the Court of Justice, as a result of somebody contesting the legality of being excluded.

Q321 Chairman: What about 188(1), the Union's ability to conclude an agreement with one or more third countries or international organisations, *et cetera*? What would be the consequences of that article for Member States not party to enhanced co-operation if the signing arose out of enhanced co-operation?

Professor Dashwood: This again is speculative because we have very little experience, but I believe the interests of non-participating Member States are amply protected by the Treaty which says their rights and responsibilities must not be affected. I am pretty sure - although it is not actually stated - that you could have an international agreement entered into within the framework of an enhanced co-operation exercise, but the consequence of that would be that the agreement binds the Union but would not bind the non-participating Member States. They would be required to refrain from action that impeded the functioning of the cooperation, but they would not acquire any additional legal responsibilities.

Q322 Lord Blackwell: Does the application of the emergency brake - if the UK were to invoke the emergency brake and the rest of them were then to proceed by enhanced co-operation, is that a different outcome than if we simply opt out? Are we in a different position?

Professor Dashwood: Substantially I think not. We are not participating in an action that others have undertaken.

Q323 Lord Blackwell: With enhanced co-operation is there not an option that you can opt in, whereas if we opt out we -----

Professor Dashwood: Under the Title IV Protocol you can opt in to a measure that has already been adopted. You do not have to opt in at the time the proposal is before the Council. You can opt in subsequently.

Q324 Lord Blackwell: For the UK these are the same thing.

Professor Dashwood: In a way it is a belt and braces for the UK. If we opt in to the proposal and then the negotiation seems to be developing in a direction which we think might be damaging to our interests, there is a question that texts do not answer, whether once having notified we can withdraw our notification. Arguably we could, but in any event we could fall back on the emergency brake.

Q325 Chairman: Can we move forward to border checks, asylum and immigration? Perhaps one of you would care to outline what you think are the most significant changes that the Treaty introduces as regards co-operation in that area, and are there any particular concerns that you have?

Mr Flynn: I have to say, My Lord Chairman, this is an area where we felt we were unable to assist you to any great extent. This is, I am afraid, something that at the level of the European

Committee we have not looked into in any great detail. I know that you have had evidence from others on this point. We were concerned at an earlier stage - and it is not directly coming from the Treaty itself - with the court's proposal for an accelerated procedure for hearing cases involving the liberty of individuals and children and so forth, which is before the Council probably at this very moment, under which a sort of simplified oral procedure is envisaged. It does not flow directly from the Treaty, although there is reference to a proposed amendment to Article 234 requiring the Court to act with a minimum of delay in relation to persons in custody. I am afraid other than that we do not have any information we can give you.

Q326 Chairman: Can we look at civil justice and family law: are you able to help us on that one - the main changes that it introduces?

Mr Flynn: There are obviously some fairly significant changes of wording as between Article 65 as it stands at the moment and Article 65 in the Reform Treaty. Notably the phrase in the existing Article 65 says that measures that can be taken in the field of judicial co-operation are civil matters having cross-border implications in so far as it is necessary for the proper functioning of the internal market. The phrase now is "particularly when necessary" so it does not have to be necessary for the proper functioning of the internal market. The previous article referred to the good functioning of civil proceedings and promoting the compatibility of national civil procedure rules, whereas the new article plainly relates to the adoption of measures - the new Article 65 in its first paragraph refers to co-operation in the civil justice field including the adoption of measures for the approximation of laws and regulations of Member States; so there is no limitation to civil procedure in the new wording. The list of areas in which measures may be adopted as set out in part 2 of that Article is longer than that which appears in the current version of Article 65. Firstly it refers to mutual recognition and the enforcement aspect, which we have discussed in

the criminal context. It refers in (g) to alternative dispute resolution matters and to training in paragraph (h), which is already a point on which you have had evidence from Sir David Edward. It is a more widely framed article, and I suppose therefore one can expect slightly more ambitious proposals from the Commission under that. Obviously, the opt-out applies. Paragraph 3 of the Article, which is concerned with family law with cross-border implications, will continue to be subject to a rule of unanimity. Our expectation is that that is very unlikely to change, given the difficulties that we had last year in relation to negotiations in connection with matrimonial support and applicable law in matrimonial matters, which died a death, with several Member States violently opposed.

Q327 Chairman: Perhaps we can go on to the transitional provisions and the protocol that deals with that, restricting the jurisdiction of ECJ and the Commission's powers of enforcement over the existing Title VI measures for five years unless it is amended. Can you help us as to what you think would happen in the interim? Are we likely to see, and is it practical for the existing measures to be re-negotiated? Perhaps most important, is it likely that it will be obvious when a measure has been amended?

Professor Dashwood: I think it is unlikely that any significant number of existing measures will be re-negotiated. I do believe that there may be difficulty in interpreting paragraph 2 of Article 10. This is Article 10 of Protocol no.10. It says that the amendment of an act referred to in paragraph 1, (ie a previous Third Pillar act), shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaty with respect to the amended act for those Member States to which that amended act shall apply. That seems to be saying that if one indeed measured it amended, then the normal powers of the Commission and the Court of Justice will apply, and the paragraph says: "To the amended act"; it does not say "to the part of the act that has been amended" or "to that amendment". The wording seems to indicate that amending a Third Pillar measure during the transitional period will

have the effect of neutralising paragraph 1. I am not convinced myself that any amendment, however small, should have this effect. I think this is an issue, and I think that there is a significant ambiguity here. There may be difficulty, but it should normally be possible to say whether an act is being amended, even if the amendment involves deleting language and adding nothing - that would clearly be an amendment. It seems to me to be a very radical consequence that any amendment at all would have the effect of neutralising paragraph 1. That is one of the provisions that I find troublesome.

Q328 Lord Blackwell: It seems to me there may be occasions where the Commission in effect has a choice of whether it wants to bring in a completely new piece of legislation or whether it wants to achieve that by tagging it on as an amendment to something which already has some relevance to that - and we have seen in the past they can be quite imaginative in stretching that. It seems to me that that has consequences because if they amend an existing piece of legislation, that is by QMV - the emergency brake does not apply and for us to opt out, it means we have to opt out of the original instrument. It would be a lot harder for us to resist something that was an amendment of an existing -----

Professor Dashwood: The inoperability threshold would have to be crossed because that applies under the Title IV Protocol. Our opting out would have to be judged sufficiently troublesome to render the original measure inoperable to the other Member States before the Council embarked on the procedure that could lead to our being excluded from that measure.

Q329 Lord Blackwell: Perhaps, conversely, I am looking for ways in which the Council might seek to get to its measures - overcome resistance, if you like.

Mr Flynn: In chatting through to prepare for this session we did see some opportunities for gaming the system, if you like, or applying a certain amount of pressure. We are perhaps not

very well placed to play the political game and guess the circumstances in which that might be done.

Q330 Lord Blackwell: Given what has already been agreed as legislation under the existing Pillar Three, how much scope does that give to extend that?

Professor Dashwood: I can think of a few measures, I suppose, but the most famous Pillar Three measure is the European arrest warrant. Most of those measures are ones that the United Kingdom has been quite enthusiastic about and would want to remain part of; so I think in practice the likelihood of our not wanting to be bound by an amendment is perhaps limited. This is not a provision that has been put in only for the benefit of the United Kingdom; we are by no means the only Member State, for instance, that has not given notice under Article 35 of the Treaty of the European Union with respect to references for preliminary rulings; there are other Member States. This seems to be a sensible kind of measure that provides an opportunity for the Member States to get used to the idea that the institutions will in the future have powers with respect to acts that have been adopted under very different institutional and procedural provisions.

Q331 Chairman: The Charter of Fundamental Rights: what impact do you think Article 6, which declares the binding nature of the Charter, will have on the protection of fundamental rights in the freedom, security and justice measures, if any?

Mr Flynn: It is a difficult question. I think we find the first part of Article 6 to be a little circular because the Charter is supposed to be declaring what is already there. It is a statement that one finds, but fundamental rights in the Charter have the same legal value of the Treaty as they are recognised, but the whole purpose of the Charter was to make clear what was supposed to be already there in the Member States. It is a little hard to know what the impact of this provision will be. I must confess I cannot remember the extent to which the

Court itself has already drawn on the Charter. I know the Advocates General have made fairly frequent reference to it and I believe in one or two judgments of the court it has been referred to by way of confirmation rather than as a source of any particular right. My own view is that one might expect to see references to it possibly in judgments but it is unlikely to change the picture very much.

Q332 Chairman: Perhaps we can go on and deal with the Protocol: what effect does the Protocol have on the application of the Charter to the UK?

Professor Dashwood: I think it is a belt-and-braces, myself. On one view of the Charter, which is mine but not universally held, it does not create any new rights; it simply records and proclaims rights that are derived either from EU law through the jurisprudence of the Court of Justice, or from national law, because it refers to national rights as well as EU rights. That understanding of the Charter is recorded in one of the recitals to the Protocol, which presumably all the Member States must agree with even if the Protocol only exists for the benefit of the United Kingdom - I think Poland has dropped out. But they must agree with this because it is part of the primary law in the Union. The recital states, that the Charter reaffirms the rights, freedoms and principles recognised in the Union, and makes those rights more visible but does not create new rights. One view, which I believe is the correct one, is that the Charter does not enlarge the possibility for acts of the Member States or indeed of the Union's institutions, to be challenged in courts, on a proper understanding of the Charter, read in the light of the explanation which will now be specifically mentioned in Article 6. If you take that view, then you have got your belt, and the Protocol is simply a pair of braces. If you take the different view, that maybe the Charter does provide something by the way of additional rights, then you can say that at least as far as the United Kingdom is concerned it must be interpreted as not doing so, in which case the Protocol would have some legal consequences. My own view is that we do not need to take that second step. The Protocol is

not an opt-out for the United Kingdom; it is an interpretative protocol, and this is how the Charter must be interpreted at least in the United Kingdom.

Q333 Lord Lester of Herne Hill: If I could take the two questions together, I put this to previous witnesses. It seems to me - and I wonder whether this is right - that the fuss about the Charter is a fuss about very little in terms of law, as distinct from politics. As a matter of English law, as long ago as the 1970s Lord Reid in *Waddington v. Miah* [1974] 1 WLR 683 said of an argument about retrospectivity of immigration legislation that it would be unthinkable in the UK to enact a law that was in breach of international human rights conventions by which we were bound even though we had not made them part of our system. In *Garland v. British Rail*, an EU case in 1981, Lord Diplock said that there is a presumption that our statutes will conform to our Treaty obligations even if they have not been incorporated; and asked *a fortiori* whether that was true of a binding directive under EU law. As an advocate, it seems to me that if I turn up in an English court and I want to rely upon soft law, i.e., the ILO Convention for collective bargaining, which is not in the European Convention on Human Rights, as an aid to interpretation of an English statute on the basis of those presumptions, it is up to the judge whether to allow me to do so. The fact that it is in the Charter does not seem to me - quite apart from the Protocol - to add or subtract; the Charter is a collection of international obligations already binding upon all Member States who have signed up to all these international human rights committees. It does not seem to me that there is anything new in the Charter that is not already in the international; Treaty obligations and in existing EU law. Am I wrong?

Professor Dashwood: No, you are right.

Mr Flynn: That is really what we are saying. If it is not adding anything then you do not have to face the question you are asking. If it does add something, as Professor Dashwood

said, then it may just be that this Protocol has some effect limiting what the judge you would be addressing can do.

Professor Dashwood: It is my view that it does not add anything, but there is a view that maybe it does. I do not find language in the Charter to support that.

Q334 Lord Blackwell: Can I pose a counter view, which is on what scope it might or might not add to the role of the ECJ to interpret laws that might then affect the UK; and I am thinking particularly about social measures in the Charter to do with social rights? The UK's Protocol says that those can only be interpreted to the extent that they are already part of UK law, so UK law, if it wants to ratify this Treaty, will embrace anything that is European law because we will have incorporated European law into UK law. Could it not be that if there is a measure which has been adopted in an area of shared competence, for example in social policy, where there is some degree of doubt as to what this legislative measure means and encompasses, the ECJ would be in a position of interpreting what that directive meant and would be able to pray in aid the measures of the Charter of Fundamental Rights and interpret it in a way that it saw fit to interpret that social policy?

Professor Dashwood: This has been a particular concern in the United Kingdom. It seems to me that if you look at the language of Title IV, "Solidarity", in the Charter - what it says, for example, about the right to belong to a trade union and the right to strike is extremely anodyne. It refers to EU law and to international law and it simply says that this right exists. There is no doubt that the right does exist in the UK. I do not think that if the Court of Justice were inclined to develop the right to strike by talking about things like secondary picketing and all those aspects of old-fashioned industrial relations, it would not gain anything from the Charter if it wanted to do that; it would have to range more widely and look at the international agreements which Member States are party to, and where I do not think you will find anything particularly helpful - or to what it calls the constitutional traditions of the

Member States. Again, I doubt if there they would find there was a sufficient consistent experience that could be drawn on. I do not think the language of the Charter would be any help at all for the Court.

Q335 Lord Lester of Herne Hill: To pursue the same question in a slightly different way, my understanding - and I will be corrected if I am wrong - is that the Luxembourg Court, like the British courts and like the Strasbourg Court, illuminates its reasoning process by having regard not only to the text before it, but also to relevant international treaty obligations, in order to establish the context, as it were, in making policy choices. That has nothing to do with the Charter; that has been going on for decades. It has been going on in the United Kingdom - the roamer rights case, which I was in, is a very good example. They looked not only at customary international law but they looked at a lot of conventions and covenants by which we were bound in order to give judgment. As I understand it, the same is true in Luxembourg. They will look at the ILO Convention to see how the principle of equality applies and will look at these instruments. Is there anything new in the methodology, if instead of looking at the Treaty they look at a charter that gathers the Treaty obligations into one place?

Professor Dashwood: I do not think they would find the Charter nearly as useful as it would the international agreements to which the Member States are parties, or the constitutional positions of the Member States, in order to guide it in applying these principles in detail, because the language of the Charter is simply recording that the European Union thinks these rights are important.

Q336 Lord Jay of Ewelme: Mine is a rather more general question. As this discussion has shown, the Treaty framework is becoming increasingly complex as we try to reconcile the need for binding rules to preserve the heart of the original Treaty and in particular the Single

Market, and at the same time accommodate a larger and increasingly variegated European Union of 27. From a legal point of view do you think it will be workable?

Mr Flynn: I suppose I would like to say on behalf of the Bar Council that I am sure we will rise to the challenge. It really is getting a bit ridiculous to my mind and it is a complete mixture of the different schemes, different compositions and different institutional arrangements. Speaking personally rather than as a lawyer, I find it regrettable it becomes a subject for specialists.

Professor Dashwood: My answer to Lord Jay's question is that I do think it is workable. I am endlessly optimistic about the European Union. We always seem to find a way of making it work. Through all the enlargements, we have been told that it is going to become unworkable, and somehow we have managed to struggle through. I think that a measure of differentiation is a price that we have to pay for the great enlargement, which I think was a very necessary thing. The European Union could not have failed to respond to the new political and security situation in Europe that resulted from the break-up of the Soviet Union. If the price of this is rather complicated legal arrangements, so be it; we will just jolly well have to make the best of it!

Q337 Lord Blackwell: The Government's response to those who have concerns about giving the EU competence to legislate by QMV in these areas we have been talking about - civil and criminal matters - has been: "Do not worry; we have our opt-out and the emergency brake; and therefore we are not really participating in the QMV legislative process here." Your responses to a number of questions have been that it is unlikely that we will regularly use that; that it would be difficult to use the emergency brake too often and we would not want to use the opt-outs. If it were the case that the rest of the EU wanted to proceed at a level of integration of their criminal and civil systems that we were not happy to participate in, and therefore the enhanced cooperation and other things meant that they went off

effectively on their own, how sustainable in practice do you think it would be that we could retain a wall between our legal system here and what evolves on the Continent, or would it become unsustainable?

Mr Hockman: Could I offer a comment on the criminal side? Forgive me if it sounds a little bit like a politician's answer to a political question. Can I question the premise of it? On the criminal side the core of this is empowering the Community to deal with problems that everybody recognises are both very, very important but also have an international dimension, whether it is cross-border crime on the one hand or environmental issues, particularly climate change on the other. If you take climate change, the need for new regulatory measures to address that problem, I would have thought, is increasingly widely accepted. If we do not empower international institutions to deal with those issues, then that will be a problem. I would question, on the criminal side - I say nothing about other areas - whether we will actually wish, as a matter of policy, to maintain the wall.

Professor Dashwood: I did not mean to give the impression that I do not think the UK will be able to take advantage of these various mechanisms. I do think that the emergency brake is going to be something that is rarely used, because that is what experience so far would indicate. I expect the UK to make quite vigorous use of the opting-in measures, as it has in the past; but, as Stephen has said, an awful lot of these Title IV measures are ones in which the UK has a great interest. I think we should see Title IV not only in terms of the extraordinary degree to which we have been able to protect our common law heritage by way of these special mechanisms, but also as an opportunity to get the kind of legislation on to the statute book which we would very much like to see there.

Chairman: There are no more questions. Thank you very much indeed for coming and giving your time this afternoon. You will of course get a transcript uncorrected in the first instance.