

WEDNESDAY 17 DECEMBER 2008

Present

Blackwell, L.
Bowness, L.
Burnett, L.
Kerr of Kinlochard, L.
Mance, L. (Chairman)
Norton of Louth, L.
O'Cathain, B.
Rosser, L.
Tomlinson, L.
Wright of Richmond, L.

Witnesses: **Lord Bach**, a Member of the House, Parliamentary Under Secretary of State, **Mr Paul Hughes**, Head of International and Property Law, and **Mr Oliver Parker**, Senior Legal Adviser, Ministry of Justice, examined.

Q72 Chairman: Thank you very much, Minister, for coming to give evidence. I understand that we have only one hour of your valuable time but we are grateful. This will be transcribed and we are on the air. You will have the opportunity to see the transcript and, of course, make any supplementary comments you wish. I should perhaps mention at the very outset that interests declared by members are available in the register of interests. Perhaps I ought to declare, however, a specific interest of my own because, as I think is well known, I was, and still am, I suppose, technically, a stakeholder in the CFR process although I have not participated in a workshop for some time. The other point which occurred to us, and I hope it will not be regarded as in any way the wrong way round, especially in the light of some helpful material that you have made available, is that we might wish to ask the Commission some questions following this session because there seem to us to be major questions as to where this project is heading and I notice that the European Parliament was asking similar

questions not long ago. Perhaps we could proceed. Is there anything you or Mr Hughes or Mr Parker want to say by way of introduction?

Lord Bach: May I introduce my two officials, please, and explain to the Committee that they, with your permission, my Lord Chairman, will be playing quite a leading role in answering your questions because I cannot pretend to be an expert in this field, although I hope I am not an ignoramus in it. On my right is Paul Hughes, who is Head of the International and Property Law branch of the Ministry of Justice and is responsible for policy on general civil law at home and abroad and has led on this project since the end of 2004. On my left is Oliver Parker, who is a Senior Legal Adviser in the Ministry of Justice and has worked on many European initiatives, usually in the field of private international law, so he is really our top lawyer in the private international law field – I hope I do not embarrass him by saying so – and, of course, is now involved with this project. The Government's view of developments will, I think, come out in the course of your questions so I do not think I need to waste any more of the Committee's time and we will do our best to answer your questions.

Q73 Chairman: I have the pleasure of knowing both your officials, and indeed Oliver Parker looks after the Lord Chancellor's Advisory Committee on Private International Law on which I sit, so I have worked quite closely with him. Could we go to the questions, which I know we have given you in writing? The first question I would like to put is whether the European Commission has had a clear objective when it has supported the development of the CFR, which has so far materialised in the form of the DCFR, the Draft Common Frame of Reference, or has it been a project looking for a purpose? A supplementary to that is whether the use by the Commission of its research budget under a contract which I do not think is publicly available but which is referred to on the web and elsewhere to support the development of an academic CFR has had any impact on the shape, scope and content of the document. Could you take those in turn?

Lord Bach: In general terms we believe the Commission has had a clear objective. If you look at the Commission's 2003 action plan and its communication in 2004, it made it clear that the CFR was conceived as part of a range of measures intended to counter at European level the problems that the Commission perceived to exist as a result of the divergences between national contract laws of Member States. As the project has developed the work to be undertaken to achieve this objective has become clearer, albeit the concerns of stakeholders and others about the possibility that the Commission might have undertaken the project with the objective of creating a code of European contract law have become more obvious. We welcome the Commission's recent disavowal of any intention to harmonise substantive general contract law and perhaps I can just say that the Commission has recently stated on a number of occasions that it is their overriding objective in developing the CFR to create a toolbox – I am afraid, my Lord Chairman, I hate that word but it does seem to me probably to cover what we are talking about – or guide or *vade mecum* for use by European legislators to improve the quality, coherence and consistency of European legislation in this area. Frankly, we do not think that the DCFR, the academic CFR, if so I perhaps can term it, is a blueprint for a legislator's toolbox or guide. The Commission's second objective, of course, and this is one we are also concerned about as the Government, is to provide the basis for further reflection on an optional instrument in the area of European contract law. It seems to us at the moment that that objective is on the back burner. That takes me to the second part of your question: has it been a project looking for a purpose? No, we do not think it can fairly be described as that. The third part of the question is, has the use by the Commission of its research budget had any impact? I think one has to say that the DCFR itself is going to be considered to be a hugely impressive academic work done by very clever and independent academics from across Europe. I think one has to pay that in straightaway. The latter stages, my Lord Chairman, were funded by the Commission; earlier stages were funded from

national research councils and foundations apparently. The extent to which the Commission could direct the work was limited by the use of research funding which only started in 2004. What I want immediately to distinguish, if I may, in answering this question, is the two projects: the academic CFR, or DCFR, which is the culmination of a long term project to revise and improve European Union contract law which is now almost complete, on the one hand, and on the second what I may describe as perhaps the final CFR, or political CFR, which, frankly, despite the length of the Commission's overall project (and it has been going on for some years now), seems to be at an early stage still and we wait till the end of next year, perhaps longer; we do not know yet, to see what that will offer.

Q74 Chairman: May I ask a point arising out of that? References then to the production of something at the end of 2008 are unrealistic, are they? There was a reference to a further document being produced by the end of 2008 and that is unrealistic?

Lord Bach: I believe that is not realistic. The end of 2009 is the date that sticks in my mind as a possible date.

Mr Hughes: For the Commission to issue a White Paper, perhaps with green edges. I am not sure who is issuing the document in question that we are talking about here.

Q75 Chairman: Perhaps a follow-up to that, although it is jumping slightly ahead, is, how is the Commission doing that in your understanding? What expertise is there within the Commission? What experts are involved in this exercise of re-writing the work of the distinguished academics who produced the DCFR?

Mr Hughes: I do not think I can really comment on the expertise within the Commission but we understand that the work the Commission is doing at present, and has been for some months is to identify the parts of the DCFR which it thinks might be useful in the preparation of the political CFR which will then provide a starting point.

Q76 Chairman: My question was not in any way intended to suggest that they could not draw on the blue-eyed expertise but are they involving other outside academics or are they finding the expertise within the Commission, in your understanding?

Mr Hughes: I do not know whether they are looking for outside academics at this particular stage. They have indicated that they will consult informally and formally and widely as the process goes along.

Q77 Chairman: It is a question which was asked by the European Parliament, I note. The European Parliament wanted the answer to that and I do not think received it.

Mr Hughes: There certainly has not been a formal written answer to that from the Commission. Commission officials, at conferences, have indicated, as I have been saying, their being at an early stage at the moment but this will lead to a full consultation.

Q78 Chairman: Can we go to the second question? Which, if any, of the various explanations of the ways in which a CFR might be used has government support, and you see them listed, starting with mandatory rules and going down through the various heads?

Lord Bach: As far as numbers (i) and (ii) are concerned, the answer is neither. I take the Committee back to Lord Falconer's speech at the Mansion House conference in 2005. We are opposed to a harmonisation of contract law across Member States on either a compulsory or a voluntary basis other than where there is a clear benefit of harmonisation, and that remains our position. There are no proposals for either of those possibilities, of course, at the moment. I wonder if I could just say that the Government considers that the availability of different contract laws across Europe is a strength rather than a weakness for the European Union. Of course, contract law reflects the legal tradition of which it forms part and the common law does bring economic benefit to this country and, wider than that, it also brings benefit to Europe as a whole. The Committee will know that it is chosen widely across the world

because it seems to meet the needs of business and it is supported, of course, by very high-class lawyers and, if I may say so, with respect, high-class judges too. That is its reputation, I think. With regard to (iii), “use as a framework for European legislators ... when consolidating the existing *acquis* ...”, such as the currently proposed consumer directive, we do support the development of CFR, as I say, as a guideline or toolbox for European legislators but – and I put this *caveat* in – we do not think legislators should be bound to use what emerges as the CFR in any given instance. If the word “framework” implies binding parameters we would not support this. As far as (iv) is concerned, the “toolbox or dictionary for European legislators”, the answer to that question is more positive, it is yes. We feel we could support a future CFR that was a non-binding source of guidance and reference for Community lawmakers when they are drafting or reviewing legislation in the contract law area as a sort of voluntary guide to lawmakers. As far as (v) is concerned, the comparative law material, I am, if I may, going to ask Mr Hughes to give you an answer to that.

Mr Hughes: It is again a positive answer. The overriding purpose is to create better European legislation which will be for the general good. Better mutual understanding of respective legal traditions of Member States can only help to develop better legislation that fits and works, and the DCFR, and indeed other comparative law works, should help to achieve this.

Lord Blackwell: Can I just try and understand the implications of this, and it may be that, like Lord Bach, I am not sure I understand quite what is implied by “toolbox”? We started off by trying to understand the objective and the Minister said that the Commission’s objective was to counter the problems of differences in law. He said the Government’s view was that there were benefits in having differences in law. I am not quite sure I understand how you can have an objective of countering the problems of differences in law without ultimately trying to remove those differences through harmonisation or standardisation, and when we

talk about using this as a kind of reference to legislators in Europe is it not an indication that if future European legislation were to be increasingly written within the context of this framework then over time *de facto* we would accumulate a body of law that was in conformity with this framework which *de facto* would become a common framework of law? It seems to me that if the EU's objective is really to counter the problems of differences in law we may be not calling a spade a spade when we say the objective is in the end to harmonise.

Q79 Lord Burnett: Could I tack on to that, my Lord Chairman, the fact that students will be learning this at universities and so forth and inexorably it will become more powerful and of greater weight and maybe ease out the common law?

Lord Bach: I am going to ask my officials in a moment to answer what are very important questions. I think it is important to say that one of the reasons we do not support an optional instrument – of course a mandatory instrument is out – is that there is a fear that an optional instrument might lead to harmonisation without our intending it. I think Lord Blackwell was asking about the stage before that, in other words, just the use of CFR as a toolbox or as a guideline.

Mr Parker: To respond to your question, Lord Blackwell, I think one has to bear in mind the primary purpose of the CFR, which is on a technical level to improve the quality of Community legislation, particularly in the areas of the existing *acquis*, for example, in consumer law, an extensive *acquis* exists already. That is an *acquis* that has to fit within the existing laws of the Member States and the extent to which it does that successfully will reflect its ultimate success throughout the Union, so I think it is really at that technical level that this project is primarily aimed, and I do not think that is in any way a threat to the diversity of the national substantive contract laws in the Member States; I think that is something different.

Q80 Lord Kerr of Kinlochard: But surely in the area of consumer protection the problem is being dealt with, albeit with a portmanteau directive pulling together the existing directives and existing *acquis*? Surely the consumer protection area is one of the very few areas where there is a direct frontier or interconnection between the law of the Union, the law written under the treaty, and private law of contract? So it seems to me that the problem, to the extent that there is a problem, is being dealt with in a sensible way. Of course, I do not know anything about the content of the directive, and whether it is good enough. But what is all this amorphous stuff about a toolbox? Why do we need that as well?

Mr Parker: You are completely right, with respect, to point out that this consolidation is happening now because this is in a sense exactly the thing that the toolbox might be aimed at, but I think it was probably felt that the consolidation needed to happen fairly quickly whereas the CFR is going to be under discussion for very many years, and when it eventually comes into being, even this consolidation will in time need to be improved and further refined, and, of course, it does not cover the whole of the consumer *acquis*; and there are other areas, beyond the consumer *acquis*. But I agree that there could be an oddity of timing here.

Q81 Baroness O'Cathain: Is this not in effect an idiot's guide to both types of law that we have got, common law and civil law, so as to make it easier for people who are drawing up contracts which will affect trade or not, particularly in the consumer field, to understand the other person's law system rather than imposing on us, for example, the laws that are on the mainland of Europe, other than Cyprus and Malta and Ireland and the UK?

Mr Parker: I think that is not really the primary purpose of the project, which is to improve the quality of Community legislation, primarily in the area of the *acquis*, that is the existing areas of law that are already covered by legislation. It is not really aimed at, although it may influence, national legislators, nor indeed private parties in the Union, in the drawing up of their contracts.

Q82 Baroness O'Cathain: I think you misunderstood me; perhaps I did not explain it properly. I mean so that somebody, say, in Frankfurt, could understand better what the implications of our law were and why we did this, as a simple handbook, if you like, to show how the systems work.

Lord Bach: If I may say so, I do not think the academic DCFR does that. I do not think that is its purpose at all. If that were its purpose I think we would be slightly more relaxed about it than we are.

Q83 Baroness O'Cathain: So you think that has to take over?

Lord Bach: That, and I have already praised it and the quality of the academic work that has gone into it, I think is looking towards a code, which is something that both you and the Government would not be happy with. As for how the CFR itself ends up, the political CFR, the final CFR, again, that might be closer to what you are asking me but I certainly think that the DCFR, the academic CFR, is not that.

Q84 Chairman: Can I just ask a follow-up to a statement you made a moment ago, Lord Bach? You said one reason why the Government does not support an optional instrument is the fear it might lead to harmonisation without us intending it. Might I suggest that that might not be a very compelling reason, maybe even a rather bad reason, if an optional instrument would in fact serve to add value to the European armoury? That is the real question I want to put. You have mentioned that this was to counter at European level problems arising from divergence. Has there been any thorough impact assessment as to the extent that there are real problems arising from national divergences?

Mr Hughes: There has not yet been an impact assessment of the political CFR, the final CFR. That does not stop the Commission having one when they move to that stage. There

have been studies, consultations, evidence-gathering over the past decade roughly on where there are problems of uneven implementation.

Q85 Chairman: Uneven implementation of what?

Mr Hughes: Of European directives as a result of a difference in the national law.

Q86 Chairman: But that would be a reason not for an optional instrument; that would be a reason for some sort of better application of the directives.

Mr Hughes: And the purpose of the CFR is to try and make better directives, is it not? It is feeding into that.

Q87 Chairman: So that justifies the toolbox approach? It does not justify the optional instrument approach.

Mr Hughes: No, it does not, and the optional instrument one, if the Commission were to bring one forward off the back burner, if it is a general harmonisation, would take an awful lot of justification to convince people of the merits of it.

Q88 Chairman: An optional instrument would require, would it not, some sort of impact assessment to justify introducing a 28th, whatever it is, legal system which would have to have some underpinning for the regulation or directive to make it work?

Mr Hughes: I imagine in the normal course of events it would, yes.

Q89 Chairman: Has that impact assessment been undertaken?

Mr Hughes: For an optional instrument the Commission has preserved the “contemplation”, I think the word is. The Commission is not actively taking forward the optional instrument.

Q90 Lord Wright of Richmond: Minister, if you agree, may I ask your officials, insofar as they have been involved in this process, are they aware of the need to defend the common law system? I put it another way: have they found there is a tendency to try to erode the principles of common law by the majority?

Mr Parker: I have in fact only attended one meeting on this project in Brussels and I was very pleasantly heartened by the degree of unanimity that there is across the Member States, throughout the Council in general, about the future direction of this project. Obviously, there are shades of difference but in principle everyone is essentially concerned about improving the *acquis* at the technical level and so on that basis the common law is not under threat at all.

Q91 Lord Kerr of Kinlochard: The optional tends to turn into the obligatory over time in the European Union. I have three questions: one, under what competence are the Commission doing this, using monies voted from the European Budget; two, if the purpose is to improve the technical quality of European law, why is the moving spirit not the Council Legal Service who worry about the quality of the laws that come out through the legislative process, where it is they who take the lead, once the Commission have delivered the draft proposal to them; and, thirdly, is the Government not concerned that if there were even commonly agreed definitions lurking around they would tend to favour the non-common law position? It would be easier, would it not, to agree a definition, a concept, for future legislative use if you had the majority understanding what you were talking about straightaway, because it reflected their tradition rather than the common law tradition of this country? Does that not justify a little nervousness, even about the very soft version of the toolbox?

Mr Parker: First of all, on the question of competence, competence depends crucially on the nature of what is proposed. If it was a full black-letter code, obviously, you would need a proper treaty base and you would, I think, need a proper treaty base for an optional code. The sort of toolbox approach which is envisaged here, the kind of soft law instrument that aims to

influence Community law-making in the future, we think should not need that kind of formal treaty basis, and, although it is not clear exactly what will happen, it may well be that this would take the form of an inter-institutional agreement of the kind that has been employed before, for which there is a very general treaty base; I think it is Article 211, paragraph 1. It has been used before in relation to the quality of Community drafting and in principle this is non-binding territory. A future instrument should say at the outset that it is of a non-binding nature. I think that is very important, and certainly if we are in that kind of territory that would not trigger concerns about our opt-in, for example, because it would not be a legislative measure, certainly within the meaning of Title IV of the Treaty. As I say, it is a bit early to say exactly how the competence issue will be determined until we see what is proposed, but we would hope for something like that. As far as the role of the Council Legal Service is concerned, if it is indeed an inter-institutional agreement, then that service I am sure will play a full role, as I am sure it did in relation to the quality of law-making inter-institutional agreement that was reached at the end of the last century. As far as definitions are concerned and the danger that they might in some way inhibit common law understandings, again, of course, we cannot be sure but there is, I think, an important point in the last document that was agreed by the Council which stressed that full importance should be attached to the diversity of legal traditions within the Union. All the Member States were entirely happy with that and I think we have reason to hope that this principle will inform this project in the future.

Q92 Lord Rosser: Minister, I have listened with interest to everything that has been said and I have noted a certain lack of enthusiasm for the measure that we are talking about. Is the Government's basic position then that there are better ways of improving the quality of European legislation than this exercise that we are going through at the moment with this Common Frame of Reference, and is it also the Government's position that if this draft

Common Frame of Reference were dropped tomorrow there are not really any downsides from Britain's point of view?

Lord Bach: No, that is not our view. Our view is that a CFR could assist European legislators in years to come in this field. Our concern – and I think it is right to express it and it is really rather as Lord Kerr put it – is that, for example, if this moved into becoming an optional code the pressure would grow so that it became a mandatory code and that would have a severe effect on the UK's interests and, we think, on European interests too because common law is one of the five different types of contract law that there are among the 27 Members now. I am sorry if I have given too negative a view. We do think that there are possibilities for the political CFR. We are waiting on what the Commission has to say about that, perhaps in a year's time, but we are not encouraged in terms of what we want to see by the outstandingly good academic work that has been done which we think would lead, perhaps inevitably, to a code. I hope that expresses it fairly clearly. That is our position.

Q93 Chairman: Without going into the detail of the document too much, would it be right to say that in its present general form though there are some pretty big philosophical problems about the direction of the document, from the point of view at least of English commercial law, the attitude to things like standard terms to good faith to pre-contractual information duties, the attitude to contract generally with the power given to the court in situations to amend contracts? Those strike one as possible big problems which may need some negotiating.

Lord Bach: They are big problems in our view, you are quite right.

Q94 Chairman: So the Government is unlikely to agree to something which did not solve those problems?

Lord Bach: That is absolutely right, but I would like to say that our impression from the Commission at the moment is that they see the academic document as having problems too for what they want to eventually see, and in that they share our view.

Chairman: That is very interesting and helpful.

Q95 Lord Tomlinson: My Lord Chairman, I always feel somewhat inferior listening to erudite lawyers discussing abstractions that I do not always with any degree of clarity understand.

Lord Bach: I hope you were not talking about me, Lord Tomlinson.

Q96 Lord Tomlinson: Would I dream of it?

Lord Bach: No, no.

Q97 Lord Tomlinson: However, I hear a lot of negative comment about some of the difficulties and yet I heard from one of your officials somewhat earlier that he was pleasantly surprised by the degree of unanimity at the one meeting that he went to. Was that a degree of unanimity sharing the same sorts of criticisms that we have of this, in which case is it going to go anywhere? My second question is, here we are with everybody concentrating on how to get people to understand and, hopefully, love Europe better, and I share that objective. How would you persuade not even a sceptic but an agnostic in the street that this is something that is worth spending a great deal of time and effort on in the interests of the ordinary citizen? What is the principal argument in favour, because I have not actually got that yet?

Mr Hughes: That is the principal argument in favour of the project. Dividing the project into two.

Q98 Lord Tomlinson: The project that so many people are arguing so much about?

Mr Hughes: Yes, they are. The project for the creation of the CFR, the toolbox, and that is worth doing because we ought to be able to do better at making European law and that is what that project is about. Talking about the project, the academic project, the project that has created the DCFR and is going to create a final version of that, which will have an awful lot of comparative law material in it and will be available to everybody for use and is not a Commission document, not a government document, that is just part of – and this might sound a bit poetic – the rich academic interaction across Europe that builds up the soft law influence, building a body of common understanding across Europe, which, in a very big political sense, ought to be a positive development for the European Union. That would be my attempt at trying to engender some enthusiasm.

Q99 Lord Tomlinson: Even though we have all got different views as to where we are going to go and the direction that we are going to go in and the methodology that we are going to use to get there?

Mr Hughes: There are discussions to be had, certainly, but they should not be viewed as road blocks.

Q100 Chairman: Just picking up the point that Baroness O’Cathain made, it is right, is it not, and I have certainly looked at it myself, that there will shortly be available publicly a really very valuable body of comparative law material which the academics have compiled as a commentary, which I think means that we are only seeing the tip of the iceberg at the moment and in some respects it would be very unfair to judge its overall value until we have seen the back-up material which might instil a good deal of better common understanding between countries?

Mr Hughes: That is absolutely right. I do not know whether the printers are on schedule but the academics are drawing together the final last few amendments and it should be published

– it is the final version of the black letter of the academic CFR and the notes and the commentary – early next year, February or thereabouts.

Q101 Chairman: And that will be available to lawmakers and give true options, different tools, which could be used?

Mr Hughes: It will at least explain the options that have been taken. That is the very least it will do.

Lord Bowness: Minister, I too am a little bit confused, to say the least of it. As I understood the drift of some of the evidence this afternoon, I made a note that it was not aimed at national legislators, more towards European legislators, and there was talk about the *acquis* section, and you kindly answered in opening, Minister, the various aspects of the CFR which might or might not have government support. To help me clarify this can you tell me specifically what our position is on what I understand is the formal position of the Justice and Home Affairs Council from 18 April, because as a layman (I may be a lawyer but I am a layman when it comes to this, no doubt about it), if I read the four positions set out in the Justice and Home Affairs Council, it seems to me to go a lot further than just being aimed at European legislators or sorting out the *acquis* if it means what it says: “(a) Purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers;” – fine; you have told us that this afternoon. “(b) Content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources”. It then goes on, “(c) Scope of the Common Frame of Reference: general contract law including consumer contract law;”, and the last one, “(d) Legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process”. At least one of those would suggest that we go further, and we are

looking --- I see I am wrong in that interpretation, so I would be glad to be told why I am wrong.

Q102 Chairman: It is all governed by the last, (d), is it not?

Lord Bach: Chairman, I have never suggested that Lord Bowness is wrong about anything, let alone that.

Q103 Lord Bowness: Minister, you are a much wiser minister than that.

Lord Bach: The April conclusions of the Council of Ministers were brought up to date a bit in November at the meeting that I was actually present at, although I have to say there was not any discussion on this particular aspect because the Council, I think, agreed with the lines from April to November because there was unanimity on an approach, and it is quite reassuring for us that that is so, but I think there is not anything in what you have just outlined to us that should be a worry to us in terms of a wider attempt at a code across Europe. The conclusions of the Council as at present are very much in line with what Her Majesty's Government thinks about this particular issue.

Q104 Lord Bowness: Then perhaps you can counsel me as to why general contract law, including consumer contract law, does not need to worry me.

Lord Bach: Because this is the scope of the CFR. It does not talk about a Europe-wide code of contract law. It talks about where the political CFR, when it eventually emerges, may be able to assist lawmakers, European legislators, and the fields in which it may do so are contract law, consumer contract law, and perhaps an example might be the directives that Lord Kerr referred to where at the moment, slightly out of order perhaps, the *acquis* for them is being consolidated now.

Q105 Lord Blackwell: Can I put to the Minister that maybe the concern here is that when Mr Hughes, for example, talks about making better European law it is difficult to avoid the implication that better European law and better *acquis* are part and parcel of more European law and more *acquis*; it is not just defining what we have got, and, to the extent that more European law and more *acquis* accord with the very detailed descriptions that are put forward in this code, the inevitable consequence of that is that more and more of the total law under which we operate will be in accordance with this standardised law and there will be less and less room for individual national law? It may be a very fine objective – a lot of people are engaged in the project in the European Parliament and otherwise – that the *acquis* is a very good thing to happen, but are we not kidding ourselves if we think that is not the end result of this?

Lord Bach: May I just say something as Minister and then get a more expert answer? Your concerns, Lord Blackwell, are our concerns. We do not want to allow this to get out of hand so that this is what this becomes. We do not think there is a danger of that happening at the moment because we think the Commission are taking a sensible view and we have just had outlined to us unanimously what the view of the Council is. We are wary of the scenario you set out. We do not think that will happen but we do think there may be a place for a CFR that is limited in scope. The word “technical” was used by one of my colleagues just a few minutes ago and that is really where we see this may be of use.

Mr Parker: I entirely agree with what you say. If this leads to additional redundant Community law, then obviously the exercise will have failed, but that is not where it should go. Indeed, it should not even really be addressed to the future policy of Community law. It is really intended to operate at a different level. This is aimed at the technical level, use of language and the use of legal concepts. It will not stop the Commission, if it wants to in

future, coming forward with legislation that is redundant or poor in policy terms, but it should at least improve at a technical level any future Community legislation.

Q106 Lord Kerr of Kinlochard: Then why would it be an inter-institutional agreement? Inter-institutional agreements tend not to be about technical matters. They tend to be about very politically fraught matters, like budgetary matters. Lord Tomlinson is an expert; he has negotiated several, and they are rather grand. They are not a sort of guide to jurists and linguists working to tidy up a piece of draft law. An inter-institutional agreement is an agreement between three institutions, one of which will be *maximalist* in its view of what the effect should be. That is the European Parliament. One will be not far behind; that is the European Commission. The Council will be playing uphill if the final negotiation is about an inter-institutional agreement, and we will find it harder and harder to maintain that all this is very soft, simply meant to be definitions, “might use”, “might not use”, “would not have to use”, “absolutely non-obligatory”. That is not the sort of language that ends up in an inter-institutional agreement, which is quite a hard sort of agreement.

Mr Parker: If we end up in that territory, that would not at all be where we wished to be.

Q107 Lord Burnett: How do you stop it?

Mr Parker: All I can say is that not all inter-institutional agreements are of that kind and I had a look at the one on the quality of lawmaking and that was of a much softer kind. There is a budgetary precedent which I think was something very different and that was legally binding. This project should not result in a legally binding instrument and the Council is quite clear about that, so I think we really do have reason to hope and expect that this will be a much more general and softer law type of instrument.

Q108 Chairman: Can I just carry the questions on, just looking broadly at the subject matter of question 9? I think we have covered most of the intermediate ones. Looking at the April 2008 Justice and Home Affairs Council definition of its position and whatever further definition of position there was in November, do you think we are going to end up with a draft which will effectively be a code of the law of contract? The present document is, of course, the DCFR one which goes much further. There is an ancillary question asked here as to whether that was what the Government originally understood. Am I right to take it that, whatever was originally understood and whatever is in the DCFR, this is at any rate going to be confined to contract, but the question is, is it going to be effectively a code of contract or something else?

Mr Hughes: I do not think it is going to be a code.

Q109 Chairman: Not in terms of a binding nature?

Mr Hughes: Not in terms of binding and hopefully not in terms of the way it looks on the page when the legislator opens whatever this political CFR is when it has been made and looks for guidance. It should not be a one-diktat answer to one question. It should not end up like that. There should be adequate flexibility to cope with different answers.

Q110 Lord Burnett: I asked your colleagues, Lord Bach, how you stop this inexorable move that the Government is fearful of, of it becoming an optional code and then gradually becoming compulsory. What do you do as a matter of negotiation, especially with Lord Kerr's point that you have the European Parliament and the Commission pushing for it and then the Council of Ministers perhaps?

Lord Bach: The Council of Ministers is pretty solid, as we speak.

Q111 Lord Burnett: People with infinitely more experience than I in these matters have made the point that once this starts -----

Lord Bach: You say “once this starts”. This has been going now for a few years and I suspect some of us will not be here when it comes to a conclusion. I take your point, Lord Burnett. At the moment we look around us and see that we have the support of other Member States who do not always support us on these issues and sometimes are very against us on some of these issues. That is why we are confident at the moment but we are wary, is I think the expression I used.

Q112 Chairman: That is very helpful. If we may just look back a little at the process, which is the subject of question 14, we know what the DCFR is as you describe it, a very impressive academic document. There is a reference there to what some stakeholders found to be a rather frustrating workshop process. Are there lessons in your view to be learned from the history of the DCFR and lessons perhaps to be learned for the future as well? I think that is really a combination of questions 14 and 15.

Lord Bach: Can I look at 15, which is about the type of law reform?

Q113 Chairman: It is perhaps linked with 16 as to whether some new institution might be around.

Lord Bach: Let me attempt to deal with that. It has been an unusual type of law reform project, I think I can safely say, so perhaps the lessons for us are limited. The marriage of convenience between the far-reaching academic work that we have discussed and the more limited work to improve European contract lawmaking has created perhaps tensions and misconceptions that might have been avoided if it had been done differently. The other point I would make is about timing really. There does seem to be, and I think it follows on from Lord Burnett’s point, a kind of move for greater urgency now than there has been for quite a

long time, and one of our concerns would be that these academic studies, high-class though they are, perhaps need some more time to mature before final conclusions are reached. Your question 16 is about whether an institution like the Law Commission here would be useful. I have to be frank: the Government has not formed a view about that. It is a very interesting point but if I am entitled to throw it back at the Committee I think we would be very grateful to hear Sub-Committee E's views on what sort of institution there might be in Europe, similar or otherwise to our Law Commission, in future.

Q114 Chairman: One might suggest, of course, that the Commission itself is a sort of law commission but in this case it contracted out and gave academic freedom to others and that might suggest to us, I think is behind the question, that perhaps there is some further institutional need, especially in a field as large as this.

Lord Bach: We do not resile from that, I do not think. We are not sure what form it should take, to be quite frank, at the moment.

Q115 Chairman: That is helpful. Just looking at the other questions, I think you have probably covered most of them but there was one I missed, which was question 6. Would you just like to outline for the record how the Government within the United Kingdom has dealt with the matter and what consultations the Government has undertaken in relation to the DCFR and its development in formulating the views which you have given us?

Lord Bach: Forgive me if my answer is fairly factual on this. We have not carried out a formal public consultation but we have consulted with stakeholders in the UK throughout the length of this project. We consulted in August 2001 on the European Commission's initial request for views. In August 2003 we consulted on the Commission's action plan on the European Community's *acquis* in relation to contract law. There have been parliamentary scrutiny committees. This is the second one, as I understand it, carried out by your

Committee, my Lord Chairman, and I hope that we inform both the scrutiny committees on a regular basis and listen very carefully to the advice that is given to us. There are also stakeholder forums based on our membership of the CFR-net, which is run by my department, the Ministry of Justice, and has been since 2005, at six-monthly intervals, which take the views of interested parties or stakeholders as well as, hopefully, updating them on where we are. That is really a history of the consultations and what we are doing at the present time.

Q116 Chairman: And that has informed the Government's attitude which you have expressed?

Lord Bach: Yes, it has, very much.

Q117 Baroness O'Cathain: Who were the sort of people you consulted with? The Law Society and people like that, the CBI and so on?

Mr Hughes: That is right.

Lord Bach: Mr Hughes is involved in this.

Mr Hughes: In the stakeholder forum meetings it is a virtual network as much as it is a formal meeting. Yes – CBI, the Consumer Association, the Bar, the Law Society, British Chambers of Commerce and British Exporters Association, and indeed individual experts who have taken the interest to come forward, like Lord Mance did for the CFR-net. The Commission issued invitations and we encouraged people to come forward.

Q118 Chairman: Can I just pick up on one other question, question 4? In relation to what is likely to emerge in the form of a lawmaking toolbox, is there likely to be a relevant distinction between business-to-business transactions and business-to-consumer or consumer-to-consumer transactions?

Mr Hughes: I think in general terms no. The toolbox can apply its legislation aimed at business-to-business or business-to-consumer, and, assuming we achieve a toolbox, the principles, definitions, model rules and regulations, general contract law matters in relation to consumer contract law matters. Both would be included.

Q119 Chairman: Would they be included on the same basis? Just taking some of the subjects that I mentioned in general terms, would standard terms be binding on the same basis, would there be the general pre-contractual information duties on the same basis, would the principle of good faith, if it applies at all, apply on the same basis, and so on.

Mr Hughes: I do not think so. I would think that there would be principles, definitions and model rules which would be different for consumer contracts, much in the way that there are within the DCFR, and obviously in the *acquis* as it presently is.

Q120 Lord Blackwell: Can I come to the last question, question 18? If at the end of the day this process ends up with something called a CFR which the Council is asked to adopt, and if, despite all our efforts, it goes further than any of us would seem to have wished, I would first like to know is this something that would be adopted by QMV or by unanimity in terms of endorsing a CFR, and, secondly, and it is quite difficult to imagine this, if it went beyond simply things to do with legislation within the *acquis* itself is it something that you could conceive that we would have the right to opt out of?

Mr Parker: I think the answer to this question is part and parcel of the competence point and where does Community competence lie here. In truth the question of an opt-in/opt-out only arises if it is a measure for the purposes of Article 65, and I think that is pretty unlikely. I do not think an opt-in really is in point here. The question of voting, if it is an inter-institutional agreement, is a moot one which has never really been finally determined. It is not clear whether it requires unanimity or whether it requires an absolute majority or qualified majority

or what exactly. This is because inter-institutional agreements have on the whole engendered a very wide degree of consensus. This is outside the area perhaps of the budget, certainly in relation to better lawmaking. That is an open question but I think we are unlikely to be in the area of an opt-in/opt-out position here.

Q121 Chairman: What would be the position in relation to legislation under Article 95 of the EC Treaty insofar as it was suggested that the operation of the internal market was affected by differences of rule relating to contract? There would be a competence there, would there not?

Mr Parker: There could be but again we do not hope and expect an instrument that would require that kind of treaty base validation. We believe, and I think the Council generally believes, that we are in a softer law area than that.

Q122 Chairman: The case has not been made and, certainly from what you have said today, has not been accepted yet at Council level that there is a need for it?

Mr Parker: No, that is right.

Chairman: We are extremely grateful to you, Minister, and to Mr Hughes and Mr Parker. Thank you.