

WEDNESDAY 18 MARCH 2009

Present

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

Witnesses: **The Rt Hon Caroline Flint**, a Member of the House of Commons, Minister for Europe; **Ms Alison Rose**, Head of the Europe Communications, Institutions, Treaty and Iberia (CITI) Group, Foreign and Commonwealth Office; and **Mr Gerry Regan**, First Secretary, Legal, UK Permanent Representation to the EU, gave evidence.

Q1 Chairman: Thank you very much, Minister, for coming before the Committee with your two advisers. We are obviously on air. There will be a transcript which will be made available in case there are any errors. As regards declarations of interest, I believe the public have a document which indicates them and, in so far as any of them is relevant, I would ask Members of the Committee to declare it when they ask a question. I do not think I have any relevant declaration myself. The matter that we are dealing with is the access proposal. Do you want to introduce those who are with you?

Caroline Flint: Yes. This is Gerry Regan. He is the First Secretary, Legal, at UKREP and he is leading the working group negotiations for the UK in relation to these changes to the regulation. This is Alison Rose, who is head of our Europe section. They have been very much involved in this for some time and I am sure they will be ably assisting me on this occasion.

Q2 Chairman: We want to start with question nine, which is on the list which I know has been supplied. Does the Government support the European Parliament's longstanding and quite vocal calls for greater transparency and openness in practice in the decision making process in Council?

Caroline Flint: Yes, we do. The fact that the Government has introduced its own freedom of information legislation in recent times is an indication of our efforts to open up opportunities for people to have access to information in terms of our Government. We believe that whilst you should enable transparency and openness in the Council we also need to be mindful about how this has to be balanced with the need for legislation to work but also understanding that Member States are involved in quite long negotiations and are concerned, if there is any concern, that we do not get the balance right and in some way, in seeking transparency and balance, create a situation whereby negotiations cannot work as well as they might be. You create a situation inadvertently where people look for other ways to have those negotiations outside of the frameworks that we currently have. We do want to avoid displacing of meaningful discussion and debate from the formal arena but at the same time there is much we can agree with the changes that have been suggested to the regulations. We are still I think, at this point, in a position of negotiation, working through the detail.

Q3 Chairman: Can I follow up what you said about balance? The present balance, leaving aside the specific subject of legal advice, is stated broadly in Article 4. Is there any objection in principle to the present provisions of Article 4.3 and 4.4 whereby access may be refused if disclosure would seriously undermine the institution's decision making process but may have to be given if there is an overriding public interest in disclosure? Does that in your judgment and experience properly balance the requirements of transparency and on the record decision making with the need for some degree of privacy in policy formulation and negotiation?

Caroline Flint: Our view is the application of provisions in both Article 4.3 and 4.4 by the Council to date has not caused any problems. The Commission's proposals to amend these articles we do not think make particularly substantive changes. We agree with this principle because we think it is important to strike the right balance between transparency and privacy in policy formulation and negotiation. The judgment of the ECJ in the *Turco* case has caused the UK some concern and that is why we think it is important in the recast to make sure that some of those protections are still maintained in Article 4.

Q4 Chairman: Let me ask about the actual attitude to the application of those provisions. Is it right that it is the Government's present attitude that it does almost always seriously undermine the institution's decision making process to make public disclosure of any working papers or non papers, as I think they are also described, texts or other documents which are created or exchanged during the decision making process, other than formal Commission or Member State proposals?

Caroline Flint: What we and other Member States need to consider is what in practice any more changes, particularly from the European Parliament, might mean in relation to how we do formulate policy and also how that does affect our negotiating position in the Council. Our initial view is that these papers are helpful in providing space to think, reflect and negotiate. I am not clear about how that will be helped by a disclosure. I think in this debate that we need to be mindful about the difference in terms of the role and responsibilities of the Council and the ministers who are represented in those forums and the difference between the accountability of those individuals to their Member States in these negotiations and those of MEPs, who I think have an important role but a slightly different role and a slightly different level in terms of the engagement on these issues.

Q5 Chairman: Is the broad answer to the question I put that the Government does think it would seriously undermine the decision making process to make any sort of public disclosure of negotiating documents?

Caroline Flint: I think it could contribute to that, yes. Inadvertently, it would lead to something that would not be very satisfactory and people would possibly find other ways to have these conversations and talks. It would not allow the candour that is necessary in these discussions and negotiations. I do not think that in itself would be helpful in terms of policy making.

Q6 Chairman: Just to take a specific example, we have referred elsewhere to the publication on Statewatch of one of the Presidency's working documents, of the type which this Committee rarely but occasionally sees, and the commentary by Professor Steve Peers. Do you regard that as helpful or unhelpful to the progression of such matters?

Caroline Flint: I do not think it is very helpful. I was talking to my colleague here about this yesterday who sits in some of these meetings where this happens. He said to me that these are a bit of a précis or summary of what goes on and they do not necessarily completely reflect all the tone of the debate. That is part of the problem. Clearly, the Committee has had access to this particular document. It is not something provided by us. It is a snapshot and in the context of trying to develop policy it does not necessarily provide the coherence of these negotiations which, from my experience in this job but also previously when I was the Home Office Minister, can take some time to pursue – if not months, years – and therefore to take these discussions and the stances of Member States out of context I am not sure adds to helpfulness. It could add up to a distraction. The problem as well is just how candid or open would Member States be if they thought that at any one time their thoughts on this might be published. Given that this is a negotiation where we work with other countries and work to

seek outcomes on points, I am afraid these do not always present the clarity and the totality of the discussion. To that end, I do not think they are helpful.

Mr Regan: I would echo the point that at the moment there is not a transcript taken of these meetings and they are not recorded. The understanding within the meetings and by those taking the notes, as far as I am aware, is that they are an unofficial *aide-mémoire* for the discussion and provide something of a snapshot but are not intended to be a comprehensive record.

Q7 Chairman: Is there not a legitimate feeling that this is a legislative process? Legislative processes here and elsewhere are normally in public. Would not greater transparency in the Council's legislative process, particularly in its dealings with other institutions, not only enhance its general accountability and enhance the image of Europe in the public eye but also benefit the process of scrutiny by national parliaments such as we undertake here?

Caroline Flint: We do endeavour to share information. That is part of the role of national parliaments in terms of our scrutiny function in committees. Certainly in my role as Minister for Europe I have had some discussion particularly with colleagues in the House of Commons about how I can better keep them informed of some of the developments that are happening. That is something we are happy to work towards. We also should be mindful that the European Parliament is also part of the codecision making and also they are partners to the negotiations. It is the Council negotiating often with the Parliament. We might have some rather different views about how we want to see the end result to a legislative proposal. Sometimes a parliament, because of the very nature of MEPs and how they work, is not necessarily answerable to a Member State or a government as such. It is much more led by protecting personal interests and what have you. I think it is a very different context in which ministers and heads of state represent their respective countries in the Council. Therefore, at

the point at which, particularly on codecision making, the Council and the Parliament come together we should remind ourselves it is a negotiating process as well with them.

Q8 Chairman: That is pretty open.

Caroline Flint: It can be pretty open at an early stage before the Council has come to its decision. Would you really want to completely show your hand in terms of where you are? Part of the Council's work is to try and find amongst 27 Member States a coherent proposal for a way forward to negotiate with the Parliament.

Q9 Lord Blackwell: Does the Government's attitude towards this balance between transparency and protection of working processes in the European Union mirror the attitude that the Government would take domestically under the Freedom of Information Act, on the balance between release of Cabinet papers and other Government papers? Is it exactly the same set of principles or is there a difference in the way you view papers in the European context?

Mr Regan: I think the principles are broadly the same but inevitably there are some differences because the Community legislation reflects the traditions of the 27 Member States which are quite disparate on the question of transparency. It also reflects, as the Minister has said, the rather different constitutional and administrative arrangements that exist within the European Union and the fact that there is the codecision process. The Council has a role both at the stage of negotiating internally the legislation and then negotiating and agreeing the legislation with the European Parliament. I do not think we can draw exact parallels but the broad principles, as the Minister has said, of achieving a balance between as much transparency as possible whilst also allowing space to think and to negotiate without inadvertently driving debate and discussion off line, out of the Council, away from the institutions, into the corridors and the cafes of Brussels which are full enough already, if I

may say so, my Lord, without needing to have any more custom directed towards them by those who are discussing and formulating policy.

Q10 Lord Tomlinson: Minister, I understand your enthusiasm for transparency and also the caveats. The drive is coming from the European Parliament in the name of transparency. Does the British Government have any view at all? Are they encouraging the European Parliament to demonstrate their commitment to transparency by for example publishing the report by Mr Robert Galvin, the internal auditor of the European Parliament, a report which is coming out in dribs and drabs by leaks, which seems to be making all sorts of allegations? It is obviously critical of some Members but is condemning the reputation of the overwhelming majority because of the secrecy surrounding the report of the internal auditors. Is the Government pressing for this report to be published, because it is tarnishing the reputation of the institution and of the institutions?

Caroline Flint: I have not personally been given a Government position on that particular auditor's report.

Q11 Chairman: Would you like to take it under advisement?

Caroline Flint: Yes. I am happy to look into that. We do recognise that there is a need for a chance to look at the transparency that is needed to make sure people feel that access to documents, understanding of the processes by which decisions are being made is understood and valued. That is why we are engaging with this. For the most part, a number of the proposals made by the Commission in terms of some of the areas we agree with. We also would agree that outside of the regulation itself there is a number of actions that the Commission and other institutions could take to make access to information more generally easier to find. I think your Committee mentioned about the websites, about the registering of documents, the updating of documents, in response to the Green Paper. Again, from what I

understand, those are very important in this debate as well. We do just need to be mindful in all of this. We are still negotiating. We are still working this through and I hope we can come to a point where all parties, the Parliament, the Council, the Commission and individual Member States, can feel that we have done as much as we can to make sure we can be as open as possible. I understand what you say about things coming out in dribs and drabs and people putting things in the public domain but, to a certain extent, no government or institution has absolute control if someone wants to put something on the net or something else. That is something we just live with. I would not want to overturn the whole process of making reasonable decisions about what is appropriate to put in the public domain at a given time based on the fact that people can just put documents out there and there is not a lot we can do about that.

Lord Burnett: Lord Tomlinson's question is a very popular one, which we discussed before you came in. Perhaps you would consider raising this matter on a government to government basis. It would be rather less hypocritical if the European Parliament were to demonstrate its *bona fides* by making disclosure of certain things that affect its own internal dealings.

Chairman: I think it comes back to the basic point about confidence in Europe which I think the Parliament itself and certainly the Court has emphasised derives to some extent from transparency.

Q12 Lord Blackwell: If the Minister is prepared to come back to the Committee on this point, I wonder if you could also indicate if they are able to withhold it where under this regulation they would find the grounds on withholding?

Caroline Flint: We will do some research on that and get back to you as soon as possible.

Q13 Chairman: Can we go to the first question? This is related to two categories of documents which would be covered under regulation four relating to court proceedings and

investigations but specifically now it is proposed to be covered on a blanket exclusionary basis under Article 2. The exclusions would mean less transparency than at present because there would be no over-arching condition requiring disclosure where the public interest so demands. Why does the Government support those changes to introduce blanket exclusions?

Caroline Flint: On court documents, our understanding is that exemption on this issue already exists in the regulation and therefore the Commission proposal merely provides some legal certainty. In terms of transparency, this will exclude court documents from the regulation but the Court would argue that it does in any case.

Q14 Chairman: The essential difference is that the present Article 4 excludes court documents unless there is an overriding public interest in disclosure. The regulation will now have a blanket exclusion of documents submitted to courts. There will not be any qualification. That is the difference.

Mr Regan: It is. The explanation given by the Commission for this is that the Court of First Instance and the European Court of Justice have their own rules of procedure and statutes of the court for access to pleadings. Those rules are part of the Treaty and therefore there is a potential conflict at the moment between the rules of the courts for access to pleadings and the provisions of the access to documents regulation. Our initial analysis of that explanation is that that appears to be correct. We therefore think it is appropriate to avoid potential legal uncertainty in not having two sets of rules in place. We also note that it is in line with our own freedom of information legislation that court pleadings are normally confidential between the court and the parties. Whilst there would be some reduction in transparency for the reasons that the Commission has given and indeed for the reasons of consistency with our legislation, we do think at the moment that that is justified.

Q15 Chairman: Is not the present draft too broad because it does not confine itself to the European Court? It applies to all courts. It would apply to domestic courts anywhere in the world if the institutions happened to have what might be extremely relevant documents which had been sent to them even voluntarily.

Mr Regan: The intention is to apply to the pleadings before the court of first instance and the Court of Justice. That has been my understanding.

Q16 Chairman: Maybe it is a drafting point but can we just ask you to take it into account? If it is intended to be confined to those courts, one understands it because they are European courts within the European sphere and a request can be made to them but, on the face of it, it applies to any court.

Caroline Flint: We will do.

Q17 Chairman: Can I move on to the second question? You said that court documents originating from the institutions themselves would remain disclosable in your letter of 11 December to Lord Roper. We understand that to mean disclosable where an overriding public interest requires under the present Article 4.2. The Statewatch website document, the Council's secretariat paper, reports that you argued against that. What is the Government's attitude?

Caroline Flint: Negotiations are still at a pretty early stage. We have yet to get into the detail. The point was made in the context of concerns that the content of a third party pleading could often be obtained by the contents of the institution's pleadings. We are keen to protect the content of our own pleadings. The issue here is what becomes the ownership of the institution, the Commission and the Council. We believe access to those third party pleadings should be governed by the rules of the Court of Justice and the court of first instance. Again, our own pleadings should remain confidential so that they do not result in

external pressure or criticism. The issue is about what becomes the ownership of the institution and moves out of Member States' domain. Clearly, there are sensitivities there about what might be disclosed and what authority we would have as a Member State, I understand, in terms of having a view as to whether they should be disclosed or not. That is part of the worry in terms of what is the property of the Commission or the Council and what is the property of the Member State.

Mr Regan: The report contained in the Council secretariat paper is not entirely on all fours with my recollection of the working group, but it was a preliminary discussion regarding these issues, certainly not Member States setting out their final positions. The point was raised, as the Minister has said, during those discussions that the institution's pleadings themselves could contain details of third party pleadings. In the context of a discussion, I indicated that I could see the force of that point and thought in broad terms it should be something that should be considered and looked to address. We have not started the meaningful negotiations in the Council on this proposal yet. That pleasure awaits us. The intention was always to have a first read through of the proposal, initial comments, thoughts, discussions, positions, and then return to an Article by Article negotiation. This is very much in the nature of a preliminary position.

Q18 Chairman: Your basic position remains as in the letter, does it, that court documents originating from the institutions would remain disclosable?

Caroline Flint: I think it is where there are third party pleadings that form the basis of those institution documents where we then would lose potentially some rights in terms of their disclosure.

Q19 Baroness O'Cathain: I would like to get some simplicity into this, if there is a hope of getting simplicity in something like this. Is there an area where working papers in which we

all try and press the boundaries and working papers where you come up with the blue skies thinking? Normally, in anything we are preparing, certainly for this House, we would not necessarily want anybody else to see it if it is only in between people of your own party or whatever. We are not asking about that sort of disclosure. Once things get into a more fluid state, where the positions are taken and the argument goes on, is it not in the interest of getting greater support for the European Union as a whole that there is not all this obfuscation because it really looks like a dog's dinner to somebody like me? I just feel that, on the basis that an awful lot of people operate – not in government; I am talking about business now – on the basis that knowledge is power so they keep all the knowledge to themselves and they only give out bits of it and it does not actually help the general public have any great confidence in the organisation as a whole.

Caroline Flint: There are matters about whether a proposal is put up and there are draft working documents. Yes, in many circumstances I think some of those can be shared and provided. The European Union, as they have done with this, produce Green Papers. There is consultation and we have our scrutiny opportunities here as well and then there are other forums outside of Parliament into development and policy. There is information there that gives a sense of what are the ideas, what is the problem that the Commission and others are trying to resolve. When it gets into the negotiations, that is where there is the sensitivity about how that will develop. The other side of it is where there are particular actions that the Commission is taking, for example, to see whether there has been an infraction or where they are investigating a particular situation, where there may be other third parties who may wish to give information to the Commission and may be less likely to come forward if, at the start of the proceedings ----

Q20 Baroness O’Cathain: They do not want to be named.

Caroline Flint: If it was in court, if they are a supplier to a major company that they believe has broken some rule or whatever, so I think there are different types of tasks that the Commission has for formulating policy with the Council and the Parliament. Then there is the enforcement and implementation policy. In some of those areas that is where it does become a little more difficult about commercial confidence, although recently they did change the regulation to take account of where documents would be disclosed if the paramount interest was a threat to the environment and emissions. In other circumstances, I think it is also about creating a space, not just for politicians and heads of state to discuss policy, but for others to come forward with information in a way that they feel they could be protected to expose something that needs to be investigated and dealt with, whether it is a company or maybe even a Member State, not working in line with what they have signed up to or what the rules are that govern their practices.

Chairman: The question is why a blanket ban. Article 2.5 and 2.6 introduced for the first time blanket exceptions and there is no let out in cases of overriding public interest or environmental cases or anything like that. That is talking about third party documents, the last sentence of Article 2.6.

Q21 Baroness O’Cathain: It does mean that some things are put into the all too difficult basket and, if there was greater transparency, there might be greater clarity on the decision in the end and it would be for the benefit of the Union as a whole.

Ms Rose: On question three, it goes back to what the Minister said. If third parties are going to give information to the Commission they want to be absolutely sure that it is not going to come out. That is really important. The Commission does have these legal powers.¹ To go back to Council negotiations, I want to differentiate between what is the UK’s overall negotiating objective, which of course we share with you in scrutiny, and the tactics by which

¹ *Note by witness:* I’m referring here to the Commission’s legal powers of investigation.

we deliver those negotiations. If you take a snapshot at every stage and say, “Why are you doing that?” there is a tactical element. In the Council it is a negotiation in its own right and therefore, within the negotiations, yes, you have the right to know where we are going, but it is not helpful to the UK achieving its position if we reveal the tactics, the how we are getting there.

Caroline Flint: Sometimes it might be other allies who support us and so it might be the best Member State to articulate that at any one time. We might be better holding our fire for something else. That is common sense.

Q22 Lord Bowness: You have just been talking about discussions, negotiations and implementations and that is where the true difficulty starts but is there not also a difficulty right at the very beginning? I think Baroness O’Cathain talked about blue skies thinking. If there was a problem, unspecified, and the commissioner responsible asks various experts to produce papers perhaps in response to an idea of his, some of which will go absolutely nowhere because other people have said, “Frankly, Commissioner, this is the daftest idea I have ever heard of”, we are not really suggesting, are we, unless it does actually go somewhere, that all that preliminary thinking and advice should somehow be capable of being exposed?

Mr Regan: The regulation as currently drafted does include all documents held by the institutions. At the moment the preliminary thoughts of the Commission and that kind of blue skies thinking is within the regulation. If an application is made for disclosure, the burden is on the institution – in this case it would be the Commission – to demonstrate to quite a high standard that not disclosing those documents would be justified. The basic premise of the regulation at the moment and of the position of the Parliament is that all documents held by the institutions should be within the scope of the regulation.

Q23 Lord Bowness: What is our position? If the idea goes forward, that is one thing. If it is abandoned and another line of thinking altogether is pursued, if you are going to enforce that in the open, are you not in fact going to stop people in a way having original thought and, worse, you are going to stop somebody giving frank advice to whoever is the high profile figure who has had the original thought. If he does give advice, he will do it over a cup of coffee and nobody will ever know anything about it at all.

Caroline Flint: We are trying in this discussion to find the space for people to have original thought and to say sometimes things that might sound off the wall in order to have that debate. Again, it is about how you create that space to allow people to come forward with ideas without necessarily having that space spoiled by a blow by blow development of thinking in certain areas. On a lot of consultations that come out of the European Union from what I have seen, they do often cover up a whole number of things that probably are not going to see the light of day, but they put it in there. If I look at consultations we have in this country, not just by Government but by other agencies as well, they often put everything in the consultation for people to think about. That is just the way it is but we end up with a lot of newspapers picking on the one thing in the consultation that probably is not going to see the light of day, saying, "My goodness, this is not going to happen, is it?" I think there is quite a lot of that sort of discussion. Are you saying would it serve things well, as a policy is developed, for people to know what ideas were not taken forward?

Lord Bowness: With respect, once something gets into a consultation paper, okay, it may not turn into legislation but it has gone into the public domain and what is behind what is in the consultation paper is fair game. What I am talking about are people attempting to have original thoughts to take advice on original thoughts and they have to dump something without it going any further. I am talking about stuff that goes no further and I understand Mr

Regan was saying, as the regulation is currently drawn, in theory everything that I am talking about would be there. Do we think that is a very good idea?

Q24 Chairman: Can you tie the answer into questions four, five and six which deal with the scope of the documents? I am not quite sure what the Government's attitude is now. In your letter you told us that you were concerned about the limitation, because the limitation is a document formally transmitted by an institution to one or more recipients or otherwise registered or received by an institution. Are you still concerned about that limitation? Are you going to support in Council a wider definition which might embrace some of the documents Lord Bowness has been asking about?

Mr Regan: Our position is that we have not supported the Commission's proposal to take out of the scope of the regulation draft documents. I think inevitably the result of the Commission's proposal, if it was to go forward, would be along the lines of what Lord Bowness has suggested. There would be a number of documents and they probably would be that type of document, initial thoughts, early drafts, internal emails between Commission officials. I think these are the types of documents which on a number of occasions would be taken out of the scope of this regulation. At the moment, we have not been persuaded by the Commission's arguments on those points. Their suggestion would not be on all fours with our domestic legislation which does not include a blanket exemption for draft documents. We think the role of the Commission is a different one to the role of the Council and, as things stand, the suggestion to narrow the scope of the regulation in this area is not one that we are persuaded by. I think Lord Bowness has gone to the heart of the issue, which is the balance to be struck between the principle of transparency and at the same time the good functioning of the administrations and the legislature. That is the balance that we are trying to strike in our negotiations.

Q25 Chairman: Can I move on to another area where the same balance is being struck? That is specifically in relation to legal advice. Are we correct to understand from the Council secretariat paper that, when you said in your letter to Lord Roper that you would be seeking an adequate level of protection for legal advice, what you are in fact seeking is permanent, blanket protection for legal advice? Are you not in that respect seeking to reverse the *Turco* and *Sweden* cases?

Caroline Flint: We did argue before the ECJ that this would be detrimental to the effective functioning of the Council and we do not think the ECJ judgment strikes the right balance. That is our view today. We believe that the Council needs to receive frank and open advice in order to make an informed decision. I think that requires a high level of confidentiality for legal advice. We are happy to look at any proposed amendments in the regulations which would achieve this objective, but we do think legal advice and being able to receive it in a confidential way is vitally important.

Q26 Chairman: Is it not the same question? Why blanket protection? Why not the present exception which permits non-disclosure if the overriding public interest requires?

Mr Regan: The way in which the Court of Justice has interpreted those exemptions in the *Turco* case in our view gives an insufficient level of protection to legal advice. The result, as I am sure you know, is that there is now a presumption that legal advice will be disclosable unless the Council can show on an individual basis that it is justified not to. The Court has set that standard higher than we expected, I think, if I can be frank about it. The current position following the Court of Justice's judgment in *Turco* is not one we feel that provides sufficient protection for legal advice. Our concern is that if legal advice is not to be protected that could have a detrimental impact upon the advice that is given and whether it is given at all. We do not think that is in the interests of the Council or indeed of transparency.

Q27 Lord Wright of Richmond: I am encouraged as a result of Mr Regan's last two interventions to revert to Lord Blackwell's question. To what extent is it fair to say that your negotiating position is to produce a result which is as near as possible to British domestic legislation?

Caroline Flint: We have pretty good domestic legislation in this area but we are also mindful of the European Union and its institutions are somewhat different. We also have to be mindful that in the Council there are 27 of us trying to reach a way forward. Clearly, within the Council there are different groups of countries who have come to this with a slightly different attitude and culture. Then we have the Parliament as well, working with them too. We are trying to find a way forward that we feel protects what we think is right but at the same time recognises that the institutions are somewhat different. Again, we need to be clear about the sort of information that the institutions of Europe have responsibility for that does not touch on where we have our own documentation and our own access but also privacy in that respect. Part of this is how we protect that. Part of this debate for us has been very much hinged around when does something for a Member State become the property of the Commission or the Council and therefore they have power to decide how they want to deal with that. This is at the heart of some of this debate, I believe.

Q28 Lord Kerr of Kinlochard: Can I come to Article 3 for a second? I heard a distinction being drawn between the Council, because it is a negotiating body, and the Commission, the internal emails and discussions in the Council perhaps deserving more protection than those inside the Commission. If that is the distinction, it is not one I really understand. I was Secretary-General of a very small institution that had a short life. I drafted various treaty articles and they were ruthlessly demolished by my staff and a far better product was submitted to the Convention. I would have hated it if my first drafts had been disclosable to the outside world. It seems to me that that is true even of a big, powerful institution like the

Commission, and should be true of it. I do not understand why we, if that is indeed our position, think that their internal emails, their notes to each other, should all be disclosable whereas Council documents or non-documents and non-papers should not be.

Ms Rose: I would distinguish in the Commission, where people are expressing their own personal opinion, from the Council----

Q29 Lord Kerr of Kinlochard: I do not buy that. The Commission's view is as a result of debate between people who feel very strongly about their views and how they personally think the law should be applied.

Ms Rose: The second point is that the Commission are allowed to apply the exemption where a document contains opinions for internal use as part of deliberations and preliminary consultations, if they think that disclosure would seriously undermine the decision making process of the Commission.

Q30 Lord Kerr of Kinlochard: I thought you were saying that they should not have that protection?

Ms Rose: No. What we are saying is it should not be excluded from scope altogether. It should be within scope but then they have the right to apply the exemption. What the Commission is saying is that they should not even be considered.

Caroline Flint: That is how it works here as well. What we are advocating is the UK system in this particular matter.

Q31 Chairman: Can we move on to questions 12 onwards? Can I start with the two preliminary legal questions? Would it be right in the light of the proposed Article 5.2 to understand the concept of third part in Article 5.1 as entirely excluding any Member State,

despite the contrary definition of third party in Article 3(b)? It is certainly at least a drafting point here but can you give us a substantive answer? What does Article 5.1 embrace?

Mr Regan: I think the question is correct. Member States are excluded in Article 5.1 entirely from the definition of third party because the practice of the Council is that, once a document has been formally sent to it by a Member State in the course of the legislative procedure, that document becomes the sole property of the Council. It is for the Council to then decide as a body whether access should be granted or not. The criteria that are applied are the Article 4 criteria.

Q32 Chairman: That may answer the next question which is: what is the point of the distinction in the proposed Article 5.2 between (a) documents transmitted by a Member State in the framework of procedures leading to a legislative act or a non-legislative act of general application and (b) other documents? Do I understand that (a) – in other words, documents transmitted by a Member State in the framework of procedures leading to a legislative or non-legislative act, become documents of the Council and are therefore dealt with solely in the Council's discretion under Article 4?

Caroline Flint: Yes.

Q33 Chairman: I think the answer to question 14 is clear from your previous answers, is it not? The Government wishes to achieve a situation where there is in fact blanket, permanent protection from disclosure to anyone of its own statements of position during negotiations, so it would wish the Council to apply a very stringent test to disclosure.

Caroline Flint: Yes.

Q34 Chairman: As to 15, going to other documents, perhaps you can help us as to what sort of documents we are going to be talking about primarily. The second sentence of the

proposed Article 5.2 enables the institution to appreciate the adequacy of a Member State's objection to disclosure only in so far as it is based on exceptions laid down in the regulation.

Can you help us as to what that means? Does it mean that it is only possible to review such an objection if it falls within Article 4 and not if it is an objection under domestic legislation?

Mr Regan: That is our interpretation, yes. To go back to your question on what type of document is within the remit of Article 5.2, these are the documents originating from the Member State which are provided to the institutions when the Member State is not acting as a part of the Council in its legislative capacity, so documents provided by the Member State in its other capacity or capacities within the European Union.

Q35 Chairman: Can you give an example?

Mr Regan: An application for clearance under the state aid rules would be one. As I am sure you know, the Member States frequently cooperate with each other within the Council or within the Commission regarding the application of Community law. In those circumstances where a Member State may provide a document – a purely hypothetical example might be the area of aviation security and the types of procedures that a Member State is implementing in its domestic airports – those would be the types of document that we would consider as falling within this category of documents originating from a Member State but not when it is acting in its legislative role as part of the Council.

Q36 Chairman: Are you not in your attitude here – it is not actually the regulation in its terms – seeking again to alter the current European Court of Justice jurisprudence in another Sweden case? In other words, there will no longer be an overriding possibility of disclosure under Article 4 if, under the domestic legislation of a state, there is some specific reason why this should be treated as confidential. That will be binding. Is that not what you are aiming at?

Mr Regan: That is the Commission's proposal. It does not reverse the ruling in Sweden because, if the only grounds that the Member State advances for not disclosing are those which fall under Article 4 of the access to documents regulation, those reasons must be provided by the Member State. The position that the United Kingdom and the Commission had thought existed, which is that we believed that there was a veto for the Member State as to whether our documents should be disclosed or not, was overturned in the Sweden case and that position would not be reinstated. Where however the Member State national law covers the issue, it would be a matter for Member State national law to determine the matter. That we feel strikes an appropriate balance between the interests of the Member State and the interests of the Union. We also think it is consistent with the principle of subsidiarity and avoids again the risk that there are parallel systems in place where a person might apply for access under the domestic legislation, not be successful and then seek to apply under the access to documents legislation and have a different set of criteria apply. The possibility of a Member State's national legislation being taken into consideration as a factor was specifically discussed by the Court of Justice in the judgment at paragraph 84, where the Court indicated that it would be possible for the regulation in the future to include a Member State's national law if it was thought appropriate.

Q37 Chairman: Does it not lead to the slightly odd situation where Member States could in fact enact national law saying, "All our communications to the institutions are confidential" and thereby give themselves blanket immunity? Perhaps you say that is unrealistic.

Mr Regan: I suppose the lawyer's answer is that is not legally clear at the moment. There are two factors that, having seen the question, I have taken into consideration. The first is that recital 15 of the current regulation indicates that, "even though it is neither the object nor the effect of this legislation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations

between institutions and the Member States, Member States should take care not to hamper the proper application of the regulation and should respect the security rules of the institutions". Your Lordship will be aware of the over-arching obligation in Article 10 of the Treaty of the duty of loyal cooperation. This is only a personal and provisional view but I think it is highly debatable whether, if a Member State initiated domestic legislation with the sole purpose of avoiding the provisions of the access to documents regulation, the Court of Justice would consider that that was in fact a legitimate objective and way of acting.

Q38 Chairman: Can we just look at your alternative approach, question 16? This would be that if there is some overriding test of compliance with Article 4 before a Member State can claim to withhold or that such a document should be withheld, it should be sufficient simply for the Member State to give the reason falling within Article 4 and then there would be no opportunity for the institution, the Court or anyone to assess the weight of the objection. Would that not be a bit of a farce and rather bad for the image of Europe, to have someone making an assertion which could not be tested for its weight by anyone?

Caroline Flint: The regulations are designed to provide access to the institution's own information and promote greater transparency. Member States' own freedom of information legislation should govern access to Member State documents. Anyone wanting a document that has originated in the UK should be able to apply to see it under our own FOI legislation. We think that is right in terms of where applicants should seek to find information from. Those permissions that we have in our own law would apply.

Lord Kerr of Kinlochard: I strongly agree with the Minister. Would it not be worse for the image of Europe if there was an institution in Brussels which set itself up to appreciate whether the reasons given by a Member State under its own law for not providing a document were or were not acceptable and reasonable? It seems to me that all the arguments of subsidiarity go with the Minister.

Q39 Chairman: Point noted.

Mr Regan: Although our position is that the institution should not look behind the reasons given by the Member State, those reasons would remain challengeable by the applicant in front of the Court of First Instance or the European Court of Justice. It would not be the case that the Member State could simply give its reasons to the institution and the matter would stop there. The institution would then communicate those reasons to the applicant and the applicant would then have the choice whether to bring a legal challenge against those reasons given by the Member State.

Q40 Chairman: The challenge under the proposed Article is only in so far as the reasons given by the Member State are based on the exceptions laid down in the regulation. In other words, on Article 4, not on domestic law.

Mr Regan: That is correct. The challenge before the European Court would be on the basis of the exceptions in the regulation. Of course, if an applicant wanted to bring a challenge against reasons given by a Member State under national law, certainly as far as the United Kingdom's legislation is concerned, there would be a domestic route available.

Q41 Chairman: This Committee is always interested in *vires* and Article 255 of the Treaty gives a citizen of the Union and any natural or legal person residing or having their registered office in a Member State a right of access to documents; and yet the proposal is to give anyone a right. That sounds very transparent but is the *vires*?

Caroline Flint: My understanding is that the existing regulation distinguishes between requests from those in the EU and those who have right of access to certain documents as opposed to those from outside. In practice, it is proving very difficult to administer this in any fruitful way. Rather like our own arrangement, which is that it is open to anyone to seek information under our own legislation, we are supporting the same in the EU. The alternative

is possibly an even larger bureaucracy or administration to follow up who is applying and where.

Q42 Chairman: We understand that point. You are conferring by this proposal a positive right of access. The present position is that they are given it as a matter of grace. Is there any power in the Treaty, bearing in mind Article 255, to give everyone in the world a right of access?

Mr Regan: Our legal view is that there is not power under Article 255 to give a right of legal access to those who are not EU nationals or not resident in the EU. We have supported the objective but we have pointed out that, as a matter of competence, we do not think the *vires* exists. We have made that point to the Commission. That is our view, yes.

Lord Kerr of Kinlochard: You could not take away anything for a non-EU citizen. It seems to me that if you are conferring something extra it is unlikely that that is going to be challenged in any court.

Lord Blackwell: Listening to this, I have a lot of sympathy with the Government's position on the need for balance. We are saying in some cases that in principle we are in favour of lots of access but in the particular we are not. I wonder whether it would not be more transparent to turn this the other way round and say that in principle we are in favour of protection of working papers for these reasons and here are the specific instances where we would allow access. It seems to me a slightly Alice in Wonderland world.

Q43 Baroness O'Cathain: Blue skies.

Caroline Flint: We are where we are. In preparation for today, I did have a look at where this conversation started, which was before discussions about the intergovernmental conference on the Constitution, I understand, so it has had quite a long journey. We are open to looking at better ways to do things. Under our presidency for example, for what it is worth,

we did get agreement, when it came to a decision in the Council, to that being done in an open way and also when proposals are put forward which in the past was just not the case at all. Nobody could see anything that was happening in the Council. We are going to have to think about this area because there are going to be some changes potentially. I say “potentially” if Lisbon is ratified in terms of national parliaments and their role and their greater say in the process. I think it is fair enough to review these situations. Obviously factors in terms of technology and how it advances also have to be factored into this. As an MP, I can tell you that ten years ago I did not have any emails but we have them today and we have to learn to live with them, I suppose. Those factors have changed and the codecision making is much more part of the process of making legislation. That requires us to give some thought. Having said that, having given some of these areas some thought, it is also an opportunity to restate the case as to why it is important to ensure proper policy is developed. Sometimes we do have to hold on to some of those protections to allow debate to take place and also to have a conversation maybe about the context of what negotiation is all about and what the Parliament’s role and the Council’s role is in relation to that. We are negotiating with each other so we have different roles in all this. If as part of this process that gets more of an airing and more of a debate, I think in itself that is no bad thing.

Chairman: We are encouraged by your earlier reference to the role of this Parliament in this. Thank you very much indeed, Minister.