



Corrected transcript of evidence taken before

The Select Committee on the European Union

Justice, Institutions and Consumer Protection (Sub-Committee E)

Inquiry on

THE UK'S OPT-IN AND INTERNATIONAL AGREEMENTS INQUIRY

Evidence Session No. 1

Heard in Public

Questions 1 - 11

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4 pm

Witnesses: Professor Steve Peers and Professor Gavin Barrett

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Members present

Baroness Corston (Chairman)
Lord Anderson of Swansea
Lord Blair of Broughton
Lord Dykes
Lord Elystan-Morgan
Lord Hodgson of Astley Abbotts
Baroness O'Loan

Examination of Witnesses

Professor Steve Peers, University of Essex, and **Professor Gavin Barrett**, Professor of European Constitutional and Economic Law, University College Dublin

Q1 The Chairman: I welcome you to this meeting of the Justice, Institutions and Consumer Protection Sub-Committee of the European Union Committee of the House of Lords. We are privileged to have with us today for this evidence session Professor Steve Peers from the University of Essex and Professor Gavin Barrett, who is the Professor of European Constitutional and Economic Law at University College Dublin.

As a preliminary point, it is important for me to remind colleagues and witnesses that this session is open to the public. A webcast of the session goes out live as an audio transmission, and is subsequently accessible via the parliamentary website.

As to the witnesses, a verbatim transcript will be taken of your evidence and will be put on the parliamentary website. A few days after this session, you will be sent a copy of the transcript to check it for accuracy, and we would be most grateful if you could advise us of any corrections as quickly as possible. Furthermore, if after this session you wish to clarify or amplify any points made during your evidence or if you have any additional points to make, you are welcome to submit supplementary written evidence to us. If you wish, you may introduce yourselves for the record when we start the questioning.

As a preliminary point in relation to this inquiry, it is important to stress at the outset that Protocol 21 to the European Union treaties allows the United Kingdom and Ireland to opt into or out of any measure under Title V of the Treaty on the Functioning of the European Union. Title V covers policies in the areas of freedom, security and justice.

The Sub-Committee has considered a large number of EU international agreements over the last few years where the Government have asserted that the opt-in protocol applies to provisions within those agreements, despite a legal base in Title V of the TFEU not being cited. They argue that it is the content of the measure that matters, subjectively assessed, rather than the legal base. The most recent statement of their policies is contained in a letter from the Home Secretary and the Secretary of State for Justice dated 3 June, which is available on the inquiries home page.

This Committee has repeatedly questioned the Government's interpretation of the opt-in protocol. The principles of conferral of power, and of legal certainty, require EU legislation to state the legal base on which the EU has power to act. Citing the legal base reflects what has been agreed between the EU institutions and member states to be the scope and legal effects of the legislation.

The Government's letter of 3 June, together with recent decisions of the Court of Justice of the EU which challenged the Government's interpretation of Protocol 21, led us to conclude that it would be timely to seek the views of others on the UK's opt-in policy. The Government have been invited to provide a written memorandum of evidence before the first evidence session of the inquiry. We are told that they are still considering the consequences of an ECJ judgment in June on an EU agreement with the Philippines. Until this is finished, it is unlikely that they will be providing written evidence. We are disappointed by

the Government's failure to engage with the Select Committee's inquiry on their policy, from which we will draw our own conclusions.

As I said, this is the first evidence session of the inquiry. I say to both of you that you are very welcome here today and we are grateful to you for giving us your time to share your expertise with us. As I also said, if you wish to make introductory points about yourselves, please do so when you give your response to this first question.

The Home Secretary and the Secretary of State for Justice wrote to us on 3 June and said that the expression "pursuant to Title V" in Protocol 21 "does not explicitly restrict the ambit of the Protocol to measures which cite a Title V legal base". Would you say that that was a reasonable legal interpretation? Please feel free to share the questions, if one or the other of you wishes to answer. Take it as you wish.

Professor Gavin Barrett: Thank you very much indeed for the invitation to be here today. It is lovely to be back in front of the Committee, and of course it is a great honour to be invited with Professor Steve Peers, who I think is the world's leading expert on European justice and home affairs co-operation.

In answer to that question, my own reply to it is that it is a possible interpretation but I would regard it as a singularly unlikely interpretation. I have a number of reasons for saying that and one of them relates to applying a simple, literal approach to this. I agree with the view expressed by Lord Roper in his published letter of December 2011 to the Home Secretary that a measure is more accurately regarded as "pursuant to" Title V if it is actually based on Title V. That is my first point.

I also note that the relevant provision, which is Article 1 of Protocol 21, refers to "proposed measures" pursuant to Article 1 and not "proposed provisions". It is interesting that Article 2 of the same Protocol evinces awareness of the distinction between measures and provisions.

I also note that the expression “pursuant to” is used a total of 99 times in the Treaties and associated documents—45 times in the treaties, 48 times in protocols and six times in declarations—yet I am not aware of any of those provisions lending support for the Government’s position in that regard.

Fourthly, I am not aware of anyone other than the Government taking this view. Certainly this Committee, as evinced by your opening remarks, and the equivalent Committee in the other place have not done so.

The Irish Government, for its part, has never publicly pronounced on this issue but it has never once attempted to opt into any measure on the basis of such an interpretation. We know that because, in order to opt in, it must gain parliamentary approval in Ireland under Article 29.4.7 of our constitution. So, there is, if you like, a smoke trail every time Ireland opts into a measure under Title V, and it has never done so, other than with measures that have a Title V legal basis.

Finally, apart from the United Kingdom Government, I have not actually encountered anyone who takes this particular view. I do not believe that the European Union institutions take a similar view but I expect that when you get Government representatives before you in due course, they may give some indication of the response that the institutions are providing to purported opt-ins.

The Chairman: Do you wish to add anything, Professor Peers?

Professor Steve Peers: First, thank you very much for inviting me again to this Committee. It is always a pleasure to be here. I agree with everything that Professor Barrett has said. I would add just two brief points. I think that the words “pursuant to” have an obvious legal meaning. They require a direct link with a parent measure and an Act which is adopted on that basis, whether it is a national Act relating to EU law or an EU law relating to national law

and so on. Secondly, the UK Government's interpretation is one that they might regret. There might be other circumstances in which the words "pursuant to" ought to be interpreted more narrowly from the UK Government's point of view. If we set a precedent here of interpreting it very broadly, then there could be other circumstances in which that was not very desirable. Thirdly, on the negotiation history, the protocol dates originally from the treaty of Amsterdam and was renegotiated in the treaty of Lisbon. If the drafters of the protocol had intended this broad notion of the words "pursuant to", they would either have used different words or made it rather clearer that they had that broad notion in mind; we would see different wording. For instance, there is slightly broader wording in a clause relating to data protection law, which was added at the time that the protocol was amended under the treaty of Lisbon. You do not see such similarly broad wording added in relation to this concept of "pursuant to" Title V. They are the really overwhelming reasons that the Government's interpretation is unconvincing.

Q2 The Chairman: Thank you. The same letter from the Home Secretary and the Secretary of State for Justice limits the principle of validity to measures where the justice and home affairs content is one of the main purposes. If, despite the absence of the Title V legal base, the UK does not opt into a proposal within ancillary justice and home affairs purposes, it is not legally bound by those provisions. Again, do you think that this legal interpretation would be considered reasonable?

Professor Steve Peers: I think the whole logic of that reasoning is flawed from the outset, because the Court of Justice has always said that, for ancillary provisions of EU legislation and international treaties, you look to the predominant purpose of the legislation for the international treaty. The legal base is determined by the predominant purpose, not by the secondary purpose, and any ancillary provisions which are marginal are ignored when

determining the legal base. Once you start using the word “ancillary”, it necessarily leads you to that case law. If an international treaty or an EU legislative measure has an ancillary JHA purpose, that must mean that its main purpose is something else and that must mean that the legal base of the treaty or legislation is that something else, and it is not JHA at all. Therefore the Title V protocol cannot be invoked: it is irrelevant. This has in fact been confirmed by the Court of Justice with respect to Title V measures. The traditional case law on the predominant nature of legal bases and the ancillary nature which has to be set aside has been clearly applied by the Court of Justice in the four or five judgments in the last year or so. It is in the Philippines judgment; it is in the judgment on driving offences; it is in the judgment on Switzerland and social security; and, even last year, it was in the judgment on descrambling devices and the protection of broadcasts. In all those judgments the Court of Justice refers to that case law in the specific context of whether the Title V opt-out applies or not, and in two of those judgments—the broadcasting devices judgment and the Swiss social security judgment—the Court of Justice specifically says that the fact that this dispute involves the protocol is entirely irrelevant. The normal legal-base reasoning applies. That is the only reasoning you apply. It reaffirms what is traditionally said about legal bases. I see in your correspondence with the Government over the last four years that this question was sometimes raised, about whether that traditional case law on legal bases and how to define should perhaps not apply fully to the JHA protocol. Since your correspondence was exchanged, this most recent case law has clearly answered the question: the traditional case law applies and this idea that ancillary JHA purposes somehow give us some kind of separate opt-out cannot possibly be correct in the light of this very clear recent jurisprudence.

The Chairman: Thank you. Professor Barrett, do you want to add anything?

Professor Gavin Barrett: I do. I took a slightly different approach to this question: although, again, I agree with everything that has been said. The second half of the Government's position is the problematic one for me: the assertion that the principle of validity "does not apply to cases where the principal purpose or purposes are not JHA-related". Furthermore, the Government also stated, "where the UK does not opt in to such proposals, we do not believe we would be bound by such so-called 'ancillary' JHA provisions, because we would not be calling into question the validity of the entire measure". That seems a deeply problematic approach to me. First, I would have thought that the principle of validity applies to the whole measure. One cannot therefore just slice off aspects of a measure and regard them as invalid. Secondly, the Government seems to be asserting the right on the part of any EU member state to regard individual provisions of measures to be inapplicable to them. If that is so, this has implications for the rule of law in the European Union, and also for legal certainty and uniformity in the EU legal order. There are issues that have been raised by the scrutiny committee in the other House during the last legislative session. Thirdly, I am puzzled as to how the UK Government intends to act on its belief that it is not bound by justice and home affairs measures that it has not opted into. If it actively defies European Union law in this regard, this is a recipe for Commission prosecutions under Article 258, prosecutions by other EU member states under Article 259 and fines under Article 260 of the TFEU. It is also a recipe for the application of the doctrine of state liability—the liability of the state in tort—in any case in which the *Brasserie/Factortame* criteria are met. Fourthly, it is also a recipe for the application of the doctrine of direct effect in an appropriate case. The *Bresciani* case tells us that provisions of association agreements can be directly effective. The *Kupferberg* case tells us that provisions of free trade agreements can be directly effective.

A fifth point is that this is effectively a border dispute between particular realms of European Union law: normal European Union law in which norms bind member states even if they are outvoted in relation to them; and justice and home affairs law which is subject, in Ireland and the United Kingdom, to a Protocol 21 opt-in. By adopting this policy, the Government seems to be asserting what lawyers would call “Kompetenz-Kompetenz” to decide who should referee such disputes; beyond that, reassigning the competence to actually decide the dispute to itself; and, finally, deciding that EU law does not apply to it. If I have correctly interpreted what the Government is saying, I think that the European Court of Justice would be likely to dispute all three assertions. I would regard it as a fairly fundamental challenge to the EU legal order if the Government is asserting that.

Q3 Lord Blair of Boughton: The first question was about the interpretation of the JHA protocol itself. The second question was about the principle of validity. This third question is about the letter as a whole. I will ask each of you in a sense to summarise or crystallise your view on the letter as a whole. Overall, how would you assess in summary the legal reasoning in the Home Secretary and the Secretary of State for Justice’s letter?

Professor Steve Peers: It starts from an assumption that there is something unique about legal base issues in relation to Title V. The Court of Justice has repeatedly rejected the idea that there is anything different about legal base issues as regards Title V. If there is nothing different about legal base issues, the rest of the Government’s reasoning falls. I do not see anything in the Government’s analysis that is legally convincing at all.

Professor Gavin Barrett: Perhaps to summarise my own view, as you asked me to, I have three points to make. First, it appears to start from a very questionable legal base, putting it at its mildest, asserting as it does “Kompetenz-Kompetenz”, assigning competence and then seeking to make the actual decision as to whether EU law applies, thus potentially

jeopardising certainty, uniformity and the rule of law. That is a neat trick, if you like, in relation to European Union law. Secondly, depending on how far the Government wishes to take this policy, it is capable of giving rise to severe legal consequences for the United Kingdom, by which I mean direct effect, state liability and Commission prosecutions. Thirdly, it seems to represent to me—I follow what Professor Peers said—a significant extension of the scope of the Protocol, beyond measures which have a Title V legal base. Indeed, it is one of very uncertain scope. I have noted that in relation to the services conditional access directive, the Government at one stage tried to apply this approach to EU instruments requiring sanctions without actually specifying their nature. Again, if this approach applies to things like that, it is of very uncertain scope indeed and renders the job, for example, of this Committee very difficult in terms of how far that Protocol is supposed to apply.

Q4 Lord Anderson of Swansea: Gentlemen, your submission appears strongly to be that the government interpretation would lead to uncertainty and is potentially dangerous. You use the phrase “a fundamental challenge to the court” and EU jurisprudence. Did I hear you say that you have effectively not only looked through court decisions but also trawled through all the relevant literature, and that the government view is wholly eccentric? Is there no one of any standing around the European Union who agrees with the Government?

Professor Steve Peers: There is not a lot of literature on the opt-outs. I certainly have not seen anything which would suggest agreement with the Government’s approach, no.

Professor Gavin Barrett: I can only agree with that. I have never seen these views articulated by anyone. As Professor Peers has said, there is not an awful lot written about the matter, so it is true that one is not fishing in a very deep pool in that regard. In speaking to individuals in the policy-making community and people who are involved in this sort of area, I have never seen views like these articulated by anyone apart from the Government.

Lord Anderson of Swansea: In essence, they are wholly on their own and eccentric?

Professor Gavin Barrett: Yes.

Q5 Lord Dykes: Thank you very much, Professor Barrett. You helpfully clarified again for us the disciplines for the Irish system in observing, for Protocol 21, the treaties and other matters, the role of the Irish Parliament, presumably with or without a recommendation from the Irish Government about what view should be taken by members of parliament, the TDs, in these matters. Just to clarify that again, do all your submissions so far suggest that Ireland accepts that a legal base in Title V is always necessary?

Professor Gavin Barrett: Yes is the short answer to that. I will preface my observations though: obviously, I do not represent the Irish Government. I am here in the capacity of an observer rather than as a representative. Perhaps I could answer your question in some detail, if that would be acceptable to the Committee. I would like to make a couple of observations about the Protocol. There are certain differences between the way the Protocol is applied or at least approached in Ireland and in the United Kingdom. The first is that the Protocol was initially taken on with some reluctance by Ireland. It was felt to be, if you like, the price of preservation of the common travel area initially, when it originated in its Treaty of Amsterdam form, and then the price of having a heavyweight ally by our side in relation to justice and home affairs matters when it was expanded at Lisbon. Those involved in applying the Protocol would be very much aware of its advantages, which are undoubted, such as the option of staying in or coming out of justice and home affairs matters as one sees fit. However, I would say that there is a difference between Ireland and the United Kingdom concerning Protocol 21 in that there is a somewhat more ambivalent attitude—a tension, if you like—in Ireland about the actual Protocol.

Difference No. 2 concerns the actual political context of the protocol. I would say that there is far less sensitivity in Ireland in relation to justice and home affairs matters. One instance, of this for example is immigration. I know that in the UK, that is quite a sensitive topic at the moment. Extradition is another such topic. The last occasion that I was before this Committee, that was very much before the public eye. I am not saying that such issues are not capable of giving rise to political controversy in Ireland. Indeed, the existence of Protocol 21 made justice and home affairs issues very much the dog that did not bark during our referendum on the treaty of Lisbon when we had it, but that is a difference as well—one of political context. I think also the general view vis-à-vis the Commission and the Court of Justice is somewhat less sceptical in Ireland. For example, when the Court of Justice pronounces in relation to issues like legal bases, I think there is a less widespread degree of scepticism regarding that. I suppose that those are the points that I would make in that regard.

As regards the interaction of Protocol 21 and international agreements, there has been complete official silence in Ireland. I suppose that this is another difference between the United Kingdom and Ireland. There have been no government statements in relation to its application and the issue has not formed the subject of any Oireachtas committee debate or inquiry. There has been no published correspondence between the Government and parliamentarians in relation to it. None the less, we can get something of an idea of the official position from a number of sources that have left what I have perhaps somewhat facetiously referred to as a smoke trail. Aspect No. 1 of the Irish official protocol seems to be to attempt to defend Protocol 21 from what is seen as an overly narrow interpretation by the Commission and Court of Justice. We know that because Ireland intervened in a series of the cases that Professor Peers referred to: the EEA case, the Switzerland case, the road

traffic offences case and the Philippines case. In each of those cases, the Irish Government intervened in support of either the Council or the United Kingdom in seeking to have a broad interpretation of the Title V legal basis and hence the Protocol—unsuccessfully, on each occasion. The prevailing official opinion in Ireland appears to be somewhat like that of the UK in seeking to have the Title V legal basis broadly interpreted.

Aspect No. 2 of the Irish position is that if the Commission does not use a Title V legal basis and the Court declines to intervene on the point, Ireland does not appear to regard Protocol 21 as being engaged. How do we know that? The answer is that Article 29.4.7 applies. That is shown because the Government have to gain Dáil approval on each occasion that the Protocol 21 opt-in is exercised. We can see that Ireland has never actually exercised the Protocol 21 opt-in in relation to any matter without a Title V legal basis. In fact, we can go further and say that Ireland actually participates in agreements and other measures with justice and home affairs elements to them but no Title V basis, without opting into them. One of those would be the citizenship directive which, as the Metock case revealed, had justice and home affairs aspects to it. Ireland participated in that and there was no exercise of the Protocol in that regard.

In summary, Ireland seems to prefer the Title V legal basis wherever possible for measures with JHA content but if there is no such basis it does not assert that Protocol 21 is engaged. Protocol 21, in other words, is regarded as engaged when a Title V legal base is asserted and not otherwise.

Aspect No. 3 of the Irish position, if I can describe it as that, is that we have an almost universal tendency to see the insertion of a recital, both in international agreements and related Council decisions, wherever an international agreement has justice and home affairs content but no Title V legal basis.

That is a matter on which I can go into detail if you want, but perhaps I have spoken enough about this issue already, so I might leave it at that. If you want me to go into detail about the recital I can do that.

Q6 Lord Dykes: Thank you very much indeed; that is a most helpful clarification. We are grateful for that. To pursue this a little further, one of the important themes in HMG's letter is that the opt-in policy seeks to deter the Commission from circumventing UK opt-in rights in measures that do not cite a Title V legal base. With all you have been saying—and Professor Peers would be very welcome to come in again on this—has the Commission sought to circumvent the UK and Ireland's intrinsic opt-in rights?

Professor Steve Peers: First, "circumvention" is not necessarily the right word to use because reasonable people can have different approaches to the interpretation of what the legal bases are in treaties. This issue of social security, for instance, has run on for years about exactly what the legal base was for third-country nationals. I do not think that the Lisbon treaty really settles it very clearly or conclusively. There have been cases over the years on the exact nature of the legal powers over development policy, association treaties and many other legal bases in the treaties besides, including criminal law issues—there are a whole series of cases on that. Again, the Lisbon treaty does not fully answer the questions that might be asked. Perhaps it answers some and raises some new ones. From the Commission's point of view, it can say that the UK is trying to circumvent its obligations under the treaties by asserting its interpretation protocol but I do not think that that kind of language is useful. The Commission has one point of view; the UK has another, and I do not think that it is outrageous that people have different legal interpretations.

Secondly, in terms of the process, I do not think you can really talk about circumvention at the stage of a Commission proposal. In any event, when the Commission states its view, the

Council and Parliament might not necessarily agree with that. You saw that in the case of the driving offences information, where the Commission's view was that this was a transport measure and the Council and Parliament ultimately agreed that it was in fact a measure relating to police co-operation. Ultimately, the Commission had to bring legal proceedings and convince the Court of Justice of its point of view being correct. We had the political process first. The UK can seek to influence the Council and Parliament—where Parliament is involved—to agree with its point of view and change the proposed legal bases. If it does, that is fine, and it falls to the Commission to bring a legal challenge. If it does not, the UK still has lots of opportunities to bring legal challenges. When we are talking about an international treaty it can intervene at a whole series of levels: at the stage of the Council giving the mandate, signing the treaty or the conclusion. It also has the process open to it—which it has not used yet—of asking the Court of Justice about the compatibility of EU law with an envisaged international treaty by the European Union. All those possibilities are there—political and legal—and it is a bit premature to be terribly concerned about what the Commission believes when it first makes its proposal.

Q7 Lord Elystan-Morgan: Distinguished witnesses, I think you have made it very clear that in so far as the United Kingdom's position is concerned, judicial decision and juridical opinion are all one way, and that therefore the United Kingdom is in glorious isolation in that matter. The question I ask is the fifth on your list and the answer is somewhat already suggested by that. As far as day-to-day attitudes of the 27 members are concerned, in relation to each other and with their own countries, is it the case that they, too, adopt a practice that is broadly similar to the judicial and juridical opinions you have referred to? In other words, is the operation on the ground similar to what you have already described?

Professor Steve Peers: I do not know what the other member states do. Of course, only the UK, Denmark and Ireland have an opt-out so it would be only those three states that would be in the position to say, “Possibly, this does not apply to us”. Every other member state would have to accept that it applied to them, unless we are talking about something else such as enhanced co-operation or some other field of law. Is that what you meant, or were you asking about legal certainty more generally?

Lord Elystan-Morgan: Yes.

Professor Steve Peers: Well, in terms of legal certainty more generally, although Protocol 21 does not mention it in its preamble, I think it would be fair to say—and that the Court of Justice would say if it was asked the question in these terms—that one of the purposes of the protocol, and the processes of opting in and out set out in it, is to have legal certainty on what applies to the UK, Ireland and Denmark. The practice of the Council reflects that because it always inserts provisions in the preamble to legislation or to decisions approving treaties that indicate whether the UK, Ireland and Denmark are bound or not, and also whether they apply to Schengen states or states that have not yet applied to Schengen fully, et cetera. I think there is quite an important concern about legal certainty reflected there. That is important for relations not just between member states but also with third states. They ought to know exactly who they are signing up to. That is perfectly reasonable. It is very important for individuals, too. If you are a Swiss person who moves to the UK, it is important that you know what exactly is happening with your social security contributions and whether they count when you go back to Switzerland. The same is true of a British citizen moving to Switzerland. It is important for them to be able to know what is happening, and important for the people who run the social security system in terms of national administrations. Those are complex enough without adding some great degree of

uncertainty over whether they apply to the UK, Ireland or Denmark. It is important to people advising them such as lawyers or other types of advisers. It is perhaps important in terms of organising your financial affairs more generally and to discussions people might have with their accountants and financial advisers, in terms of planning other pensions, and so on, that you might need if you are not fully covered for the purposes of your contributions when you are in Switzerland and things like that.

All those are very sound reasons for observing the process in quite a formal way, as set out in Protocol 21. That is not what I would call inventing new concepts such as ancillary JHA legal bases, where we are not bound if we do not say so and things like that. I do not think that that is provided for at all. In fact, the case law on external relations of the Court of Justice in some cases specifically mentioned legal certainty as a specific feature when it requires legal bases to be used for decisions on implementing international agreements, giving the Commission a mandate, the signature of treaties and things like that. That is a feature that the Court of Justice insists on in terms of allowing institutions to know where they stand, as well as member states and third countries. It also allows individuals to hold their member states and EU institutions accountable because there is some clarity on what they have and have not decided. That is a political feature as well. You ought to be able to know, if you want to bring legal proceedings and challenge a decision, what exactly the legal position is. All those are very good reasons why the Government's position is flawed in terms of legal certainty.

Lord Elystan-Morgan: So does it really come to this, that if one were to ask the question, "Will there, in the short term, be total certitude with regard to the situation?" that the answer may be "Well, perhaps not" but all the evidence seems to be going in that direction

and inevitably, gradually perhaps, there will be what you might describe as total certitude?
Does that make sense?

Professor Steve Peers: Well, I think there would be total certainty if the Government gave up their position. There is so little support for the Government's position that I do not think that anyone seriously believes it, if they ever did. Certainly, after the most recent judgments in the Court of Justice, there is not much that could give credence to the Government's position.

Professor Gavin Barrett: I will make just a few observations on the uncertainty point. One has to draw a distinction between potential uncertainty and the uncertainty being caused today in practice. The potential uncertainty which the pursuit of the Government's opt-in policy could cause in practice is, to my mind, enormous. The potential uncertainty arises principally where the UK does not want to opt in to justice and borders provisions in a measure without a Title V legal basis. That situation was perfectly summarised in the letter in December 2007 from Lord Roper to the Home Secretary, in which he hypothesises—I quote him because the point is as well put by him as I have seen it put: “The Government would assert that it does not participate unless it opts in, so it will do nothing and will presumably not vote in the Council. The Commission and the other members of the Council will consider that the UK is participating in negotiations and will be bound by the result. There will be no recital recording that the measure does not apply to the UK. On the adoption of the measure, how would a citizen decide what the law in the UK is?”

For “citizen”, of course, we can substitute “third country” entering a non-Title V-based international agreement with the European Union; the uncertainty would be equal there. Of course, the uncertainty is even greater than it first appears, because if the UK Government is correct in its assertion, something of the same uncertainty would attach to the Irish and

Danish positions as well, because they would have the right not to opt in to justice and home affairs measures, and might have exercised that in relation to any given proposal. One just would not know. One would have also to note that a wide range of international agreements would be affected – including agreements relating to free movement of services, development co-operation and association agreements.

There would be uncertainty, as I mentioned, even for parliamentary committees such as this in knowing what to review. So there is a great deal of potential uncertainty. In terms of actual uncertainty, however, I pick up on what Professor Peers mentioned: how seriously is this being taken at the moment? I would have to say that the UK policy seems invisible at the moment, in practice; it has not attracted an awful lot of attention. There are various reasons why that may be the case. Some of it may be because of what we might call limb 1 of the Government's policy: in other words, their acceptance of the principle of validity where JHA is either the whole or one of the two main purposes of the measure. That may be blunting the impact of the policy. Some of it may be due to a feeling that the UK Government are engaging in a rather symbolic act of defiance, rather than a policy that they seriously intend to pursue to what could be a very bitter end indeed. That might be another reason for it. Or it may be that the consequences of the policy still have to work their way through the system, when they will result in serious inconvenience and, perhaps, a Commission prosecution under Article 258.

In practice, what has caused a certain degree of resentment to date, rather than the application of the policy, has been the existence of the Protocol at all in favour of Ireland and the United Kingdom. It may be felt by some more integrationist member states to indicate a rather suspicious attitude towards their legal systems and, it may be felt to be a

case of having one's cake and eating it on the part of Ireland and the United Kingdom, privileging them unfairly compared to the other member states.

That has generated a certain counter-reaction, but the Government's actual policy in this regard has resulted in radio silence to date. So there is a lot of potential uncertainty, but the actual reaction in practice seems to have been quiet; perhaps because the policy is not being taken that seriously.

Q8 Lord Anderson of Swansea: Gentlemen, I am a little puzzled by the Government's position. Professor Peers said that no one seems to believe this, and Professor Barrett talked of this being a symbolic challenge. What symbolism is it meant to express? Do I detect a sort of visceral suspicion of the Commission in the response, which may or may not be temporary, as the force of legal opinion persuades the Government in another direction? Gentlemen, you were a little averse to using the word "circumvention", but I think you know what is meant. If there is that visceral suspicion on the part of the Government, do you think that it has been justified as a result of empire building or creep in the Commission's interpretation? How would you, if you were in the position of splendid isolation, perhaps, among the Government's legal advisers, advise the Government either to continue or to find a way out of this?

Professor Steve Peers: The first recourse is political. You try to convince the rest of the Council to back the UK's view. That is sometimes successful, as it was in the case of the road traffic offences directive, where the Parliament was ultimately also convinced. However, the recourse is also legal; ultimately, if the UK is not successful in convincing other countries to share its point of view, you may have to bring annulment actions at some point in the process. As I said, there are several points when you can do that in relation to international agreements, or you can ask the Court of Justice for a review of the compatibility of an

international agreement. So there are several possibilities on the table: the ordinary political and legal processes which exist in any area of EU law are equally available here, but there is an extra one available in relation to international agreements. Extra steps are available. The possibility of annulment agreements exists in relation to international agreements, so there is a surfeit of legal possibilities, as well as the ordinary political possibilities. Usually with international agreements, at least where we are talking about an implementing measure or the earlier stages of negotiations, the Parliament is not involved; you only have to convince the Council, so that perhaps makes it a bit easier, because you have only one level at which to try to win your political argument. That is what I would advise: use your ordinary powers of persuasion during the political process and, if that fails, use your ordinary powers to seek judicial review of various sorts at various stages in the process.

Lord Anderson of Swansea: Likely to be magnificent but unavailing?

Professor Steve Peers: Yes; it has been a while since the UK won a case in the Court of Justice, but sometimes it works with legal arguments. Look at the financial transaction tax. These participants in that are perhaps backing off from some of the more ambitious approaches that they might have considered in the beginning, which were more extraterritorial, perhaps because of the thought that the UK might successfully challenge the implementation of the tax if they did so. So it is not impossible that you win these arguments at the end of the day. If you go back before the past few years, the UK was more frequently successful in cases that it brought or intervened in. It is not impossible. The UK sometimes wins some political arguments, as well.

Professor Gavin Barrett: I add only that I wholeheartedly agree: use political means, first; if those do not work, use legal means. In the longer term, the Government may want to broaden the scope of the Protocol in any future treaty negotiations to reflect unambiguously

the interpretation which they favour. I have to say that I honestly doubt whether the other member states would prove amenable to conceding that point. If the Government wish to limit the possibility of implementing measures being adopted—readmission agreements—without the engagement of the Title V protocol, use of recitals and international agreements might be continued with, as well. I agree with Professor Peers.

Q9 Baroness O'Loan: I would like to ask you about the ECJ decisions and the UK's litigation strategy. I should like to ask you about the five cases which have been under discussion, C 137/12, 431/11, 656/11, 43/12 and 377/12. In interpreting the scope of Title V in those cases, has the Court of Justice done so correctly? I know that you have given us some evidence, Professor Peers, on at least two of those cases. Has the interpretation of the scope been too restrictive? You said that it has been restricted, but has it been too restrictive?

Professor Steve Peers: In the first three cases, the cases on broadcasting devices, and the two cases on social security, I would say that the Court of Justice is correct, because, in my view, the common commercial policy was expanded by the treaty of Lisbon, and even before that point it covered services, and was therefore apt to cover descrambling devices, for the reasons that the Court of Justice gives its judgment: that can be reasonably related to the EU services policy or, failing that, the internal market powers of the EU.

The mere fact that there is a brief mention of seizure and confiscation on a purely ancillary basis, backing up the main prohibitions of descrambling devices in the international treaty that was the subject of that case I do not think is enough to make it a criminal law measure as well as a commercial policy measure.

In the social security cases, I have always thought that if you have an association agreement between the EU and a third country, the whole logic of the association agreement is that you are extending some aspects of the internal law of the European Union to the third country. If

you are extending some aspects of the EU's internal law to the third country, the legal bases to do that, if you are taking individual decisions, such as on social security, are those that relate to the internal policy measure. In this case it is social security, what is now Article 48 of the Treaty on the Functioning of the European Union. I would say that any association agreement, not just those with the particular features of the European Economic Area or Switzerland, such as the adoption of social security rules, needs the legal base of Article 48. Therefore, no opt-out applies. All member states are covered.

I point out that the concept of an association agreement has existed from the very beginning of the EU legal order. We signed up to it when we joined the EU in 1973. No treaty amendment since alters the definition of an association agreement. If we wanted to carve things out of the nature of the legal power relating to association agreements and their scope, covering all member states, we should have specifically argued for that when we negotiated and renegotiated the protocols on justice and home affairs.

On the other two cases, however, I am less convinced by what the Court of Justice said. I am not convinced by what it said in relation to driving offences. That is because the Court of Justice said that issues related to driving offences are entirely transport law measures, although in some member states they have a relationship with the criminal law. To my mind, the treaty creates special legal powers relating to criminal law. Where you have something such as driving offences, where some member states have a criminal law approach and others have an administrative law approach, you have to reconcile the differences between the different legal approaches of the member states. It is best to have one criminal law measure which covers those member states which have a criminal law approach and a separate measure—in this case, the legal base would be transport—which governs the member states which have an administrative law approach. Then you relate those two legal

instruments to each other so that you have a cross-border policy which fully covers the whole European Union.

There is a precedent for that with the European protection order in relation mainly to victims of domestic violence. Some member states have an administrative or civil law approach to protection orders when people are beating up their wives and girlfriends; some member states treat that as an aspect of the criminal legal system. The EU decided very wisely to have two measures which interrelate, so all the member states are ultimately covered by those two measures taken together. You create a coherent system in two different pieces of legislation. That would have been a better approach that would have reconciled the fact that some member states have a criminal law approach and some do not in relation to driving offences.

In relation to the treaty with the Philippines, I cannot quite see how readmission treaties help the development of the third country concerned. It has to take its own citizens—and, perhaps, citizens of neither the EU nor that country—back on to its territory if they have lived there in transit. I cannot see how that helps their development. The mere fact that there is some EU legislation—EU soft law—that refers to readmission as part of the development process is not convincing. As the Court of Justice says in most of its case law, the mere fact that the EU has taken one approach in the past to the legal scope of its powers does not create a precedent to bind the Court of Justice in future.

You have to look at this independently when the case comes before it. The UK has lost arguments to that effect in some of this case law, and equally the Commission has lost a similar sort of argument that it was making in this Philippines case. If you are to deal with the level of detail of readmission and create legal obligations, as the treaty with the Philippines, that is an immigration policy issue. This does not matter too much for the UK, of

course, because we are always keen to opt into readmissions anyway, so it is a bit of symbolic argument. Nevertheless, from a strictly legal point of view it is not entirely convincing to me.

Professor Gavin Barrett: I note in passing that the Irish Government seemed to think that Title V should form part of the legal basis of these measures as well, so they supported the UK Government's position. The UK Government's opt-in policy rests largely on an interpretation of Protocol 21 and what that implies and these cases do not really say anything about that. But in so far as the UK Government says that, notwithstanding its content-based approach as to the application of Protocol 21, "Nevertheless, the Government will push for the addition of a Title V legal base in EU negotiations on a measure that we consider to have JHA content", I think these decisions are clearly inconsistent with that because in all of them it was deemed that Title V could not be used as a legal basis.

I was listening to Professor Peers; one might think that we had compared notes before we came in here. Actually, we had not spoken at all before we came in here but I share his views in relation to the first three cases—I thought the conclusions in them were reasonable and were fair enough. I put my point less strongly in relation to the other two; I am ambivalent about the findings in these. The road traffic offences case rested on something of a knife edge for me. You could really have said that it involved criminal law or transport policy. It is worth bearing in mind that the Court of Justice's case law does tend to bring it down in favour of a single legal base, so it does tend to oblige it sometimes to make decisions where, in an ideal world, I suppose you would identify more ambivalence to the matter. Again, in the Philippines case, I think what told in that regard there was the specificity of the provisions in question and the court did not seem to find them specific enough, if you like, to fall within the exception that it had laid out. So, as I say, I feel a bit more ambivalent on the

latter two judgments. However, in relation to all of them I do not think there would be any doubt about the court's sincerity on the conclusions that it reached at the end of the day. But, as I say, I feel a little bit more ambivalent in relation to the latter two decisions.

Lord Blair of Boughton: I will ask one very brief question. You talked about the United Kingdom, Ireland and Denmark. Given that Malta's legal system is the same as ours, has Malta opted out?

Professor Steve Peers: Malta does not have an opt-out. I suppose they could have demanded one.

Lord Blair of Boughton: So they never went to one?

Professor Steve Peers: They never got one, so it is not an issue. I suppose it might be an issue in some cases where they say there is a common law issue and that has to be taken account of because the treaty talks about taking account of different national traditions. That would be an argument to be made during the negotiations, with perhaps a legal challenge, if necessary, to argue that the common law was being suppressed in some way. However, that would not be an opt-out; that would be a whole different type of proceeding, if that is the argument they wanted to make.

Professor Gavin Barrett: Bargaining power does count in relation to these things and in treaty negotiations as well. Of course, Malta would not have quite as much of that as either the United Kingdom or, in fact, Ireland, whose bargaining power is derived largely from its tendency to hold referendums on Treaty outcomes. That, if you like, gives Ireland extra bargaining power to such protocols.

Q10 Lord Blair of Boughton: The next question follows on from Baroness O'Loan's question but it brings in a new witness, which is the law societies of England, Wales and Scotland. I think that the ECJ's case law on the opt-in protocol has reached a point where it will not be

reversed by further case law. They suggest the Government should reconsider its policy as a consequence. Do you agree, or is there anything more the UK can do?

Professor Gavin Barrett: All I would say in relation to that is that I think the rules on choice of legal basis have been repeated in each of the above five cases, and to a certain extent extended in the Philippines case, or dealt with in more detail in that case. I do not see it as being at all likely that that law is likely to be reversed now. Therefore, in so far as Government policy involves pushing for the addition of Title V legal bases in EU negotiations on any measure it considers to have JHA content, I think it is really pursuing a lost cause.

Professor Steve Peers: The Government, of course, is putting something down for renegotiation. If we enter into renegotiation of our treaty commitments, that is one thing you could argue for. However, I think trying to get changes to the free movement of people is going to be the most difficult thing and, inevitably, I think the negotiations are primarily going to be about that. I would question whether it is wise to get too much distracted by this issue.

Q11 Lord Anderson of Swansea: Gentlemen; your views, if I may, on a matter of procedure. If a Title V legal base is added in the course of negotiation, from when, in your judgment, should the three-month period provided for in the opt-in protocol run?

Professor Steve Peers: The strict wording of the protocol only talks about three months from the original proposal, so you could conclude from that that it has to be within three months of the original proposal. However, that is not very well adapted to a situation where something was proposed on a non-JHA legal base and then got changed to a JHA legal base during the course of proceedings. In that case, logically, you would have to apply the rules in the protocol by analogy and to date the three-month time period from some other point, such as when the Council politically agreed or officially adopted its first reading position.

However, it could be that there is a first reading deal with the Parliament, so it makes more sense, then, to date it from the Council's formally agreeing that the legal base has to be changed. If there is any concern that that is not compliant with the treaty, I would point out that, of course, the protocol is part of the treaty. However, the rest of the treaty includes the rule that the council can change this if it agrees unanimously the text of a Commission proposal. It is clear from the case law that that includes a change to the legal base. Since the treaty provides for that possibility, as interpreted by the Court of Justice, of the Council changing the legal base of a proposal by the Commission—sometimes the Parliament would have to agree—then, logically, you should read that clause together with the protocol and say that that is when the three-month period starts to run from.

Lord Anderson of Swansea: What you suggest is clearly a practical suggestion given the length of time involved, but are there any relevant precedents which could guide us in this?

Professor Steve Peers: That is what happened with the road traffic offences legislation where the Commission made a transport proposal, the Belgian presidency of 2010 did a deal on changing the legal base and then the assumption was that the three-month time period starts to run again. I think it has also happened with a proposal on fraud against the EU's interests where the Commission made the proposal on the basis of the general anti-fraud powers in Article 325 but the Council quite rightly changed that to Article 83 of the treaty—the criminal law powers of the treaty. I think the Parliament will go along with that. However, the three-month time period was assumed to start from the Council's agreement in principle to change the legal base, and the UK has decided not to opt in. This might be another issue which involves us in interesting legal proceedings soon and, if the Commission wants to challenge the position of the Council and the Parliament, it would again involve our legal base. This is a case which I do not think the Commission would, or should, win.

However, I have been wrong before, and maybe it would win. Maybe this is a case where the Commission would convince the court. However, I think it is the weakest of the cases we have been looking at, if it does reach the Court of Justice.

Professor Gavin Barrett: I agree; if one takes the view that the Protocol is engaged only when a Title V legal base exists, it makes sense that the three-month period should run from the time that the Title V legal base is added because otherwise one renders the Protocol either partly or entirely ineffective in any case where a Title V legal base is added in the course of negotiations. However, if one takes the view, as the United Kingdom Government appears to, that the justice and home affairs opt-in is triggered whenever there is JHA content, it seems inconsistent to then claim that the three-month period should run only from the time that a Title V legal base is added. Why should that be the case, if one takes the view that the JHA opt-in is triggered whenever there is JHA content?

The Chairman: Thank you both very much for coming here today and sharing your professional expertise with us. It has been extraordinarily useful. I draw the public evidence session to a close; the Committee will now go into private session.