



European Scrutiny Committee

Oral Evidence: [UK Government's Renegotiation Of EU](#)

[Membership: Parliamentary Sovereignty And Scrutiny](#)

[Inquiry](#), HC 458

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Members present: Sir William Cash (Chair), Peter Grant, Kate Hoey, Kelvin Hopkins, Stephen Kinnock, Craig Mackinlay, Graham Stringer, Kelly Tolhurst, Mr Andrew Turner, Heather Wheeler.

Questions [111-146]

Witness: **Professor Damian Chalmers**, European Union Law, London School of Economics (via video link), gave evidence.

Q111 Chair: Professor Chalmers, hello. You are a long way away, but it is nice to see you. Welcome back to our proceedings. We are going to try to do it in a way that allows a little bit of time between questions, because of the distance and the synchronisation. If I could start by asking you the first question, as follows: from the legal perspective, which of the specific proposals the Prime Minister has put forward in his letter to Donald Tusk fundamentally changes either the European Union or the United Kingdom's relationship with it? I stress the word "relationship", rather than just changing laws.

Professor Chalmers: I need some help in terms of what you mean. If you mean which proposals require treaty change, I can maybe talk to that, if that is helpful. In terms of how significant they are, that is obviously a matter of judgment.

Chair: I think the question turns to a great extent on whether or not you would require treaty change, but the question related to the issue of relationship really turns on the constitutional relationship, rather than just changing a particular law, in a manner that would simply deal with a specific policy question.



Professor Chalmers: If I turn to the last question first, Sir William, my own view is that none of the proposals effect a significant change in the relationship between the United Kingdom and the European Union, and the reason for that is that they relate, by and large, to very specific policy proposals, particularly in migration, or they are largely, dare I say it, symbolic measures, in my view. Let me give an example of two that are symbolic proposals but, if they add some practical clout, might be a little bit more significant.

The first is the commitment to releasing the United Kingdom from the legal obligation to ever-closer union. This will require quite a significant treaty change. In fact, you cannot use a simplified revision procedure. You need a full TFEU revision procedure and it would be a complicated process to revise it. However, I saw with a deal of interest the House of Commons' note on this. That phrase has not been used very much. I note that 57 judgments were cited. The reality is that the overwhelming majority of those related to the preamble of the legislation on transparency. There is only one judgment where the phrase really made a difference, which was the Pupino judgment, which has now been superseded. Other than that marking, perhaps in an important way, that we want a different legislative body from the EU, that will not have any practical effects.

The other significant change, which might have been important, was the relationship between national parliaments and the EU. The central proposal in that is to allow a group of national parliaments—the number is to be negotiated—to block any unilateral proposal. I really have three issues with that. The first is the problem must now be about blocking proposals, as opposed to just giving them a yellow card. Proposals that receive a yellow card have not gone through. The problem has been a collective action problem. It has been very difficult to meet the thresholds. Between 2011 and 2013, there were 30 instances where five or more reasoned opinions would go by national parliaments, which was a breach of subsidiarity, but in only two instances was a yellow card triggered. Five national Parliaments were not happy with that level, but of course they went too far. The measures could still go forward. It is very difficult, at the moment, for national parliaments to get together to veto a Commission proposal.

The second problem I have is that it seems to be an important part of parliamentary democracy for parliaments to have to say yes, rather than just the possibility of saying no. This is not just constitutional nit-picking, but the possibility to say yes allows national parliaments greater possibilities to deliberate on a proposal and to put forward amendments. This is important; beyond just the general principle, there should be parliamentary votes before you impose things on citizens. The second aspect is that it does not really allow parliaments sufficient voice over things like amendments to deliberations.

The third problem is what happens should national parliaments change their mind. What happens in republican democracies is parliaments are not obliged to have fixed views. It is one of the reasons we have elections. The challenge is that, once you have those special agreements in place, they are very difficult to amend. There is no real proposal at the moment of allowing national parliaments to put forward amendments or suggestions that EU legislation should be repealed. Therefore, on those grounds, I find it quite a limited proposal. I hope that was not too long.

Chair: No, it was not. That was extremely interesting. Thank you very much indeed. Heather Wheeler.

Q112 Heather Wheeler: Hello there. I am not sure if you can see me or not, but welcome. There you go; that is me. What would be the effect of the UK's disengagement from the aspiration of an ever-closer union, whilst some member states retained it?



Professor Chalmers: I am not sure that it would have much effect. The concerns that have been raised about it are twofold. It marks a philosophy that some people do not like, namely a move in only one direction, and the other thing is the belief that it has been widely used by the Court of Justice for integrationist judgments that go beyond what many people are happy with.

In relation to the second aspect, which is the more practical aspect, the reality is, as I said in my initial reply to Sir William, the court very rarely reverses this. There is only one case where this made a difference, which was the Pupino judgment, which was about giving a particular instrument, the latest and the third pillar, certain legal effects. Now, there is still a possibility, and I think the likelihood, that the Court of Justice ruled in integrationist judgments. My belief on that is that the docket of the court is structured in such a way that it tends to get references of it sent out to the courts, but on the instigation of parties that want EU law rights to be expanded. That is the way it happens, if you look at all the cases on the free movement of goods for example; typically, they want free movement to be expanded—and equally on anti-discrimination law. Whilst you have all that flow going one way, people who are opposed to that direction will be unhappy with the judgment of the court. I do not believe it deals with the court effectively and I believe that it is not just symbolic—the court will still be open-minded and still likely to give integrationist judgments.

Q113 Chair: Could I just intervene at that point, very briefly? Please give a short answer to this question, if it is possible, because we only have half an hour. I do want to try to get to the root of one issue, which is this. The question of removing ever-closer union would appear only to be applicable, even if it were to be achievable, to the future in relation to European Court judgments. It cannot affect, it would seem, existing treaties or existing laws, because they are all part of the *acquis*. Therefore, it would only apply in relation to future questions and moving towards more ever-closer union. Would you agree with that, very briefly?

Professor Chalmers: I would. It would be impossible to apply it into the future. You cannot have a situation where the court makes a judgment just for the United Kingdom or other states that have disengaged from ever-closer union, and another judgment for those who wish it to continue. It would be very difficult for any reform of the kind proposed to change what the courts are doing.

Q114 Craig Mackinlay: Thank you, Professor Chalmers. What general principles apply in determining whether the Prime Minister's renegotiation objectives, in respect of immigration, require treaty change? I know you have had a particular view on the immigration aspects.

Professor Chalmers: There are some that do. You will probably get a consensus from EU law academics on this. We will come to the issue of benefits in a moment, but there is a concrete proposal, which is that EU citizens cannot bring in non-EU spouses more easily than British citizens can, and that would require treaty change. That is a right given directly by article 45 of the TFEU. The other issue that might require treaty change is the possibility to deport criminals from other EU states more easily at the end of their sentence. At the moment, you have to show a degree of threat. There has to be a recidivist possibility before deportation is allowed under the treaty. This might require treaty change, and they might be able to get round that argument through making sure of their transfer to prison in their home state before the end of their sentence.



Now, in relation to the issue of a residence condition for benefits—that EU citizens should be resident in the UK for four years before they acquire any benefits—I have to say I am an outlier on this. Most academics believe that it does require a treaty change. My view, and I believe the overwhelming majority have taken that view, is to be cautious and to follow the majority. My view is that it still does not require a treaty change. You can do a lot by amendments and secondary legislation. I can go into detail why that is the case; there is a series of legal arguments for that. The central point is that, if you look at when EU citizens have been denied benefits by a host state, the court has always relied on EU secondary legislation by relying, in some cases, on certain parts of the treaty articles. There is a series of other reasons that I would put forward as well.

Firstly, it was not necessarily a unilateral thing, but there is the new EU measure, and EU measures have a margin of discretion. Some of them allow discrimination that unilateral national measures do not. The second reason that I would give is that EU citizenship allows limitations to be placed on movement of residents.

The final reason I would give for why I think you could get away with changing secondary legislation is no one has ever argued this point, in terms of national citizenship. The British Government have not got to that point yet, but the EU treaties say very clearly that EU citizenship is additional to and derivative from national citizenship. If you accept these rights are the fundamental elements of national citizenship, and the general constitutional court should bestow them, it did so with EU citizenship, has in respect of 2006, then you can go a long way with this through secondary legislation, simply saying we have created our national citizenship in EU treaties to protect these rights. As I said in my written evidence, in terms of people concerned about the risk I would argue for a declaration on the European Council that this is the relationship between EU law and national citizenship. Unless the Court of Justice decide otherwise, it would be intolerable to get the House of Commons to amend the treaties accordingly. The main status should be that national citizenship should come “attached with”, and we can go a long way with that strategy. My views has allowed for that.

Q115 Chair: Thank you very much for that. I would just like to ask one supplementary on that. I am going into quite deep waters here, I think, but I was at a seminar very recently at All Souls College, Oxford, and a very eminent professor of law suggested—I think I have got her right—that the question of whether or not the court now was being as rigorous in following the treaties seemed to be questionable in relation, for example, to that element of the immigration question relating to decision 38 of 2004. Now, I am not asking you to give a definitive view of that, but I am asking whether you have noticed that the court is in fact tending to rely on interpretation of secondary legislation, such as directives, and not sticking to the exact wording of the treaties. I really would just be interested to know what your thought on that was.

Professor Chalmers: Normally when there is secondary legislation in place, the court goes to the secondary legislation. It recognises that the EU legislature has a margin of discretion. This has caused some chagrin among national governments, who think there is a double standards between what EU institutions do and how they are privileged.

Q116 Kelvin Hopkins: Morning, Professor. You have already described your suggestion that treaty change would not be necessary in respect of what the Government is proposing on welfare benefits, but would your novel scheme apply to other immigration changes? How confident are you that it would work? We have discussed the Prime



Minister's thoughts or suggestion that European migrants would have to have a job offer before they arrived in Britain. That is one suggestion. Another one would be that, if they had not got a job within six months, they would be required to leave. Would your proposal cover those kinds of changes?

Professor Chalmers: There is a debate about migrant benefits. There is less debate about some of the other changes that the Prime Minister suggested, so I am not sure it would. If I read the Prime Minister's letter to the President of the European Council correctly, I do not see anything in that list of proposals that was originally in his speech of 2014. They just do not seem to be there anymore. I do not know if I read too much into it.

There was, however, an additional one. He placed it on sovereignty but actually it went to migration. The British Government have been concerned for a while that international agreements between the EU and non-EU states were by-products of the opt-outs that the UK has in relation to non-EU nationals. Just before the section on immigration, he says he wants some reassurance on that. Now, that would need treaty change. As I mentioned earlier, the requirement about changing the position of non-EU spouses would need treaty change, and it is possible—although this is more arguable—that my suggestion would work for this last point: the issue of deportation of criminals. It is argued that that would not need treaty change. It is well known that it is not covered by treaty; it is covered by secondary legislation. That is a long way of saying that some could be done by my route, but others, and I think Governments aspire to this idea, could not.

Q117 Kelvin Hopkins: Are you suggesting that the Prime Minister has played down some of the proposals he put forward in November 2014, on the grounds that they might not be acceptable in negotiation and, therefore, he does not want to push his luck?

Professor Chalmers: I have to be careful here, because obviously there is speculation. But as I look at his recent letter, like everyone else, it is somewhat different from his speech's content, and that of course can lead one to speculate. I will put it no more strongly than that. His position might be moving slowly on this, but I do not know; you would have to ask the Government about that.

Chair: I am sure we will get round to that. Thank you very much.

Q118 Craig Mackinlay: Could I have a brief supplementary? I did not feel that we are fully informed on the proposal that, after six months, people could be deported. This was a previous declaration by the Prime Minister. Does that hold any water whatsoever?

Professor Chalmers: I must say I was a bit surprised. My understanding is that EU law allows us to deport people who have not found a job. The relevant case was Antonissen in, I think, 1990. What they said then was six months was fine but beyond that, you should deport someone then. The only issue was if it looked as if they were about to get a job, if it is the case that someone has a job interview the next day and it is not just some tentative job interview, but it is between them and one other person. The court said in that case that they can cut close to the limits, just because life is a little bit messier than that, but they thought six months was fine. I thought the Government was being overcautious there. You can deport people probably in less time. I have to be careful what I say, but other states have done that.

Q119 Heather Wheeler: Back to me again, Professor. Thank you. How can there be put in place irreversible and legally binding commitments to either treaty change or EU secondary legislation before the referendum takes place?



Professor Chalmers: I will deal with treaty change. That will be reversible. Do you mean binding? It is almost impossible to imagine that there could be treaty change before the referendum takes place. If one looks at treaty change, every other treaty whether allowing for constitutional challenge and so on, it is just not possible by May 2017. Now, of course I should just say on this point that people talk about the Edinburgh declaration, what the date was at Maastricht, and this is then brought in, word for word, by the protocol of the Treaty of Amsterdam, as a reassurance.

There is a less happy and more recent example that has not really been mentioned, and it is the case of the declaration in relation to the Czechs on the EU Charter of Fundamental Rights and the Lisbon Treaty. What happened with that was that the Czech Government, at the last minute, just before ratifying the Treaty of Lisbon, asked for the same protocols on the Charter of Fundamental Rights that applied to the United Kingdom and Poland to apply to them. Now, it was too late to sign that. The other member states gave a declaration to that effect and said that this would apply at the next possible opportunity, which was the accession of Croatia. This was vetoed, however, by the European Parliament, so you have a case where what was honoured with the declaration of Denmark was not honoured in relation to the Czech Government in relation to the Lisbon Treaty, with the EU Charter of Fundamental Rights. There it was not resolved, so the Czechs withdrew their request, but there are worries on that score.

Secondary legislation could be passed on time, particularly as much of it could be done by qualified majority. The bigger concern there, of course, is that it can also be changed back again by a qualified majority and that might not be reassuring enough for Members of the Committee or the British public. I have thought about this a little bit, and my suggestion would be that you could include in legislation that certain provisions could not be changed without a European Council decision because they are integral to national identity, which is set out in article 4.2 of the treaty, which must be respected. That might work like an emergency brake. It is legally unusual. No doubt some people will say that you cannot do that, but that might provide extra reassurance, if one was worried about being out-voted on these changes on which the referendum is taking place.

Q120 Chair: Thank you very much. We had the Foreign Secretary in yesterday and we do not yet have the transcript. I am sure you would like to have an opportunity to look at that, as to what he said, when it comes through in a few days' time. Subject to that, the question of whether or not it is legally binding, as to whether or not the decisions could be, in practice, irreversible and how far they can modify existing EU law, is obviously very important. Otherwise you would need treaty change and that is not on offer. Crucially, the question of whether or not these so-called decisions would be binding is of imperative importance, when it comes to making decisions in relation to the referendum.

As a general proposition, the Foreign Secretary was indicating that there was some system under international law that he was hoping might do the trick. He was saying that decisions by member states registered in international law interpreting treaties as originally adopted by the same member states might be one route, including a commitment to changing the treaty at the next opening of the treaties, all of which looked a little bit as if it was a bit futuristic, if I could put it that way round. He also asserted that registered international agreements, as a matter of international law, do have binding force, but then of course the question is whether or not that is really applicable in the case of European law, in its application to member states.



Also, the former legal adviser to the European Commission, Jean-Claude Piris, gave evidence to the European Parliament and also has been quoted in the *Financial Times*. He was the architect of the Danish precedent, which I am sure you are familiar with. He said that such accords “cannot add something to or modify the meaning of the treaty”. He went further, and you may care in future, when you have a chance to do so, to look at what he said to the European Parliament. He indicated to them that the Danish and Irish agreements were 100% with the treaties whereas, as respects the questions that are currently being posed in relation to the matters that we are considering at the moment, about these decisions as to whether they are legally binding and irreversible, really that would not be the case with respect to those agreements, as compared with the Danish and Irish agreements, which were 100% consistent with the then treaties. I know this is a bit of a googly at this stage, but I am sure you are familiar with the thinking that lies behind this and I just wonder whether you might like to give us your thoughts on that.

Professor Chalmers: I sit between those two positions as you relate them to me, Sir William. I have seen Monsieur Piris’s views and they are quite black and white, to be honest. They go to the issue of what is allowed and what is not allowed, but there is often more wiggle-room that can be elaborated by member states, in my view, than he would concede. Once again, I might be doing the Foreign Secretary an injustice, because I have not seen his words.

In relation to what is possible with regard to the treaties if you do not have a formal amendment, my understanding of the Vienna convention, article 39, is that you have to follow the procedures of the treaty to amend it, so any sort of fiddly things—it could be something on the side—cannot amend the treaty if it has no procedures for amendment. The Vienna convention on the treaty is quite clear on that, and the EU treaties, in article 48, set out very clearly the procedures for that. That does not stop, however, interpretations of the treaty. One has seen this with the European Council conclusions from June 2014. You can probably go a long way with interpretations of things like ever-closer union, if you wanted to, elaborating in quite a lot of detail a bit of a political statement that really does not lend interpretation to it, because article 1 has stuff about a two-track Europe, etc. I do not see anything that has been suggested so far that is violating what is in the treaties on ever-closer union. In relation to things like migration, it might be hard.

Q121 Chair: When you mention the word “interpretation”, of course, that is a question for the European Court, if it were taken to the court. Without an appeal procedure to their decision, they then would have the right to decide what the interpretation was. We are talking about very high stakes here. I am sure you would agree with that.

Professor Chalmers: Yes, I do.

Chair: Do answer; we are running a bit short of time.

Professor Chalmers: I take that point that there are legal risks to the approach suggested by the Foreign Secretary, and that will be looked at—and I’m sure they are.

Q122 Chair: Just very quickly on that, then I would like to bring Kelvin Hopkins in, I want to ask this question. If there are legal risks in that, then to present the argument as if, in the case of a referendum, politically this will all be done and dusted really leaves open the question of whether or not the European Court would buy the whole project in the last resort. Is that not right?

Professor Chalmers: For a number of the proposals, there are dangers of that, because these areas are subject to judgments and the court might take a judgment view. Sorry, can I



just add one point? However, if you did that, you have a lot of national courts that are now quite sensitive to European Court decisions. For example, in one case the UK Supreme Court made very clear that the Court of Justice can act ultra vires. It followed that the Court of Justice can act ultra vires, and the Czech Constitutional Court indicated that the other constitutional courts can act ultra vires. There are risks because if the Court of Justice ignores what member states are saying it is also playing with very high risks, particularly on issues like national citizenship, because it just will not be followed by top national courts. It is like a game of poker with not many players.

Q123 Kelvin Hopkins: This is just a brief question. You say that there is no possibility of treaty change before the referendum. What if commitments, understandings or promises are made before the referendum and then, afterwards, they are either withdrawn, reinterpreted or there is a debate about what they mean, there is an enormous row and people feel that they have been misled in the referendum? Is that not a possibility?

Professor Chalmers: It is a real possibility. Bad faith is unlikely. What is more likely, particularly with a most febrile political system across Europe, is that new governments will come in who do not feel so bound by the commitments of their predecessors. There is a real danger of that. That in my view is bad for those who want to stay in the European Union and those who want to stay out of the European Union. That is the worst of all possible worlds.

Chair: Could I say thank you very much indeed, Professor Chalmers? Hopefully, we will be able to review all this in the light of other evidence that we receive from the other lawyers. As you know, we have Sir Alan Dashwood and also Martin Howe coming to see us in a few minutes. I would also like to thank the technicians and staff at the Singapore High Commission, in Westminster and elsewhere, who have enabled this discussion to take place. Thank you very much indeed, and we are very grateful to you.

Professor Chalmers: Thank you, Chair.

Witnesses: **Professor Sir Alan Dashwood QC**, Emeritus Professor of European Law and Fellow of Sidney Sussex College, Cambridge, **Martin Howe QC**, and **Professor Sir Francis Jacobs KCMG QC**, President, King's College London Centre for European Law, gave evidence.

Q124 Chair: Good morning, everybody. It is a great pleasure to see you here. We have just had a session from Singapore, by a successful videolink, with Professor Chalmers from the London School of Economics. We are going to be asking you similar questions. In fact, they will be the same questions, as far as we can make them. I am going to ask the first one, and it goes like this.

From the legal perspective, which of the specific proposals the Prime Minister has put forward in his letter to Donald Tusk fundamentally change either the European Union or the United Kingdom's relationship with it? Just to add a gloss to that, I emphasise the word "relationship" and not merely a change in the law, fundamentally or otherwise. It is the relationship we are interested in; it is really a constitutional question, in a sense. First of all, may I ask Sir Francis Jacobs? Thank you very much.

Professor Sir Francis Jacobs: Thank you, Chairman. Thank you for the opportunity to speak to the Committee. This is a difficult question to answer. I have not given it any consideration so far. It is difficult because some of the ideas set out in the letter are not yet sufficiently specific for one to know exactly how far they are likely to go in the process of



negotiation and, therefore, what the outcome is likely to be, whether there are going to be binding legal commitments coming out of the particular proposals, for example, declarations or measures of different kinds. It is difficult to predict, so I find it difficult to form a view on that question, at this stage. I would leave it at that.

Q125 Chair: Can I put it in context, for the benefit of you and the other witnesses? The words that the Prime Minister used come from a statement he made in the House of Commons immediately before the General Election. He made a very specific statement on 23 March. He said, “In the coming two years, we have the opportunity to reform the EU and fundamentally change Britain’s relationship with it.” I thought I would just give you that as context. That was immediately before the General Election and clearly was intended to be the basis on which the General Election would go, with respect to the question of the European issue. Martin Howe, would you like to comment on that, please?

Martin Howe: I share Sir Francis’s view that this question is difficult to answer, because one does not know from this letter where we will end up in terms of concrete treaty changes versus other perhaps softer and less legally binding or effective measures. Let us assume, for the sake of argument that these various proposals were all achieved to their full extent and were embedded into treaty changes. The question you are asking, Chairman, is whether that results in a fundamental change to the United Kingdom’s relationship with the European Union. I cannot see, even at its fullest extent, that it would amount to a fundamental change. There would or could be significant changes, but I would not personally use the word “fundamental”.

Professor Sir Alan Dashwood: I echo what Sir Francis and Mr Howe have said about the difficulty of answering your question in relation to the objectives, as they are set out in the letter, because they will need to be developed in the course of the negotiations. I would hazard an answer that the relationship between the United Kingdom and the eurozone could, as a result of this negotiation, be fundamentally changed, but of course that would also affect the other member states that do not participate in the single currency. If the United Kingdom were fully successful in its objectives relating to welfare and freedom of movement, that might fundamentally alter things, not only for the UK but for the union in general.

Q126 Heather Wheeler: Gentlemen, if you would be kind enough, what would the legal effect be of UK disengagement from the aspiration of ever-closer union, while some other member states retained it?

Professor Sir Alan Dashwood: Would you like us to take it in alphabetical order?

Chair: We will take it in the same order. It makes it a lot simpler. Sir Francis Jacobs.

Professor Sir Francis Jacobs: I have to say that this is one aspect of the subject I find a little puzzling, because there is a certain measure of misunderstanding about the references in the treaty to ever-closer union. The term appears in the preambles to the treaty. If I were going to answer this question properly, I would have to say that we have to look at the preamble.

Chair: We also have to look at article 1.

Professor Sir Francis Jacobs: Indeed, yes. It may be that the Committee is already familiar with the language of the preamble and of article 1. The preamble of course now says that the aim is “to continue the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen, in accordance with the principle of subsidiarity”. Article 1: “This treaty marks a new stage in the process of



creating an ever-closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”

These words go back to the preamble to the original EEC Treaty, which is reproduced in the preamble to the Treaty on the Functioning of the European Union, which says that the signatories are “determined to lay the foundations of an ever-closer union among the peoples of Europe”. It is clearly a union among the peoples of Europe, and this expression predates the notion of the European Union itself—the entity that consists of the member states of the European Union today. It is a union of the peoples of Europe, and the union of peoples is not part of the process of integration that is provided for by the treaty, as shown, for example, by the fact that it is complemented by the principle of subsidiarity.

Although there has been some misunderstanding about this, and there are references to the idea that this notion creates a legal rule, it seems to me nothing of the kind. It does not create rights or obligations. It does not impose obligations on member states. It sets out an aim, which is ever-closer union among the peoples of Europe. There is, in fact, no trace of this notion in the corpus of European Union law. It is essentially an objective.

There is also a view that reference to ever-closer union in the treaty has been used by the Court of Justice as the basis for an integrationist interpretation of the treaty, but again there again seems very little basis for that view. In fact, the phrase seems to have been invoked very rarely by the Court of Justice. When it is a question of amending these provisions, it has to be borne in mind that they do not, as I see it, create legal obligations.

However, because there has been so much misunderstanding of the notion of ever-closer union, it may well seem appropriate to clarify the notion and to bring out some of these points. In fact, this process has already been started, as the Committee may be aware, in a statement of the European Council in June of last year, stating that the concept of ever-closer union should not be interpreted as a strict legal provision. It allows for “different paths of integration for different member states, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further”. That is a statement in the conclusions of a meeting of the European Council on 27 June last year.

That process of course could be continued, if it were thought desirable, to make it clear that the notion of ever-closer union should not be understood as a sort of continuous process of ratchet in the integration system. For example, reference could be made to other statements in the preamble to the Treaty on European Union, which refer for example to the aim “to deepen the solidarity between the peoples of Europe while respecting their history, their cultures and their traditions”, and also the requirement in article 4, paragraph 2, of the Treaty on European Union that “the union shall respect the equality of the member states before the treaties as well as the national identities, inherent in their fundamental structures, political and constitutional”. It may be that clarification along those lines would be a helpful process, but I conclude on that.

Q127 Chair: Could I just throw into the equation the fact or, if I may put it to you as distinguished lawyers, the question that if it were to be done by agreement between the member states in some form of treaty, which article 1 would presume, then what effect would that have in relation to past treaties and past laws? If you were to change the treaty by taking the words “ever-closer union” out, whether in its application exclusively to the United Kingdom or to the other member states as a whole—and that raises a whole series of questions anyway—it would not have any effect on the *acquis*, would it? The existing treaties and existing laws could not be retrospectively changed merely by taking the words “ever-closer union” out, in 2015, 2016 or whenever.



Professor Sir Francis Jacobs: My answer to that would be it would not affect the acquis, but it would affect the future interpretation, even of past treaty provisions and of past EU legislation.

Chair: Fine, I just wanted to get that into the equation. Martin Howe.

Martin Howe: Can I address the question that, if I may say so, poses a real brainteaser? One can imagine a scenario in which the phrase “ever-closer union” was deleted from the treaties as a whole and, therefore, ceased to be part of the defining objectives of the European Union as a whole, but that is not what the Prime Minister’s letter says and not what the question addresses, which is removing the United Kingdom from the ambit of any obligation to work towards ever-closer union whilst, one assumes, leaving that in article 1 of the Treaty on European Union and in the preamble, where they stand.

Now, it is very difficult to see what direct legal effect that would have. If we consider, for example, European Union legislation, which applies within the United Kingdom and in other member states, it is very hard to see how the meaning of that legislation could be interpreted differently in respect to the UK from its interpretation in other member states. I would not expect to see that happen, in general. Would it play its part? Most foreseeably, it might play a political part, if and when we came to a next round of treaty negotiations, since it would make it easier for the UK to put forward a political case that it should be exempted from any further future substantive treaty changes. We have the veto to insist on that anyway, so it would not change anything legally, in that context. I am really struggling to think of circumstances in which a treaty change that removed the UK from adherence to that obligation would have a real effect on a real legal issue. Conceivably something surrounding the interpretation of one of the UK’s opt-out protocols might come in as a factor, but I cannot be any more concrete than that in what I can think of.

Q128 Chair: If I read out what the Prime Minister actually stated on this, he said, “First, I want to end Britain’s obligation to work towards an ever-closer union,” suggesting the future, “as set out in the treaty. It is very important to make clear that this commitment,” he says, “will no longer apply to the United Kingdom. I want to do this in a formal, legally binding and irreversible way.” We will come on to that aspect of it in a moment. Sir Alan Dashwood.

Professor Sir Alan Dashwood: I agree with Sir Francis that the phrase “ever-closer union” is essentially aspirational. If you place it in its historical context, it first appeared in the preamble to the EEC Treaty, which was drafted in 1957, only 13 years after the end of the Second World War and, when half of Europe was subject to Soviet domination, it was a noble aspiration. It is one that has been achieved to a degree that would hardly have been credible at the time the treaty was written. In my opinion, it should not be and was never intended to be interpreted as a commitment to take the process of European integration forward from where it began in 1957 to the establishment of some kind of European state. It was, as Sir Francis has pointed out, an aspiration to bring the peoples of Europe closer together, and that has happened.

To move on to the issue of what difference it would make if the United Kingdom no longer wanted to associate itself with this aspiration because we took the view that, if it were interpreted as a commitment to ever-increasing integration, the process had gone far enough, it seems to me that the statement by the European Council in June 2014 makes very clear that the other member states would be willing to accept that the United Kingdom does not share the aspiration to take integration any further.



Would this have an effect on the interpretation of the law of concrete legislation? Almost certainly not, because it has not had any effect hitherto. Here I agree with Martin Howe: it might have an impact on the situation where a future treaty was being negotiated, if the United Kingdom wished to opt out or to be given the opportunity to opt in to some aspect of the amendments that were being discussed. It would provide a political argument that could usefully be deployed in the negotiations, and that is not negligible.

Q129 Chair: By the same token, it would also take account of the political decisions that were being taken at that time so, again, we are back in a sense to looking to the future, and to whether or not there would be an adjustment, with regard to a specific provision in the treaty, which is now embedded in the acquis. You could not be sure, and nor could anybody else, that would necessarily happen, because one would not know what the outcome was regarding unanimity of all the other member states. Would that not be right?

Professor Sir Alan Dashwood: Nobody has mentioned so far that, even if this were a legal commitment—and the three of us are agreed that it is not—to take the process of integration steadily forward, no further step can ever be taken without a treaty amendment to which all of the member states, including the United Kingdom, have to consent. That would be the case in any future negotiation. Now, if the United Kingdom were negotiating for some form of opt-out, in any negotiation there are bargains to be struck, but it would be a significant additional argument available to any minister that was negotiating the matter that the United Kingdom's unwillingness to take the integration process any further has been formally acknowledged by the European Council.

Q130 Kate Hoey: Putting it into plain speak, does it really mean that this negotiation demand that the Prime Minister has put in is pretty meaningless, in terms of changing a fundamental relationship between the decisions that this parliament can take and the European Union? In other words, the supremacy of this parliament and our fundamental relationship would not change in the slightest bit if these words were removed. Would that be a layperson's way of putting it?

Professor Sir Francis Jacobs: I think it is right to say that, since it does not impose any obligation as it stands at present in the treaty, removing it would not remove any obligation. You can look at it that way. However, perception is also very important and perception could affect not merely the perception of the European Union in the United Kingdom, but it might also affect the perception by other member states and by the institutions.

Chair: Of course, as Lewis Carroll said, words mean what you choose them to mean. "The question is ... which is to be master—that is all." Martin Howe.

Martin Howe: Can I just add to Sir Alan's historical reference to the preamble, as it stood in the original Treaty of Rome? In fact, these words in the preamble are not without importance in the development of the jurisprudence of the European Court. Probably where that preamble played its greatest part was very early in the history of the court, in the early 1960s case of Van Gend en Loos, which I am completely mispronouncing. If you ask a Dutchman, he would pronounce it completely differently and correctly. That was the case that established the very fundamental doctrine that community law applied directly to the people and not merely to the member states. The court reasoned that it is more than an agreement that merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the treaty, which refers not only to governments but to peoples,



and then it is also confirmed more specifically by the establishment of institutions endowed with sovereign rights and so on.

Now, they did not use in that judgment the actual words “ever-closer union”, but that is a reference to that part of the preamble and it certainly played its part, as one of the factors that led them to the conclusion that community law is a distinct legal order that binds individuals directly. Although it is at a level of aspiration, and I agree with both my colleagues in that regard, that does not mean that aspirations and symbols are unimportant. I concede that the total removal of this from the treaty as regards all member states potentially has a long-term effect on the development of the jurisprudence of the court but, when it comes to removing it in respect of the United Kingdom only, I really cannot see it having any significant concrete effect, apart from on a political plane in future treaty negotiations.

Chair: It seems clear, from what the Prime Minister says, that he is not intending to have this applied to the European Union as a whole. What he says is, “First, I want to end Britain’s obligation,” and then he goes on to say, “It is important to make clear that this commitment will no longer apply to the United Kingdom.” It does not sound as if he is seeking to get the words “ever-closer union” removed from all the treaties, but only in its application to the UK. I just mentioned that because it seems worth doing so. Sir Alan Dashwood.

Professor Sir Alan Dashwood: Chairman, I do not have anything to add.

Q131 Craig Mackinlay: Just moving on to immigration, a key part of the Tusk letter, the Prime Minister has renegotiation objectives to clamp down on various benefits, changes and abuses that are perceived, criminal deportation and a widening of free movement under various ECJ judgments. Would achieving those objectives require treaty change, in your view, or are there other means by which these could be achieved? Is fundamental treaty change really required?

Professor Sir Francis Jacobs: Certainly some progress could be made without treaty amendment. On the first point that the letter raises under immigration, which is the question of what happens on the admission of new member states and whether there should be some delay in the implementation of the free movement provisions of nationals from the new member states, as there has been in the past, maybe that should be taken further. It is clear there that those provisions, including the transitional provisions of the length of delay and so on, would all have to be negotiated between the European Union and the new member states. Those treaties would then have to be ratified by all member states, so every member state, including the United Kingdom, would need to agree on the precise and specific terms by which nationals from new member states were entitled.

Craig Mackinlay: Just to stop you there, there were changes on the accession of the Hungary, Poland, etc., group, whereas Britain, Sweden and Ireland had different proposals from other parts of the EU.

Professor Sir Francis Jacobs: The position was that the United Kingdom and certain other member states did not avail themselves of the transitional provisions and were willing to accept nationals from those new member states with immediate effect. That was not repeated in the case of the subsequent enlargement with Romania and Bulgaria.

Martin Howe: As regards that point, I agree with Sir Francis that no treaty change is needed in order to achieve the first point in the Prime Minister’s letter, which is as regards accession arrangements on future enlargement. We have a veto as a member state, so we can insist on that, even if every single other member state was against us on the point, although it



might result in blockage of the new state acceding altogether, if the impasse could not be resolved.

As regards the other proposals in the Prime Minister's letter, I find it very difficult to see how all of those could be achieved, at least to their full extent, without treaty change. For example, a long-running sore that he addresses is that it is easier for an EU citizen, under the free movement of workers provisions, to bring a non-EU spouse to Britain than it is for a British citizen to do the same. That stems directly from the interpretation by the Court of Justice of the provisions of the treaty on free movement, and I find it difficult to see how that could be altered without altering the treaty itself.

The other area is welfare and the four years before they qualify for in-work benefits. Personally, I find that an area of fiendish complexity, and it is not beyond the bounds of possibility that one might manage to make alterations to our own domestic welfare system that somehow can get a solution of this nature that falls within the scope of the existing treaties, although I cannot profess to be an expert in that area. As I say, to achieve the full range of objectives here, I cannot see how you could do it without a treaty change.

Professor Sir Alan Dashwood: Chairman, would you like me to address only the first of the Prime Minister's points or all three of them?

Chair: All of them, if it is possible.

Professor Sir Alan Dashwood: Thank you. I agree entirely with what has been said about the first of them. Very long transitional periods were set for Spain and Portugal when they acceded. I think it was 13 years. In the event, it was agreed by everyone concerned that their economic development had gone so far in the early years that it was not necessary to maintain the full period. My understanding of the Prime Minister's letter is that he wants a commitment that this will be the approach taken by the union in the future. That seems to me to be an objective that is achievable and does not require any legal change.

So far as concerns cracking down on abuses, again I would regard this as achievable. It is an objective that it difficult to oppose in principle. There are cases, for example, whereby a third-country national whose immigration status was flagrantly illegal in the host member state was able to acquire a right of residence by marrying an EU citizen exercising their right of movement. These were individuals who were on the point of being deported. Now, you could avoid that kind of outcome by amending the definition of family member or of beneficiaries in the directive that governs these situations, Directive 2004/38, sometimes called the "citizens' directive". Now, would the Court of Justice be likely to strike down such an amendment? It might, but I doubt it, because the Court of Justice is alert to national legislation that, in its view, conflicts with the principles of the treaties, but there have been very few instances in which EU legislation has been struck down. My view would be that that kind of amendment, which is hard to oppose, would get past the Court of Justice.

On the question of entitlement to in-work benefits, I would just mention that so-called benefit tourism should not be a problem in the future, owing to recent developments in the case law. That is in regard to non-economically active migrants. It would be more difficult to restrict in-work benefits, given the principle in article 45 of the Treaty on the Functioning of the European Union, which talks about discrimination based on nationality, but it is worth noting that the precise wording is discrimination as regards employment, remuneration and other conditions of work and employment. That does not necessarily cover the access of migrant workers to the whole panoply of welfare rights.

In my view, it would be compatible with the principles written into the treaties that migrant workers be required to have established a genuine link with the economy of the host member state before they became entitled to the full range of social advantages and in-work



benefits. It is not unreasonable to require a measure of commitment to the host society before a person begins to enjoy all the social advantages of belonging to it. This could be achieved, in my opinion, by amendments both to the directive that I have mentioned, the so-called “citizens’ directive”, and also to regulation 833 of 2004 on the harmonisation of social security schemes.

Now, any temporal limitation would have to be reasonable and my instinct would be that four years is rather too long, because there would be a proportionality test that any such legislation would have to pass and, of course, an amendment along the lines that I have been suggesting might lead to a tussle with the Court of Justice. It would result not in restrictions imposed by the union legislator but the kind of restrictions that, when imposed at the national level, the court has struck down. Would the Court strike down this kind of legislation? Again, it is possible of course, but I am doubtful.

Chair: Could I just throw into the equation the fact that, in the Conservative Party manifesto, there was a promise that a future Conservative Government, which we now have, “would regain control of EU migration by reforming welfare rules”? It then went on to say, with respect to this question of children living abroad of European migrants who are living in the United Kingdom specifically—and the Prime Minister was quite specific about this as well, and said something like “we wouldn’t stand for it”—they should receive no child benefit or child tax credit, no matter how long they have worked in the UK and no matter how much tax they have paid. That has been dealt with by a European Court decision very recently that said that that just would not stand up. I am putting that into the equation to demonstrate, as you have already referred to the European Court, that European Court judgments on these matters ultimately will be extremely important in determining the extent to which you can bring in a treaty change or not. I would now like to ask Peter Grant if he would like to ask a question.

Q132 Peter Grant: Thanks, Chairman. A fairly small but important point I know has been raised in earlier sessions, but I would like to get it on the record for this session as well. Do we need to work on the assumption that anything this is done to affect the rights of EU migrants coming into the United Kingdom or EU nationals already in the United Kingdom will almost certainly have an equal impact on UK nationals either living overseas or seeking to move overseas in the future?

Professor Sir Francis Jacobs: I think I can answer that question, because it seems to me that, to the extent that the problems we have been discussing are dealt with by EU legislation, they are likely to apply to all member states and, therefore, they would affect the position of United Kingdom nationals living in other member states and wanting access to other member states. Insofar as the changes might to some extent be made, as Martin Howe has suggested, by amending the UK system so that the objectives can be achieved by measures that apply equally to nationals from other member states and UK nationals, of course those measures would apply only within the United Kingdom.

Peter Grant: But they would apply to UK citizens as well.

Martin Howe: I would agree. It seems to me that any sort of proposal for reform here, whether amendments of directives or treaty changes, would likely apply across the board. Therefore, in principle, UK citizens resident in other member states would be equally affected or at least there would be greater freedom for member states to take action. To what extent other member states chose to take advantage of those freedoms might be up to them. Only if it was some special protocol or arrangement giving the UK special and different rights would



that not apply, but I am not sure that that is what is being suggested here, in the Prime Minister's letter.

Professor Sir Alan Dashwood: Chairman, I am once again in the number three position.

Chair: I will have to promote you to number one next time.

Professor Sir Alan Dashwood: No, I am not complaining. Whenever I appear in the Court of Justice, because of the tyranny of the alphabet, if I am representing the United Kingdom, I am the last person to speak, which sometimes means that I am the 12th or 14th representative of a member state that the Court has had to listen to.

Chair: There we are. Thank you very much. I would like to ask Kelvin Hopkins to ask the next question.

Q133 Kelvin Hopkins: This is a question to anyone or all three of you. Professor Chalmers has put forward a specific scheme for dealing with the benefits difficulty. I just wondered if you would comment on Professor Chalmers' specific scheme. He thinks he could avoid treaty change by using secondary legislation supported by a declaration. What are your comments about that?

Chair: Are we familiar with Professor Chalmers' view on this scheme or not because, if not, we could pass on to the next question?

Professor Sir Alan Dashwood: We were provided with access to the evidence that had been given previously, so I have certainly seen his written evidence.

Martin Howe: I have read his written evidence. I was a little surprised by his conclusion. I am not so dismissive of it, having read the detail of his evidence. I am not as sure as he is that the Court of Justice would allow changes of this nature to be done by amendment to directives, rather than treaty change.

Chair: Could I just help a little by saying that he gave evidence earlier from Singapore? He gave an explanation there and it may be that you would like to look at the transcript to see what the outcome of that is, in the light of our questions. Maybe we can pass on from that one, on that basis.

Martin Howe: Indeed. Can I just make one further point on the status that Sir Alan touched on? This other issue is the status of EU citizens who bring a spouse or family member into this country. That spouse or family member can get in even when, under our immigration rules, were they a British citizen, that spouse or family member would not be admitted. Sir Alan suggested that could be dealt with by amendment to Directive 2004/38. However, my recollection is that this issue arose well before Directive 2004/38, in the jurisprudence of the Court of Justice relating to free movement of workers provisions, rather than the rights of union citizenships. Therefore, it is probably rather harder to eradicate this problem than merely amending the 2004/38 Directive.

Chair: You will notice when you see it that we did have an exchange with Professor Chalmers about this. I mentioned that I was at a seminar at All Souls College, Oxford, recently and this came up. One of the participants, a professor of law, said that they were aware of the fact that 2004/38 was obviously interpreting a secondary legislation, a directive, and indicated some surprise that that was a departure from what they would have expected, which was an interpretation of the treaties. This will all come out in the wash when you have had a chance to have a look at it. Kelvin Hopkins wants to ask a question.

Q134 Kelvin Hopkins: I have a couple of more points. A year ago, the Prime Minister made two other points on immigrant or migrant workers from the EU. One was the



suggestion that he would like them to have a job offer before they arrived in Britain. I do not think this is specifically a legal requirement, but he would want them to have a job offer. I do not know how you will interpret that. The other one was that, if migrants had not successfully become employed within six months, they should be required to leave the UK. They do not seem to be in the negotiation at the moment specifically, but that kind of change might be very popular with those who are deciding how to vote in the referendum. Would they be possible to enforce without treaty change?

Chair: Sir Alan Dashwood, you must come first on this one.

Professor Sir Alan Dashwood: I am sorry; I really was not complaining. If memory serves, and perhaps Sir Francis may be able to correct me, the original version of article 45 talked about responding to job offers made. I think it was amended. Whether or not, I see difficulty in imposing the requirement that anybody coming in should have to have a job offer. I see difficulty in imposing that, in the light of the wording of article 45, because the non-discrimination provision, as I have suggested, does not necessarily extend to a right of access to all kinds of social advantage. It must extend to all the conditions of employment or any kind of conditions that might impede access to employment. I would find that one very difficult to achieve without treaty change.

The second one, if I have understood you correctly, requires a person, a jobseeker, who fails to find a job after six months to leave. The answer is that we are pretty much in that situation already. Under Directive 2004/38, there is an unfettered right of access and residence for three months. For anything over three months, a person has to qualify in some way. They must have a job, be self-employed, be self-sufficient so that they do not become a burden on social systems or they must be a student.

There is one other rather precarious category of jobseekers. These are people who have been in the country for more than three months and who can satisfy the authorities that they are genuinely looking for a job and have a genuine chance of finding one. If they cannot do that, they can be deported. Vigorous enforcement of the law as it stands would probably achieve that result, though the situation could be made easier by setting a reasonable limit, which would probably need to be flexible, because it may take longer. If you are a highly qualified technician, it might take you a little longer to find the right kind of job than it would take somebody just looking for work in the retail trade. In my opinion, a reasonable and proportionate time limit for jobseekers would be compatible with the existing legislation.

Martin Howe: I agree with Sir Alan on that. There is scope, were we to bother to do it. I say “bother to do it”; that is quite dismissive, but there would be a lot of work and administration involved in such a system of monitoring people as to whether they really were seeking jobs and potentially removing them, either if they were not genuinely seeking jobs or clearly had no chance of obtaining them. A six-month arbitrary cut-off might be difficult to justify.

Chair: Of course, some people could argue that the complexity of all this is such that, with all the permutations that have been described, all the legal implications, Court of Justice judgments and the rest, some might think that it would be rather better to have your own legislation, where you deal with it on your own terms, through your own parliament. I will not ask you for political comment on that.

Q135 Mr Turner: Which other renegotiation objectives, under the other three categories, require treaty change and which require EU secondary legislation?

Professor Sir Francis Jacobs: Are we still looking at the context of immigration?



Chair: We are talking about the other renegotiation objectives under the three other categories requiring treaty change. In other words, do we need treaty change and what requires EU secondary legislation?

Professor Sir Francis Jacobs: We will start off then by taking the topics in the order in which they appear in the letter. The first is under the heading “economic governance” and the objective there is to ensure that measures taken by the eurozone countries will “respect the integrity of the single market and the legitimate interests of non-euro members”. These are to be set out in “legally binding principles”, with “a safeguard mechanism to ensure that the principles are respected”. Others may be better placed than I am to advise on the detail here, but perhaps I could make three points.

The first is that there should be recognition that the European Union has more than one currency. It seems to me that that recognition is already contained, to some extent, in the treaty as it stands and the protocols. The treaty is clear that there are separate categories: member states whose currency is the euro; member states that are not yet in the single currency; and member states that are under no commitment to join it. Indeed, the chapter in the treaty beginning with article 136 is headed “provisions specific to member states whose currency is the euro”, and the position of the United Kingdom is governed by protocol number 15, which guarantees that the United Kingdom is not committed to join the euro and itself sets out the provisions relevant for the United Kingdom. I understand there has been some doubt expressed about the legal force of the protocols to the treaty, so perhaps I could mention in parenthesis that the protocols to the treaty are not in any way subordinate to the treaty itself. In fact, they often contain provisions that are matters concerning a particular member state and, by article 51 of the Treaty on European Union, the protocols to the treaties form an integral part thereof, so what is in the protocol is of equal force with what is in the treaty. There is that degree of recognition already; it could be taken further, perhaps.

The second point I would mention is that there is the principle that there should be no discrimination for any business on the basis of the currency of their country. It seems to me that principle is already implicit in the treaty—it is not spelt out—but the prohibition of discrimination is a fundamental, all-important general principle of law that is recognised across the whole of European Union law and upheld by the court. Again, this could be spelt out but is already inherent in the treaty. The same applies to the requirement regarding the integrity of the single market. The integrity of the single market should not be affected by the different currencies operating within the European Union. The integrity of the single market is also certainly inherent in the treaty.

As regards the safeguard mechanisms called for, the existing system does provide a safeguard mechanism in the form of the Court of Justice. For example, a business that considered it was suffering from discrimination by reason of the currency in which it was operating would be able to take a case to the Court of Justice on a reference from a national court to make that claim. There are also cases taken by the United Kingdom. There was a recent decision in a case brought by the United Kingdom against the European Central Bank, where the United Kingdom considered that the European Central Bank was discriminating in favour of euro states and the court annulled that decision. Therefore, there are safeguard mechanisms available in that shape already.

Martin Howe: With regard to economic governance, the question of whether treaty change is required to implement the objectives or principles set out here depends upon how you interpret them. There are aspects of these principles that are quite difficult to interpret. On one view, they could be considered as merely restating principles already in existing treaties, but can I just point out a couple of areas where, it seems to me, there are considerable



difficulties in interpreting what is intended to be achieved? On one view, if they are meant to achieve a certain objective, it would require a treaty change.

Let me pick up the second bullet point in the Prime Minister's letter: "There should be no discrimination and no disadvantage for any business on the basis of the currency of their country." My assumption is that that is intended to be directed to the kind of case that Sir Francis just mentioned, where the European Central Bank took measures that were intended to ensure that clearance of certain euro securities would only take place within the euro currency zone. In fact, that case was dealt with by the General Court—the lower tier court—and it was resolved—successfully from the United Kingdom's point of view—by that court on the very narrow basis that the ECB did not have power to regulate these kinds of securities yet.

As a result, the General Court never addressed the wider issue of whether this amounted to discrimination contrary to the principles of the single market, so that at the moment at the legal level is unresolved, although the United Kingdom has been successful in heading off this particular attack on the City of London. If you say there should be no discrimination or disadvantage for any business on the basis of the currency of their country, on a simple level, that is already in the treaties. However, if the argument is the kind of argument put forward by the ECB, our measures are designed such that, in order to ensure effective supervision, markets that substantially deal in a certain currency need to be regulated within the currency area that they relate to, ergo euro securities markets clearances should take place within the euro area and sterling ones in the sterling area, etc. That is not necessarily discrimination against companies by reason of the currency of their country. Therefore, if you clearly want to safeguard what appears to be the intention here, one might want rather clearer language and, at that point, one might need treaty change in order to embed it. That is a particularly important point, I think.

There are other points here. Very quickly, the fourth bullet point is: "Any changes the eurozone decides to make, such as the creation of a banking union, must be voluntary for non-euro countries, never compulsory." It says, "Any changes that the eurozone decides to make", so this implies a measure taken by the eurozone countries as a group without involving the other member states.

Chair: It is not a legal entity in itself.

Martin Howe: It is not a legal entity in itself and, on the face of it, appears to be contemplating a measure that only applies to the eurozone states. If it is enhanced co-operation, in principle it cannot affect the rights and obligations of other states anyway. What this might or might not be intended to tackle is what happens if a measure is brought in, a single market measure, for example, or one of the other treaty provisions that applies to non-euro member states—take, for example, bankers' bonuses—but the eurozone, by voting as a bloc or in their collective interests to achieve qualified majority, can vote it through. It binds the other member states. The bankers' bonuses are regarded as damaging to the City and counterproductive because it just forces up base salaries. Nonetheless, that kind of thing would not be prevented by this proposal, unless this proposal was made more stringent in some way to give non-eurozone countries a form of veto. Whether any treaty change is needed on this one, I conclude, depends on whether these principles are intended to change anything.

Professor Sir Alan Dashwood: There is quite a lot to be said about this. This seems to me to be one of the most important elements in the Prime Minister's negotiating agenda, and it is specifically on the issue of whether treaty change is necessary. My answer would be: possibly quite effective mechanisms could be devised that do not involve treaty change to



address the point Martin Howe raised about so-called caucusing by the eurozone countries. There are different ways in which this might be addressed. One would be to generalise the double majority mechanism that has been introduced for decisions by the European Banking Authority. That mechanism was introduced by legislation and it was possible because the banking authority is a creation of the legislator. If a similar mechanism were to apply at the level of the Council, there would have to be a treaty change unless the member states were prepared to reach a political agreement to similar effect, and that also seems to me to be not inconceivable.

One change I would recommend, which goes to some of the points that Sir Francis and Mr Howe made, would be that there ought to be written into the treaty—and this would require treaty change—a principle recognising the primacy of the internal market. In other words, the internal market has primacy over the other activities of the union. If I may complete the story that Mr Howe and Sir Francis mentioned about the European Central Bank's attempt to impose a requirement that clearinghouses that handle trades denominated in euros must be physically located within the eurozone, not only did the UK win its case in the General Court, as we must now call it, on very narrow grounds, as Mr Howe noted but, more importantly, the case was then settled because there were other issues before the court. It was settled in a highly intelligent and satisfactory way, because the European Central Bank and the Bank of England agreed that they would extend their normal swap arrangements to cover this situation. In crude terms, if a clearinghouse located in the UK ran short of euros, and the Bank of England did not have enough, the ECB will lend the euros needed and vice versa for sterling. It seems to me that is a wonderful example of how grown-up arrangements between institutions can resolve otherwise knotty problems in this relationship.

Q136 Chair: Surely if you wanted to change to a double majority voting system, you would need to have treaty change to achieve that? You cannot just make up new rules for voting on the hoof, can you?

Professor Sir Alan Dashwood: I am not suggesting it should be done on the hoof. I am suggesting that the members of the eurozone would agree that, if it were clear that—this is one possible way of doing it—a majority of non-participating member states were opposed to the measure, they would not ask the President of the Council to put the matter to the vote but continue discussions for a certain time, or you could subject this to some kind of mutually politically agreed procedure for referring the issue to the European Council. This could be done with goodwill by way of political arrangements, though clearly it would be more satisfactory if it were written into the treaty.

Q137 Chair: If one were to ask the question relating to double majorities in relation to the red card for national parliaments, there are those who would argue that to change the existing rules and then apply double majority arrangements would be regarded as extremely serious without treaty change. In other words, double majorities change the whole process by which national parliaments would arrive at conclusions.

Professor Sir Alan Dashwood: It would be a benign version of the old Luxembourg compromise, which operated in a similar way.

Q138 Graham Stringer: The basis of the problem here is the oppression of a minority by a majority in the eurozone, but surely there are two categories within the minority. There are those, like the United Kingdom, who have no intention of joining the euro and there is a majority in those people outside the eurozone who sometime in the future



intend to join. I suppose this is a political and not a legal question, but really the only guarantee of the non-oppression of a minority is a veto by one of the minority, given the two classes within the minority.

Professor Sir Alan Dashwood: There is so far no evidence at all of the eurozone voting as a caucus. This might develop in the future because, in fact, the interests of different members of the eurozone diverge. Systematic caucusing might develop in the future, and that is why I think it is useful that there should be a mechanism available to deal with it. It is my view that such a mechanism is not, in practical terms, required at the moment, though it would be useful to establish it in case it should become necessary in the future and also to get people used to its operation. So far as concerns the differences between eurozone members, I think the decisions that are made in relation to a particular measure that is being considered are more likely to be governed by the interests that individual member states in the minority group have with respect to that particular measure than by the fact that many of them, and indeed most of the nine, would hope and expect to become members of the eurozone at some future date. It is their concrete interest in the particular measure that will determine the attitudes they take.

Chair: Could I say that these bells are an indication of the pressure of time. Prime Minister's Questions are coming up and we have some other questions we need to ask. Graham, did you want to ask another one?

Graham Stringer: No.

Q139 Chair: I want to now move on to this question about putting in place irreversible and legally binding commitments to either the treaty change or EU secondary legislation before the referendum takes place. The question of whether or not decisions can be regarded as legally binding in international law is an issue that we discussed with the Foreign Secretary yesterday. The transcript will be available quite soon. There is a question of whether they are in practice irreversible and how far they could modify existing EU law. He dwelt, to some extent, on the question of international law, and came up with a proposal that was to do with it being made binding, which some people would regard as being rather difficult in the context of European law, because it would not be subject to enforcement mechanisms as found in the European treaties. Then there is the other question, which is that the former Director General of the Council Legal Service, your successor, Jean-Claude Piris—

Professor Sir Alan Dashwood: No, my boss.

Chair: Your boss? Well, let us see what you make of it. He was the architect, we are told, of the Danish precedent, and he has been quoted in the *Financial Times* and also in his remarks to the European Parliament as saying that the Danish and Irish agreements were 100% consistent with the treaties at that time. He told MEPs that such accords “cannot add something [to] or modify the meaning of the treaty”. For practical purposes, the idea that we would be able to have legally binding decisions that would be irreversible has, to say the least, been questioned very severely. I would be interested to know what your view of that is, starting with Sir Francis Jacobs.

Professor Sir Francis Jacobs: I have to say that this is a difficult issue but, at first sight, there seems to be much force in that view, in that the treaty provides very elaborate and complex provisions for treaty amendment requiring ratification by all member states in accordance with their own constitutional requirements, which in some cases may involve holding national referenda and the like, which may be unpredictable in their outcome. It does seem difficult to accept that, to avoid that difficulty, you can have an agreement or decision in



advance that the treaty will be amended, if that were the suggestion, where the agreement or decision involves changing the treaty. In relation to the previous examples for Denmark and Ireland, indeed, it could be said that those were clarifications of the meaning of the treaty as it should be understood at that time, rather than substantive amendments to the treaty. It seems to me that a kind of pre-amendment to the treaty would not be appropriate if it led to changes in the treaty.

Chair: Therefore basically you agree with Jean-Claude Piris?

Professor Sir Francis Jacobs: Basically, I think that is so, and it would, in a sense, subvert the national constitutional processes.

Chair: That is extremely helpful, thank you very much. Martin Howe?

Martin Howe: I would agree with Sir Francis on this issue. The treaty itself provides for its amendment via mechanisms that safeguard the constitutional processes of the individual member states. You cannot therefore have a commitment binding on the states to amend it in advance without going through that process. It seems to me that, at most, you could argue you could create a binding obligation on the governments of member states to work towards getting a treaty change through their constitutional process but, if they are unable to achieve that, so be it.

Q140 Chair: The question ultimately could be a matter either for a member state who might have made an arrangement that they then retract because of a change in government or, alternatively, it could be a matter adjudicated on by reference to the European Court, which says, “We do not agree that it was irreversible and binding.” There is a whole series of uncertainties. By the way, we had quite an extensive discussion with Professor Chalmers along these lines, which you will see when the transcript comes out. What is your view on this, Sir Alan?

Professor Sir Alan Dashwood: I do not entirely agree with the other two speakers. The first point I want to make is that the thrust of most of the discussion this morning has been that probably not much treaty change will be necessary. I do agree with Jean-Claude Piris—he and I seldom disagree—that a binding commitment could not properly be made if it purported to have the same effect as a treaty change or if it was incompatible with the treaty. That is what I think he was saying in the letter to the *Financial Times* that you referred to.

What sort of instrument are we talking about to begin with? Very briefly, there are two possibilities. We are talking about a decision by the European Council as such, in other words the European Council acting as an EU institution. The European Council now has the power to take binding decisions, which it takes by consensus and they can only be changed by consensus. In that sense, they are irreversible. The alternative would be a decision by the heads of state and governments of the member states meeting within the European Council, which would not be an act of the European Council but an international agreement in simplified form between the member states. Both are binding.

I can see no difficulty in using that kind of instrument to adopt the interpretative text that is being considered on the issue of ever-closer union. It seems to me that would be an appropriate way of doing it, because it is simply a clarification of the heads of states and governments’ understanding of the treaties in their present form. Many of the other elements that we have been discussing could only involve changing legislation and, again, I can see no difficulty about a commitment at the level of the European Council, possibly with the collaboration of the Commission. If the Commission could be brought on board it could be made more positive. Otherwise it could take the form of an invitation to the Commission to make proposals on certain matters.



In the rather few cases where treaty change may be necessary, for example the introduction of the double majority mechanism that I was talking about or spelling out in terms the primacy of the single market, that would entail treaty change. Perhaps that is not appropriate to do by way of a formally binding act, but it could be done by way of a solemn statement of intention by the European Council. Would that be sufficient? In my opinion, it most certainly would be. It is inconceivable, whether or not the statement is incorporated in an act that is, by its nature, binding, the European Council would give a solemn undertaking as to its future agenda that it would then likely toss aside.

Q141 Chair: It does not alter the fact that there could be elections and a change of government, and therefore you have a different council decision that could be taken at a later date or, for that matter, somebody challenges it and it goes to the European Court, with the uncertainties inherent in that too, surely.

Professor Sir Alan Dashwood: I do not think it would be challengeable. I do not think it is likely to go to the Court of Justice. Of course governments change. That could mean that the consensus had changed, but it would still be a consensus that would have to be debated within the European Council and a new consensus would have to be reached. Perhaps I must qualify what I said in the light of possible changes of government.

Q142 Chair: Because we are getting quite tight on time, I will ask Martin Howe to comment on the discussion we have just had on that issue.

Martin Howe: I agree with Sir Alan on measures that are at a lower level than treaty change. There are mechanisms that could lock them in. However, if we are talking about a treaty change, there really is a fundamental point that, even if all members of the European Council say they collectively undertake, when the next treaty change round comes along, that these changes will be made, they cannot guarantee that result. Under their own national constitutions, either there may be a change of government or a change of composition of the national parliament, which feels it is not willing to accept this, or there might be a referendum. Some of these issues might be quite sensitive, particularly free movement, in some member states where this issue is important to them.

Q143 Chair: We are getting towards the end now. Do any of the other members of the Committee want to ask a question on that? Yes, Sir Francis Jacobs?

Professor Sir Francis Jacobs: I would like to add that I adhere to the provisional view I expressed on the question of amendment. Many of the ideas that have been discussed could indeed be achieved by treaty amendment. The objective must be to see if there are ways in which these changes can be made without formal treaty amendment. The answer, in many cases, is that they can be done by legislation. They may be able to be done by declarations of the European Council. In some cases, it may be simply a matter of practice. The process, for example, of testing subsidiarity could be more effective and so forth.

Q144 Chair: In fact, as Sir Alan Dashwood made clear just now, in response to my question about changes in governments, it has to be qualified against a background of a decision being taken that would then be changed, as Martin Howe has indicated. There are huge uncertainties in this sort of process. Treaty change would be the ideal way of doing it. If there is an alternative, it has to be clear enough. If you are going to present it to the British people in a referendum with the outcome of these negotiations and then say, "This is



definitely going to be completely binding and completely irreversible,” you are asking a very big question to the electorate, are you not?

Professor Sir Francis Jacobs: Given the fact that it will be very difficult to complete the process of treaty amendment before a referendum, the optimum solution may be to see whether these changes can be achieved without treaty amendment where possible—and many of them perhaps can.

Professor Sir Alan Dashwood: It was my point that changes of that kind could be incorporated in a binding act of the European Council—the intention to pursue changes of that kind.

Q145 Chair: With the qualifications we have already built into the discussion, because these are uncertainties and, frankly, the British people have a right to know whether or not the proposals presented to them, whatever they are, are things they can rely on in deciding whether or not they say they want to remain in or they want to leave. That is the background against which this has to be taken. They are not going to be taking into account all the permutations that we have discussed in this particular session. They are going to be asking and answering really vital questions about their futures, are they not?

Professor Sir Alan Dashwood: One of the points I intended to make was that any commitment to amend legislation could be incorporated into a binding act of the European Council, which could only be amended by consensus.

Q146 Kate Hoey: Do you think the British public would have any faith or trust in that?

Professor Sir Alan Dashwood: I hope they would. They ought to be able to. While it may be possible that positions that have been adopted by the European Council and have not been incorporated into binding legal texts might—though I still think it unlikely—be halted as a result of political changes in the member states, it is quite different if the outcome of the Council’s deliberations is incorporated either in a decision of the Council as such or in a decision of governments of the member states meeting within the Council that binds not only the present members of the European Council but future European Councils too.

Martin Howe: I do have one reservation on that point if we are contemplating either an agreement by the heads of state and government in the Council to amend legislation in a certain way to achieve certain objectives or a decision of the Council itself to amend legislation to achieve certain objectives. Even if we assume that everyone there is acting in good faith, and in good faith will try to carry out the intention and make the intended changes, an issue could arise when you get down to the level of detailed legislation, and whether what the Council has agreed is sufficiently clear and precise to allow it to be translated into actual legislation without room for debate on what exactly it should and should not say, which then results in member states legitimately disagreeing as to what precise legislation should be put through to achieve the general objectives of the Council. That is an issue.

Chair: I think we have reached the point where we are going to have to go to Prime Minister’s Questions, but we are extremely grateful to you for your thoughts and observations on this. As I said, Professor Chalmers’ evidence will be available later in transcript. This is going to be an evolving situation, but we are extremely grateful to you for coming and, as they say, the bandwagon will continue to roll. Thank you very much.