

European Scrutiny Committee

Oral evidence: [UK Government's renegotiation of EU membership: Parliamentary Sovereignty and Scrutiny: follow up](#), HC 818

Wednesday 10 February 2016

Ordered by the House of Commons to be published on 10 February 2016

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Members present: Sir William Cash (Chair), Richard Drax, Peter Grant, Damian Green, Kate Hoey, Kelvin Hopkins, Craig Mackinlay, Mr Jacob Rees-Mogg, Alec Shelbrooke, Mr Andrew Turner, Heather Wheeler

Questions [1-47]

Witnesses: *Rt Hon Philip Hammond MP*, Secretary of State for Foreign and Commonwealth Affairs, *Vijay Rangarajan*, Europe Director, Foreign and Commonwealth Office, and *Cathy Adams*, Legal Director, Foreign and Commonwealth Office, gave evidence.

Q1 Chair: Foreign Secretary, thank you for coming this afternoon. Thank you also for handing me last night a copy of the Council legal service opinion on the Tusk package. I have shared this with the Committee, we discussed it just now and we have decided to release it to the public. I should say at the very beginning that it does not change our conclusions. It is generally accepted that the Tusk package is based on an international agreement, not renegotiation of the treaties. Such international agreements can be changed only by consensus and are binding, although enforcement is solely through diplomatic means. More importantly, it is also generally accepted that such an agreement cannot change the existing treaties; it can merely interpret or clarify them. That clarification does not subvert the European Court of Justice's role in interpreting and applying the treaties, although it is hoped it will guide the ECJ's thinking.

It is also generally accepted that this international agreement does not, indeed cannot, bypass the requirement for any future treaty change to be ratified or approved by member states in accordance with their constitutional requirements. The agreement for treaty change in the Tusk package is only timetabled for the—and I quote—“next revision” and that next revision may well include other, more controversial matters. I happen to recall that on 3



February, when I put the case to the Prime Minister in reply to his statement, he said I was wrong. I now move on because, not unnaturally, I do not agree with that proposition. Foreign Secretary, how can an international agreement that purports to make no change to the existing treaties be described as a “proper, full-on treaty change” or a “reform of the EU and a fundamental change in Britain’s relationship with it”? That is the first question, Foreign Secretary.

Mr Hammond: Mr Chairman, I am glad that you found the advice of the Council legal service useful, but I would not like to think that the Committee was relying entirely on the legal advice of the Council legal service and I sincerely hope that the Committee has obtained other legal advice as well.

Chair: We certainly have.

Mr Hammond: In the open spirit that I have displayed, perhaps the Committee would like to share with us any other legal advice that it has, so that we can compare notes on legal advice. From the legal advice I have seen, and the Council legal service is only one element of that, it is clear that legal opinion is that this international law decision will have to be taken into account by the ECJ in any future decision making that it does. It will have the effect of producing a binding interpretation of the treaty by the Heads of State and Government in accordance with the Rottmann judgment. That seems to me to be the important thing here.

Q2 Chair: Thank you very much for that. I rather thought you would give me that answer, so my next question is: what can the Council do if, despite the agreement, the European Court of Justice interprets the treaties in an unexpected way?

Mr Hammond: What we can do in specific cases is use the powers that we have as a member state to go to the Court of Justice and challenge the way the Court of Justice is operating and the interpretation that is being placed upon it.

Q3 Chair: Of course it is out of your control then, is it not?

Mr Hammond: Any process that one conducts through a court is out of one’s control to the extent that one makes the arguments based on the legal advice that one has and takes them to the court. Cathy, do you want to add anything in answer to the Chairman’s question?

Cathy Adams: I might add one thing. As the Foreign Secretary has said, the provisions of the draft decision provide binding interpretive statements that the Court should take into account. That is clear from the preamble of the decision, which draws on the Rottmann case, as the Foreign Secretary has mentioned. Starting from that position, we would say that there is no reason to assume the Court would, therefore, disregard what has been said and what has been agreed.

Q4 Chair: Nor could we assume that it would not.

Cathy Adams: As the Foreign Secretary has said, a court is independent and makes its own decisions. Nevertheless, the member states, in accordance with standard procedures of international law as recognised in the Vienna Convention on the Law of Treaties, which has been recognised directly by the Court of Justice itself, have the power to agree binding interpretations of the treaties.

Q5 Chair: As I said at the beginning of my response to the Prime Minister, this is about voter trust, so I am now going to ask another question: how can the voters, when they vote either to remain in or to leave the EU, be certain that any treaty change envisaged in the Tusk package will be achieved when the necessary approval by all the member states could be blocked following a change in Government or an adverse referendum in other member states, as has happened frequently in the past? Is it not the case that the prospect of treaty change



held out by the Tusk package is not, therefore, irreversible, as has been alleged, and that any inference to the contrary would be to cheat the voters who, when they do vote, need to know that the package is guaranteed and that they can vote accordingly?

Mr Hammond: I would certainly reject that last suggestion. What is irreversible is the international law decision, which will be unanimously made by the 28, registered at the UN as an international legal decision with treaty status and could only be reversed by an equally unanimous decision, i.e. a decision that the UK has concurred in. I should be absolutely clear, lest we were to mislead any potential voters, that nothing in this package depends upon treaty change. It is very clear that it is self-standing. The international law decision is what gives the certainty and the irreversibility. What is being explored is options for incorporating these measures in the primary legislation of the European Union through treaty change at a point in the future. We have always said that that would be desirable, it would be preferable, but it is not essential in order to deliver the irreversibility. That is delivered through the international law decision.

Chair: Though of course the Prime Minister did say that we were going to have full-on treaty change.

Q6 Mr Rees-Mogg: I want to follow up on one point. Accepting that the agreement would be an irreversible international one but that it might contradict elements of the treaties in the view of the European Court of Justice, am I correct in thinking that the interpretation of the European Court of Justice would, under the 1972 European Communities Act, have standing in UK law?

Mr Hammond: I am going to pass that question to my legal adviser because it is a technical, legal one, but let me just say that all the advice I have seen is clear that this international law decision does not contradict the treaties. It is compatible with the treaties and the Council legal service are clear, I think I am right in saying, in the legal opinion that you have now seen, that the decision is compatible with the treaties.

Q7 Mr Rees-Mogg: That is extremely helpful, Foreign Secretary, but can I remind you that just a few months ago every member state of the Council believed that our opt-out applied in relation to the sharing of information from DVLA? The Commission took us to the Court and the Court ruled that our understanding of the treaties and other member states' understanding of the treaties was entirely wrong and that the Commission was right that it was a matter of transport legislation and, therefore, affected by qualified majority voting. Whatever advice you have is advice. That is why I want to get to the specific point. In the event that what is in this agreement is deemed by the ECJ to contradict something within the treaties, am I right in thinking that under the 1972 European Communities Act that interpretation by the Court would have standing in UK law?

Cathy Adams: The starting point, as the Foreign Secretary has said, is that this is an authoritative interpretation. Obviously, the treaties set out general principles and the aim of this decision is to flesh out those principles in certain areas. That, we say and the Council legal service says, is a binding interpretation, which we would expect the Court to take account of. We would say that the Court is required to follow what is in the decision. However, you are right to say that any decision reached by the Court takes effect in UK law through the 1972 Act.

Q8 Mr Rees-Mogg: So we are depending on "expect to take account of". All we can say confidently is that we expect the ECJ to take account of this agreement, and we may be right, but it may turn out that that is not right.



Mr Hammond: The ECJ itself has said in Rottmann that it must take account of the decisions of Heads of State and Government in interpreting the treaties. This was a case in relation to the 1992 Edinburgh agreement.

Q9 Mr Rees-Mogg: “Take account”, Secretary of State. We are taking very careful account of what you are saying in evidence. That does not mean the Committee will agree with it. The two are very different things.

Chair: Indeed, there are some who might think this was a stitch up by the Council, because of the difficulty you have of not having treaty change.

Vijay Rangarajan: I would just make one point. This is covered slightly less by interpretation of the current treaties, which I think is what Mr Rees-Mogg was referring to. This is, as Cathy said, under the Vienna convention, a binding interpretation by the parties who made the treaty itself of what the treaty means, so the analogy is slightly different, perhaps, from the one that you were saying. There are two previous examples of such a binding interpretation and they are the Irish and the Danish cases. In both of those, though challenged, the Court has indeed followed them.

Q10 Mr Rees-Mogg: If I may make one final point, a binding interpretation cannot contradict what the treaties say, can it? It has to be strictly an interpretation.

Mr Hammond: It has to be within the treaties. That is right.

Q11 Mr Rees-Mogg: But the ECJ decides what is in the treaties. That is the difficulty.

Mr Hammond: Perhaps you have a different legal opinion available to the Committee, but Council legal service, the Commission legal service and every other legal opinion that I have seen are clear about this: that the interpretation in this draft international law decision is within the scope of the treaties.

Mr Rees-Mogg: Yes, but if lawyers always got their interpretations right there would be no need for courts.

Q12 Kate Hoey: Foreign Secretary, in the Government’s response to our Committee report, the Prime Minister’s position, it is said, remains that some of the reforms will require treaty change and we must have agreement to such treaty change before the referendum. That was said four times about the need for treaty change. Are we saying now that we do not need treaty change; that the reform is so minimum, even more minimum than most of us thought originally, that it does not even need any attempt to get a treaty change? Is that what you are saying?

Mr Hammond: We would still like treaty change, because it would be neater and tidier to have some of this in primary legislation, particularly the eurozone governance stuff, but we are clear that with an international law decision we have a mechanism that delivers the permanence and irreversibility that we need without treaty change and for reasons that we all understand.

First, in any treaty change process there is a degree of uncertainty because the countries have processes that need to be followed. There would inevitably be a lengthy process to achieve treaty change and where we started from was assuming that we would eventually need treaty change, but in the interim we needed to have something that was robust, legally bomb-proof and irreversible to get us through to the point of treaty change. The logic, inevitably, is that, once you have constructed that interim model and tested it, it is no longer necessary to have treaty change in order to deliver the required outcome. The international law decision delivers that legal certainty and irreversibility



Q13 Kate Hoey: We have just heard that that is not necessarily true. Is the Prime Minister no longer sticking by what he said: that we must have agreement to such treaty change before the referendum?

Mr Hammond: We are seeking treaty change.

Kate Hoey: Before the referendum?

Mr Hammond: No, of course we cannot get treaty change before the referendum.

Kate Hoey: “Agreement on that treaty change before the referendum”—that is what he said four times.

Mr Hammond: We would like to see in the texts agreement to treaty change in due course, at the next opening. This will not change the substance of anything. It will take what is currently an international law decision and build it into the treaty at the next opening of the treaty. That would be the neatest and tidest way of doing this.

Q14 Kate Hoey: Are you going to get that agreement to treaty change before the referendum?

Mr Hammond: I do not know. There is a discussion under way as we speak.

Q15 Kate Hoey: If you do not, what is the Prime Minister’s view then going to be?

Mr Hammond: If we do not, it will not make any difference to anything.

Q16 Kate Hoey: It does not make any difference. That is what you are saying, so why did he say that?

Mr Hammond: If you check the record, that is precisely what I have just said. The international law decision will give us the binding and irreversible position that we need. Having it enshrined in the treaty at the next opening would be a nice-to-have; it would tidy it up; it would build it into the primary legislation of the Union, but it will not change the situation that we find ourselves in.

Q17 Kate Hoey: I appreciate that that is what you said. I am trying to get at whether the Prime Minister’s position has changed, because he was very clear that we must have agreement to such treaty change before the referendum. You are now saying that there could be agreement; there might not be agreement.

Mr Hammond: The position we are in is that we can achieve the effects of treaty change through this international law decision. That will be binding immediately upon the completion of our referendum, so it will deal with what would otherwise have been a very lengthy gap, which we would have had to deal with to have a credible proposition here, because I think everybody is aware it would take years to achieve and ratify a treaty change. This gives us the certainty and the irreversibility that we need even before we get to the question of treaty change.

Chair: We must adjourn because of the Division, as long as it is not a pig in a poke.

Sitting suspended for a Division in the House.

On resuming—

Q18 Kelvin Hopkins: Foreign Secretary, is full-on treaty change amending the voting rules in the Council not essential to give non-eurozone member states proper protection from eurozone member states overriding their interests; that is, to protect us from domination by the eurozone states?



Mr Hammond: This is a very important issue and it has been at the forefront of our negotiations. The provisions in section A of the draft international law decision, the declaration by the Heads of State and Government, go precisely to this point. Rather than seeking to amend the voting procedure, where a supermajority voting procedure is already enshrined, the international law decision seeks to carve out the protections that we need, and that is what you see in the draft before you. We have two egregious examples in real life that we can refer to: the attempt by the ECB to restrict the clearance of euro-denominated financial instruments to banks established in eurozone countries only, fortunately ruled unlawful by the European Court of Justice; and the attempt last year to force us to contribute to a eurozone bailout of Greece in the face of clear assurances we had received that non-eurozone countries should not be responsible for such actions.

This international law decision puts beyond doubt those and other protections that we need: that the operation of the single market must be protected, that discrimination on the basis of currency of country of domicile or operation cannot be permitted, etc. We think that this achieves what needs to be achieved in relation to the eurozone governance process.

Q19 Kelvin Hopkins: You have drawn two examples that show there is a danger there. Indeed, the Prime Minister recently made the obvious statement that the Union is a multi-currency union and this caused feathers to fly in the Commission. Is there not still some division of views, some frisson there?

Mr Hammond: There is always a sensitivity about declaratory statements. That the Union is a multi-currency union is a fact beyond dispute and it is included. It is clear from this text that that is acknowledged; it cannot not be acknowledged. Of course, it raises sensitivities because all but two countries in the Union are under an obligation to move towards joining the euro. For many members of the eurozone, it is a very important matter of principle that those countries that are not in the eurozone and that are not Britain and Denmark, which have the permanent exemptions, should continue to be committed, ultimately, to membership of the eurozone.

Frankly, this is a piece of grief that does not concern us. We need to be clear about Britain's exemption from this process, and the Danes need to be clear about their exemption. We need to look at the arrangements for governance of the eurozone to ensure that, while the eurozone does what it needs to do—and, as we have said many times before, it is in our interest that the eurozone is successful and the euro is a stable currency—it does not transgress on the vital interests of the non-eurozone countries, of which Britain and Denmark are the two permanent examples.

Q20 Kelvin Hopkins: Sweden, the Czech Republic and Poland are countries that have no prospect of wanting to join the euro. In fact, they have said to us that they do not intend to join the euro. Do we get some support from them? They have their own currencies and would surely agree with the Prime Minister that it is a multi-currency union.

Mr Hammond: Yes, we do get support from them. Of course the other non-euro countries that are nonetheless obliged, ultimately, to move towards membership of the euro do want to protect their position as non-euro countries in the interim period, which could be a very long time, as you have suggested, for some of them. They see their interest as being aligned with ours in seeking to ensure that the interests of the non-eurozone countries are properly protected, that the single market is not undermined and that the measures of integration within the eurozone do not adversely affect the non-eurozone countries.



Q21 Kelvin Hopkins: Under the proposed emergency brake, what happens if the Council is not successful in seeking and finding a solution to the issues raised in a reasoned opposition? Things would come to an impasse then, surely.

Mr Hammond: There is a political and a legal answer to this question. The political answer is that in the history of the European Union, when there is a mechanism like this, referring things to the very top, to the leaders, and a large member state has a fundamental problem with something, a solution has always been found. One can criticise the European Union for all sorts of things, but in the end it had shown remarkable agility and flexibility in resolving problems that, at first glance, are irresolvable.

The legal answer is that, on the basis of the international law decision, if we believed that the principles protecting our interests, as set out in section A of this decision, were not being observed and the European Council had failed to act in order to protect us following a use of the emergency brake, we would go to the Court. The principles that are set out in this international law decision have to be enforced by the Court and we would be able to go to the Court, present to them the evidence that the principles had been breached and seek a remedy from the Court.

Q22 Heather Wheeler: Could I bring you back to the business about if the Commission announces its intention to propose secondary legislation, as it has for the free movement emergency brake? Is it not true that there can be no guarantee that it will be adopted prior to the referendum, nor that the European Parliament, which has made no declaration on this as part of the Tusk proposal, will agree to it?

Mr Hammond: Let us be clear about the first part of your question. It is clear from a practical point of view that, unless the referendum was very long postponed, it is unlikely that it would have been adopted before a referendum. In fact, just thinking on my feet through the logic, the proposal in this document is that it will only come into effect after our referendum. When we notify the Council secretariat that the referendum has been conducted and that the decision has been to remain in the European Union, it will trigger the coming into effect of this decision, so it is the case that it would not be legislated until after the referendum.

As far as the European Parliament is concerned, the Parliament and the leaders of the Parliament are a part of this process. They are part of the political discussion that is now going on and they do not exist in a vacuum, of course. The Parliament consists of representatives of political groupings, senior representatives of which are sitting in the European Council and will be having this discussion with us next week in the European Council. They are not on the outside. They are on the inside of this process and we have a high degree of confidence that, if this package is agreed, it will be agreed on the basis that the leaders of the factions in the European Parliament will be, effectively, part of the deal, part of the process of agreement.

Q23 Kate Hoey: The Tusk proposal identified two instances where treaty change is to be contemplated at the time when the next treaty revision happens. When do you envisage that any such treaty change might or could come into force? Are we talking 20 years, 10 years?

Mr Hammond: This is in the realms of speculation, but there are many people who believe that measures of eurozone integration will, at some point, require treaty change. It is also possible, of course, that treaty change would be required for the accession of a new member state. I cannot put a timescale on it, but, looking backwards, I would observe that there have been quite a substantial number of treaty changes in the EU's history. As I always say to my colleagues who say, "We cannot talk about treaty change", the British people's observation would be that we have had nothing but treaty change for the last 25 years and I

find it difficult to imagine that the European Union will be able to evolve and maintain effectiveness without, at some stage, needing to change the treaties.

Q24 Kate Hoey: Can I ask you about the Danish precedent? It is used as a way of ensuring things are definitely going to happen, but the former director general of the Council legal service who was involved in drafting it stated that the Denmark precedent was only used to clarify the meaning of already existing treaty provisions. Is it not then the case that, by saying that the Tusk proposal follows the Danish example, you and the Prime Minister are accepting that the clarification and the principles contained in this whole Tusk package add nothing to the existing treaties?

Mr Hammond: What it does is clarify and interpret in a way that is authoritative. In *Rottmann*, the court is clear that it must take into account an authoritative interpretation by the Heads of State and Government. Clearly, as Mr Rees-Mogg has already suggested, an interpretation has to be an interpretation within the confines of the primary piece of legislation. It cannot contradict the primary piece of legislation. I am not a lawyer, but my understanding is that, so long as it is interpretive—that is to say, does not contradict the document it seeks to interpret—it will be authoritative when the court considers it, as it did in the *Rottmann* case.

Cathy Adams: That is right. The only thing I would add is to note that some of the provisions of the decision seek to impose obligations on the members of the EU when they act within the Council in looking at legislation. They are imposing obligations of conduct, in that respect, on what they will do, which is slightly different from an interpretive measure. We and the Council legal service say that is a binding obligation on the member states to act in a certain way. This is obviously slightly different from what was done in the Denmark and Ireland decisions, but the principle is exactly the same, so there is no reason to think that the legal consequence is different.

Q25 Kate Hoey: Was the former director general wrong then?

Mr Hammond: I think someone has already said this afternoon that you can get as many legal opinions as you can afford lawyers. We have clear advice from the current Council legal service, Commission legal service and, indeed, from independent academic lawyers, which underpins and supports the interpretation that we have.

Q26 Kate Hoey: Are you not glad that the British people are not making their opinion to either remain or leave on the basis of legal opinion but on the basis of instinct and how they feel?

Mr Hammond: I hope that the British people will want to be informed by the facts and, clearly, if there is an overwhelming weight of legal opinion in one direction I would expect people to be influenced by that.

Q27 Kate Hoey: And trust it?

Mr Hammond: These are legal opinions about what is likely to happen if the issues come to court. There will be people in the forthcoming referendum campaign who are suggesting outcomes. Where there is a clear weight of legal opinion on one side or the other of the argument, I would expect the public to be persuaded by the clear weight of legal opinion. Where opinion is more balanced, clearly people will take a judgment.

Chair: I think we can also say that we have very strong legal opinions.

Q28 Craig Mackinlay: Foreign Secretary, you said that what the Heads of State are proposing here would be interpretive, but it cannot conflict with the primary document, the



treaty. We are saying a lot about abandoning ever closer union. That would obviously be completely counter to one of the first lines in the treaty and one of the first duties of the ECJ when it comes to its pronouncements. I am struggling to find how any agreements that we are having outside of treaty change could be at all persuasive to changing that first line of every treaty.

Mr Hammond: No, I do not think that is correct. The “ever closer union” language in the treaty is preambular. It is not in the operative clauses.

Q29 Chair: No, it is not. It is in Article 1 of the TFEU.

Mr Hammond: I stand corrected; it is in Article 1. The document issued by the President of the Council goes to some lengths to explain what that means in the context of the treaties and to explain that it does not bind the United Kingdom—or, indeed, it suggests, anybody else, but the important thing for us is the United Kingdom—to any kind of closer political union. In the international law decision we have as clear a statement as we could expect. In drafting this document, the Council will have been guided by the advice of the Council legal service and, bluntly, would not have been allowed to put out a document that the Council legal service believed contradicted the treaties.

Q30 Chair: On the substance of the question, removing the words “ever closer union” makes not one jot of difference, not one word of difference, to any of the existing treaties or laws that are part of the status quo. Surely you accept that. It is only for the future.

Mr Hammond: There are two things about ever closer union. First, it has a symbolic significance and the fact that we are talking about it rather demonstrates that. Whatever operative effect it has in the treaties, it is of symbolic importance to us in the United Kingdom. Secondly, the ECJ has referred to the principle of ever closer union in judgements that it has handed down, not frequently, but there are recorded occasions when the European Court of Justice has referred to that principle.

Vijay Ranganathan: If I may, you are both right, but I will clarify one important difference. “Ever closer union” does come in the preamble and it is not as binding, but it is resolving “to continue the process of creating an ever closer union”. It is a forward-looking aspiration, which is one of the things that the international law decision does indeed interpret and interprets very clearly, as the Foreign Secretary said. The part in Article 1 just says “This treaty”—the previous treaty that was ratified—“marks a new stage in the process of creating ever closer union”. The two do quite different things.

Chair: We will park it at that.

Q31 Richard Drax: What a tragedy that we need banks of lawyers for our great country in the first place, what an utter tragedy. I welcome a Eurosceptic Foreign Secretary who is doing his best for our country to this Committee. How nice to see him here.

The Prime Minister has said many things and has told the Government that we would look to put beyond doubt that the Parliament is sovereign. It has been reported that as part of this a constitutional court might be created modelled on the German constitutional court. I quote Lord Neuberger: “A recipe for complication, for cost and for unnecessary duplication”. Sir Francis Jacobs: “If the EU is to work at all then EU law has to prevail over the law of the member states. If there were 28 member states each taking a different view of what European Union law should mean, then it would be impossible for the European Union to function.” I think we all know that. My question to you, Foreign Secretary, is: how would such a court protect the sovereignty of Parliament?

Mr Hammond: As the Committee knows, the Prime Minister has set out a plan to change UK domestic law to make clear that Parliament is sovereign and that United Kingdom



courts cannot be bound by the EU Charter of Fundamental Rights. That is a separate process from the one that we are engaged in here. This is not something we will be negotiating with the European Union or setting out in a document agreed at 28. It is something that we will do unilaterally in the UK and the Secretary of State for Justice is leading that process. The model that we start from is the observation of the situation of the German constitutional court. Many people in this country admire it and want to understand how it is possible for the Germans to enjoy the protection that their constitution and their constitutional court affords them while still being active members of the European Union.

Q32 Chair: You do not seriously believe that, do you?

Mr Hammond: I hope you are not suggesting, Mr Chairman, that I would say anything to this Committee that I did not seriously believe.

Q33 Chair: I am only saying that, as regards the German condition, it is based on their own constitutional arrangements. They have never really gone anywhere near putting the European Court of Justice in jeopardy.

Mr Hammond: It may well be the case that the German constitutional court has never tested this boundary in a decision, but my understanding—and I am not an expert on German constitutional law and I will defer to you, Mr Chairman—is that it is clear on paper that the German constitutional court has that power. The fact that it has not tested it is interesting but not, I would suggest, definitive. The Secretary of State for Justice is charged with looking at this model and other models and coming up with a proposal that will enshrine in domestic law the sovereignty of the United Kingdom Parliament.

Q34 Richard Drax: Foreign Secretary, it says it here and it is so right: “If the EU is to work at all then EU law has to prevail”. Do you not think that is a purely common sense and logical conclusion, if the EU is going to work in the way that it wants legally, yes or no?

Mr Hammond: That is the opinion of Lord Neuberger.

Q35 Richard Drax: Is it not your opinion?

Mr Hammond: I am not a judge. I am not qualified to pass an opinion on complex issues.

Richard Drax: I am asking for common sense, Foreign Secretary, not a legal opinion.

Mr Hammond: We are talking here about a very complex area of conflict of laws and I am not sure that I am qualified to challenge and analyse Lord Neuberger’s decision, but it is important that I am clear that we are doing two separate things here. We are doing a renegotiation with the European Union. That is a discussion with the European Union to get to an agreed position at 28. Separately, we are carrying out a process unilaterally in the United Kingdom, which we will deliver through our own domestic law, which is the responsibility of the Secretary of State for Justice—

Richard Drax: Our own domestic law has been overruled on many occasions, has it not?

Mr Hammond: —and which will come in time, sequentially. It will come after we have completed this process.

Q36 Richard Drax: Has our own constitutional law not been overcome in the European Court on many occasions already?

Mr Hammond: It depends what you mean. Do you want to answer that question?

Richard Drax: Have our courts been overruled? Our courts have been overruled, have they not?



Cathy Adams: It is our own law that gives the powers to EU law, so I would say that it is through the measures enacted by Parliament in 1972 that European law takes effect.

Chair: Including over an Act of Parliament in the Merchant Shipping Act 1988, under Factortame, when Lord Bridge made it absolutely clear that we had voluntarily agreed, under sections 2 and 3 of the European Communities Act, to assume those obligations. I cannot see how a constitutional court, without a written constitution and the repeal of the European Communities Act 1972, could possibly be reconciled with what we have just heard, because it would entail leaving the European Union, as Sir Francis Jacobs made clear on the *Today* programme.

Q37 Craig Mackinlay: Foreign Secretary, given that we already have the ability for blocking minorities in the Council of Ministers—generally, two big states and two smaller ones can form that blocking minority—I want to investigate what this new red card proposal will mean in reality. Will it be easier to achieve than the blocking minority we have? In my mind, getting 16 countries together sounds like a very tall order. What are the real practicalities of that coming into being at any time, frankly?

Mr Hammond: It is a measure that will require a wide sense of agreement across the European Union. My perception—and this is a political observation—is that the European Union is changing. There are many more Governments around the European Union, many more elected representatives around the European Union, many more populations around the European Union that think in a more sceptical way about the European Union than there were even a few years ago. The tide is running in a certain direction.

I will not name countries, but I did the exercise on Saturday and can think of nine countries that would instinctively align with us on most of these issues. That is not 55% of the parliamentary chambers in the European Union, but it is not a bad starting point for a discussion and it is a very, very, very long way from the characterisation of Britain just a few years ago as always being on its own on these issues. The truth is that the arguments about Europe are being won: the argument that Europe needs to focus less on social mechanisms and more on being competitive, creating jobs, looking outwards to open markets and more trade; that Europe needs to be more accountable; that there needs to be less regulation from Brussels; that more powers need to be exercised by the member states, fewer be exercised from Brussels. These arguments, which a few years ago were characterised as slightly strange British arguments, are now mainstream in many countries of the European Union, including countries that have traditionally been regarded as euro federalist.

Chair: Well, thank heavens some of us have managed to move the argument in the opposite direction.

Q38 Craig Mackinlay: On the immigration aspect of the deal, I am going back again to the interpretation where that would be completely contrary and in conflict to the treaties. How sure are we that the European Court of Justice would not simply overturn whatever we are proposing here? Going back to the 55% blocked by other Parliaments, how do we know that other Parliaments would not get together against us to stop the secondary legislation required for us to get the freedom that we are looking for on immigration?

Mr Hammond: As I said earlier, on the latter question, there is a political package being agreed here and we have to assume that those who are engaged in this effort, if we get to a solution and a deal, will get there in good faith and do what they have all committed to do, which is then taking it through the process.

In answer to your question about the robustness, essentially, of the mechanism that is being proposed, this is the most controversial part of the package; I think that is well known

and understood. A huge amount of intellectual energy, both here and across the European Union in many member states, in the institutions, has gone into trying to find the best way forward, and we believe that the measures that are included in this proposal are robust.

They deal with access to a set of benefits, our in-work benefits, which have a unique character. They are not part of the package of social benefits, as that term is understood in most member states: pensions, sickness and unemployment benefits. They are tax credits. That is what they are called, tax credits, paid to people in work to top up low wages, the effect of which has been to make the UK an unnaturally attractive market for people with low skills and low earning capability to approach, and we need to undo that. I make no bones about this: we are greatly helped in this exercise by the fact that no one else in the European Union operates a system like this. It is almost unique in the way it works and, therefore, it is possible to design a regime that addresses it without sacrificing what others would regard as important principles.

I think we have the balance about right. I spent Friday and Saturday with my 27 counterparts and, talking to people around the room, I will not say everybody is delighted but, broadly, the mood was that those countries that could be expected to have been critical of this approach were impressed with the way the Council had managed to find a solution that addressed the UK's needs without trampling roughshod over their cherished principles. We have something here that is workable. There are some refinements still to do and the discussion is still under way, but we have the basis of a workable deal in this section.

Chair: Now it will be down to the voters eventually.

Q39 Alec Shelbrooke: Foreign Secretary, in terms of the social benefits and free movement, is it not the case that the application of the emergency brake is conditional upon, first, the agreement of the Commission to make a proposal; secondly, a qualified majority of the Council to adopt that proposal; and third, the Court of Justice, which can be asked to rule whether or not the threshold condition has been met? Does the issue of migration of EU nationals not remain in the hands of the EU institutions and will it not require treaty change to make it judge-proof and guaranteed?

Mr Hammond: The Commission will have to look at the proposition the member state has put forward, but the principles are set out in this international law declaration and the Commission will have to look objectively at whether the member state in question does indeed face the challenges and the problems set out in the document. We think that is a process that the Commission will be able to do objectively.

It is also important to be clear that, in one of the accompanying documents, the Commission sets out its view that the UK has already satisfied the condition. Without prejudice to what happens on future occasions, right now, with the problem that the UK faces, which has been largely the trigger for this whole process, the Commission has set out clearly its view that we satisfy the conditions laid down in the ILD.

Q40 Alec Shelbrooke: Thank you for that. Bearing in mind what you have just said there about where it lies with the Commission, I just want to probe you on the hypothetical of what recourse the UK would have if the Commission refused to make a proposal for the emergency brake to be applied.

Mr Hammond: On a future occasion?

Alec Shelbrooke: Yes, bearing in mind what you have just said.

Mr Hammond: To the court.

Alec Shelbrooke: To the ECJ?

Mr Hammond: Yes.

Q41 Damian Green: I want to ask about competitiveness, which is the one bit of the agreement we have not discussed, but first I have a thought on the legal aspects. I have to say I slightly part company with Mr Drax. I think it is good that we live under the rule of law and, it seems to me, an essential part of having the rule of law is that you need lawyers to argue about what the rule of law operates.

Richard Drax: That is not the point I was making.

Damian Green: Well, it sounded like you did not like to work under the rule of law.

Richard Drax: That is a ridiculous thing to say. I did not say that at all.

Damian Green: Yes, you did.

Chair: Can we stop the discussion?

Damian Green: The Chairman made a statement, before we started discussing the legal aspects, where the word “we” was slipped in as though that were a Committee statement. I should make it clear that that was the Chairman’s personal statement, which the Committee had not seen before he made it. Clearly, though, as ever, it expressed his view very eloquently.

On competitiveness, straightforwardly, what difference is going to happen here? Everyone is in favour of competitiveness: the Commission has said it has been for years; successive British Governments have said they are in favour of competitiveness. What difference will anyone see, in practical terms, because of this agreement?

Mr Hammond: In the competitiveness section, it is quite right to say everybody is in favour of competitiveness. I can say, without exception, there is agreement across the European Union that the Union has to become more competitive or it will be failing its populations. It is also true to say that we are pushing at a half open door in another sense, which is that the institutions that have so burdened our competitiveness in the past have started to correct their behaviour. This Commission, in its work programme, in its approach to legislative proposals, has shown that it is going to be a very different Commission from the Barroso Commission.

The challenge for us is to move beyond a relatively benign situation. I am not suggesting there are not massive improvements still to do, but the mood music is relatively benign at the moment. That is a function of Europe coming out of a period of very nasty recession, which has cost millions of jobs and created huge unemployment across the European Union. That has put the focus, quite properly, back on the necessity of job creation, opening markets, supply side reforms, etc. We need to make sure that, to use the Prime Minister’s language, this change of mood is baked into the DNA of the European Union so that a future Commission cannot lapse back into the old ways of thinking that this is rather more about dividing the cake than baking a bigger cake. We need to keep the institutions of the European Union and the European Union itself firmly focused on the need to keep growing the cake and that is what this is all about, I would suggest.

Q42 Chair: So it is the great European bake off; is that the idea?

Mr Hammond: I am not sure, Mr Chairman, in which role that casts you.

Chair: I will leave you to reflect on that one.

Q43 Peter Grant: Good afternoon, Foreign Secretary. I want to go back to the concept of sovereignty. I wish we had more time to investigate this idea that Parliament will legislate to make Parliament sovereign, because if Parliament is already sovereign it does not need to, and if Parliament is not already sovereign then how does it have the right to declare itself sovereign? That might be one for the Constitutional Affairs Committee to get its teeth into.



You will be aware from the Backbench Business Committee debate last week, for example, that the concept of absolute parliamentary sovereignty as espoused by the Prime Minister on numerous occasions simply does not wash in Scotland. I cannot speak for other parts of the UK, but in Scotland it does not apply as far as we are concerned. Incidentally, that got support from Jacob Rees-Mogg, which surprised me and, I think, some of his colleagues at the time. Within that context, there are clear indications now that the people of Scotland could vote by 60% or more to stay in the European Union. Yet, because of the way that your Government chose to frame the legislation, we could be told “You have to get out, because of the way that people in other nations of the UK have chosen to exercise their vote.”

Could I put it to you that that is not an assertion of any sovereignty? That is a betrayal of the sovereignty of the people of Scotland, as it would be a betrayal of the sovereignty of the people of Wales, England or Northern Ireland if the same thing happened to them. How do you defend creating a situation that has the possibility to completely fly in the face of the sovereignty of the people we are elected to represent?

Mr Hammond: I reject that. Our constitutional settlement is one that reserves certain powers for the United Kingdom Parliament, in which Scotland, Wales, Northern Ireland are represented, and devolves other powers to the devolved Administrations. It is clear that this question is a reserved matter. It will be voted on by the people of the United Kingdom. Of course it is possible that particular nations and particular regions of England will vote in different ways on this issue, but in the end the issue has to be decided by the people of the United Kingdom, just as other issues of national importance, including who forms the Government of the United Kingdom, are determined by the votes of all the people of the United Kingdom.

Q44 Peter Grant: Could I follow up on that, Secretary of State? You appear to be saying that, in respect of matters that are reserved for the United Kingdom, the Government’s position is that the United Kingdom Parliament has the absolute right to legislate in a way that has a potentially detrimental impact on Scotland even if it knows, through a referendum, that a significant majority of the people of Scotland do not want that legislation to take place. Is the Government’s position that the constitutional settlement is that the will of Parliament overrides the will of the Scottish people, as expressed in a referendum on EU membership?

Mr Hammond: I do not accept your premise that it would be acting in a way that was detrimental to the interests of Scotland. The interests of Scotland are no different from the interests of the United Kingdom, the interests of England, of Wales, of Northern Ireland. This is a matter that everybody in the United Kingdom must consider and everybody must reach an opinion on. It is a matter that can only be decided at the level of the United Kingdom.

Q45 Peter Grant: Not necessarily, but we may come to that later on.

Mr Hammond: The question is whether the United Kingdom should remain a member of the European Union. It is the United Kingdom that is the member state of the European Union and it is only the people of the United Kingdom who can decide that the United Kingdom should cease to be a member state of the European Union.

Q46 Peter Grant: Do you regret at this point, Foreign Secretary, being part of a campaign that less than two years ago persuaded the people of Scotland that being in the United Kingdom was the only way to protect their membership of the European Union, when it is quite clear the legislation that your Government have passed through Parliament is creating a situation where being part of the United Kingdom is becoming the biggest single



threat to Scotland's continued membership of the European Union? Do you regret your part in that campaign?

Mr Hammond: Scotland is not a member of the European Union. The United Kingdom is a member of the European Union. The point that was being made in the Scottish independence referendum, quite properly, a matter of fact, was that, if Scotland had voted to become an independent nation, apart from now being a bankrupt nation on the back of a 94% decline in oil fiscal revenues, it would have to apply ab initio for membership of the European Union and would have to comply with all the requirements that the European Union makes of new candidate members. This would include a very lengthy process, all sorts of compliance requirements and an obligation to become a member of the euro currency zone.

Q47 Chair: On that note and before we finish, I will just say that there are obviously two sides to the argument. There are those who may wish to remain in and those who wish to leave. As far as the fundamental question is concerned, when they go to the polling booth they will need to know that, when they are making that decision, they can be guaranteed that the outcome is something on which they can rely. For those who want to leave, of course, the real question is: do you want to govern yourselves in your own Parliament and not have regard to the accumulated obligations of the European Communities Act? That is the fundamental question for them. The others, who wish to remain, will then be faced with the status quo, with a prospective but not guaranteed reform proposal. That is where we stand. I am very grateful to you for coming, Foreign Secretary.

Mr Hammond: I am grateful for the opportunity to give evidence to the Committee. I suspect that, alongside those who wish to remain and those who wish to leave, whom you have just characterised, there will be a considerable number of people who are open-minded about the issue. They will want to listen to the arguments not only about sovereignty but also about economic wellbeing and national security, and will want to weigh them in the balance and make a rational decision about whether to stay in or leave, recognising that if we leave we have left forever. If we stay in, we can continue to fight for further reform and further change to the European Union, to make sure that it is the kind of European Union that works for Britain, not just now but in the future as well.

Chair: Thank you very much, Foreign Secretary.