



Implementing the Lisbon Treaty

Standard Note: SN/IA/5331

Last updated: 8 February 2010

Author: Vaughne Miller

Section International Affairs and Defence Section

Preparation for the entry into force of the *Treaty of Lisbon* began shortly after the Treaty was signed on 13 December 2007, even though it was far from clear when or if it would be ratified by all Member States.

The Treaty finally came into force on 1 December 2009, introducing new institutional positions such as the President of the European Council and the European High Representative for Foreign Affairs and Security Policy.

The European Parliament has yet to achieve its full Lisbon composition. The new Commission is soon to be confirmed, following European Parliament hearings in January 2010. The European Council has a new status as a Union Institution and the Council, presided over by the Spanish Presidency, is seeking to define its relationship with the new High Representative. Other institutions, such as the Courts and the Committee of the Regions, have adapted their internal procedures to take account of new powers.

In the UK new scrutiny procedures are to be drawn up and Government guarantees made during the passage of the *European Union (Amendment) Bill* have already been questioned.

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to [our general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

Contents

1	Implementation preparations and concerns	3
1.1	2007	3
1.2	2008	4
1.3	2009	5
2	New institutional posts	6
2.1	President of the European Council	6
2.2	Union High Representative (HR) for Foreign Affairs and Security Policy	10
	The Haiti test case	12
	The European External Action Service (EEAS)	13
3	The new Commission	14
4	The European Parliament	26
4.1	New MEPs	26
4.2	Relations with the Commission	26
5	Other institutional changes	27
5.1	EU Courts	27
5.2	Committee of the Regions	27
6	The Spanish Presidency	27
6.1	Rotating Presidency relations with the European Council President	27
6.2	Presidency plans	28
7	Other Lisbon developments	29
7.1	The citizens' initiative	29
7.2	Trade agreements	30
8	The scrutiny of EU business in the UK Parliament	30
8.1	European Scrutiny Committee proposals for change	30
8.2	Ministerial correspondence	35
8.3	The opt-in scrutiny procedure is put to the test	45

1 Implementation preparations and concerns

The Lisbon Treaty introduced potentially important changes to the institutional arrangements of the EU, but was vague about implementation details. The result is that some concerns raised very soon after the conclusion of the Treaty in 2007 have still not been resolved.

1.1 2007

Preparation for the implementation of the Lisbon Treaty began as early as 2007, just after Member State leaders had signed the Treaty and when it was still expected to come into force on 1 January 2009. The Slovenian Government, which was about to take over the EU Presidency, was concerned about the lack of clarity in the Treaty with regard to the main new posts of President of the European Council, the foreign policy High Representative and the Secretary-General.

Igor Sencar, Slovenia's EU ambassador, speaking at the European Policy Centre think tank in November 2007, said:

The questions run from pinning down the exact powers of the EU president; agreeing who the president will be; to sorting out the funding, personnel and scope of the diplomatic service as well as looking at issues such as whether the EU's police body, Europol, needs to be adjusted and how national ministers will fit into the EU decision-making process.¹

Mr Sencar indicated that the issues would have to be dealt with by EU leaders with a "common view" drawn up by the end of 2008. A "common view" was not achieved, however, and the debate over the role of the two main posts continued well beyond the end of 2008.

The December 2007 European Council Conclusions stated that:

The European Council will take stock of progress on necessary preparatory work when appropriate so as to ensure the full functioning of the Treaty as soon as it enters into force. It underlines the comprehensive nature of this exercise and consequent need for a single framework as well as political guidance at the highest level. Technical work will start in Brussels in January on the basis of a work programme which will be presented under the authority of the incoming President of the European Council.²

While the Slovenian Presidency and the incoming French Presidency consulted over the preparations for an anticipated smooth entry into force of the Lisbon Treaty on 1 January 2009, implementation was in fact far from assured, with Ireland due to hold a referendum and three other countries with possible constitutional problems that could have delayed or prevented implementation. In addition, politicians, academics and commentators were already voicing criticism of the recently approved political arrangements in the new Treaty.

Dr Andreas Maurer from the German thinktank *Stiftung Wissenschaft und Politik* thought that if the post of EU President were to be effective, it ought to have its own ministry with personnel, administrative and financial resources, none of which are mentioned in the Lisbon

¹ *EUObserver* "Unclear EU treaty provisions causing 'nervousness'", 28 November 2007 at <http://euobserver.com/9/25234/?rk=1>

² European Council Conclusions, December 2007 at

Treaty. He raised questions about the legitimacy of the new president, as s/he would not “actually [be] accountable to anyone – neither MEPs nor MPs”.³ He also pointed to the ambiguities in the foreign minister post: it was “not completely clear where his or her duties begin and that of the council president and commission president end”; neither was it clear whether s/he would assume the trade and development aspects of EU foreign policy when chairing the foreign ministers’ meetings. If so, this would put into question the “autonomy and the political profile of the commission” – which traditionally has strong powers in this area”.⁴ It would also have implications for the “hierarchy among commissioners” and risk reducing the trade and development commissioners to “junior commissioners, answering to the foreign minister”.

1.2 2008

In advance of Sweden taking over the EU Presidency in the second half of 2009, the Swedish Prime Minister, Frederik Reinfeldt, told the European Parliament in February 2008 that there should be an outline of co-sharing tasks for the leaders of future rotating EU presidencies after the new post of EU President had been established, so as not to leave EU leaders with little or no role in the future and run the risk of their lack of engagement.⁵

In January 2008 EU diplomats from the Member States began work on the technical and legal aspects of Lisbon with a view to clearing up loose ends before implementation. An internal Slovenian Presidency document identified 33 areas that needed to be examined in 2008 to allow for a smooth entry into force in 2009. It was reported that the Presidency would assess whether “different arrangements are necessary at a later stage for some of the more sensitive and political points”, such as the new posts of President of the European Council and the High Representative, and the enhanced role for national parliaments.⁶

There was also the “thorny issue of all the pending EU laws that may be affected by the fact that the entry into force of the treaty will see MEPs have full co-decision rights. Pending laws in the area of justice and home affairs, agriculture, fisheries, transport and structural funds could all be affected as MEPs gain new powers in these areas”.⁷ The new system for chairing sectoral Council meetings by ministers from teams of three Member States for 18 months needed ground rules, because it could “lead to all sorts of political haggling”.⁸

A report in the *EUObserver* considered the possibility of sensitive legislation on police and judicial cooperation (e.g. reform of Europol, easier transfer of evidence between Member States, and the protection of data held for criminal investigations) collapsing after years of difficult negotiation if it was not adopted before Lisbon came into force.⁹ Lisbon removes the intergovernmental “third pillar”, making these subjects subject to the Union’s institutional procedures, EP input and qualified majority voting. If proposals in these areas were not adopted by the time of entry into force, they would fall and would have to be re-introduced under the provisions of the Lisbon Treaty. The EP was divided over whether to fast-track such matters in order to avoid delay in implementation, or wait until they were reintroduced under Lisbon, at which point the EP would have more influence over them. The report noted

³ *EUObserver* 28 November 2007 at <http://euobserver.com/9/25234/?rk=1>

⁴ *Ibid*

⁵ *EUObserver* 20 February 2008 at <http://euobserver.com/9/25689/?rk=1>

⁶ *EUObserver* 21 January 2008 at <http://euobserver.com/9/25489/?rk=1>

⁷ *Ibid*

⁸ <http://euobserver.com/9/25489/?rk=1>

⁹ “EU security laws face Lisbon treaty cut-off”, at <http://www.europeanvoice.com/archive/article.asp?id=29619>

that “Member states are unlikely to want to reintroduce much legislation under the first pillar considering the length of time it has taken to negotiate some of the proposals”.

A senior German judge, Professor Hans-Jürgen Papier, was critical of the new role for national parliaments, suggesting that “while democracy has been strengthened in the EU's new treaty, a key innovation involving national parliaments does not go far enough and member states have no guarantee that EU powers will not continue to grow”.¹⁰ Given the large amount of law coming from the EU, the new “early warning system” for national parliaments was “somewhat impracticable”, the eight-week deadline for giving an opinion on subsidiarity was too short and the requirement for a third of national parliament opinions needed for a review of a proposal within the two-month deadline would require “considerable international coordination”.¹¹

1.3 2009

The Lisbon Treaty did not come into force on 1 January 2009, or in time for the European Parliament elections in June 2009, but Member State leaders, all of whom supported the Treaty, remained optimistic that it would eventually be implemented. Plans for its entry into force therefore continued in the EU institutions and Member States during the period of uncertainty in Ireland after the negative referendum on Lisbon and while doubt remained over Czech ratification of the Treaty. Unofficial shortlists of possible candidates for the posts of European Council President and High Representative were reported and positions taken on whether the new president should be a powerful leader from a large Member State (e.g. Tony Blair) or more of an administrative figure or chairman from a smaller Member State.

The Commission President, keen to retain the power of his post, sided with the smaller Member States¹² in wanting to restrict the role of the president so as not to upset the institutional power balance. He also suggested the post holder needed “to have the necessary skills to create unity within the body that represents EU leaders” and “a good understanding of the ‘Community method’”.¹³ Other Member States headed by France wanted a “major player [...] someone who can open doors in the US and China and who can give the EU some gravitas on the world stage”. In October 2009 EU diplomats sought to clarify the roles of the new posts, but the arguments raged right up until the appointments were made by Member States behind closed doors on 19 November 2009.¹⁴

At the time the Lisbon Treaty entered into force, much if not most of the detail concerning the functioning of new posts and institutions remained unclear. As Antonio Missiroli and Janis Emmanouilidis of the European Policy Centre (EPC) commented in a paper on the EU presidency arrangements:

Installing the new system will also be a complex undertaking because the Lisbon Treaty lacks clarity, and entails checks and balances, opportunities and constraints that are not spelled out in detail.

¹⁰ *EUObserver* 27 February 2008 at <http://euobserver.com/9/25729/?rk=1>

¹¹ *Ibid*

¹² A paper on the Lisbon Treaty posts by Belgium, the Netherlands and Luxembourg emphasised the importance of maintaining the “institutional balance” of the Union. Poland produced another paper on this subject.

¹³ *EUObserver* 9 October 2009 at <http://euobserver.com/9/28807/?rk=1>

¹⁴ See Standard Notes /09 and for further information on the appointment of the President and High Representative.

Now that the preliminary decisions on the office holders have been taken, the functioning of the new presidency system will depend on:

- (i) the decisions on their staffing and resources;
- (ii) the specific arrangements for their practical *modus operandi*, including new Rules of Procedure for the European Council and changes to the existing ones for the Commission and Council; and
- (iii) the way in which the Spanish and Belgian Presidencies in 2010 will create precedents that might then be followed by their successors.¹⁵

2 New institutional posts

Under the Treaty of Lisbon, the European Council (Heads of State and Government), becomes a Union Institution whose acts may be subject to review by the Court of Justice. The establishment of the European Council as a Union Institution and the creation of the post of President of the European Council required the drawing up of Rules of Procedure for the European Council, which were published as a European Council Decision on 1 December 2009.¹⁶

As before, the European Council defines the general political directions and priorities of the Union but does not have legislative functions. The European Council elected Herman Van Rompuy¹⁷ unanimously (the election required at least a qualified majority) for a term of two and a half years, renewable once. The European Council is assisted by the General Secretariat of the Council and has no new administration. The offices of the General Secretariat are at the President's disposal and include the Directorate for general political questions, the Legal Service, policy DGs (Ecofin, environment, health, Justice and Home Affairs etc.), the translation services, protocol, press office, etc. The President has his own private office, which is presently at the Council's Justus Lipsius building. When the new European Council building is completed, the President will move there (estimated 2013).

2.1 President of the European Council

The new European Council President, Herman Van Rompuy, set out his visions for the EU in a speech called “No *realpolitik* without *idealpolitik*” on 7 December 2009. *EurActiv* commented on Van Rompuy's personal philosophy:

The EU president's political thinking is rooted in the philosophical school of 'personalism'. Although the concept is somewhat difficult to define as a philosophical and theological movement, primarily due to many different philosophical schools, they all have at their core one central standpoint which serves as a canonical touchstone.

For Van Rompuy, the concept lies strictly in the quest to balance political realism with ethical idealism, a view he shares with French Catholic philosopher Jacques Maritain.

¹⁵ Antonio Missiroli and Janis Emmanouilidis, “Implementing Lisbon: the EU Presidency's other (rotating) half”, European Policy Centre, December 2009, at http://www.epc.eu/TEWN/pdf/97640204_Implementing%20Lisbon.pdf

¹⁶ OJL 315, 2 December 2009 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:315:0051:0055:EN:PDF>

¹⁷ CV available at <http://www.consilium.europa.eu/uedocs/cmsUpload/Van%20Rompuy-CV-EN-R2.pdf>

Rational politics needs to rest on sound ideals, Van Rompuy said, but without too much fanfare or deafening publicity in order to avoid falling into the trap of irreparable rhetoric, which can alienate the electorate in the long run.

In other words, action cannot stand without solid and thorough ideals. But shrewd political leaders need to take into account external events too. "Circumstances can provide an opportunity as good ideals mature according to circumstances," he said, stressing that political leaders need to be able to seize the opportunity to act. He cited as an example former German Chancellor Helmut Kohl, who used the fall of the Berlin Wall to unify his country.¹⁸

One of the first changes announced by Van Rompuy on 10 December 2009, was a shake-up of the four European Council meetings "to make them less formulaic so that they result in decisions that have immediate relevancy".¹⁹ Their attendance would be "streamlined" and ministers other than prime ministers would attend only from "time to time" depending on the agenda. Thus, at the first European Council meeting held under the authority of the Lisbon Treaty on 10-11 December 2009, foreign ministers were not invited to attend. This move by the Swedish Presidency was criticised by other Member States' foreign ministers. The Austrian foreign minister, Michael Spindelegger, argued in an interview with *Der Standard* that "foreign ministers should accompany leaders on the same logic that sees national ambassadors accompany foreign ministers in their meetings".²⁰ The Swedish Foreign Minister, Carl Bildt, defended the change by stating that relations between Member States were no longer considered to be "foreign policy" but were now "domestic policy", so EU leaders no longer needed their foreign ministers beside them.²¹ This situation raised some concerns in the UK Parliament, when the Foreign Affairs Committee questioned the Foreign Secretary, David Miliband, about EU matters:

Q11 Chairman: Thank you, Mr. Mackinlay. We now move on.

Foreign Secretary, you have attended European Council meetings. Are you going to be at the forthcoming one?

David Miliband: I'm not going to be there tomorrow, because the Lisbon treaty says that the European Council is for Heads of Government. The interpretation provided by the EU legal adviser is that it means what it says. But in true consensus-building European fashion, there will be a discussion over dinner about whether the treaty means what it says.

Q12 Sir Menzies Campbell: So you're going to dinner?

David Miliband: I am not invited to the dinner. The dinner is for Heads. Perhaps I should have been more specific. Heads of Government will have a discussion over dinner about whether or not they want each to have an aide-de-camp with them in the shape or form of their Foreign Minister. That is what they are going to do.

Q13 Chairman: Is this a decision taken by the Swedes, or is it a decision taken under the new arrangements by Mr. Van Rompuy?

¹⁸ *EurActiv* 7 January 2010 at <http://www.euractiv.com/en/priorities/eu-president-picks-catholic-forum-outline-vision/article-188616>. The full text of his speech in French is at <http://www.grandesconferences.be/files/VanRompuy7decembre2009.pdf>

¹⁹ *EUObserver* 11 December 2009 at <http://euobserver.com/9/29134/?rk=1>

²⁰ *EurActiv* 10 December 2009 at <http://www.euractiv.com/en/future-eu/solana-leaves-ashton-impossible-job-description/article-188183>

²¹ *EUObserver* 10 December 2009 at <http://euobserver.com/9/29130/?rk=1>

David Miliband: It has not been taken by Mr. Van Rompuy; I don't think he has taken any decisions, because he has not yet chaired a meeting. His first meeting will be in January-or the spring Council meeting-but he comes into active office then. It is the Swedes, informed by the legal eagles of the EU.

Q14 Chairman: Do you assume that when the new institutional arrangements come into effect, it will mean in practice that Foreign Secretaries will no longer be attending European Councils?

David Miliband: To be honest, I did not spend much time as the Lisbon treaty went through thinking about this issue. The particular issue of whether or not Foreign Ministers attend the European Council was not one that detained me unduly. The honest truth is that I think it is a bigger issue in countries where there is a coalition Government and where the Foreign Minister comes from another party than it is under our system. However, there are countries with coalition Governments that want to have the virtues of a rather more intimate, smaller discussion.

One benefit of having one person per Government attending is that it would be far more likely that all the Heads would have to sit around the table for the whole meeting. That is seen as an advantage. The disadvantage, obviously, is that you haven't got an extra person to do extra business. If you take this week, we have just had two days of Foreign Ministers' meetings in Brussels under the Foreign Affairs Council and the General Affairs Council. Am I going to be weeping at the prospect that I'm not spending Thursday and Friday in Brussels going through the motions again? No, I'm not going to be weeping about that.

Q15 Chairman: Does this not, however, have a danger within it? We have seen over the years a shift of foreign policy away from the Foreign and Commonwealth Office towards the Prime Minister and No. 10. Is that not in a sense institutionalising it, so that the Prime Minister, any Prime Minister in future, will have to spend more time at such meetings because it has to be a Head of State or Government?

David Miliband: I don't think so, no, for three reasons. First, you'll still have the pre-European Council, General Affairs Council and Foreign Affairs Council. For example, this week we have spent a long time talking about Turkey-Cyprus, and a lot of time talking about the Balkans, Iran and Afghanistan. All that has been pre-cooked for the European Council discussions. Secondly, there is no change really, because Heads of Government have always been able to discuss foreign policy and will continue to do so. Thirdly, the Lisbon treaty actually says: "When the agenda so requires, the members of the European Council may decide each to be assisted by a minister", so it is written in that there is flexibility for Foreign Ministers to go along if there is going to be a foreign affairs discussion.

Q16 Mr. Illsley: Given that the European Council is now institutionalised in the treaty, Sweden has the presidency and the chairmanship of this meeting-somewhat accidentally, in that Van Rompuy will not chair it-why did the Swedes decide to restrict it?

David Miliband: Because they got advice from the Legal Adviser-is that Piris's title?

Matthew Rycroft: He is the head of the Council Legal Service.

David Miliband: The head of the Council Legal Service advised the Swedes.

Mr. Illsley: They are just being specifically very careful.

David Miliband: Yes. I think that it is fair to say that this is perceived in a number of quarters as being a unique European Council, because it is post-Lisbon passage, pre-Lisbon delivery.²²

Herman Van Rompuy gave his first official speech as President at a gathering of Bavarian conservatives shortly after the group had expressed its opposition to Turkey joining the EU. He did not mention Turkey on this occasion, although he is remembered for having said that "Turkey is not a part of Europe and will never be part of Europe", at a meeting of the Council of Europe in December 2004 on the subject of Turkey's possible entry into the EU. Since becoming President, Van Rompuy is reported to have said that "his personal opinions are "irrelevant," as his job is to seek consensus among member states".²³

In November 2009 then President-elect Herman Van Rompuy started a tour of EU capitals for talks with Member State leaders, as follows:

30 November	Denmark
1 December	Slovenia and Italy
2 December	Finland and Latvia
9 December	Lithuania and Estonia
14 December	Bulgaria
15 December	Spain and Portugal
17 December	United Kingdom
6 January	The Netherlands
8 January	Spain
12 January	Greece ²⁴
13 January	Germany. ²⁵ And Malta ²⁶
15 January	Sweden ²⁷
18 January	Romania ²⁸
19 January	United Kingdom ²⁹
21 January	Cyprus ³⁰
26 January	Poland
27 January	Luxembourg
29 January	Czech Republic.

Van Rompuy's immediate objective has been tackling the economic crisis, on which he will hold informal and formal meetings in the coming months. The first one is due in February,

²² Foreign Affairs Committee, uncorrected evidence, "Developments in the European Union", 9 December 2009, at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmfa/uc144-i/uc14402.htm>

²³ *EUObserver* 8 January 2010 at <http://euobserver.com/15/29225>

²⁴ Press release at http://www.consilium.europa.eu/uedocs/cmsUpload/100112-Visit_to_Greek_Prime_Minister.pdf

²⁵ Press release at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/112277.pdf

²⁶ Press release at http://www.consilium.europa.eu/uedocs/cmsUpload/100113-Visit_to_Maltese_Prime_Minister.pdf

²⁷ Press release at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112313.pdf

²⁸ Press release at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112428.pdf

²⁹ Press release at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112439.pdf

³⁰ Press release at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112478.pdf

ahead of the informal March European Council meeting. The new President will also take part in all EU ministerial meetings, “giving him an oversight across all policy areas”.³¹

2.2 Union High Representative (HR) for Foreign Affairs and Security Policy

Javier Solana, who stepped down as EU High Representative on 8 December 2009, was reported to be leaving his successor, Catherine Ashton, with a “nearly impossible job description”.³² Some commentators maintained that the new High Representative post required a combination of the qualities of Solana and Chris Patten, a European Commissioner from 2000 to 2004, in a so-called “Pattana” figure. Solana was convinced Ms Ashton would need deputies to carry out all the tasks of the HR effectively, even though he had had very few staff working for him.³³

Carl Bildt chaired the first post-Lisbon foreign ministers Council, invoking a “transitional period” before the full assumption of the chair by the new High Representative, Catherine Ashton, who participated in the Council in a listening capacity only. The EPC paper suggested the rotating Presidency foreign minister could substitute for the High Representative “whenever her predictably-dense agenda prevents her from attending a Foreign Affairs Council session in Brussels or other official meetings, thus de facto acting as her deputy”.³⁴

At her hearing before MEPs to confirm her position of Vice-President of the Commission, Ms Ashton set out her foreign policy priorities as:

- responding to the demands of citizens to see a greater European response to international crises,
- establishment of the European External Action Service,
- Middle East Peace Process,
- European Neighbourhood Policy and relations with individual Western Balkan countries,
- human rights,
- non-proliferation of weapons of mass destruction,
- Common Security and Defence Policy (CSDP).

An EP press release summarised the hearing as follows:

"Full scrutiny of Parliament" over European diplomatic service

In her opening statement, she told MEPs the European External Action Service (EEAS) "will be a top priority and not just a bureaucratic exercise", adding that it was a "once in a generation opportunity to build something that brings together all the elements of our engagement – political, economic and military – to implement one coherent strategy" in foreign policy.

³¹ *EUObserver* 11 December 2009

³² *EurActiv* 10 December 2009 at <http://www.euractiv.com/en/future-eu/solana-leaves-ashton-impossible-job-description/article-188183>

³³ *Ibid*

³⁴ Antonio Missiroli & Janis Emmanouilidis, EPC, December 2009, at http://www.epc.eu/TEWN/pdf/97640204_Implementing%20Lisbon.pdf

Questioned by Elmar Brok (EPP, DE), Parliament's rapporteur on the EEAS, as to the budgetary role Parliament would play, the High Representative-designate said the new body "would be subject to full scrutiny by Parliament". She was looking forward to working with Parliament "throughout the process", "so that I can present a proposal to allow a decision by the Council in April".

However, "I remain unconvinced of the idea of hearings for top posts because we are expanding something that already exists", was her response to questions by Kristian Vigenin (S&D, BG) and Annemie Neyts (ALDE, BE).

Mr Brok and Ria Oomen Ruijten (EPP, NL) asked her about "the difficulty of pursuing a coherent foreign policy with the overlap between the Commission and the Council". Lady Ashton, however, said the overlapping nature of the post was an "asset". When reporting to Parliament, she would do it as a "Commissioner" but would add a Council perspective.

Coordination between Commissioners in charge of international affairs

Asked how she would establish her leadership over foreign affairs with the other Commissioners in charge of international affairs, she said that the Treaty "is very clear" about responsibilities and that "I take my lead from the Treaty". She reminded MEPs that she would chair the General Affairs and External Relations Council due to meet Monday 25 January.

On the division between strategy and implementation of policies implied by the EEAS, Catherine Ashton said to Franziska Brantner (Greens/EFA, DE) that she would "work with a cluster of Commissioners dividing the work among us and putting the emphasis on implementation such as on development for example". But she added that "strategy falls within my remit".

Afghanistan, Middle-East, Iran

"Afghanistan and Pakistan, Iran, the Middle East, Somalia and Yemen are clearly among some of the top priorities", she said in her opening statement, adding that she intended "to travel to Washington soon, to discuss with Hillary Clinton and other top US officials how we can pull together our strategies and actions on the global issues".

Jean-Luc Mélenchon (GUE/NGL, FR) and Norica Nicolai (ALDE, RO) asked her about the EU's strategy and military presence in Afghanistan to which she replied "we will come back to that at the London conference" of 28 January. She added that the EU needs to "provide concrete results about what we do to the citizens of Afghanistan".

On the Middle East, she said "I will be meeting Senator Mitchell and Tony Blair tomorrow and I intend to travel to the region as soon as possible". However, she declined a suggestion by Bastiaan Belder (EFD, NL) to organise an EU-Israel summit in the near future.

Asked by Véronique de Keyser (S&D, BE) what she would do with the Council conclusions on East Jerusalem, Baroness Ashton said "the next step in the region is to go where we think we can do more and pull together appropriate solutions".

Describing her initiatives to revitalise the Union for the Mediterranean (UfM), she told Dominique Baudis (EPP, FR) and Vincent Peillon (S&D, FR) "We also need to take forward the work started under the UfM, which lived through a

difficult time with the blockade of Arab nations in 2009. We will also have to see how the co- presidency of the UfM can be run with the end of the French presidency approaching".

On Iran, she said it was "regrettable that Tehran did not accept the agreement under the IAEA". She also "deplored all the recent human rights violations", in her reply to a question by Barry Madlener (NA, NL).

Energy and EU-Russia relations

"We need to have a strong relationship with Russia", she told Jacek Saryusz-Wolski (EPP, PL). On energy, she advocated "diversification of sources of supply" as well as a strategy to avoid relying on energy coming solely from Russia. She told MEPs she had on her "a map of the pipelines".

Human rights

Asked by Heidi Hautala (Greens/EFA, FI), chair of the EP Subcommittee on Human Rights, about her willingness to meet human rights defenders in public when travelling in her job, she replied "my interest is in outcomes". More specifically, she said, "this does not mean I would turn away from human rights, although sometimes talking to people without full publicity can be more effective".

To concerns voiced by Richard Howitt (PES, UK) about the need to improve the EU's record in this field, Baroness Ashton said "the Commission's delegations have a critical role to play here although human rights sometime require different approaches".

Relationship with NATO

Lady Ashton told Arnaud Danjean (EPP, FR), chair of the Subcommittee on Security and Defence, that the European Defence Agency should be developed, as should research and development across the Member States. She was also in favour of "working pragmatically for a very effective EU NATO partnership". Mr Danjean had asked about the fact that achievements in ESDP were "a bit up and down" compared to the policy's ambitions.³⁵

The Haiti test case

The first Council meeting chaired by the new EU HR took place on 18 January 2010. Development ministers sought to coordinate the EU's humanitarian aid to Haiti following the earthquake on 12 January. Haiti has become something of a test case for the Lisbon institutional provisions and the authority of the HR. On 18 January an emergency development ministers meeting committed €92 million in humanitarian assistance to Haiti, and earmarked another €100 million for early non-humanitarian assistance primarily to help restore the government's capabilities.³⁶ The EU Commissioner for Humanitarian Aid, Karel de Gucht, visited Port-au-Prince on 21 January and Catherine Ashton met US Secretary of State, Hillary Clinton, on the same day. Ashton has been criticised, however, for not going to Haiti herself, although others argued that the appearance of the new HR at the disaster area is not the issue; rather, it is the speed and efficacy of a coordinated EU approach to the humanitarian disaster. EU foreign ministers met in Brussels on 25 January, with Europe's response to the situation in Haiti high on the agenda. The Council agreed to a request from

³⁵ 11 January 2010 at http://www.europarl.europa.eu/news/expert/infopress_page/008-66979-008-01-02-901-20100108IPR66978-08-01-2010-2010-false/default_en.htm

³⁶ *EurActiv* 25 January 2010 at <http://www.euractiv.com/en/priorities/eu-struggles-fly-flag-haiti/article-189184>

the United Nations, that EU Member States would provide engineering expertise and equipment to open routes to facilitate aid, a maritime logistic capability which can operate without port facilities, and a collective EU contribution of a least 300 personnel to reinforce MINUSTAH's police capability. This includes the contribution made by those EU member states which are part of the European Gendarmerie Force (not the UK).

The Council also agreed to the HR's proposal to set up a coordination cell in Brussels (EUCO Haiti) to facilitate a European response in the military and security domain, avoiding duplication and to complement action taken through the Monitoring and Information Centre (MIC).³⁷ Haiti will be on the agenda at the informal European Council summit on 11 February.

The Lisbon Treaty foreign policy arrangements were welcomed by US Secretary of State, Hillary Clinton, who met Ms Ashton in January. Ms Clinton was reported to have said she expected that "in decades to come, we will look back on the Lisbon Treaty and the maturation of the EU that it represents as a major milestone in our world's history".³⁸

The European External Action Service (EEAS)

In January 2010 54 of the European Commission's 136 delegations abroad "quietly" became new EU embassies, including Afghanistan, China, India and 33 African states. All delegations were renamed "EU Delegations" on 1 January, but 54 were at the same time given new powers. Some have commented that this could make the Foreign Office redundant in many parts of the world. The new embassies are distributed as follows:

Europe	Armenia, Georgia, Macedonia, Moldova, Norway, Serbia, Switzerland and Ukraine.
Asia & Pacific	Afghanistan, Australia, China, East Timor, Fiji, Hong Kong, India, Indonesia, the Philippines, Papua New Guinea, Thailand and Vietnam.
Africa	Angola, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, Djibouti, Eritrea, Ethiopia, Ghana, Guinea Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Togo, Uganda, Zimbabwe and the delegation to the African Union in Addis Ababa. ³⁹

The choice of the 54 missions was made by the new HR following discussions with EU states and guided by technical issues; other embassies will be converted in due course.⁴⁰ According to the *EUObserver*, the choice of embassies to convert in the first tranche was:

... designed not to undermine the prestige of the Spanish EU presidency: None of the new placements are in former Spanish colonies in Latin America or in countries due to hold EU summits on Spain's watch, such as the US and Russia. China is the only exception, with a summit due on 15 March.⁴¹

³⁷ See press release 25 January 2010 at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/112548.pdf
³⁸ *EUObserver* 22 January 2010 at <http://www.2010againstopoverty.eu/opencms/?langid=en>
³⁹ *EUObserver* 21 January 2010 at <http://euobserver.com/9/29308/?rk=1>
⁴⁰ Ibid
⁴¹ Ibid

According to the *Telegraph*, Mats Persson, director of Open Europe, said the new embassies would “for all practical purposes” take over the job of representing Britons on the world stage because under the Lisbon Treaty they will be headed by ambassadors who will act on behalf of the EU as a whole, rather than bilaterally.⁴²

Common EU embassies means that Britain can be overruled on crucial diplomatic matters, such as on how to respond to human rights abuses in a conflict-ridden country [...] In order for common embassies to work, EU member states must have shared national interests. This simply isn't the case, particularly in Africa where the EU has consistently failed to act in a unified manner in the past”.⁴³

3 The new Commission

The college of Commissioners is composed of 27 Commissioners, one per Member State, until or unless Member States decide otherwise. The distribution of portfolios is decided by the Commission President, José Manuel Barroso. Each Commissioner usually covers one or several directorates-general (DGs) or agencies dealing with specific policy areas or services.

The old Commission has remained in place in a caretaker capacity to deal with EU business until the new College is approved and takes office (seven Commissioners, including Peter Mandelson, had resigned their portfolios before the end of the Commission's term of office, some to stand in the June EP elections).⁴⁴ The caretaker Commission has been able to fulfil only its public service duties without making any new political or legislative initiatives.

The procedure for appointing the Commission President was carried out under the pre-Lisbon Treaty provisions, but the appointment of the College will be completed under the Lisbon provisions. The Barroso II Commission includes three new portfolios: justice, fundamental rights and citizenship; Home affairs (internal affairs and migration), and Climate action.

A Commission press release looked at the composition of and new portfolios in the new college:

The new College will have 7 Vice-Presidents, including Vice-President Baroness Catherine Ashton who will, at the same time, be the High Representative of the Union for Foreign Affairs and Security Policy, following the entry into force of the Lisbon Treaty on 1 December next. Three of the Vice-Presidents will be women. The new College will have 27 members, including President Barroso, one from each Member State. It includes 9 women. The members of the College come from different political families, notably the European People's Party (EPP), the Progressive Alliance of Socialists and Democrats (S & D), and the Alliance of Liberals and Democrats for Europe (ALDE). 14 members, including the President, were already members of the outgoing College.

President Barroso has given a new look to the College of his second mandate. He has announced a number of new portfolios: Climate Action; Home Affairs; Justice, Fundamental Rights and Citizenship. He has reconfigured a number of

⁴² *Telegraph.co.uk* 22 January 2010 at <http://www.telegraph.co.uk/news/worldnews/europe/eu/7045354/More-than-50-EU-embassies-open-across-the-world.html>

⁴³ Ibid

⁴⁴ For information on Commissioners standing down and their new jobs, see *EurActiv* 1 February 2010 at <http://www.euractiv.com/en/future-eu/women-fly-highest-among-outgoing-commissioners>

other portfolios: Education, Culture, Multilingualism and Youth; Health and Consumer Policy; Industry and Entrepreneurship; Research and Innovation; International Cooperation, Humanitarian Aid and Crisis Response. There will be a new emphasis on inclusion in the Employment, Social Affairs and Inclusion portfolio, and a renewed focus with the Digital Agenda portfolio.⁴⁵

The press release in November 2009 set out the proposed allocation of portfolios and supporting services for the Barroso II Commission from 2010 to 2014.

Portfolios	Names	Services
President	José Manuel Barroso	Secretariat-General (SG); Legal Service (LS); Bureau of European Policy Advisers (BEPA); Spokespeople's Service (SPP). <u>Changes for the SG:</u> - <i>The Better Regulation Unit ENTR B.5 moves to the SG from DG Enterprise and Industry (ENTR);</i> - <i>The Secretariat of the Audit Progress Committee (Unit SG B.2) moves from the SG to the Internal Audit Service (IAS).</i>
High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission	Baroness Catherine Ashton	DG External Relations (RELEX)
Budget and Financial Programming	Janusz Lewandowski	DG Budget (BUDG)
Climate Action	Connie Hedegaard	DG Climate Action (to be set up before Summer 2010): core of DG Climate Action will be the existing Directorate C of DG Environment (ENV) except the Clean Air Unit ENV C.3 that will remain in DG Environment.

⁴⁵ Ibid

<p>Competition. Vice-President of the Commission</p>	<p>Joaquín Almunia Amann</p>	<p>DG Competition (COMP)</p> <p><u>Change for DG COMP:</u></p> <p><i>The state aid competencies currently in DG Transport and Energy (TREN) will move to DG COMP.</i></p>
<p>Development ¹</p>	<p>Andris Piebalgs</p>	<p>DG Development (DEV);</p> <p>The development part of EuropeAid-Cooperation Office (AIDCO). ²</p>
<p>Digital Agenda. Vice-President of the Commission</p>	<p>Neelie Kroes</p>	<p>DG Information Society (INFSO);</p> <p>European Network and Information Security Agency (ENISA).</p> <p><u>Change for DG INFSO :</u></p> <p><i>The MEDIA Programme Unit INFSO A.2 moves from DG INFSO to DG Education and Culture (EAC).</i></p>
<p>Economic and Monetary Affairs</p>	<p>Olli Rehn</p>	<p>DG Economic and Monetary Affairs (ECFIN)</p> <p>EUROSTAT</p>
<p>Education, Culture, Multilingualism and Youth</p>	<p>Androulla Vassiliou</p>	<p>DG Education and Culture (EAC);</p> <p>DG Translation (DGT);</p> <p>DG Interpretation (SCIC);</p> <p>Translation Centre for the Bodies of the EU (CdT);</p> <p>European Centre for the Development of Vocational Training</p>

		<p>(CEDEFOP);</p> <p>European Training Foundation (ETF);</p> <p>European Institute of Technology (EIT);</p> <p>The EAC part of the Education, Audiovisual and Culture Executive Agency (EACEA).</p> <p><u>Changes for DG EAC:</u></p> <p>- <i>The MEDIA Programme Unit INFSO A.2 moves to DG EAC from DG Information Society (INFSO);</i></p> <p>- <i>The Marie Curie Programme Units RTD T.2 and T.3 move to DG EAC from DG Research (RTD);</i></p> <p>- <i>The Citizenship Unit EAC D.4 and the Visitors Unit EAC D.5 move from DG EAC to DG Communication (COMM).</i></p>
<p>Employment, Social Affairs and Inclusion</p>	<p>László Andor</p>	<p>DG Employment, Social Affairs and Inclusion (EMPL);</p> <p>European Foundation for the Improvement of Living and Working Conditions (Eurofound);</p> <p>European Agency for Health and safety at Work (EU-OSHA).</p> <p><u>Change for DG EMPL:</u></p> <p><i>The Equality between Men/Women, Action against Discrimination, Civil</i></p>

		<p><i>Society Directorate EMPL G will remain within DG EMPL but be placed under the responsibility of the commissioner for Justice, Fundamental Rights and Citizenship.</i></p>
<p>Energy</p>	<p>Günter Oettinger</p>	<p>DG Energy to be created out of DG Transport and Energy (TREN);</p> <p>Euratom Supply Agency;</p> <p>The energy part of Executive Agency for Competitiveness and Innovation (EACI).</p> <p><u>Change for DG TREN:</u></p> <p><i>The state aid competencies currently in DG Transport and Energy (TREN) will move to DG COMP.</i></p>
<p>Enlargement and Neighbourhood Policy³</p>	<p>Štefan Füle</p>	<p>DG Enlargement (ELARG);</p> <p>The neighbourhood parts of DG External Relations (RELEX) and of the EuropeAid-Cooperation Office (AIDCO).⁴</p>
<p>Environment</p>	<p>Janez Potočnik</p>	<p>DG Environment (ENV);</p> <p>European Environmental Agency (EEA).</p> <p><u>Changes for DG ENV:</u></p> <p><i>- The Climate Directorate ENV C moves from DG ENV to the new DG for Climate Action (except the Clean</i></p>

		<p><i>Air Unit C.3);</i></p> <ul style="list-style-type: none"> - <i>The Civil Protection Units ENV A.3. and ENV A.4 move from DG ENV to DG Humanitarian Aid (ECHO);</i> - <i>The Biotechnology, Pesticides and Health Unit ENV D.4 moves from DG ENV to DG Health and Consumers (SANCO).</i>
<p>Health and Consumer Policy</p>	<p>John Dalli</p>	<p>DG Health and Consumers (SANCO);</p> <p>Community Plant Variety Office (CPVO);</p> <p>European Centre for Disease Prevention and Control (ECDC);</p> <p>European Food Safety Authority (EFSA);</p> <p>European Medicines Agency (EMA);</p> <p>Executive Agency for Health and Consumers (EAHC).</p> <p><u><i>Changes for DG SANCO:</i></u></p> <ul style="list-style-type: none"> - <i>The Pharmaceutical Products and Cosmetics Units ENTR F.2 and F.3 move to DG SANCO from DG Enterprise and Industry (ENTR), consequently the European Medicines Agency comes under the Health and Consumer portfolio;</i> - <i>The Biotechnology,</i>

		<p><i>Pesticides and Health Unit ENV D.4 moves to DG SANCO from DG Environment (ENV).</i></p> <p><i>- The Consumer Contract and Marketing Law SANCO B.2 moves from DG SANCO to DG Justice, Liberty and Security (JLS) as part of the Justice, Fundamental Rights and Citizenship portfolio.</i></p>
Home Affairs	Cecilia Malmström	<p>Directorates B, C and F of DG Justice, Liberty and Security (JLS) (Directorate A will serve both the Home Affairs portfolio and the Justice, Fundamental Rights and Citizenship portfolio);</p> <p>European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX);</p> <p>European Police Office (EUROPOL);</p> <p>European Police College (CEPOL);</p> <p>Visa System (VIS II) and Schengen System (SIS II);</p> <p>European Monitoring Centre for Drug and Drug Addiction (EMCDDA).</p>
Industry and Entrepreneurship. Vice-President of the Commission	Antonio Tajani	<p>DG Enterprise and Industry (ENTR);</p> <p>European Chemicals Agency (ECHA).</p>

		<p><u>Changes for DG ENTR:</u></p> <ul style="list-style-type: none"> - <i>The Better Regulation Unit ENTR B.5 moves from DG ENTR to the Secretariat-General (SG).</i> - <i>The Pharmaceutical Products and Cosmetics Units ENTR F.2 and F.3 move from DG ENTR to DG Health and Consumers (SANCO), consequently the European Medicines Agency moves to the Health and Consumer Policy portfolio;</i> - <i>The co-ordination of the Trans-Atlantic Economic Council (TEC) moves from DG ENTR to DG TRADE;</i> - <i>The Satellite Navigation Units TREN G.3, G.4 and G.5 move to DG ENTR from DG Transport and Energy (TREN), consequently the Global Navigation Satellites System Supervision Agency (Galileo) comes under the Industry and Entrepreneurship portfolio.</i>
<p>Vice-President for Inter-institutional Relations and Administration</p>	<p>Maroš Šefčovič</p>	<p>For inter-institutional relations, the Vice-President will draw on the support of the Secretariat-General (SG).</p> <p>For administration: DG Personnel and</p>

		<p>Administration (ADMIN – from 1 January 2010 DG Human Resources and Security, HR);</p> <p>DG Informatics (DIGIT);</p> <p>Office for Administration and Payment of Individual Entitlements (PMO);</p> <p>Office for Infrastructure and Logistics in Brussels (OIB);</p> <p>Office for Infrastructure and Logistics in Luxembourg (OIL);</p> <p>European Personnel Selection Office (EPSO);</p> <p>European Administration School (EAS).</p>
Internal Market and Services	Michel Barnier	<p>DG Internal Market and Services (MARKT);</p> <p>Office of Harmonisation in the Internal Market (OHIM).</p>
International Cooperation, Humanitarian Aid and Crisis Response ⁵	Rumiana Jeleva	<p>DG Humanitarian Aid (ECHO)</p> <p><u>Change for DG ECHO:</u></p> <p><i>The Civil Protection Units ENV A.3. and ENV A.4 move to DG ECHO from DG Environment (ENV).</i></p>
Justice, Fundamental Rights and Citizenship. Vice-President of the Commission	Viviane Reding	<p>Directorates D and E of DG Justice, Liberty and Security (JLS) (Directorate A will serve both the Home Affairs portfolio and the Justice,</p>

	<p>Fundamental Rights and Citizenship portfolio);</p> <p>The Equality between Men/Women, Action against Discrimination, Civil Society Directorate EMPL G (will remain within DG EMPL but be placed under the responsibility of the commissioner for Justice, Fundamental Rights and Citizenship);</p> <p>European Fundamental Rights Agency (FRA);</p> <p>European Institute for Gender Equality (EIGE);</p> <p>European Judicial Cooperation Unit (EUROJUST);</p> <p>DG Communication (COMM);</p> <p>Publications Office (OP).</p> <p><u>Change for DG JLS:</u></p> <p><i>The Consumer Contract and Marketing Law SANCO B.2 moves to DG JLS from DG Health and Consumers (SANCO) as part of the Justice, Fundamental Rights and Citizenship portfolio.</i></p> <p><u>Changes for DG COMM:</u></p> <p><i>- The Citizenship Unit EAC D.4 and the Visitors Unit EAC D.5 move to DG COMM from DG Education and</i></p>
--	---

		Culture (EAC).
Maritime Affairs and Fisheries	Maria Damanaki	DG Maritime Affairs and Fisheries (MARE); Community Fisheries Control Agency (CFCA).
Regional policy	Johannes Hahn	DG Regional Policy (REGIO)
Research, Innovation and Science	Maire Geoghegan-Quinn	DG Research (RTD); Joint Research Centre (JRC); European Research Council (ERC); Research Executive Agency (REA); European Research Council Executive Agency (ERCEA). <u>Changes for DG RTD:</u> - The Marie Curie Programme Units RTD T.2 and T.3 move from DG RTD to DG Education and Culture (EAC).
Taxation and Customs Union, Audit and Anti-Fraud	Algirdas Šemeta	For Taxation and Customs Union: DG Taxation and Customs Union (TAXUD). For Audit and Anti-Fraud: ⁶ Internal Audit Service (IAS); European Anti-Fraud Office (OLAF). <u>Change for the IAS:</u> - The Secretariat of the Audit Progress Committee (Unit SG B.2) moves to the IAS from the Secretariat-General (SG).
Trade	Karel de Gucht	DG TRADE <u>Change for DG TRADE:</u> - The co-ordination of the Trans-Atlantic Economic Council (TEC) moves to DG TRADE from DG Enterprise and Industry.
Transport. Vice-President of the Commission	Siim Kallas	DG Transport to be created out of DG Transport and Energy (TREN); European Railway Agency (ERA); European Aviation Safety Agency (EASA); European Maritime Safety Agency (EMSA); Trans-European Transport Network Executive Agency; The transport part of the Executive Agency of Competitiveness and Innovation (EACI).

	<p><u>Changes for DG TREN:</u></p> <ul style="list-style-type: none"> - The state aid competencies currently in DG TREN will move to DG Competition (COMP). - The Satellite Navigation Units TREN G.3, G.4 and G.5 move from DG TREN to DG Enterprise and Industry (ENTR), consequently the Global Navigation Satellites System Supervision Agency (Galileo) moves to the Industry and Entrepreneurship portfolio.
--	--

¹ :In close cooperation with the High Representative/Vice-President in accordance with the treaties.

² :Without prejudice for the future creation of the European External Action Service (EEAS). - The development commissioner will moreover assure the political representation of the Commission in the Foreign Affairs Council given the role of the High Representative/Vice President as the President of that formation of the Council and for this task draw on the support of the SG and of DG RELEX.

³ :In close cooperation with the High Representative/Vice-President in accordance with the treaties.

⁴ :Without prejudice for the creation of the future European External Action Service (EEAS).

⁵ :In close cooperation with the High Representative/Vice-President in accordance with the treaties.

⁶ :For budgetary discharge, the commissioner will draw on the support of DG Budget (BUDG).

Note on the Vice-Presidencies: Baroness Catherine Ashton will be the 1st Vice-President. However, having regard to her specific functions, notably in the Council, the replacement of the President in his absence will be assured by the other Vice-Presidents, in the order of precedence defined by the President. The order of precedence is: Viviane Reding, Joaquín Almunia, Siim Kallas, Neelie Kroes, Antonio Tajani, Maroš Šefčovič.⁴⁶

The EP held hearings from 11 to 19 January 2010.⁴⁷ Only the Bulgarian foreign minister, Rumiana Jeleva, the Commissioner-designate for humanitarian aid and crisis response, was not endorsed by the EP. Kristalina Georgieva, vice-President of the World Bank, was nominated to replace her and a vote on the whole Commission, initially scheduled for 26 January, will take place on 9 February. The updated list of Commissioners-elect is at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/112505.pdf.

The High Representative for Foreign Affairs and Security Policy, Baroness Catherine Ashton, who under Lisbon is also a vice-President of the Commission, faced a particularly gruelling hearing at the EP. There were some concerns about her lack of experience and expertise, which were countered by arguments about her good performance as a Commissioner when she was brought in to replace Peter Mandelson in the trade portfolio in 2008. Concern was also expressed about her past role as treasurer of the Campaign for Nuclear Disarmament (CND) in the early 1980s. The Foreign Secretary, David Miliband, said of the appointment of Ms Ashton:

I think she will use her consensus-building and management skills to very good effect in what is quite a complicated management challenge to establish the new External Action Service out of the two current organisations. I think she will bring a real determination not to allow consensus to become lowest common denominator-ism. I think she will really search for a stronger version of European unity, so I think that she will prove the critics [...] wrong.⁴⁸

⁴⁶ "President Barroso unveils his new team", IP/09/1837, 27 November 2009 at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1837&format=HTML&aged=0&language=EN&guiLanguage=fr>. The CVs of the Commissioners-designate are available at <http://www.europarl.europa.eu/hearings/commissioners/getHomePage.htm?language=EN>.

⁴⁷ The timetable for EP hearings is in the *EUObserver* 18 December 2009 at <http://euobserver.com/9/29178/?rk=1>. The Commission website at http://ec.europa.eu/commission_designate_2009-2014/index_en.htm has a lot of information on the new Commission.

⁴⁸ FAC uncorrected evidence December 2009, at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmfaff/uc144-i/uc14402.htm>

Under principles agreed by the Romano Prodi Commission (1999-2004),⁴⁹ "all senior officials serve a minimum of two years in any function and a maximum of five years," extended to seven years in exceptional cases.⁵⁰

4 The European Parliament

4.1 New MEPs

Following the adoption of a resolution before the June 2009 EP elections, 18 "observer" MEPs representing 12 Member States were admitted to the EP in addition to the 736 elected in June under the Treaty of Nice provisions. Under Lisbon the number of MEPs should be 751, but it has temporarily risen to 754 to allow Germany to keep the three MEPs it would have lost under Lisbon, had the Treaty been in force at the time of the election. These Members will keep their seats until the end of the present legislature. Raising the number of MEPs requires the consent of all Member States and the ratification of a protocol. The 18 new Members cannot become full Members until this ratification procedure is complete. Some of the 12 States elected their "Lisbon MEPs" in the June 2009 elections, but others will decide later on how to choose their Members. In reply to a question about the extra UK EP seat in January, Gary Streeter, who represents the Speaker's Committee on the Electoral Commission, replied that the Commission had "not yet recommended which of the 12 UK electoral regions should receive the additional European Parliament seat" and could "only do so following receipt of a statutory direction from the Secretary of State for Justice".⁵¹ If the additional UK MEP goes to the West Midlands region on the basis of the 2009 EP election results, it would go to the Conservatives.

4.2 Relations with the Commission

The basis for relations between the European Parliament and the Commission has been a 2005 framework agreement.⁵² The EP gains more powers of scrutiny and wider legislative powers under the co-decision procedure. The EP summarised its new powers as follows;

- The Lisbon Treaty makes the European Parliament a **stronger lawmaker** by bringing over 40 new fields within the "co-decision" procedure, under which Parliament has equal rights with the Council. These areas include agriculture, energy security, immigration, justice and home affairs, health and structural funds.
- Parliament gains a bigger role in **setting budgets**, as the old distinction between "compulsory" and "non-compulsory" expenditure is abolished. Parliament will decide on the entire EU budget together with the Council.
- MEPs will also have to give their consent to a whole range of international agreements negotiated by the Union, in areas such as international trade.⁵³

⁴⁹ See principles at http://www.euractiv.com/29/images/Document1_tcm29-188477.pdf

⁵⁰ "President Barroso unveils his new team", IP/09/1837, 27 November 2009 at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1837&format=HTML&aged=0&language=EN&guiLanguage=fr>. For further information on this and possible changes, see *EurActiv* 8 & 15 January 2010 at <http://www.euractiv.com/en/future-eu/musical-chairs-officials-take-turns-european-commission/article-188479>

⁵¹ HC Deb 5 January 2010 c 6W at <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100105/text/100105w0002.htm#1001051000036>

⁵² For the text of the agreement see http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/docs/framework_agreement_ep-ec_en.pdf

⁵³ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=66>

A working party was established consisting of MEPs Klaus-Heiner Lehne (EPP, Germany), Hannes Swoboda (S&D, Austria), Dagmar Roth-Berendt (S&D, Germany), Diana Wallis (ALDE, UK) and Rebecca Harms (Green/EFA, Germany), which drew up with the Commission President Barroso, revisions to the framework agreement to cover relations between the two institutions from 2010 to 2015. These will tackle amongst other things the EP's right to raise objections to draft legislation (the so-called 'orange card') as part of the subsidiarity control mechanism and include measures to improve the Commission's accountability by means of an initiative for the EP to nominate the Special Representatives and foreign ambassadors to the European External Action Service. The EP is also likely to be granted the authority to seek the resignation of an individual European Commissioner. The draft framework decision agreed on 27 January is to be submitted to a vote on 9 February.⁵⁴

5 Other institutional changes

5.1 EU Courts

Under Article 19 TEU the EU court system is now the Court of Justice of the European Union, comprising three courts: the Court of Justice, the General Court and the Civil Service Tribunal.⁵⁵ The Court now has general jurisdiction to give preliminary rulings in the area of freedom, security and justice, and the preliminary ruling procedure is extended to acts of European Union bodies, offices or agencies under Article 267 TFEU. It may also review acts of the European Council and it makes it easier individuals to bring actions against decisions of the EU institutions, bodies, offices or agencies.

New rules for the Court's preliminary ruling procedure were published on 5 December.⁵⁶

5.2 Committee of the Regions

Lisbon gives the Committee of the Regions (CoR) the right to refer to the Court of Justice alleged breaches of the subsidiarity principle for legislative acts on which it must be consulted. At its plenary on 3-4 December 2009, the CoR amended its Rules of Procedure to enable this.

6 The Spanish Presidency

6.1 Rotating Presidency relations with the European Council President

Spain is the first Member State to hold the rotating presidency under the Lisbon Treaty. The draft 18-month programme of the Spanish, Belgian and Hungarian Presidencies covering the period January 2010 to June 2011 was set out on 27 November 2009.⁵⁷ The Spanish Presidency will be the first to test the new relationship between the national leader of the Presidency, Jose Luis Zapatero, and the President of the European Council, Herman Van Rompuy. Zapatero will manage the day-to-day running of the EU and chair the monthly sectoral councils, which will continue to operate on a rotating basis, while Van Rompuy will represent the EU externally at summits and give political direction to European Council meetings. However, even before Spain took over the Presidency there were indications that

⁵⁴ See *EurActiv* 29 January 2010 at <http://www.euractiv.com/en/node/255711> and *EUObserver* 29 January 2010 at <http://euobserver.com/9/29373/?rk=1> and letter to EP President, Jerzy Buzek, from Klaus-Heiner Lehne at <http://www.euractiv.com/sites/all/euractiv/files/LetterLehentoPressEN.pdf>

⁵⁵ For information on the Lisbon changes to the European Court of Justice, see Court press release No 104/09, 30 November 2009 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-12/cp090104en.pdf>

⁵⁶ OJC 297, 5 December 2009, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF>

⁵⁷ Council document 16771/09 at <http://register.consilium.europa.eu/pdf/en/09/st16/st16771.en09.pdf>

the two roles might come into conflict. The *EUObserver* reported on the eve of the Spanish Presidency:

The treaty leaves plenty of scope for potential turf wars: Spain has said that it would like to host the EU-US and Latin America summits, in a move that will propel Mr Zapatero into the global spotlight alongside Mr Rompuy. The possibility of having Barack Obama on Spanish soil for a summit is already sparking protocol speculation, such as who will be the first to shake the US leader's hand.⁵⁸

In a report entitled "The EU in 2010: What to expect from the Spanish EU Presidency", Open Europe commented that under the Lisbon changes:

[...] individual countries holding the rotating EU Presidency will have less power to set the agenda in the EU than they did before. However they will continue to have some influence and it is therefore interesting to look at which policies they plan to push. Spain is particularly interesting because, as the first country to hold the Presidency under the Lisbon Treaty, it will to some extent set the tone for how the rotating presidencies will work in future. There are several suggestions that the Spanish government has no intention of simply stepping aside and allowing Mr Van Rompuy to take centre stage.⁵⁹

There has been considerable speculation about the relationship between the new leading figures. According to some French press reports, Zapatero "does not intend to make Van Rompuy's job easy",⁶⁰ although other reports maintain that Spain intends "to take a backstage role" during its six-month Presidency,⁶¹ that there will be "no competition, there will be complementarity, there will be support to these new institutions and personalities".⁶² Zapatero is also reported to be keen to promote solidarity with Van Rompuy and to put the rotating presidency at his disposal to help him to carry out his new leadership functions effectively.

6.2 Presidency plans

According to the Spanish EU Minister, Diego Lopez Garrido, the Spanish EU presidency is going to "summit its way into the Guinness Book of Records", with ten summits planned and bilateral meetings with Russia, Pakistan, Mexico, Canada, the US, Morocco, Latin American and Mediterranean countries.⁶³

Zapatero outlined his priorities for the Spanish presidency in a speech in December 2009. His first priority would be "to give impetus to economic recovery and job creation".⁶⁴ Spain hopes to secure approval for financial supervision proposals during its Presidency, following agreement among Member States in December 2009 to set up three pan pan-European

⁵⁸ 31 December 2009 at <http://euobserver.com/9/29151/?rk=1>

⁵⁹ Open Europe, December 2009 at <http://www.openeurope.org.uk/research/EU2010.pdf>

⁶⁰ Jean Quatremer, *Coulisses de Bruxelles, UE*, 10 December 2009 at <http://bruxelles.blogs.liberation.fr/coulisses/2009/12/lisbonne-grincements-de-dents-et-tentatives-de-sabotage-.html#more>

⁶¹ *EurActiv* 18 December 2009

⁶² *Ibid*

⁶³ *EUObserver* blog, 10 December 2009 at <http://blogs.euobserver.com/mahony/2009/12/10/the-guinness-book-of-summits/>

⁶⁴ Speech at plenary session of conference with President of the EP and Presidents of the EP groups Palacio de El Pardo, 3 December 2009 at http://www.eutrio.es/comun/descargas/091203_Intervencion_PG_en_Conferencia_Pdtes_PE_EN.pdf

watchdogs to supervise banks, insurers and trading exchanges, with another agency to monitor wider risks to the economy.

Spain will also need to take forward the international agreement on climate change following on from the Copenhagen climate meeting in mid-December 2009.⁶⁵

Zapatero referred several times in his December 2009 speech to the importance of the Lisbon Treaty as a defining moment in history and for its Presidency:

... if anything defines our Presidency, it will be the implementation of the Treaty of Lisbon. Putting it into practice will be our second major priority. It is not a task which can be completed in just one Presidency, but we must make a start.⁶⁶

The Presidency has also announced agreement among all Member States on the EU acceding to the Council of Europe's European Convention on Human Rights, which it will formalise after consulting the Council of Europe and on making the Lisbon Treaty Solidarity Clause in Article 222 TFEU (consolidated text) operational, obliging Member States to help each other out in the event of a terrorist attack, or a natural or man-made disaster.⁶⁷

7 Other Lisbon developments

7.1 The citizens' initiative

Under Article 11.4 of the Treaty:

Not less than one million citizens who are national of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

On 7 May 2009 the EP adopted a resolution on the citizen's initiative,⁶⁸ which sets out guidelines for the implementation of the Citizens' Initiative, including details on the minimum number of signatures per Member State, a minimum number of States, eligibility criteria, requirements for the collection of signatures, verification, timing, and the registration of the proposed initiatives.⁶⁹

On 11 November the Commission launched a consultation on how to implement the new "citizens' initiative" procedure under Article 11 TEU and Article 24 TFEU.⁷⁰

In January 2010 the Spanish Presidency obtained agreement from all 27 Member States on the rules for the Citizens' Initiative. The million signatures must come from a minimum of nine Member States, constituting at least one third of the Union's members. Europe Ministers

⁶⁵ See <http://euobserver.com/9/29151/?rk=1>

⁶⁶ Speech, 3 December 2009

⁶⁷ The Lisbon Treaty contains a solidarity clause concerning external aggression, but this does not explicitly mention military assistance and so cannot replace Article 5 of the modified Brussels Treaty on the Western European Union.

⁶⁸ Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0389+0+DOC+XML+V0//EN>

⁶⁹ *EurActiv* 11 November 2009 at <http://www.euractiv.com/en/future-eu/eu-attempt-frame-citizens-initiative/article-187237>

⁷⁰ The Commission Green Paper and other relevant documents are available at http://ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_en.htm

meeting informally on 13 January 2010 also discussed mechanisms to check the authenticity of signatures, a process for ascertaining admissibility and safeguards to counter attempts to abuse the spirit of the Initiative.⁷¹

7.2 Trade agreements

One issue which has yet to be resolved concerns legislation initiated under the Treaty as amended by Nice but still to be concluded under the Treaty as amended by Lisbon. Lisbon puts trade policy under the EU external action heading with other elements of EU external policy. In addition, the EP has significant new powers in relation to trade, and its consent to a treaty has to be obtained in most cases. The new arrangements mean the EP is more likely to be the object of lobbying, which might delay or impede such negotiations.

One agreement in this position is a proposed free trade agreement with South Korea, aspects of which are strongly opposed by the EP. The draft agreement was initialled by the EU negotiator, the Commission, and the South Korean Government in October 2009, but is yet to be ratified, and the EP is reluctant to approve it as it stands. The *EUObserver* set out the issues as follows:

A number of European sectors are deeply unhappy with the bilateral FTA, which took two years to negotiate, most vocally European small car manufacturers that fear greater levels of South Korean imports will hammer their sales.

Amongst other issues, opponents argue the agreement offers too many concessions to Korean companies in the area of duty drawbacks, a mechanism under which Korean companies can claim back EU import duties on car components purchased outside Korea.

Unable to participate in the deal's negotiations, and under pressure from local constituencies, MEPs may now choose to block the deal, a fate that would mimic South Korea's free trade agreement with the United States, signed in 2007 but still languishing in both parliaments.⁷²

8 The scrutiny of EU business in the UK Parliament

8.1 European Scrutiny Committee proposals for change

In both Houses of the UK Parliament changes in the rules of procedure arising from the Treaty of Lisbon are under discussion. The Lisbon Treaty's provisions on the role of national parliaments and the subsidiarity yellow card arrangements, the new procedures for Treaty amendment and the UK's opt-in provisions for justice and home affairs proposals will all give rise to changes to the ways in which the UK Parliament scrutinises European business. In its Report on "Subsidiarity, National Parliaments and the Lisbon Treaty" in October 2008, the Commons European Scrutiny Committee (ESC) concluded:

46. The entry into force of the Lisbon Treaty brings with it new provisions for national parliaments. There is, in our view, less to the provisions on subsidiarity than meets the eye. In our experience it has been rare for the entirety of a proposal for legislation to be inconsistent with the principle of subsidiarity. We do not therefore expect frequent use to be made of the yellow and orange cards. Indeed it would be surprising if the mere existence of such provisions

⁷¹ *EurActiv* 14 January 2010 at <http://www.euractiv.com/en/priorities/citizens-9-countries-kick-eu-legislation/article-188896>

⁷² *EUObserver* 14 January 2010 at <http://euobserver.com/9/29268/?rk=1>

gave rise to a growth in the number of well-founded subsidiarity cases; it might even give the impression of a lack of focus on subsidiarity concerns in the past.

47. The changes to definitions contained in the Lisbon Treaty necessitate the redrafting of the Committee's Standing Order and the House's scrutiny reserve resolution. We will pursue with the Government the need for the redraft to make the texts clearer, simpler and tougher. In particular, we are looking to see draft European Council and Council conclusions, European Council and Council decisions under the Common Foreign and Security Policy, and both legislative and non-legislative acts included in the categories of document deposited for scrutiny.

Paragraph 64: We welcome the Minister's readiness to reflect on ways of enhancing the scrutiny process. Since the opt-in arrangements already apply to the significant areas of asylum and immigration and judicial cooperation in civil matters, we see no convincing reason why the commitments offered by the Government in its Statement should not be applied now to those areas, irrespective of what may happen in the future in relation to the Lisbon Treaty.⁷³

The Government responded to a question about the Lisbon *passerelle* provision in Article 81(3) in the Lords EU Committee report, "The Treaty of Lisbon: An Impact Assessment"

12.60. The *passerelle* provision in Article 81(3) TFEU is stronger than the existing *passerelle* in Article 67(2) TEC in providing that national parliaments can directly veto a proposal to make use of it. As discussed in Chapter 3, thought will have to be given as to how this right of veto will be implemented in the UK. A further protection is provided by the European Union (Amendment) Bill as the approval of both Houses is required before a Minister can vote in favour of the use of the *passerelle* in the Council of Ministers (see paragraph 6.43).

The Government agrees with the Committee regarding national Parliaments', and specifically the UK Parliament's, role in the use of the family law *passerelle*. Any proposal to change the current decision making arrangements for family law will be subject to the UK opt-in and furthermore, in line with the Prime Minister's commitment and clause 6 of the EU (Amendment) Bill, should a UK Minister wish to support such a move it must be with the prior approval of both Houses.⁷⁴

In its response in January 2009 to the ESC 1st Report, the Government said it "was content to enhance the existing European scrutiny process in the following ways":

- We will continue to do our utmost to ensure that Explanatory Memoranda are submitted within 10 days of deposit of documents.
- We will endeavour to include in the EM a list of factors that we expect to take into account when coming to an opt in decision, and where possible an indication as to whether we expect to opt in.
- We are content to take the views of the Committee into account in the case of Title IV TEC opt-in decisions if they are forthcoming within 8

⁷³ First Special Report of Session 2008-09, "Subsidiarity, National Parliaments and the Lisbon Treaty", 33rd Report of Session 2007-08, HC 563, at <http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmeuleg/563/563.pdf>

⁷⁴ Government response to 10th Report of 2007-08, Cm 7389, June 2008 at <http://www.official-documents.gov.uk/document/cm73/7389/7389.pdf>

weeks of the publication of proposals, and therefore not to opt in within that 8 week period unless it is essential. The final decision as to whether to opt in will of course rest with Ministers.

- We are content to be flexible regarding making time available for debates on policy on which opt in decisions will need to be made, if the Committees recommend such questions for debate. However, this will only be possible if there is early, informal communication with the Clerks to the Committees to forewarn us when a debate might be desirable, and on the condition that the 8 week period for giving a view on the opt-in decision cannot be extended even if it proves impossible to hold a debate before that deadline.⁷⁵

In the ESC's report in January 2010 on "The Work of the Committee in 2008-09", it considered changes to the scrutiny mandate in light of the Lisbon Treaty⁷⁶

14. The entry into force of the Lisbon Treaty necessitates changes to the terminology used in both Standing Order No.143 and in the scrutiny reserve resolution. We have recognised this as an opportunity to propose to the Government further revisions which make the Standing Order and the scrutiny reserve resolution clearer, simpler and more thorough. Another important proposal is the request that draft European Council and Council conclusions be included in the categories of document which the Government is required to deposit in parliament for scrutiny. The replacement Standing Order No.143 and the scrutiny reserve and opt-in resolutions we have proposed can be found in Annex 2 to this report.

15. But the changes brought in by the Lisbon Treaty are more than just terminological. EU activity will be divided into legislative acts, which are defined, and non-legislative acts, which are not. It is the second category which poses the problems for scrutiny. Many binding "Union acts", issuing particularly from the Council or European Council will fall under the second category. It is for this reason that we have requested that the revised Standing Order refers to "non-legislative acts" as well as "legislative acts". Indeed, were it not to make this reference, we would be in a position where our scrutiny mandate under the Lisbon Treaty would be narrower than it is today. It should also be noted that the Lisbon Treaty's yellow and orange card procedures for monitoring subsidy only apply to legislative acts.

16. The Conclusions of the European Council have a powerful influence on the policies of the EU and its priorities. They are frequently cited by the Commission as the authority for a proposal. Yet the draft of the Conclusions is not deposited for scrutiny by Parliament. Nor are the draft Conclusions of the Council of Ministers, even though the Conclusions are politically binding on Member States. National parliaments of other EU Member States, notably Denmark, Sweden and Finland receive draft Conclusions. We are convinced that the Government must change its position if it is serious in supporting the scrutiny process.

17. Changes to the deposit arrangements and the scrutiny reserve resolution need to apply to both Houses. The Lords EU Committee has therefore been engaged in similar work.

⁷⁵ Government response to ESC First Special Report, "Subsidiarity, National Parliaments and the Lisbon Treaty", 21 January 2009 at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmeuleg/197/19704.htm>

⁷⁶

18. Under the Lisbon Treaty, the national veto over EU proposals in police and criminal justice matters is abolished, while the UK is not bound by such laws unless it decides to 'opt in' to them. Such an opt in arrangement existed prior to the Lisbon Treaty in relation to EU laws concerning asylum, immigration and judicial co-operation in civil matters, and continues to apply in this field under the Lisbon Treaty.

19. On the scrutiny of opt-in decisions, we asked that the undertaking by the Government to provide us with an eight-week period of scrutiny before opting into legislation when the Lisbon Treaty came into force should also apply to existing opt-in decisions in the areas of asylum and immigration and judicial cooperation in civil matters under the EC Treaty. The Government accepted this recommendation.⁷⁷

The ESC proposed a redraft of Standing Order No.143 (paragraph 1), a new Scrutiny Reserve Resolution, and a draft resolution on opt-in scrutiny (changes marked in italics), as follows:

Redraft of Standing Order No.143

143.—(1) There shall be a select committee, to be called the European Scrutiny Committee, to examine European Union documents and—

- a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
- b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and
- c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression 'European Union document' in this order and in Standing Order No. 16 (Proceedings under an Act or on European Union documents), No. 89 (Procedure in general committees) and No. 119 (European Committees) includes in particular —

- i. a document published by the Commission;*
- ii. a document submitted by an institution of the European Union to another Union institution;*
- iii. a draft legislative act, a draft non-legislative act, or a proposal for an amendment of such acts;*
- iv. draft general guidelines and decisions relating to the Common Foreign and Security Policy;*
- v. draft conclusions of the European Council and the Council.*

The Committee may waive the requirement to deposit a document, or class of documents, by agreement with the Select Committee on the European Union of the House of Lords.

⁷⁷ "The Work of the Committee in 2008-09", European Scrutiny Committee 6th Report, 6 January 2010, at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg/267/26703.htm#a6>

New Scrutiny Reserve Resolution

Resolved, That—

(1) Subject to paragraph (5) below, no Minister of the Crown should give agreement in the Council or in the European Council in relation to any document subject to the scrutiny of the European Scrutiny Committee in accordance with its Standing Order, while the document remains subject to scrutiny.

(2) A document remains subject to scrutiny if –

(a) it is awaiting consideration by the House (that is, it is a document which has been recommended by the European Scrutiny Committee for consideration pursuant to Standing Order No. 119 (European Committees) but in respect of which the House has not come to a Resolution); or

(b) in any case, the Committee has not indicated that it has completed its scrutiny.

(3) In this Resolution, agreement in relation to a document means agreement however described and whether or not a formal vote is taken, and includes in particular—

(a) political agreement;

(b) agreement to a general approach;

(c) agreement establishing the position of the Council at any stage in legislative procedure; and

(d) agreement to Council and European Council conclusions.

(4) Where the Council acts by unanimity, abstention shall be treated as giving agreement.

(5) The Minister concerned may, however, give agreement in relation to a document which remains subject to scrutiny—

(a) if the European Scrutiny Committee has indicated that agreement need not be withheld pending completion of scrutiny; or

(b) if the Minister decides that exceptionally and for special reasons agreement should be given; but he must explain his reasons in writing—

(i) in every such case, to the European Scrutiny Committee at the first opportunity after reaching his decision; and

(ii) in the case of a proposal awaiting consideration by the House, to the House at the first opportunity after reaching his decision.

Draft Resolution on Opt-In Scrutiny

1) This Resolution applies in relation to a notification to the President of the Council of the European Union or to the Council and the Commission of the wish of the United Kingdom to take part in the adoption and application of a proposed measure or acceptance of an adopted measure following from a

proposal or initiative presented to the Council pursuant to Title V of the Treaty on the Functioning of the European Union.

2) No Minister of the Crown may authorise such notification until eight weeks have elapsed since the proposal or initiative was published, nor if it is awaiting consideration by the House (that is, it is a document which has been recommended by the European Scrutiny Committee for consideration pursuant to Standing Order No. 119 (European Committees) but in respect of which the House has not come to a Resolution).

3) Where, after the adoption of a measure by the Council, a Minister of the Crown wishes to accept that measure, he shall inform the European Scrutiny Committee by letter.

The Minister concerned may not authorise such notification until eight weeks have elapsed since the date on which the letter was sent to the Committee, nor if the measure is awaiting consideration by the House (that is, it is a document which has been recommended by the European Scrutiny Committee for consideration pursuant to Standing Order No. 119 (European Committees) but in respect of which the House has not come to a Resolution).

4) The Minister concerned may, however, authorise notification sooner than provided for in paragraphs (2) and (3) —

if the European Scrutiny Committee has indicated that notification need not be withheld pending completion of scrutiny; or

if the Minister considers that for special reasons notification should be given; but he must explain his reasons—

vi. in every such case, to the European Scrutiny Committee at the first opportunity after reaching his decision; and

vii. in the case of a proposal awaiting consideration by the House, to the House at the first opportunity after authorising notification.⁷⁸

8.2 Ministerial correspondence

In ministerial correspondence from autumn 2009 to January 2010 between the Minister for Europe, Chris Bryant, and the Chairman of the European Scrutiny Committee, Michael Connarty, the ESC's scrutiny proposals linked to the implementation of Lisbon were elucidated. Extracts from these letters are reproduced below:

Chris Bryant wrote to Michael Connarty on 21 October 2009

In your letter of 10 September you raised concerns about the timing around adoption of implementing legislation under the Lisbon Treaty, in particular with respect to the provisions of the Protocol on the role of national Parliaments. Without beginning a discussion on the scope of the Protocol, we welcome the Protocol's aim of encouraging the greater involvement of national Parliaments in draft legislative acts. As you rightly say, in urgent cases, and where justification is given, the Protocol allows for more expedient handling. The Presidency considers that the entry into force of a new Treaty constitutes such an exceptional circumstance, and we agree.

⁷⁸ European Scrutiny Committee, 6th Report, Session 2009-10, 6 January 2010 at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg/267/267.pdf>

We envisage that four proposals out of the Swedish Presidency implementation work programme will require formal scrutiny clearance prior to agreement by Ministers. The Home Office has already sent you the draft text of the Council Decision on the Committee on Internal Security (COSI) and an un-signed Explanatory Memorandum in order to give you the chance to feed in views. The Home Office will of course write to you if it proves necessary to agree to the formal adoption of this proposal before formal scrutiny is completed. Over the coming year we are expecting three other proposals relating to the External

Action Service, the new Multi-annual Financial Framework regulation (See Note 1), and the Financial Regulation (See Note 2), in 2010. So we hope there will be adequate time for proper scrutiny of these documents.

We are still exploring with the Swedish Presidency the timing for adoption of texts agreed during the preparatory process. You may similarly wish to seek the views of colleagues in other national Parliaments. In the meantime, we remain keen to give the Scrutiny Committees as much time as possible to engage on implementation issues and have forwarded documents to the Committees, on a confidential basis, as they emerge from preliminary discussions in Brussels - exactly as we did under the Slovene Presidency in 2008. In this way we are seeking to keep the Committees informed and to provide them with an opportunity to use the time available now before the possible entry into force of the Lisbon Treaty to consider the issues and give us any views.

We will continue to forward texts on all the implementation issues – whether for scrutiny clearance or for information – to the Committees and provide any follow-up information. The Home Office and HM Treasury will do the same where they have the policy lead. You will understand that due to the confidential nature of these texts I would not be in a position to discuss them in detail during a public evidence session, although I would be happy to do so in private. My Ministerial colleagues in other departments will be happy to give you further information on the implementation issues on which they lead.

The Swedish Presidency workplan dated 30 June, which Baroness Kinnock forwarded with her letter to you of 21 August, has slipped in some areas owing to delays in the issuing of the relevant fiches, and the need for more detailed discussion. A full update on each implementation issue is set out below. I hope the Committee will find this helpful.

1. Coreper has considered a draft notification to third countries and international organisations (Draft letter to EU Partners on the EU legally succeeding the EC) about Article 1, third subparagraph, of the TEU which states that "The Union shall replace and succeed the European Community" (sometimes called 'single legal personality'). This notification will be necessary to inform third States and international organisations of this legal succession which will be effective at the time of the entry into force of the Treaty. The note underlines the fact that the EU will have a legal personality that will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties. The reference to Union Delegations has been square bracketed until such time as Coreper reaches discussion on that aspect of the organisational structure of the European External Action Service (EEAS). A date has not yet been fixed for that specific discussion, but I felt it was helpful for you to be informed of the progress to date on this issue. The draft document is attached.

2. The Home Office forwarded the draft Council text on the Committee on Internal Security (COSI) to the EU Scrutiny Committees on 2 September under an un-numbered Explanatory Memorandum.

2b. Provisional discussions in Coreper on the Implications of the JHA working structure have resulted in a draft fiche which will be forwarded by the Home Office to the EU Scrutiny Committees shortly.

3. A draft text, proposing a series of acts which should be prioritised before entry into force and the subsequent transition to co-decision of some policy areas, was forwarded to the EU Scrutiny Committees on 16 September.

4. A draft set of Rules of Procedure for the Council of Ministers (RIC) emerged following discussion in Coreper on 7 October and is attached for the Committees' information. This sets out the internal arrangements by which the various configurations of the Council will operate, including how meetings are prepared and held, the split of responsibilities between different configurations, including the new, separate General Affairs and Foreign Affairs Councils, and the respective roles of the key actors involved, notably the Rotating Presidency, European Commission and the President of the European Council. Rules currently exist for the Council of Ministers, and are simply being reviewed to reflect changes introduced by the Lisbon Treaty.

5. A draft set of the Rules of Procedure for the European Council (RICE) was discussed in Coreper on 15 October. The draft as of this date is also attached for the Committees' information. There will be further discussions during the week beginning 19 October. These rules will set out how the meetings of the European Council will be prepared and run, the role of key individuals such as the President of the European Council and the Head of State or Government of the Rotating Presidency, and how any follow-up work from European Councils will be taken forward. In contrast to the RIC, no rules of procedure for the European Council presently exist.

6. The issue of the Chairmanship of preparatory bodies in the area of external relations was discussed at Coreper briefly on 30 September and 7 October. The Presidency plan to schedule a further discussion during October but we do not yet have the date. We should be able to forward a text to the EU Scrutiny Committees after that meeting.

7. A Presidency text summarising the position of Member States, and seeking a mandate for discussions with the European Parliament and Commission on transitional budgetary arrangements (the future budget procedure and related issues as introduced by the Lisbon Treaty) was discussed by Ambassadors in Coreper on 6 October. A copy of this text will be sent by HM Treasury to your Committee on a confidential basis shortly.

8. On the subject of 'issues related to the GAC' (General Affairs Council) our understanding remains that these issues have been incorporated into discussions in the context of the draft rules of Procedure of the Council of Ministers and/or European Council (RIC/RICE) as set out above. We no longer expect a separate draft fiche to be issued for this reason.

9. Discussions on the European External Action Service (EEAS) have taken place on 6, 8, 13, 15 and 19 October. I attach copies of the texts that were used to help focus the discussions. I will continue to forward you future versions as they emerge. We do not expect the draft Council Decision on

setting up the EEAS, which will require scrutiny clearance, to issue until next year.

10. The Procedures for appointing a President of the European Council; Council Secretary General; High Representative, are something of a misnomer. The substance of these appointments procedures (how the candidates are appointed and by what voting regime) are set out in the Lisbon Treaty and as such were debated and decided on by Parliament as a part of the EU (Amendment) Act 2008. Procedural issues were folded into discussions under RIC and RICE (at items 4 and 5 above). The only documents under this specific item are likely to be the publication, in due course, of the name of the Council's nominees for each post.⁷⁹

Notes

1 As required by Articles 312 of the Treaty on the Functioning of the European Union

2 As required by Articles 322 of the Treaty on the Functioning of the European Union

Michael Connarty looked forward to Government proposals on how to give effect to Lisbon provisions affecting the role of national parliaments, in particular, the arrangements for the operation of the “yellow and orange card” mechanism. He continued:

In the meantime, we have been reviewing options for redrafting the Committee's standing order and the scrutiny reserve resolution, not only to take account of changes necessitated by the entry into force of the Lisbon Treaty but also to explore the potential for making them clearer, simpler and, where possible, tougher. Changes to the deposit arrangements and the scrutiny reserve resolution need to apply to both Houses. The Lords EU Committee been engaged in similar work and its proposals have been sent to Baroness Royall.

The Committee proposes revisions of Standing Order No.143 and the scrutiny reserve resolution, and a new scrutiny reserve resolution on Opt-ins. Drafts and explanatory notes are attached to this letter.

The attached explanatory notes explain the reasoning behind the proposed changes to Standing Order No. 143 and to the scrutiny reserve resolution. Since changes have to apply in both Houses, I should point out that there are three areas where the Committee wishes to go further than the Lords' proposals.

The first is to include “non-legislative acts” in the examples of types of “European Union document” that are subject to scrutiny. These are used for all acts in the field of CFSP, as well as in other limited fields, and may not necessarily be caught by the catch-all provision: “a document submitted by an institution of the European Union to another institution”.

For the avoidance of doubt, reference to “non-legislative activity” does not include documents sent to the Council concerning the exercise of the Commission's own delegated powers. This waiver is consistent with current scrutiny practice, and should be interpreted with reference to paragraph 2.3.1 of the current Cabinet Office Guidance.

The second relates to the deposit of Council and European Council conclusions; the European Council becomes more influential under the Lisbon

⁷⁹ Ministerial correspondence, ESC 2008-09, 21 October 2009, at <http://cms.parliament.uk/documents/upload/Ministerial-Correspondence-2008-09.pdf>

Treaty, reflected not least by the fact that it will become an 'institution' of the EU. The Committee wishes European Council and Council conclusions to be deposited in all circumstances, rather than when they relate to a deposited document, which is the proposal of the Lords Committee. The third is the scrutiny of opt-in decisions, on which the Government has agreed not to make any formal notification to the Council of a decision to opt-in within the first eight weeks following publication of a proposal, so as to give time for scrutiny and, if appropriate, debate of the opt-in decision. A separate scrutiny reserve resolution of the House would be required to give effect to this. We can foresee circumstances in which the Government may prefer to wait until a proposal has been adopted before deciding to opt-in. The Committee therefore considers that a resolution should go beyond what the Government has proposed and also cover decisions to opt-in to legislation (rather than a proposal) after it has been adopted.

In our proposed redraft of the scrutiny reserve resolution we have combined, with amended wording, paragraphs (3) and (4) of the existing resolution, and dispensed with the wording of existing paragraph (3)(a) which we now consider to be superfluous.⁸⁰

Chris Bryant replied on 16 November 2009:

The Lisbon Treaty provides new powers for national Parliaments to have a direct say in EU law-making. This is an important benefit of the Lisbon Treaty, as it allows for increased accountability and transparency of EU business. The Lisbon Treaty gives Parliament two new powers:

1. Challenging draft EU legislative proposals on subsidiarity grounds (sometimes known as the yellow/ orange card procedure);
2. Asking HMG to take cases to the European Court of Justice on behalf of Parliament on subsidiarity grounds. During the passage of the EU (Amendment) Bill, the Government also offered two further new powers to Parliament:
3. Prior Parliamentary control of 'passerelles' (i.e. Treaty provisions which allow Member States to decide, by unanimity, to move a particular provision from decision making by unanimity to Qualified Majority Voting and/or to codecision with the European Parliament);
4. Enhancing scrutiny of the UK's decisions on whether or not to opt in to Justice and Home Affairs (JHA) legislation.

There will also be a need for some minor terminological changes to the Scrutiny Reserve resolution in both Houses as a result of the Treaty coming into force, e.g. 'EC' will become 'EU'.

I anticipate that challenging draft EU legislative proposals on subsidiarity grounds and asking HMG to take cases to the European Court of Justice can be accommodated within existing procedures in the House of Commons, and require some adaptation of procedures in the House of Lords (where reports from the European Union Committee are usually taken note of by the House). The Government's commitment on prior Parliamentary control of 'passerelles' can also be implemented within existing procedures in the House of Commons;

⁸⁰ Ministerial correspondence, ESC 2008-09, 22 October 2009, at <http://cms.parliament.uk/documents/upload/Ministerial-Correspondence-2008-09.pdf>

the House of Lords would have to determine its own procedures and timing in this respect.

In the House of Lords, it may be necessary to adopt a new Scrutiny Reserve Resolution, or amend the current one, to reflect the Government's commitments in the JHA area.

I outline in the attached Annex how I propose the main elements of the package of powers could work in practice. Of course the final decisions on how these powers will work are for the Houses respectively.

Before then, I hope the EU scrutiny committees in both Houses will consider these proposals and give their views, so both Houses can take a view informed by your expertise. I have discussed and agreed the proposals jointly with the Leaders and Business Managers of both Houses of Parliament.

These proposals are based on principles which I hope will find wide favour in both your Committees, namely:

- that these new powers are essentially independent powers for each House to exercise;
- that decisions on how these powers should be exercised are ultimately for each House as a whole to make;
- respect for the prerogatives and procedures of each House;
- building on the work of the Modernisation Committee report of 16 March 2005 and on the Lords EU Committee Report of 2005 (Strengthening national parliamentary scrutiny of the EU - the Constitution's subsidiarity early warning mechanism) which considered some of these issues in relation to related provisions of the defunct Constitutional Treaty.

The Government is keen to see these powers operational as soon as possible. I recognise that changes to Parliamentary procedures are unlikely to be fully in place by the time the Lisbon Treaty enters into force on 1 December. The Government will bring forward proposals to facilitate the necessary changes when Parliamentary time allows. However, the Government will be prepared to act on the basis that both Houses can exercise the new powers fully from entry into force of the Treaty, as we are already doing for scrutiny of JHA opt-ins.

I am happy to come and talk to Committees either formally or informally to discuss any of these proposals in more detail.⁸¹

On 25 November 2009 Michael Connarty, not entirely satisfied with the Government's response, wrote:

You wrote to the Committee on 16 November with proposals on how you see the new powers for national parliaments being given effect by the House. I was surprised that your letter did not address any of the points contained in my letter to you on 22 October. In that letter I put forward the Committee's proposals for redrafting the Committee's standing order and the scrutiny reserve resolution, not only to take account of changes necessitated by the entry into force of the Lisbon Treaty but also to explore the potential for making

⁸¹ 16 November 2009 at <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf>

them clearer, simpler and, where possible, tougher. I trust that a full response to these points will be sent shortly.

In the meantime you say that changes to parliamentary procedure are unlikely to be in place by the time the Lisbon Treaty enters into force. Nevertheless, the Government will act on the basis that the House can exercise the new powers fully from the entry into force of the Treaty on 1 December.

On the yellow/orange card (subsidiarity) procedure, the Government's suggestions reflect the view taken by the Modernisation Committee in 2005 and endorsed by the European Scrutiny Committee in 2008. That is, the Committee will consider proposals in the usual way but where it has a serious concern about subsidiarity it will say so in its report chapter and append to it a "reasoned opinion" setting out its concern.

However, the Government is proposing that the ESC's report and "reasoned opinion" be debated either in the European Committee or on the Floor. The Modernisation Committee said (and the ESC agreed) that there was a balance to be struck between maximising opportunity for debate in the House and ensuring that the necessary processes can be completed before the end of the (now) eight-week deadline specified in the Treaty.

The ESC's proposal was therefore for the motion to approve the Committee's reasoned opinion to be taken without debate but with the chairman of the European Scrutiny Committee (or another Committee member) being permitted a short speech to outline the reason for the opinion and with the Minister having the right of a short reply on behalf of the Government.

There is another point to make concerning the desirability of a debate. A subsidiarity concern is not the same as "politically important". The House might find itself being required to debate a proposal which is minor and technical but which nevertheless gives rise to a serious concern over subsidiarity.

In your letter you say that there will also be a need for "some minor terminological changes" to the Scrutiny Reserve Resolution as a result of the Treaty coming into force. The ESC considers that the changes brought in by the Treaty go further than this. EU activity will be divided into legislative acts, which are defined, and (by inference) non-legislative acts, which are not. It is the second category that poses the problems for scrutiny. Many binding Union acts issued particularly from one EU institution will fall under the second category, and it is for this reason that the revised Standing Order refers to "non-legislative acts". Indeed, were it not to make this reference, the ESC would be left in a position where its scrutiny mandate under the Lisbon Treaty would be narrower than it is today. We will send you a list of examples of such non-legislative acts under cover of a further letter, and look forward to your response.

You mention in your letter that it may be necessary to adopt a new Scrutiny Reserve Resolution in the House of Lords, or amend the current one, to reflect the Government's commitments on opt-ins in the JHA area. A separate Scrutiny Reserve Resolution of the House of Commons (rather than amending the current one) would also be required to give effect to the undertakings given by the Government. This is because the opt-in decision which falls for scrutiny is taken in Whitehall, rather than in the Council in Brussels.

Attached to my letter to you of 22 October was a draft Resolution proposing a scrutiny procedure for opt-in decisions. I look forward to your response to that. You will see that it applies to opt-in decisions taken by the Government both before and after the legislation has been adopted in Brussels. From a scrutiny perspective there can be no substantive difference between the two types of opt-in decision and so the undertaking to give eight weeks for parliamentary scrutiny should apply pre- and post-adoption.⁸²

In a letter in January 2010 Chris Bryant responded to letters from the ESC in November and December 2009, and following a meeting on 10 December at which he had expressed his support for a new Scrutiny Reserve Resolution but doubted that the House would have time to debate one before the General Election. He also clarified what the Government understood by a “legislative act” under Lisbon for the purposes of parliamentary scrutiny:

With regard to the definition of a ‘legislative act’ under Article 289(3) TFEU, our understanding is that the relevant Treaty legal base must explicitly refer to the legislative procedure, whether special or ordinary, for it to constitute a legislative act. We understand that this is also the position of the EU Institutions but we are following up with them to confirm this. This is of course an EU-level definition for the purposes of applying the EU Treaties and is wholly independent from domestic UK scrutiny arrangements. I can assure you that we are committed to continue arrangements for scrutiny, following the entry into force of the Lisbon Treaty, in exactly the same way as previously. This means that there will be no change in the range or scope of documents that we send to you for scrutiny.

With regard to the process of the House submitting its reasoned opinion in order for a ‘yellow’ or ‘orange’ card to be raised, I restate the offer in my letter of 16 November for the Government to facilitate this independent power by tabling a motion, which would be amendable, to endorse the Committee’s recommendation.

On scrutiny of JHA opt-ins, as I also mentioned in our meeting of 10 December, the entry into force of the Lisbon Treaty does in no way affect the process of opting in to JHA proposals, other than to extend it across the field of JHA measures. The UK has been operating the opt-in procedure since 1999. The Home Office and Ministry of Justice are already implementing the Government’s commitments of enhanced scrutiny of JHA opt-ins, as set out in Baroness Ashton’s 9 June 2008 statement.

As I mentioned to you in our 10 December meeting, it is up to the Committees to seek scrutiny of a decision of the Government to opt-in to a JHA measure, but from the Government’s perspective I consider it important that sensible conduct of the process is maintained, with scrutiny on a case by case basis. There were at least 14 proposals which led to opt in decisions in 2009; if the Committee seeks a debate on the floor of the House for every opt-in, this will likely cause real difficulties for the manageable conduct of legislative business in the House.

You have asked for a commitment that the opt-in scrutiny period of 8 weeks will also apply to opt-in decisions taken by the Government after the legislation has been adopted. However, I do not consider there is a need to require 8 weeks in cases of post-adoption legislation opt-ins. By definition, the proposal in

⁸² 25 November 2009 at <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf>

question will already have been the subject of detailed negotiation in its pre-adoption stages.

Both the Home Office and Ministry of Justice keep the Committee fully informed of progress on dossiers even where the UK has not opted in - particularly in cases where the Government has said that it intends to participate actively in negotiations with a view to securing the amendments necessary to allow us to opt-in to the measure. I therefore consider that the Committee, in such situations, will have had a very good opportunity to scrutinise the measure.

I fully support a new Scrutiny Reserve Resolution to codify the commitment given by Baroness Ashton on 9 June 2008 when Parliamentary time allows; in the meantime Home Office and Ministry of Justice will codify the commitment given by Baroness Ashton in a Code of Practice.⁸³

Michael Connarty replied on 27 January 2010:

New resolution

We welcome your support for a new scrutiny reserve resolution, an opt-in resolution and (by implication) an amended standing order. As you know our position is that the changes need to go beyond terminology and updating and address the areas set out in my letter of 25 November, foremost among which is the deposit for scrutiny of draft Council conclusions.

I realise the difficulty of finding time on the floor of the House to consider these changes but there is a possibility that the Wright Committee's reform proposals may be debated in the coming weeks. If so, this might provide an opportunity to take the Committee's proposals alongside the wider reform package.

Tabling a motion

You repeat the Government's offer to facilitate the House submitting its reasoned opinion for a yellow or orange card to be raised, by tabling a motion to endorse the Committee's recommendation. The Committee's view is that the House's endorsement of its reasoned opinion should not itself require endorsement by the Government. It prefers therefore that the chairman or another member acting on behalf of the Committee should table the motion. At present only Ministers can put motions down on the effective order paper (with the exception of Opposition Days and the two Public Accounts Committee days). The Wright Committee's report talks of restoring private members' motions in some form, so the issue of who can table motions is up for discussion. This change can be made without any amendment to the House's standing orders.

The Government is proposing that the ESC's report and "reasoned opinion" on subsidiarity be debated either in the European Committee or on the Floor. The Modernisation Committee said (and the ESC agrees) that there was a balance to be struck between maximising opportunity for debate in the House and ensuring that the necessary processes can be completed before the end of the (now) eight-week deadline specified in the Treaty. The ESC's proposal remains therefore for the motion to approve the Committee's reasoned opinion to be taken without debate but with the chairman of the Committee (or another Committee member) being permitted a short speech to outline the reason for

⁸³ Ministerial Correspondence, House of Commons European Scrutiny Committee 2009-10, 11 January 2010, at <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf>

the opinion and with the Minister having the right of a short reply on behalf of the Government.

Legislative acts

Your interpretation of Article 289 TFEU means that certain draft regulations, directives or decisions, although adopted with the “participation” of the European Parliament, are not adopted by a special legislative procedure, and are not therefore legislative acts. That this could have been the intention of the drafters of the Lisbon Treaty we find surprising when other provisions adopted with the same participation of the European Parliament are special legislative procedures. In our view it is the actual legislative procedure, rather than the absence of a classification in the Treaty provision, which should carry more interpretative weight. We also note that the Cabinet Office guidance on this is at odds with your interpretation and confirms our own. *Ad Hoc Guidance Letter (09) 25* (7 December) states as follows:

“The common denominator is that they [legislative acts] must be proposals which are subsequently adopted as acts jointly by the Council and European Parliament, or by one with the involvement of the other in the legislative process.”

In addition, your interpretation leads to anomalies in the applications of Protocols 1 and 2. The provisions we cited in our letter of 3 December cover significant EU policies such as competition and state aid, judicial cooperation, criminal procedure, emergency asylum procedures and employment, transport and economic policies. The consequence of your interpretation is that these provisions will not constitute “legislative acts”. They will not therefore be subject either to the eight week period for parliamentary scrutiny before adoption under the national parliament protocol, nor the reasoned opinion mechanism under the subsidiarity protocol (with the wider consequence of whether subsidiarity arguments should apply at all if the protocol is not applicable).

We ask you to confirm the EU institutional interpretation of these provisions as soon as possible. If it is consistent with your own, we would be grateful for precise reasons why, for each Treaty provision we cited in our letter of 3 December, the legislative procedure was not mentioned, thereby rendering them non-legislative acts even though the European Parliament has participated in their adoption.

Scrutiny of opt-ins

On opt-in decisions, surprisingly you say that it is “up to the Committees to seek scrutiny of a decision of the Government to opt-in to a JHA measure”. This is not correct — it is up to the Government to ensure that any European document, including one subject to an opt-in decision, is cleared from parliamentary scrutiny. This is the essence of parliamentary scrutiny, and we wonder whether this misunderstanding has affected your consideration of this issue.

In the meeting of 10 December the one area on which there was agreement was the need for decisions to opt into adopted legislation (as well as draft legislation) to be subject to scrutiny. So your change of view on this is disappointing. You state that “the proposal in question will already have been the subject of detailed negotiation in the pre-adoption stages... I therefore consider that the Committee, in such situations, will have had a very good opportunity to scrutinise the measure”. But the way the Committee scrutinises

draft legislation to which the Government has said it will not opt in is very different from scrutiny of the same proposal when the Government has indicated that it will opt in. This is because the former has no or little impact on the UK, and the latter a potentially significant impact. In addition, the Government can decide to opt into legislation months or years after it has been adopted. If Parliamentary scrutiny of EU “Freedom, Security and Justice” policy is to be comprehensive, each decision to opt into legislation must be subject to scrutiny.⁸⁴

8.3 The opt-in scrutiny procedure is put to the test

On 4 February 2010, in spite of the spirit of openness conveyed by Chris Bryant in his correspondence with the ESC, the Government was criticised for its “apparent intention to breach the undertaking to Parliament about the time scale and process for opt-in decisions in relation to the European Union (Amendment) Act 2008” (the Act of Parliament which authorised the legal effect of the Lisbon Treaty in the UK).⁸⁵ The Government had agreed to opt in to EU-US counter-terrorism measures without formal parliamentary clearance of the UK opt-in. For the Government, the Exchequer Secretary to the Treasury, Sarah McCarthy-Fry, maintained that the interim agreement with the US to permit the sharing of SWIFT data for the US terrorist finance tracking programme, described by the Government as “a valuable counter-terrorist tool” and “crucial for global security”, was to be “subject to an expedited conclusion”. This would not permit Parliament the usual eight weeks to scrutinise the UK’s decision to opt into the agreement, and the Minister set out its reasons for agreeing to the interim measure under “exceptional circumstances”. Michael Connarty said:

This is the first instance of the post-Lisbon treaty imminent opt-in decision, and the assurance given by the Government is on trial. This breach of that undertaking is therefore a very bad start to the new process.⁸⁶

He thought someone was “treating this Parliament with disdain and contempt”. Bill Cash thought the new “increase in the powers of national Parliaments have been completely jettisoned in the most ramshackle manner[?]”.⁸⁷ Sarah McCarthy-Fry insisted that she took her responsibilities to the House “very seriously” and that this was “an exceptional occasion”, concluding that “given all the points that I have made, I think that we should agree to this opt-in, and that is what I intend to do”.

⁸⁴ 27 January at <http://www.parliament.uk/documents/upload/ministerial-correspondence-2009-10.pdf>

⁸⁵ HC Deb 4 February 2010 at <http://pubs1.tso.parliament.uk/pa/cm200910/cmhansrd/cm100204/debtext/100204-0004.htm#1002046600007>

⁸⁶ Ibid c 456

⁸⁷ Ibid c 459