



House of Commons
European Scrutiny Committee

Withdrawal from enhanced cooperation: the Committee's evidence session with Baroness Wilcox

Thirty-ninth Report of Session 2010–
12

*Report, together with formal minutes, oral and
written evidence*

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The European Scrutiny Committee

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- 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
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1 Introduction

1. The European Scrutiny Committee took evidence from the Parliamentary Under-Secretary for Business, Innovation and Skills, Baroness Wilcox, on two occasions on proposals to establish a system of unitary patents in the EU.
2. On the second occasion,¹ which took place on 22 June, the Committee examined the question of whether a Member State could withdraw from a Decision of the Council to authorise enhanced cooperation pursuant to Article 329(1) TFEU.

2 Background

3. The European Patent Convention (“the EPC”), signed at Munich on 5 October 1973, is a Treaty to which 38 States, including all the Member States of the European Union, are now parties. The European Union is not a party to the EPC. The EPC provides for a unitary procedure for granting European patents by the European Patent Office (“the EPO”). Whilst the procedure for granting patents is unitary, the European patent in fact amounts to a bundle of national patents, each governed by the domestic law of the States which the holder of the patent has designated.
4. In April 2007 the Commission presented a Communication entitled *Enhancing the patent system in Europe*. It proposed the creation of an integrated system for the European patent and a proposed Community patent. The latter would be granted by the EPO pursuant to the provisions of the EPC. It would be unitary and autonomous, producing equal effect throughout the European Union (unlike the European patent), and could be granted, transferred, declared invalid or lapse only in respect of the whole of that territorial area. The provisions of the EPC would apply to the Community patent to the extent that no specific rules were provided for in EU law (in the form of a Regulation on the Community patent).
5. Work by the Council also led to the drawing up of a draft international agreement to be concluded between EU Member States, the European Union and third countries which are parties to the EPC to create a court with jurisdiction to hear actions related to European and Community patents. The agreement would establish a European and Community Patents Court, composed of a court of first instance, comprising a central division and local and regional divisions, and a court of appeal, that court having jurisdiction to hear appeals brought against decisions delivered by the court of first instance. The third body would be a joint registry.
6. In December 2009 political agreement was reached on a Regulation establishing a unitary EU patent (the name was changed from Community patent after the entry into force of the Lisbon Treaty).

¹ The first occasion took place on 11 May, and is reported in the Thirty-second Report of Session 2010–12, HC 942.

7. In June 2010 the Commission adopted a proposal for a Regulation on the translation arrangements for the EU patent. Translations represent a significant proportion of the cost of patenting across Europe, and therefore agreeing a business-friendly language regime for the EU patent is important. Studies quoted by the Council say that to obtain a European patent in 13 countries would cost about €18,000, with approximately €10,000 of that being spent on translations.

8. The Commission's proposal echoed a 2009 proposal for a three-language arrangement (which had failed to get consensus), but with additional elements relating to the availability of quality machine translations and the reimbursement of translation costs for applicants from EU States that have an official language which is not English, French or German. Despite compromises being offered, the required unanimity was not achieved at either the October or November Competitiveness Councils. In advance of the December Competitiveness Council, 11 Member States, including the UK, wrote to the Commission to request it to make a proposal to use enhanced cooperation for the translation of EU patents. On 14 December the Commission duly proposed a draft Council Decision authorising enhanced cooperation — this Decision is the document on which scrutiny was breached.

9. The Decision on enhanced cooperation was due to be adopted by the Council on 10 March. However, a pending Opinion of the Court of Justice of the European Union (ECJ), requested by the Council, was expected on 8 March. The ECJ had been asked to consider whether the draft agreement creating the unified patent court was compatible with the EU Treaties. The Opinion was published on 8 March. The ECJ found that the draft agreement establishing the unified patent court was incompatible with the EU Treaties for two reasons. Firstly, it would deprive national courts of the power or, as the case may be, obligation, to refer a question of EU law (including under the EU Patent Regulation) to the ECJ for a preliminary ruling under Article 267 TFEU — such preliminary rulings were “indispensable to the preservation of the very nature of [EU] law”. And secondly, if a decision of the unified patent court were to be in breach of EU law, it could not be subject to infringement proceedings by the Commission nor could it give rise to financial liability on behalf the EU Member States — two essential characteristics of EU law.

10. The ECJ's Opinion notwithstanding, the Council adopted the authorising Decision on enhanced cooperation on 10 March. But in doing so, it agreed that Member States could withdraw from the authorising Decision, once they had fully considered the implications of the ECJ's Opinion for the proposed EU unitary patent.

3 Correspondence with the Minister

11. 14 December 2010 — the Commission proposed a draft Council Decision on enhanced cooperation to agree a language regime for the EU patent.

12. 7 January — the Minister deposited an Explanatory Memorandum saying that the Council Decision was set for 10 March but that the UK might withdraw before if the ECJ's Opinion concluded that the ECJ had insufficient jurisdiction over the proposed patent court.

13. 9 February — the Committee’s Eighteenth Report questioned the legal basis on which the UK was able to withdraw and the need for the Decision to be adopted two days after the Opinion was published. It asked the Minister to consider seeking to have the Council Decision postponed.

14. 16 February — the Minister wrote to say that the EU Presidency and Commission had given assurances of the possibility of withdrawing from the Council Decision, and the Commission would make a declaration to that effect when the Decision was adopted. She said that re-opening the text was not a viable option and the date of 10 March allowed the Commission to propose implementing legislation very shortly thereafter. The UK would have to take a view on the ECJ’s Opinion when it received it, and would update the Committee afterwards.

15. 3 March — the Committee wrote to say that the Commission’s declaration did not overcome the problem that the Treaty does not provide for Member States to withdraw from a Decision to enter into enhanced cooperation, and asked again for the Council Decision to be postponed so that the Government and the Committee could review the ECJ Opinion before a Decision was adopted.

16. 8 March — the ECJ issued its Opinion, saying that the proposed unitary patent court was incompatible with the EU Treaties.

17. 9 March — the Minister wrote to give advanced warning that there was the possibility that the Government may need to override scrutiny. She added that the Council legal service has also advised that it would be lawful for a Member State to withdraw from the Decision. The Commission’s implementing Regulations were to be adopted at the 30 May Competitiveness Council. On the Opinion the Minister said that the Government would take a final view once it had fully considered the implications.

18. 10 March — the Government voted in favour of the Council Decision authorising enhanced cooperation.

4 Assessment of the evidence of 22 June 2011

19. The focus of the Committee’s attention was whether it was possible under the EU Treaties for a Member State to withdraw from a Council Decision authorising enhanced cooperation. This being so, it was to the Legal Adviser at the Department of Business, Innovation and Skills, Nicholas Fernandes, that most of our questions were addressed.

20. The relevant provisions of the Treaties provide as follows:

- Article 20(2) TEU:

“The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at

least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.”

- Article 20(4) TEU:

“Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.”

- Article 328(1) TFEU:

“When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.”

- Article 329(1) TFEU:

“Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. [...]

“Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.”

- Article 330 TFEU:

“All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.”

- Article 331(1) TFEU:

“Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.”

21. Mr. Fernandes confirmed in evidence what we had been told in correspondence with the Minister, namely that it was lawful for a Member State to withdraw from an authorising Decision of the Council to proceed with enhanced cooperation. This view had been agreed across Whitehall and was based on the following reasons:

- whilst there is no provision in the Treaties to withdraw from the authorisation to proceed with enhanced cooperation, equally there is no prohibition against withdrawal.² Member States have freedom to act unless they are restricted by the Treaties;³
- moreover, the possibility of withdrawing can be inferred from the fact that enhanced cooperation is a measure of last resort which needs to be applied flexibly;⁴
- whilst the authorisation decision is legally binding, critically, it binds Member States only “to proceed with the enhanced cooperation” as set out in Article 329(1) TFEU, not to participate in the enhanced cooperation once established. Enhanced cooperation is established by the adoption of substantive measures pursuant to that authorisation; before then, it is permissible to withdraw from the authorisation decision.⁵

5 Conclusions

22. The decision to enter into enhanced cooperation is a last resort — the TEU says as much, and if proof were needed **this is only the second time it has been invoked since first being incorporated into the EU Treaties by the Amsterdam Treaty.**⁶ The question of withdrawing from enhanced cooperation did not arise on the previous occasion.

23. **The question of whether and when it is permissible to withdraw is precedent-setting, therefore.** This is particularly so if you take the view, as some do, that the EU is likely to have to rely on enhanced cooperation, or “variable geometry”, more frequently in the future.

24. The advice which the Department of Business, Innovation and Skills received from its legal adviser was advice agreed across the Government Legal Service.⁷ It is also shared by the Commission, which made a declaration to this effect, and the Council Secretariat. **From this we conclude that it will be possible for Member States to withdraw from a future decision to proceed with enhanced cooperation but before enhanced cooperation is implemented.**

25. This is something we had not read into the relevant Treaty provisions — and for the reasons we outline below, do not think should be read into the provisions — and **we will seek confirmation from the Commission and Council Secretariat of their views.**

2 Q 4

3 Q 25

4 Q 12 and 25

5 Q 4, 9, 22, 26

6 The first occasion was in relation to the adoption of Regulation (1259/2010) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

7 Qs 17–19

26. On the Government’s interpretation of the relevant provisions, **legitimate confusion arises as to the consequence of an authorisation to proceed with enhanced cooperation.** The replies to questions 8 to 12 and question 25 demonstrate this. Mr Fernandes appeared to conclude that there is no enhanced cooperation after the authorisation Decision, but rather a legal basis to proceed to establish enhanced cooperation. But later he said that:

“The whole process, if you like, could be seen as enhanced cooperation, but the point at which it really starts to function, if you like, is when the measures have been taken and implemented.”⁸

We do not think the drafters of the Treaty on the Functioning of the European Union could have intended such confusion to arise.

27. **If the Treaties had meant to allow for withdrawal from an authorisation to proceed with enhanced cooperation, we think express provision would have been made for this.** We note in this regard that Article 328(1) TFEU makes provision for the establishment of enhanced cooperation to be “open to all Member States”, but, significantly, not for Member States to withdraw from the establishment of enhanced cooperation.

28. We also have in mind that Article 20(2) TEU states that a minimum of nine States is needed for enhanced cooperation to take place. By virtue of Article 329(1) TFEU those nine or more States wishing to participate are required to address their requests to the Commission, which in turn submits a proposal to the Council. It is then that the Council adopts the *authorising Decision*. **If the Treaties had intended for participating Member States to be able to withdraw after the authorising Decision of the Council, we think they would have made provision for what happens in the event that the number of Member States who had sent requests to the Commission but then withdraw falls below nine.**

29. Mr. Fernandes says the enhanced cooperation procedures should be viewed in the context of an overarching desire for flexibility.⁹ In our opinion, **a provision allowing for withdrawal from the authorisation Decision would have been more consistent with a desire for flexibility.**

30. **Nor are we convinced that Member States have freedom to withdraw from a legally binding Council Decision unless they are restricted by the Treaties.**¹⁰ The logic of this seems to lose all force when it is said not to apply to withdrawal from enhanced cooperation once implementing acts have been adopted, as the replies to questions 45 to 47 attest.

8 Q 23

9 Q 12

10 Qs 4 and 25

Formal Minutes

Tuesday 19 July 2011

Members present:

Mr William Cash, in the Chair

Mr James Clappison
Nia Griffith
Kelvin Hopkins

Penny Mordaunt
Henry Smith

Draft Report (*Withdrawal from enhanced cooperation: the Committee's evidence session with Baroness Wilcox*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 30 read and agreed to.

Resolved, That the Report be the Thirty-ninth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Wednesday 7 September at 2.00 pm.]

Witnesses

Wednesday 22 June 2011

Page

Baroness Wilcox, Parliamentary Under-Secretary of State for Business, Innovation and Skills; **John Alty**, Director General of the Intellectual Property Office; **Liz Coleman**, Divisional Director, Patents Directorate; **Nicholas Fernandes**, Legal Adviser, Department for Business, Innovation and Skills

Ev 1

Oral evidence

Taken before the European Scrutiny Committee on Wednesday 22 June 2011

Members present:

Mr William Cash (Chair)

Nia Griffith
Kelvin Hopkins
Chris Kelly

Stephen Phillips
Jacob Rees-Mogg
Henry Smith

Examination of Witnesses

Witnesses: **Baroness Wilcox**, Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills, **John Alty**, Director General of the Intellectual Property Office, **Liz Coleman**, Divisional Director, Patents Directorate, and **Nicholas Fernandes**, Legal Adviser, Department for Business, Innovation and Skills, gave evidence.

Q1 Chair: Thank you for coming again, Minister. I will pass the first question to Stephen Phillips—or would you like to say something first?

Baroness Wilcox: I should just like to say thank you very much for giving me the opportunity to come back slightly calmer and, I hope, better informed than last time. I hope that all the letters I have sent out in the last few days have arrived and that members of the Committee have been able to have in advance anything they are going to discuss today, so that nobody is surprised. Is it okay if my officials are with me today?

Chair: I am always delighted to see the officials. We also suggest that, from time to time, where there are technical questions that could be answered by them, the Minister takes the opportunity to ask them to respond to us.

Q2 Stephen Phillips: Thank you, Minister, for coming again. You will recall that at the outset of this process on 7 January you signed an explanatory memorandum on the proposed Council decision. I do not ask you necessarily to find it, but at paragraph 26 of that memorandum you stated: “the UK’s position on enhanced co-operation in general is that any proposals will be examined on a case-by-case basis to ensure that treaty requirements are rigorously applied.” Is that the position of the Government?

Baroness Wilcox: Yes.

Q3 Stephen Phillips: As a general question, do you think the treaty requirements were rigorously applied in this case, particularly in view of the fact that Member States were allowed to withdraw, if necessary, from the Council decision authorising enhanced co-operation?

Nicholas Fernandes: If I may—

Baroness Wilcox: Nicholas is the lawyer who is with us.

Stephen Phillips: Mr Fernandes, do go ahead.

Nicholas Fernandes: We do consider that the conditions under which enhanced co-operation was granted were stringently applied. That is very clear from the authorisation decision. All the conditions for

granting authorisation were systematically set out in the recitals.

Q4 Stephen Phillips: It is important for the Committee to be clear on this. Do you accept that the Treaty does not make any provision at all for a Member State to withdraw from a decision to enter into enhanced co-operation, and that a Council decision is legally binding under the treaty, under EU law?

Nicholas Fernandes: That is perfectly correct. There is no provision in the treaties. The treaties do not prohibit withdrawal. The Council decision is binding, but the question is: on what is it binding? To what does it bind you? For that you have to look at the nature of the decision. The nature of the decision here—this is crucial—is one of authorisation to proceed with enhanced co-operation proposed by the Commission. What the decision under article 329 does not do is establish enhanced co-operation. That is an essential distinction. It is, I quote, the “Authorisation to proceed with the enhanced co-operation”. Enhanced co-operation is then established by the adoption of substantive measures pursuant to that authorisation. That is a crucial stage; it is a point of no return. Up to that time, a Member State can withdraw, but prior to such time, the decision merely authorises Member States to proceed to establish enhanced co-operation. Of course, you need authorisation, because it is an exceptional arrangement. Enhanced co-operation is an exception in the treaties because it allows a limited number of Member States to make use of the EU institutions. That is clear from article 20 of the Treaty on the European Union. It is a last resort and is subject to stringent conditions, which we say were rigorously applied in this case. Member States cannot undertake enhanced co-operation without permission, so essentially the authorisation decision is a permission for a group of Member States to proceed to establish enhanced co-operation, and such form of authorisation clearly requires a legal Act. That is why you have a decision. This is binding, and gives participating Member States the legal authority to proceed to establish enhanced co-operation between themselves and, accordingly, make use of the EU institutions.

Without that, they would not be able to take part. However, the important point is that it does not compel Member States to take part in the subsequent measures establishing enhanced co-operation. That arises only when the States themselves take part in the measure by voting for it, so up until that time each Member State is free to withdraw.

Q5 Stephen Phillips: If one looks at article 329.1, the second paragraph reads as follows: "Authorisation to proceed with the enhanced co-operation referred to in the first subparagraph shall be granted by a decision of the Council, on a proposal from the Commission and after obtaining the consent of the Parliament." It is right, is it not, that there was such a decision in this case?

Nicholas Fernandes: Yes.

Q6 Stephen Phillips: As I understand it, the position of the Government, consistent with advice received from the Commission's Legal Service, was that withdrawal would be possible thereafter. Is that right?

Nicholas Fernandes: The decision was accompanied by a statement from the Commission that is basically declaratory of the position under the Treaty and allows for withdrawal from the authorisation.

Q7 Stephen Phillips: I do not want to interrupt you, but, just pausing there, you said it was consistent with the position under the Treaty. What is the provision in the Treaty that enables withdrawal?

Nicholas Fernandes: It goes back to the nature of the authorisation. It may help if I make an analogy here. The authorisation is similar to a train ticket, basically. The destination of the train is enhanced co-operation, established by substantive Acts. A Member State may or may not choose to get on the train. However, it does have authorisation; it has a ticket to get on the train, and you cannot object to that, but once the train gets moving—that is to say, once you have a substantive measure—you are locked in. You then cannot get off and your destination is enhanced co-operation. That is the nature of the decision here. It is binding authorisation to proceed to establish enhanced co-operation.

Q8 Stephen Phillips: Is the position of the Department and Government that there is no enhanced co-operation following the decision of the Council?

Nicholas Fernandes: No. We are proceeding to establish it.

Q9 Stephen Phillips: So, the answer to my question is, I think, yes. Is it right that the position of the Government is that, until something else happens, there is no enhanced co-operation in place?

Nicholas Fernandes: There is authorisation to proceed under the enhanced co-operation provisions, but the enhanced co-operation itself will be established once substantive measures are adopted.

Q10 Stephen Phillips: What is the position following the Council decision and before the subsequent Act—we will come back to the nature of that Act—which establishes enhanced co-operation?

Nicholas Fernandes: The substantive Acts will be the actual measures on translation provisions and unitary patents.

Q11 Stephen Phillips: But those will follow from enhanced co-operation, which is in place at the moment.

Nicholas Fernandes: No; they follow from the authorisation procedure to proceed to establish enhanced co-operation.

Q12 Stephen Phillips: Is there a basis at all for any of this interpretation in title III of the Treaty?

Nicholas Fernandes: It may help to go back to the origin of these provisions, which is basically the Amsterdam Treaty. The thinking at the time when the provisions of the Amsterdam Treaty were introduced was to provide some flexibility in the Treaty to allow Member States who wished to achieve a particular aim but could not do this through the Union, because the Union was unable to get the majority of Member States behind it, to participate in enhanced co-operation, so certain flexibility was built in. There was no prohibition. The fact that it is a measure of last resort and the actual nature of the authorisation as a permission all point to the ability of Member States to withdraw until they have got a measure established under enhanced co-operation.

Q13 Stephen Phillips: If that was the correct legal interpretation of the Treaty and the decision of the Council on enhanced co-operation was merely permissive, what would be the purpose of article 331?

Nicholas Fernandes: As implied in your question, article 329 is about starting off, and article 331 comes into play when you join, after the authorisation decision has taken place.

Q14 Stephen Phillips: But what you join, as the opening words of article 331, paragraph 1 say, is enhanced co-operation; it is a Member State that wishes to participate in enhanced co-operation.

Nicholas Fernandes: Who wishes to participate in enhanced co-operation in progress in one of the areas.

Q15 Stephen Phillips: Yes—in progress.

Nicholas Fernandes: Yes, but it is not yet established, so at that point you are joining when enhanced co-operation is in progress.

Q16 Stephen Phillips: I am afraid I have to suggest to you that this is an untenable interpretation of title III of the convention. Under article 329, enhanced co-operation is established by a decision of the Council. Once that decision of the Council has been taken, enhanced co-operation is in progress, as indeed article 331 points out, and there is no mechanism in the Treaty, or any legal or lawful basis, upon which a Member State can thereafter withdraw from enhanced co-operation. With respect, it seems to me and, I think, to the other members of this Committee that that is absolutely obvious.

Nicholas Fernandes: With respect to the Committee, this goes back to the nature of the decision. What we are doing with the authorisation decision is obtaining

22 June 2011 Baroness Wilcox, John Alty, Liz Coleman and Nicholas Fernandes

permission to proceed to enhanced co-operation. Article 331 is basically for someone who then wants to join in the process.

Q17 Chair: Have you discussed this with the other legal advisers in the Government Legal Service?

Nicholas Fernandes: Yes, certainly. This was discussed across Whitehall and with the Foreign and Commonwealth Office.

Q18 Chair: So the line you are giving us is the line taken by the Government Legal Service?

Nicholas Fernandes: That is correct.

Q19 Chair: I ask that question because enhanced co-operation looks as if it will become even more important in areas relating to economic governance, and because of the whole question of the two-tier system of the Treaty, which the Prime Minister has thought it right to sign up to, and from which a referendum is excluded under clause 4 of the European Union Bill as it now stands. Is what you are telling us authoritative, at any rate from your lips, as regards the views of the rest of the Legal Service?

Nicholas Fernandes: This is the cross-Government view that has been taken.

Q20 Stephen Phillips: Has the advice of leading counsel outside the Government, or indeed of either of the Law Officers, been taken on this interpretation?

Nicholas Fernandes: That is a difficult question for me to answer, because the convention is not to—

Q21 Stephen Phillips: I am not asking for the substance of the advice; I just want to know whether it has been taken, which is not privileged.

Nicholas Fernandes: We are not allowed to disclose whether or not advice has been sought. With respect, that is the convention.

Q22 Stephen Phillips: If I am to use your analogy, my difficulty is that the Treaty establishes that the train itself is called enhanced co-operation. There is no subsequent destination station called enhanced co-operation, so once you have bought the ticket, it puts you in enhanced co-operation, and there is no mechanism in the Treaty to withdraw. Analogies are useful only as far as they go, but you do not agree with that.

Nicholas Fernandes: Once a substantive measure is taken, you are locked in; you are then committed to the resulting enhanced co-operation.

Q23 Stephen Phillips: But the decision has already been made at that stage. The substantive decision is made. What is the purpose of enhanced co-operation? It must ante-date the decision itself, must it not?

Nicholas Fernandes: The whole process, if you like, could be seen as enhanced co-operation, but the point at which it really starts to function, if you like, is when the measures have been taken and implemented.

Q24 Stephen Phillips: In any event, you do agree with the fact that, if that interpretation of the Treaty is wrong, there is nothing in the Treaty itself that

permits a Member State to withdraw once a Council decision has been taken?

Nicholas Fernandes: I would agree that there is nothing explicit in the treaty.

Q25 Stephen Phillips: So, if that interpretation is wrong, withdrawal would be unlawful and contrary to the Treaty, would it not?

Nicholas Fernandes: No, because there is nothing prohibiting it. Member States have freedom to act unless they are restricted by or under the Treaties. There is no prohibition here. If there was an express prohibition on withdrawal, that would be illegal, but that is not the case; it is left open. I would say it is deliberately left open because of the flexibility that they were trying to provide at the time of the Amsterdam Treaty, when these provisions were introduced.

Q26 Stephen Phillips: Would it be right to say, particularly given the terms of article 331, that it is a bit of a revolving door? You can enter enhanced co-operation and then withdraw, and if you change your mind again you can enter and withdraw, and so on ad infinitum.

Nicholas Fernandes: No, not once the substantive Act has been established. Once that has been adopted and voted on, you are locked in; the door will not revolve.

Q27 Stephen Phillips: I may not agree with the evidence you have given, but I understand it. I suspect my next question is for the Minister. In your letter of 7 June, you indicated that Spain and Italy had challenged the decision to which the Council came to authorise enhanced co-operation. Could you explain to the Committee in further detail the basis of their complaint? What has become of it? If it has not yet been dealt with, what is its likelihood of success?

Liz Coleman: Italy in particular has challenged the decision on the basis that it does not fulfil the requirements of the Treaty. We had already made the assessment that the requirements of the Treaty were fulfilled, and when we receive the usual notification that the case is being considered by the ECJ, the Government will put in observations, as it would often do in a case of this nature, but we had already decided that the conditions of the Treaty were fulfilled in this case.

Q28 Stephen Phillips: What is Spain's objection?

Liz Coleman: I have not seen the Spanish grounds of objection, but I would be surprised if they are not the same as those of the Italians.

Q29 Stephen Phillips: What grounds do the Italians assert is the basis of their challenge to the decision of the Council to authorise enhanced co-operation?

Liz Coleman: I do not have that paper with me; I can certainly send it to you if that would be useful.

Q30 Stephen Phillips: Are they roughly speaking the grounds that I have been debating with Mr Fernandes?

Liz Coleman: They are not directed specifically to that ground; they are more on the basic requirements

for entering into enhanced co-operation—for example, that it should not be discriminatory against Member States outside the enhanced co-operation.

Q31 Stephen Phillips: That is article 326. Is one of the arguments made by the Italian Government that there is no mechanism in the Treaty to withdraw from enhanced co-operation, and therefore the decision is unlawful because it records that Member States who have agreed to enhanced co-operation in relation to this matter can withdraw?

Liz Coleman: I do not recall that argument.

Q32 Jacob Rees-Mogg: My questions are probably addressed to Mr Fernandes again. Is there any example of a country that has entered into an agreement to proceed to enhanced co-operation and then has withdrawn?

Nicholas Fernandes: There is none, the reason being that enhanced co-operation has rarely been used. This is only the second instance of its use since the introduction of the Amsterdam Treaty. The first instance was divorce and legal separation. At that time, Greece withdrew its request, but there is no instance of that recorded.¹ As I say, this is a developing area. It is only the second time it has been used.

Q33 Jacob Rees-Mogg: So if somebody did withdraw from the agreement to go to enhanced co-operation, that would be precedent-setting; is that right?

Nicholas Fernandes: It would be precedent-setting, yes.

Q34 Jacob Rees-Mogg: Therefore, for all future enhanced co-operations, people could agree to proceed and then come out, so the position from the British point of view would be fairly favourable, in terms of enhanced co-operation, under this precedent.

Nicholas Fernandes: Yes. They would be able to agree to proceed until the stage when voting began. If they participated in that, they would be locked in.

Q35 Jacob Rees-Mogg: So, as soon as they have participated in a vote they would be completely locked in, but until a vote, they could withdraw?

Nicholas Fernandes: Yes.

Q36 Jacob Rees-Mogg: Then they could opt in later, so we get to the revolving door to which Mr Phillips referred.

Nicholas Fernandes: They could not opt in automatically, because joining in is a slow lane; it takes at least four months.²

Q37 Chair: I am just wondering whether, given that all this is recorded and broadcast, you think it would be the vote or the Act taken in light of the proposed enhanced co-operation that locks them in; in other words, whether or not the critical moment when the

lock-in takes place is when they carry on with the actual function, as compared with the vote.

Nicholas Fernandes: For that we have to return to the statement by the Commission, which is that any Member State may notify the Council that it is withdrawing from enhanced co-operation, provided that at the time of that notification no Acts have yet been adopted within the framework of the enhanced co-operation.

Q38 Chair: It sounds as if I might be right.

Nicholas Fernandes: So, it is at the time that the Act has been adopted.

Q39 Chair: Therefore, they are able to carry through the functions that it confers?

Nicholas Fernandes: Carry through the functions that it confers, yes. They would then be obliged to implement that Act that has been adopted.

Q40 Chair: You can understand that circumstances could arise where it would become totally chaotic, with people jumping in and out according to the latest policy decision taken by that government.

Nicholas Fernandes: Yes, but once an Act has been adopted and it has participated in the adoption, it is bound. If a subsequent Act is adopted, it is bound, because that is as far as this statement goes.

Q41 Chair: You say “the Commission”; are you referring to the Commission Legal Service, or some document that the Commission has produced to explain how it thinks it ought to operate, as compared with the law?

Nicholas Fernandes: This is the Commission’s statement, which was entered into the minutes on adoption of the authorisation decision.

Q42 Chair: So it is its version of what should happen?

Nicholas Fernandes: Yes.

Q43 Jacob Rees-Mogg: Could you therefore theoretically have a situation where an agreement to go to enhanced co-operation had taken place and you were left with one Member State in enhanced co-operation at the point at which an Act was adopted?

Nicholas Fernandes: At that point enhanced co-operation would have failed, because you need at least nine Member States.

Q44 Jacob Rees-Mogg: So that is really the position of the European Union? From the precedent point of view, I think this is very important. This is what other Member States have accepted as well—it is the Whitehall view, the European Commission view, and the view of other Member States of how enhanced co-operation works?

Nicholas Fernandes: Yes.

Q45 Stephen Phillips: You said that once an Act had been adopted, it was at that moment Member States were locked in and could not subsequently withdraw, not at the earlier stage of the Council decision on

¹ *Note by witness:* this should read “that was before authorisation”.

² *Note by witness:* this should read “could take up to four months”.

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enhanced co-operation. As I understand it, that is the view of the Government, consistent with the evidence you have given today. Is there anything in the Treaty that would prevent withdrawal after the adoption of the act?

Nicholas Fernandes: There is nothing specific in the treaties, but in certain areas of co-operation, once co-operation has been established, the treaties would need to provide expressly for withdrawal. In that case, you would need express permission for withdrawal.

Q46 Stephen Phillips: Why, Mr Fernandes? A few moments ago you told the Committee that there was nothing in the Treaty prohibiting withdrawal after a Council decision. You said, essentially, that that which is not prohibited is permitted. What you have just done, in relation to the difficulty you find yourself in once the Act has been adopted, is accept that there is nothing in the Treaty that permits withdrawal after the Act has been adopted, but you have now said that the Treaty requires some express provision. Why? The two are inconsistent.

Nicholas Fernandes: I would submit they are not inconsistent. We have the Commission's statement. If you do want treaty provisions, you can look at the permanent structured co-operation. There, you can only withdraw from permanent structured co-operation unilaterally, but that is provided under the Treaties, because at that point permanent structured co-operation is established. The only mechanism for withdrawal is by explicit provision in the Treaty.

Q47 Stephen Phillips: But no such explicit provision is required in relation to withdrawal after a Council decision has been taken, according to you. Is that right? In one case you do need an express treaty provision, and in the other you do not.

Nicholas Fernandes: The reasoning here is that we do not have explicit authority under the treaties to withdraw once a Council decision has been adopted. In other areas there is explicit provision, so that is the distinction. If we needed to withdraw after adoption, we would need explicit authority under the Treaties.

Q48 Stephen Phillips: Maybe this question is better directed to the Minister. I quite accept that you have to live in a political world, and this may be an area in which the treaty is badly drafted or defective, but I have to suggest to you that both the Government's position and that which appears to have been adopted by the Commission's Legal Service is simply one where, given the lacuna in the Treaty, the wish has been the author of the thought. Is that right?

Baroness Wilcox: Overall, if I am allowed to answer politically, the Government's view is that withdrawal is allowed under the EU Treaties.

Q49 Stephen Phillips: But I am suggesting that is because it is convenient, rather than because it has any legal base.

Baroness Wilcox: We did not go ahead on our own, because we knew that would be dangerous. Of course, we looked long and hard at the issue of withdrawal and consulted extensively with legal advisers across

Government Departments, and with the Commission and Council Legal Services. The assurances that we obtained gave me the confidence that withdrawal was allowed. Now, you are arguing with Nicholas as to whether that is right or wrong; we went forward with the best advice we could possibly have.

Chair: Minister, we are in something of an impasse. There is a procedure available to us to go to the administrative Court to ask for an action for a declaration, and then for the Court to make an adjudication on that with a view to deciding whether or not the European Court might decide to annul the decision. I have already asked you whether this is a view that has been adopted by the Legal Service as a whole. Although you are not the head of the Legal Service, I am sure you are doing your best faithfully to represent what they think, but whatever they think, it does not seem to accord with what we think. There is a case here, because of the importance of this issue, but also because of the increased likelihood of the procedure of enhanced co-operation being used in even more sensitive areas, for us giving a view. I put it to you that you should go back to the Legal Service, tell them what I have said, with which hopefully the Committee would agree, and then come back to us, because we are getting into a situation where we are going round in circles. Stephen, do you have a thought on that?

Q50 Stephen Phillips: No. I think you have explained your position very clearly. Obviously, we have our own legal advisers, whose advice I take and have to represent in the questions that I ask. I also think the Minister has been extremely frank in her last answer, for which I am very grateful. I quite understand that you have to act not only politically but on the basis of the advice you receive. It may be that your advisers are right; it may be that ours are right, but it seems to me quite important that a settled view on that is reached between this Committee and the Government.

Chair: In the absence of a settled agreement, I think there is perhaps an opportunity, after this session, for you to go back. The previous session that we had with the Minister was on other matters, as it were. Now we are talking about the substance of the issue, plus the legal advice. It is important. You have made it clear how important it is, and the range of people from whom you have sought advice on this. We are still in an impasse, and therefore, unless any members of the Committee disagree, I think it would be advisable to go back to them and tell them what I have said, with a view to seeing whether or not they would take this matter to the administrative Court and seek an action for a declaration, or something along those lines.

Nicholas Fernandes: I will certainly do that.

Q51 Henry Smith: Good afternoon. You recently submitted two explanatory memorandums on the implementation regulations proposed by the Commission. Can you tell us whether you think a unitary patent for the EU is now a reality, a probability or a possibility?

Baroness Wilcox: I can tell you what I know. The Commission have issued proposals for two regulations

implementing enhanced co-operation to create a unitary patent, one on the patent and the other setting up the language regime for the patent. Two regulations were discussed at the Competitiveness Council on 30 May, which Ed Davey attended on behalf of the UK, but no further decisions have as yet been taken. At the UK's request, both regulations now include a specific link with the court, so that the patent cannot come into force until the court is set up, and that is one of our key objectives. I do not know whether that is the answer you are looking for from me; I would be very embarrassed if it is not. Stop me if I am not responding to your particular question.

Q52 Henry Smith: It seems to me that the answer is that it is probably a reality. Are there any circumstances in which you can envisage the UK being reluctant to participate in it?

Baroness Wilcox: No. Well, we did have a reluctance because of the court. The court was a worry, and we wanted to make sure that there was a link. We have a complete description of that for you here. We requested a specific link with the court, so that the patent could not come into force until the court was set up. That is one of our key objectives. We are happy with the way that is proceeding, and very hopeful that is what we will get. I think we have notice of that.

Q53 Chair: We had the opinion of the Court of Justice, and the Commission has now proposed that the unified patent court be limited to EU Member States alone. Are you happy with this? What do you think the effect of this will be on non-EU states that are party to the European Patent Convention?

Baroness Wilcox: On 14 June they produced a revised draft agreement for the court system to address that. It is under discussion among the participating members. It has not yet been published. The presidency's proposal amends the current draft international agreement to meet the concerns of the ECJ. This would establish an EU patent by international agreement by participating Member States. This agreement would be outside EU institutions and would not extend the power of the ECJ. I think the answer is that it is for the European Union States, yes?

Q54 Chair: It is not really the answer to the question. Maybe Mr Alty or Mr Fernandes might try to chip in. Do you want me to repeat the question, or are you quite happy to proceed?

Nicholas Fernandes: Tell me if I have got it wrong, but what I understand you to be asking about is the fact that the proposal, which I gather has not yet been put into the public domain, is that the Member States participate without the European Union, and it is solely restricted to EU Member States participating.

Q55 Chair: What is your view about that? Are you happy with it? What do you think the effect of this will be on non-EU states that were a party to the patent convention?

Nicholas Fernandes: It might be helpful if Liz answered that, if I may pass over to my policy colleague.

Liz Coleman: I will not answer from a legal point of view, if that is acceptable to the Committee. From a policy point of view, when we originally supported the first draft agreement, we were very interested in having the other states of the European Patent Convention become party to it. That would have been useful for coherence across the whole body of the European patent organisation, but we do have to deal with the concerns raised by the Court of Justice. If a way to deal with them is to restrict the new agreement only to EU Member States, that will still represent progress, particularly for our industry, which has been asking for a unitary patent court for some years now. From that point of view, it may not be ideal, but it is still pretty good.

Q56 Chair: I am sure that you will appreciate that the European Court, although I am sure it strives to give its opinions in the interests of the European Union as a whole, will tend to be rather uneasy about the idea of differentiation in something as universal as this, certainly within the region of the EU and its legislative framework, and to have a patent operating at different levels in different states. I hear what you say, but perhaps that is another reason why, in the light of what I said earlier, it might be important to get a view from the Administrative Court and see what the European Court has to say about that in the light of its previous opinion. Are you saying that as far as you are concerned, you can live with the current situation?

Liz Coleman: We have to examine the draft agreement more fully when it is published and get views from stakeholders, because they have not had an opportunity to comment on this yet, but we are looking at it from a positive point of view.

Q57 Chair: Although this is being broadcast and recorded, at the moment what we are discussing is not actually known to the stakeholders.

Liz Coleman: The full text of the agreement has not been published, but the Commission non-paper, which I think we sent to you with the letter of 7 June, was made available and it sets out that this is one of the ways forward, if I remember rightly.

Q58 Chair: In light of the fact that all of this is being recorded anyway, it looks as though there is a strong case for you to move as swiftly as possible to get in touch with the stakeholders to make them aware and get their representations. Other matters to which you referred a little earlier, Ms Coleman, suggested that you could supply us with the information that we requested. It looks to me as if, although decisions have effectively been taken and are being acted upon, there are still a considerable number of uncertainties about the whole of this as it moves forward. I will leave it at that for the time being, but you will need to consult the stakeholders to see what the practical, down-to-earth implications are for them, because after all that is one of our main concerns. That is all I have to say. Does anybody else have any further thoughts, apart from Stephen, who would like to say something at the end?

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Baroness Wilcox: We have been speaking with industry in this country and they are very keen for us to go forward on this. To have a single patent across the European Community is very important for us and for the people who are trading from Britain into the European Community and beyond. To have a single patent is something that the European Union has been trying to achieve forever. To us, it looks as if we are as near as damn it as we can be to getting there. Everything we can do to make it possible for British industry is being encouraged by industry in this country. It is not that the stakeholders think we are holding back on something, and it is not that the stakeholders do not want us to do it. There is no question that, with China sitting on one side of us and the United States and the rest of the world sitting on the other side, we look like the disunited states of Europe. Therefore, given the translations and the time lags, which are so expensive to our industry, they are very keen for us to fight this through. I know that is a political answer and not a legal one, but it is important to convey to you that the Government are very keen to be able to do this.

To override your scrutiny process is not something we do lightly. My Department has a very good record in this area—I do not think we have done it more than once before—but this is so important, and we are at a time when we have the opportunity to lead on it. If we do not go in, we will not be designing it and describing it in the way that we want. With the caveat that we made, we have already made known our concerns about the court. They have now been addressed. We have secured a link between the patent and the court so that the unitary patent cannot come into force until the patent court is set up. Now we are clear on the proposed design of the court, which will not lead to any extension of the powers of the ECJ, and that is very important to us. I hope you do not feel that we are being listless, inefficient or ineffective in our approach. If you can advise us further, we are very happy to take that back. It is for us to learn from the Committee's experience across the European Community. You will understand that we are very excited and keen to get going with this, but obviously we must be very careful if ever we override your scrutiny advice.

Q59 Chair: We know that the Spanish and the Italians are concerned.

Baroness Wilcox: We know that they are concerned. In particular, we know they found it difficult that the languages chosen to be spoken do not include Spanish. They felt—I think this was on the record at the time—that if each country did it in their own language and then there would be an English translation, they would have been very happy with that, but on having French and German as the other translations, their argument on the day was: people are speaking Spanish; people are speaking Chinese and Spanish. The idea that there would be German and French and not Spanish—and Italian, in that case—was very difficult for them. Therefore, they have not joined at this stage. I have to say it is my belief, and

that of the people who sat around the table with me, that once this is achieved, the industry in those two countries will wish to prevail upon their Governments to join them, because it will be such an advantage to us to be able to have a single unitary patent.

Q60 Stephen Phillips: On behalf of the Committee, let me be clear. I think that the concerns have been twofold. The first was the way in which scrutiny was overridden; the second was the legal basis for withdrawal. Those are the only matters we sought to explore with you. We quite understand the desirability, for everybody in this country, of getting a patent and removing the costs associated with translation. Those have not been our concerns. Mr Fernandes, before we close I want to come back to you, if I may. To be entirely fair to you, I ask you to look at article 330 of the Treaty. I did not take you to it earlier, partly because I was so surprised by the answers you were giving, although you may well be right. If we look at article 330, the first paragraph reads as follows: "All Members of the Council may participate in its deliberations, but only Members of the Council representing the Member States participating in enhanced co-operation shall take part in the vote." What is the vote that is being referred to there?

Nicholas Fernandes: I understand the vote referred to there as being the vote on the substantive measure that will take place or is adopted.

Q61 Stephen Phillips: Given that, would you agree with me that prior to that vote taking place, as article 330 tells us, there are Member States participating in enhanced co-operation?

Nicholas Fernandes: They are Members who have been authorised to proceed to enhanced co-operation.

Q62 Stephen Phillips: Do I see in that article the word "authorised" in relation to the decision of the Council to authorise enhanced co-operation? It is not there.

Nicholas Fernandes: It is a matter of interpretation.

Stephen Phillips: In any event, I do not ask you to form a view on it now; I simply draw it to your attention, because it seems to me to be wholly inconsistent with the position the Government are adopting.

Q63 Chair: Mr Fernandes, to conclude, it is for those kinds of reasons, and because the question that remains on the table is a matter of interpretation, that I believe there is a strong case—in fact we would request the Government—to seek an action for a declaration in order to be able to get this clear, because of the implications in general and the fact that this is a universally understood legal position, as explained by you to this Committee, on behalf of the Legal Service.

Nicholas Fernandes: Certainly.

Chair: Thank you very much indeed. Thank you, Minister.

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