HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

EUROPEAN SCRUTINY COMMITTEE

ROLE OF NATIONAL PARLIAMENTS UNDER THE LISBON TREATY

Wednesday 14 May 2008

PROFESSOR ALAN DASHWOOD CBE

Evidence heard in Public Questions 1 - 36

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Oral Evidence

Taken before the European Scrutiny Committee

on Wednesday 14 May 2008

Members present

Michael Connarty, in the Chair

Mr Adrian Bailey

Mr David S. Borrow

Mr William Cash

Mr James Clappison

Ms Katy Clark

Keith Hill

Kelvin Hopkins

Mr Bob Laxton

Angus Robertson

Richard Younger-Ross

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Witnesses: Professor Alan Dashwood, Professor of European Law, University of Cambridge, gave evidence.

Q1 Chairman: Good afternoon. It is nice to welcome you back, Professor Dashwood. It is good to see you.

Professor Dashwood: Thank you very much.

Q2 Chairman: You know the context in which we have invited you back. We have a number of outstanding issues coming from the discussion of the Lisbon Treaty in the House and we decided to

look at a number of procedures that we may recommend to the House in our report. One of these, obviously, is looking at the question of subsidiarity and the conditions and terms which the new Treaty, as proposed, offers to national parliaments.

Professor Dashwood: Yes.

Q3 Chairman: I have for you a very simple question to begin the process; not necessarily a simple answer. How would you define the principle of subsidiarity in plain words?

Professor Dashwood: I think, without wishing to over-complicate, it is worth saying a word about the function of the principle as enshrined in Article 5, second paragraph of the EC Treaty. The context, which is the one that concerns this committee, the function of the principle, is to guide the choice between acting collectively through the community institutions or using national powers where either possibility would be legally permissible under the treaties. So the subsidiarity principle does not apply in the policy areas, where community competence is exclusive, and there are, in fact, very few of those: the common commercial policy, fisheries conservation, monetary policy for the Member States and the euro. In guiding that choice the principle says, perhaps in very plain words, that action by Member States individually should be preferred unless the need for acting at the level of the community can be clearly demonstrated. That is essentially what the principle means.

Q4 Chairman: Thank you. That is most helpful. Protocol 30, as you know, of the EC Treaty, which is about the application of the principle of subsidiary, paragraph three, says: "Subsidiary is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows the Community action within the limits of its powers to be expanded where circumstances so require and, conversely, to be restricted or discontinued where it is no longer justified." Could you tell us how you think that passage from the Protocol should be interpreted?

Professor Dashwood: Thank you, yes, I will do my best. I think it has to be read in its context together with the preceding paragraph. It is a provision that was put into the Protocol in order to reassure those Member States that were fearful that the subsidiarity principle would have a dampening effect on the development of the community. It goes back to the informal text that was agreed at the European Council at Edinburgh in December 1992. I very well remember the discussions which preceded that conference because I sat through many of them in COREPER II, and there were essentially two points of view, those who wanted to promote the principle of subsidiarity and those who were fearful of its implications, and I think the purpose of paragraph three, together with paragraph two, is to provide reassurance that in applying the principle it will sometimes be appropriate to expand the field of community action, though always within the limits imposed by the treaties, and it will sometimes be appropriate to refrain from acting, or even to discontinue action which has previously been taken. That is how I understand paragraph three.

Q5 Mr Cash: Could you be kind enough, Professor Dashwood, to tell the committee when it has ever been used? Because I remember being very sceptical about subsidiarity during the Maastricht Treaty, which seems an awfully long time ago now, and I am somewhat at a loss to know of any examples where it has ever been used.

Professor Dashwood: I think I am in danger of anticipating the answer to some of the other questions that I have seen. I believe that subsidiarity is a legal notion, but it is a legal notion that has a heavy policy load and it is, therefore, one which is difficult for courts to apply. I believe that it is a more youthful principle at the stage of law-making as a guide to action by the Commission in formulating proposals and by the Council and European Parliament in enacting them, and I believe that it has had a useful impact on the practice of the legislative institutions over the past 15 or so

years. It is very difficult to prove that. As you know, there is a paragraph in Protocol 30 which requires the Commission to produce an annual report on subsidiarity. Nowadays these are known - it sounds rather silly - as the Better Law-making Reports.

Q6 Mr Cash: I was thinking about those.

Professor Dashwood: They come out every year, and it seems to me that, if one reads them sympathetically, they do provide an indication that the subsidiarity principle has had an impact on practice.

Mr Cash: The thing is, it is better, but I would have said lesser. If it was a lesser regulation programme, then I would have been looking for a reduction in the volume of law, but better suggests that somehow or other there is a qualitative element to it and I am not quite sure where that leads us. It is a little bit like words meaning what we choose them to mean?

Chairman: Can we leave that.

Mr Clappison: Specifically, following on from the question Mr Cash has just asked, Protocol 30 envisages the case where community action can be restricted or discontinued, where it is no longer justified, in accordance with the subsidiarity principle. I am reading here what I am told is the protocol in our briefing notes. So this would be a case where the community institutions say, "Well, look chaps, we have looked at this. Subsidiarity requires us to discontinue doing something we are doing." Can you give us any example of any occasion when this has happened, when the community institutions have said, "We are doing this but subsidiarity requires us not to do it any longer"?

Q7 Mr Cash: You mean like fishing?

Professor Dashwood: I am struggling to understand Mr Cash's interjection. I cannot identify a particular measure which has been repealed specifically on the grounds that it infringes the principle of subsidiarity. There is, however, a regular cull of Commission proposals that have been sitting on the Council table for a while and I think that habit has been encouraged by considerations of subsidiarity.

Q8 Mr Clappison: Can I take you on to the other case that follows from Protocol 30, and this is where it says it is the last community action within the limits of its powers to be expanded where circumstances so require. Here we are talking about the community institutions are thinking of expanding their power. Can you give me an example of a case where there has been discussion amongst community institutions of an expansion of power of the community doing something which it has not been doing hitherto where the community institutions have said, "Let us not do this. Let us stop here, chaps, because this would infringe the principles of subsidiarity"? Can you give me any specific example of where subsidiarity has prevented an action being taken?

Professor Dashwood: I think we need to be clear about what the sentence says. It refers to community action being expanded, not the powers of the institutions but the actions which they are empowered to take within the limits imposed by the Treaty. As I say, I think that element was put in there to reassure Member States who were concerned that the subsidiarity principle might have a dampening effect on the development of the community. As I say, it is very difficult to demonstrate this, but I think if you read the Better Law-making Reports from year to year and look at the Commission guidelines on the preparation of proposals, these all provide indications that the law-making institutions are taking the principle seriously, and there has, I think, been a noticeable

falling off in the volume of legislation, at any rate, though that might perhaps be attributable to the completion of the Internal Market Project.

Q9 Mr Cash: Would you be good enough to give us your summary of the case law of the European Court of Justice on subsidiarity? It is a sort of tripos question really.

Professor Dashwood: Do I have 45 minutes?

Q10 Mr Cash: You do not actually. There are a number of invigilators who are walking up and down keeping a close watch on your answer!

Professor Dashwood: Very briefly, in the early 1990s there was a fierce debate as to whether the principle of subsidiarity was justiciable. I think it is perfectly clear, in the light of the case law, that it is justiciable, but the intensity of review will vary with respect to different aspects of compliance with the principle as it is formulated in Article 5. For instance, whether a given measure falls within an area of exclusive community competence is a purely legal issue which the Court of Justice would feel completely comfortable in resolving. There was a time when some commentators believed that the internal market was an area of exclusive community competence, and, indeed, there were advocates general who took that view. The court, in fact, ruled very clearly in one of the tobacco cases that the internal market is an area of sheer incompetence, so that is not an issue any more, but if the legislator had taken the view that the internal market was an area of exclusive community competence and that, therefore, the principle of subsidiarity would not apply to the adoption of harmonising legislation under Article 95 so that subsidiarity simply was not addressed during the legislative process, then that would have provided grounds for the annulment of the measure. As I said, that is not an issue any more and I do not think that the other areas of exclusive community competence are liable to give rise to any problems with respect to subsidiarity. There may, in some cases, be a challenge based on the formal requirement in Article 190 of the EC Treaty to give reasons why a measure is necessary. The Court has said it is sufficient if the recitals refer to factors which establish compliance with subsidiarity; it is not necessary for there to be an express reference to the principle, but, I suppose, if it could be shown in a particular case that the elements mentioned in recitals on which the Council and the Commission relied to establish compliance with the subsidiarity principle, if those elements of fact could be shown to be erroneous, then you would have the possibility of bringing a successful legal charge. That has not happened to date, but I can see that is a possibility. In most situations, under most legal bases in the EC Treaty, the conditions for the conferral of competence on the community have something to do with freedom of movement or the removal of distortions of competition. In any legal basis, for example Article 95 on harmonisation measures for the purposes of the well functioning of the internal market, on which an awful lot of community legislation is based, if the conditions for the exercise of competence are fulfilled, the subsidiarity principle will automatically be satisfied because you can only remove restrictions on freedom of movement or distortions of competition by a measure adopted at the level of the community. So, although that kind of issue does arise, I think it will almost always be addressed as an issue going to the existence of competence under Article 95 rather than subsidiarity, and there are several recent cases where the Court has considered a subsidiarity argument and rejected it on that ground. The more difficult cases in policy areas like social policy or the protection of the environment, where community competence does not have to be triggered by some kind of transnational element, in that kind of case - I suppose the leading example is the case on the Working Time Directive - the Court of Justice has shown that it is extremely reluctant to substitute its own judgment for that of the political institution; so in that kind of case one would expect nothing more than the most marginal kind of review. The upshot of all of this is that, in my view (and it may be different under the regime of the Treaty of Lisbon), under the existing arrangements

the subsidiarity principle, while I believe it to be useful at the stage of law-making, is largely inoperable at the stage of adjudication.

Mr Cash: I am very grateful for that assessment, because it somewhat confirms my concern from the very beginning in the Maastricht Treaty that it was all a bit of a con trick, as I think I said, because basically, and I am not putting words in your mouth by any means, but I fear that what it boils down to is that there is a form of restraint in the law-making process, some would hope, but actually, when it comes down to it, there is not really any evidence that it has ever been used; and the Court would be reluctant to use it if it appeared to impinge on the political process, and we know they want more integration, so it is not very likely. Having said that, can you envisage a scenario where the Court of Justice would overturn a community measure on the grounds that it does not comply with the principle of subsidiarity and, conversely, can you envisage a scenario where the Court of Justice would strike down or, as it were, issue some form of direction to a national court that would overturn a measure of a national Parliament on the grounds that it asserted the political will to achieve subsidiarity, for example, by abolishing fishing in its own repatriation of powers? Could you give us some views about the supremacy of Parliament in that context? That was also a tripos question.

Chairman: We are not judging the Tripos; we are simple people here, apart from Bill and Mr Clappison, who are both lawyers. I am sure you can give us an answer that will be understood by your students as much as by your examiner.

Q11 Mr Cash: I am just a simple politician.

Professor Dashwood: I think, from what I have said already, it is clear that I find it difficult to think of practical instances where infringement of the subsidiarity principle would be crucial in securing the annulment of a community measure under the law as it stands. To go back to an illustration that I mentioned a few moments ago, the mischaracterisation of a policy area as one where community competence is exclusive, leading to the non-application of the subsidiarity test during the legislative process, would, I think, provide grounds for annulment. Without sounding two contrived, I suppose it is not inconceivable that you might have a measure on the marketing of fish which was adopted within the framework of the Common Fisheries Policy rather than as an internal market measure based on Article 37, and you could you just about squeeze it in under that legal basis. It is something to do with the way in which fish are protected.

Q12 Mr Cash: Or thrown overboard.

Professor Dashwood: No, absolutely not that. I am talking about marketing. If that were mistakenly treated during the legislative process as falling within the community's exclusive competence for fisheries conservation, with the result that the subsidiarity principle was not given formal consideration during the legislative process, then I think that would provide grounds for the annulment of the measure, and if it had to do with chucking fish overboard, then it would be part of the fisheries conservation policy, which is exclusive community competence.

Q13 Mr Cash: To use the converse, I would like an answer to that second question, which is the one where the national Parliament in question insists on the principle of subsidiarity on its own terms and then says, "We are going to legislate and use a formula, notwithstanding the European Communities Act 1972, to ensure that the courts give effect to that provision", and the question I am interested in is whether, at that point, the Court of Justice would seek to overturn and/or to get the Court of Justice, as in the case of the Merchant Shipping Act, for example, to overturn the

national Parliamentary legislation, seeking repatriation of the powers on the grounds of subsidiarity?

Professor Dashwood: What would happen in practice in that kind of situation is that an action would be brought by the Commission against the United Kingdom under Article 126 of the Treaty for infringement of the United Kingdom's community obligations.

Q14 Mr Cash: But it says "notwithstanding the European Communities Act" in the Act of Parliament. The Court cannot do this. The domestic United Kingdom court would then be precluded, would it not?

Professor Dashwood: I do not know that the United Kingdom court would get involved at all. The Commission would bring proceedings in the Court of Justice and the Court of Justice, in the circumstances that you have described, would certainly find that the UK was in breach of its community obligations. It would not get as far as subsidiarity because it is a clear breach of community law.

Q15 Kelvin Hopkins: Continuing on the same sort of theme, it strikes me, and has always struck me, that introduction of the concept of subsidiarity was a political measure to deal with a situation where people were fearful that the European Union was going to take too much power. People like myself and one or two other colleagues around here who want to retain powers with national Parliaments could be pacified with this, "Ah, well, it is all right, the subsidiarity will protect you." If you are asking a lawyer to deal with what was essentially a political measure, it puts you in something of a difficulty? Is that fair.

Professor Dashwood: It does. It puts courts into embarrassment, but that does not mean that the principle has no effect in practice. It is my belief that it has had a useful practical effect at the stage of legislation, when legislation is passing through the institutions, and I must not anticipate, but I believe that the great virtue of the new subsidiarity mechanism is that it puts the judgment as to whether the subsidiarity principle has been complied with firmly into the hands of those who have an interest in ensuring its application; in other words the national Parliaments. They are the ones presuming power to the institutions of the Union and I think they are best placed to make a political judgment to apply this principle. Although, as I say, it is a legal principal which is justiciable, it has a very heavy political load, and I will explain when we come to it why I think that the task of the Court of Justice may ultimately be facilitated by this new procedure if a dispute ever gets as far as that.

Q16 Kelvin Hopkins: In these extreme circumstances where a court is likely to be taking a decision on the basis of a clear legal test or on political grounds, what is the Court going to do? Is it going to act, essentially, politically to avoid conflict with Member States who are threatening not to comply with the measure, or are they going to act strictly judicially and say, well, the Member State has got it right, the Commission has got it wrong, or the European Union has got it wrong, and find in their favour?

Professor Dashwood: No. I think it is going to adopt the kind of approach that it normally does adopt towards legislative measures where the institutions of the Union have a very considerable discretion. For example, agricultural legislation. The Court does not try to second-guess the Council as to whether this was a sensible measure or not, it does not substitute its own judgment as to the merits of the measure for that of the political institutions. So it operates what is known as marginal feeling; in other words, that is limited to abuse of power or manifest error. For example, and I have mentioned this but I think it is a realistic possibility, if the factual elements mentioned in the recitals

of an instrument and relied upon by the Council and the Commission to demonstrate compliance with subsidiarity are found to be absent, factually incorrect, then the Court would, acting judicially, be able to be in a position to annul the measure. It is a kind of area where the Court has to defer, as courts always do, the political judgment to the law-maker. The Court is at its strongest when the issue can be proceduralised in some way.

Q17 Kelvin Hopkins: One last question from me. In a circumstance where there might be a government elected which was, shall we say, unenthusiastic about a federal centralising drive in Europe and wanted to preserve at least, if not strengthen, Member States' rights within the European Union and a Member State government said, "This issue, we believe, is clearly a matter of subsidiarity", and the European Union says, "No, we do not think it is", and they know that it is going to cause a political crisis if they rule in favour of the European Union, what happens then? It strikes me, I may say, that this is a matter for politics rather than the law, because the subsidiarity definition is too unclear.

Professor Dashwood: I do not believe that in that situation the Court of Justice would give a ruling that was motivated by a wish to avoid a political crisis. I think it would give the ruling that it considered legally correct and leave it to the politicians to sort out the problem. If the Member State concerned wanted to remain a member in good standing of the European Union, sooner or later it would have to come into line, as the French did over British beef; rather late in the day, but they did.

Q18 Mr Clappison: Following on, Professor, is compliance with the principle of subsidiarity capable of objective assessment or is it essentially a matter of political opinion?

Professor Dashwood: I do not believe that the substantive test of subsidiarity, which is the dual test in Article 5, paragraph two of the Treaty, that the objective of the proposed measure cannot have been sufficiently achieved by the Member States and can, therefore, because of its scale and likely effect, be better achieved by the community. That is the sort of dual test. Protocol 30 insists on both elements, though they have always seemed to be two sides of the same coin. That is a test which is, I think, not capable of being applied directly by a court. It is essentially a test to guide those involved in the political process of enacting legislation, and this is where things become legal. It will be for the court to ensure that the principle was genuinely applied in the course of the legislative process and that the justifications which are given both in the Commission's explanatory memorandum and at various other stages in the legislative process, the Council's statement of Reasons when it adopts a common position under the clear decision procedure and, finally, the recitals of the Act which is formally adopted - all of that - satisfy the subsidiarity test, but that, I think, is as far as the court is able to go, for the reasons that I have been explaining.

Chairman: Moving from the question of courts, Mr Bailey.

Q19 Mr Bailey: Do you think it possible to develop a set of criteria against which proposals could be checked, if you like, which would be consistently applied to determine the level of subsidiarity?

Professor Dashwood: I am afraid that I do not. I think it is bound to be a matter of judgment. We have some criteria in paragraph five of Protocol 30 which are pretty broad: "The issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States", but "actions by Member States alone or lack of community action would conflict with the requirements of the Treaty" by, for example, creating obstacles to freedom of movement or distortions of competition. Under Protocol 30, "Action at community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States". I

must say, we wracked our brains back in the early 1990s to think of a more circumstantial list and did not come up with one, but I think that is why it is more important to focus on procedure rather than substance.

Q20 Chairman: I notice that you are quoting from the Protocol in the Treaty of Amsterdam section, section five.

Professor Dashwood: That is right. That is Protocol 30.

Chairman: Some of us have come back from the COSAC meeting, which involves the committees of all the countries of Europe, just in the last week, and it clearly is a big exercise for the countries to see whether they can have, not simple but certainly agreed trigger mechanisms by which they can judge subsidiarity and alert others to their concerns about subsidiarity, and I can assure you they have been saying to us that they will be looking very closely at our inquiry; so you are not just informing our inquiry but probably the interests and inquiries of all the others. In that light, Mr Younger-Ross.

Q21 Richard Younger-Ross: I find it puzzling that we cannot come up with clearer criteria when it comes to governance in the UK. We understand what central government does, we understand what the regional development agencies do, we understand what local government does. Why are we not able to define more clearly what national government can do and what is in the competence of the EU? I find that slightly puzzling. Are you not puzzled that we are not able to define that better?

Professor Dashwood: Not really. I think the transnational criteria, the first two criteria in paragraph five of Protocol 30, are pretty useful. They define the matter negatively. They tell you when the action has to take place at the level of the community, because there is a transnational element that needs to be taken into account or because action that was taken autonomously by the Member States would interfere with some important aspects of the Union's functioning, more particularly by creating obstacles to freedom of movement or distortions of competition. Once you have got past those two criteria, I think it does become a matter of political judgment: can we do this thing effectively? What is our objective? Can we achieve it effectively at the national level or is there some clear added value in acting at the level of the community? It seems to me that is simply a judgment that has to be made. What is more effective, what will work better, what is really needed is a matter of judgment which it ought to be possible for national parliamentarians to make under the new procedures.

Q22 Richard Younger-Ross: Part of the problem, though, is this competition. We go from hundreds of documents, thousands a year, and every time it will say it is because of competition. We are bringing this in because of competition. The EU, I thought, were creating a level playing field. Very often it seems to be creating something as flat as a bowling green. I usually go on to say that the UK Government then go on to make it as flat as a snooker table, but is it not possible to get some idea of what competition means: because it strikes me that at times we are actually managing the competition rather than having competition which is broadly across Europe rather than very specific to within an area. Is there not a danger of that?

Professor Dashwood: There is. It is a danger to which the Court of Justice is alert. In the tobacco advertising case, for example, it rejected the Commission's argument that the Directive could be justified on the grounds that it removed distortions of competition. The Court thought that the possible effect on competition of different rules in tobacco advertising in the different Member States was too remote, at least in the case of some forms of advertising, and, therefore, it rejected that argument. It is very difficult to say how much distortion of competition the internal market can

tolerate. I do not think anybody could give a precise answer to that. It is a matter of feel. When this committee, in the future, is considering a particular Commission proposal, testing it against the principle of subsidiarity, you have to look at the Commission's explanation and, if the Commission is relying upon the distortion of competition argument and you feel that, in the circumstances, it is exaggerated, then you would be perfectly entitled to take the view that the subsidiarity principle has been infringed, and if sufficient other national parliamentary chambers take the same view, then you will be able to trigger either the yellow card or the orange card procedure.

Q23 Chairman: You mentioned acting internationally. I wish to ask a question before I call on Mr Robertson. There was a subsidiarity check on the prevention of terrorism proposals by the Commission, for example, where many states, acting together internationally under the Council of Europe, had already agreed to act on this matter and the Commission was intending that they should act in that matter. We did take the view in this committee that that was a breach of subsidiarity because we were acting as nation states together and did not require the Commission to act in the same area. How do you feel about that, when nation states have already begun to act internationally, say, through the Council of Europe, but there is no requirement, therefore, for the Commission to take that role on?

Professor Dashwood: I am sorry, I am not familiar with this example. Can you remember what measure it was?

Q24 Chairman: It was the prevention of terrorism. It was a framework decision of the Council of Europe which had been agreed by many more countries than there are in the EU, it included all those that are in the EU, and then the Commission's proposal was to become involved in this and to bring in a separate regulation which they would control, and we thought that was a breach of subsidiarity because the nation state, the UK, was already acting with other nations, through the Council of Europe, to carry out those functions.

Professor Dashwood: This was a third pillar framework decision, was it, rather then a second pillar or a joint action?

Q25 Chairman: Yes.

Professor Dashwood: I can see that the subsidiarity argument might have some force in that context. I would have to look at the procedure.

Q26 Chairman: We will send you copy of the paper that we produced and you can have a look at it. In reality the Commission's response was that they needed, somehow, to control the process.

Professor Dashwood: I can give a lawyer's answer, which is that the solidarity principle in Article 5 of the EC Treaty does not apply to the third pillar, but you are thinking of subsidiarity.

Chairman: We will send you our paper and our submission to COSAC, which was a subsidiarity check. We were the only country who took that view, but we still think we were right. Mr Robertson.

Q27 Angus Robertson: Looking forward rather than looking back, we are spending quite a lot of time here and with colleagues throughout the EU working out how the yellow and orange card procedure might work in practice. What thoughts have you had on that?

Professor Dashwood: I am rather enthusiastic about it, because, as I said earlier on, it seems to me that national parliaments are the right body to make the initial judgment as to whether the subsidiarity principle has been complied with, and no doubt this new opportunity which Protocol provides, if it is taken full advantage of by national parliaments, will be a considerable additional burden because there will be a lot of legislation to be vetted; but it seems to me that potentially it enhances significantly the relevance of the subsidiarity principle. Mr Cash was sceptical about whether the principle had much of an impact on the legislative institutions of the Union. I am less sceptical about that, but under the new dispensation the bodies initially applying the principle will be those that have the greatest interest in its effective operation, namely the national parliaments. Under the yellow card procedure, if we have votes amounting to a third of the available number in a union of 27 - that would be 18 votes out of a possible 54 - then the Commission will have to review its proposal and, if it decides to maintain the proposal, it will have to give reasons for that. Under the orange card procedure, if there is a simple majority of national parliaments adopting the reasoned opinion to the effect that the subsidiarity principle has been infringed, then the Commission will have to adopt a formal reasoned opinion and, what is more, there will have to be a formal moment in the legislative process when these matters are considered by the European Parliament and the Council. It seems to me that this will have a real impact on the political dynamic within the community, but if there are a significant number of national parliaments which take the view that the proposal infringes the principle of subsidiarity, then, all things considered, it is something that would be better done at national level, left at national level, rather than done at the level of the community, that is bound to have an impact on the prospect of the measure being adopted, whichever of the procedures applies. I think it would also make a difference, as I suggested earlier, to any possible proceedings that might eventuate in the Court of Justice because the Court would be faced with more extensive documentation than it has at the moment. If somebody was challenging the validity of a measure which had been adopted after the yellow card or the orange card procedure had been triggered, the Court would have in front of it reasoned opinions from at least 18, perhaps more, national parliamentary chambers, it would have the Commission's statement of reasons or reasoned opinion, depending on which procedure was being followed, and there would have to be some kind of minute of the view that was taken within the European Parliament and in the Council the reasoned opinions which had been submitted to them. All of that would provide the Court with alternative political appreciations, and this would help to proceduralise the issues. Instead of the Court being faced with the substantive issue of whether or not the test of subsidiarity was satisfied, it would be able to consider whether the Commission and the other institutions had taken proper account of the reasoned opinions that would have been put them and whether the argumentation which they put forward meets the points which have been made by the national parliaments. So by proceduralising the subsidiarity issue, I think this facilitates the task of the Court of Justice itself, if things ever get that far.

Q28 Angus Robertson: All of this makes perfect sense to me in the context of centralised Member States, but you will appreciate that there are a great number of Member States of the European Union that are either federal states or have symmetrical or asymmetrical devolution, in which case the responsibility over matters that may be brought up using the subsidiarity argument are actually areas which are exercised not in the "national Member State", a term which is not always accurate, but Member State parliaments and some state legislatures. That would be true for Spain, that would be true for Germany and Austrian and it would be true for the UK. There is less complication in a federal state, obviously, but in Germany or Austria you would have the member meeting as part of their upper chamber and that would then solve that problem, but how can you see the operation of the yellow or orange card in Member States where the sovereignty in question, or the decision-making in areas such as environment, transport, agriculture, criminal justice, actually may lie somewhere else and perhaps not even in this "Member State Parliament"?

Professor Dashwood: It may be difficult. The text of Article 6 of the Protocol acknowledges the problem without providing a terribly effective solution. It says it will be for each national parliament to consult, where appropriate, regional parliaments with legislative powers. So it is left to Member States to sort things out under their own constitutions. There would have to be some subsidiarity machinery, I guess, particularly if it was a piece of legislation relating to matters that are covered by the devolved powers in Scotland and Wales.

Q29 Angus Robertson: If one concedes that under this mechanism some different Member State Parliaments might take exception to something using the subsidiarity argument and other Member States might not, it is conceivable that you might have a difference of view within a Member State? Conceivably, for example, the Scottish Parliament might take the view that it feels that the subsidiarity protocols are being infringed, but the UK Parliament may not. Is it conceivable in a case like that, because the UK, as the Member State of the European Union, might choose to disregard concerns such as those?

Professor Dashwood: I think that is a political question. It is the two chambers of the UK Parliament that have the votes, but I imagine that it would be a considerable political risk for the clearly expressed views of the Scottish Parliament or the Welsh Assembly to be brutally ignored by Westminster.

Chairman: I can assure you that we endeavour as a Committee to ensure that all departments, as part of the consultation process, do question any subsidiarity matter. I am sure that will become more and more relevant after the Lisbon Treaty is approved in operation.

Q30 Richard Younger-Ross: On the yellow card/orange card, these effectively mean that the Commission ultimately may have to go back and review a decision. There is nothing in the procedures which says no. There is no veto, in effect, from the parliaments. Should there not be a red card? Was a red card considered?

Professor Dashwood: I do not know, as a matter of history, whether it was considered or not. The constitutional objection in EU terms would be that it would fetter the Commission's right of initiative which under the Treaties is exclusive. But it seems to me that if the Commission persists with a proposal without amending it - to which at least one-third of the national parliaments had raised objections - it is going to be quite difficult to assemble a qualified majority within the Council because the ministers from the Member States whose parliaments had raised objections would run a political risk by voting in favour of the measure once they got to Brussels.

Q31 Richard Younger-Ross: I would like to think so.

Professor Dashwood: I will not comment on that. And even more so in the case of the orange card procedure. I have not worked out the arithmetic of this but I do not see how you could achieve a qualified majority in the Council. If there were 28 votes out of 54, unless it was only the tiny Member States that were voting, it is in practice terribly unlikely. I think this procedure, if it can be made to work, will have a significant impact on the political dynamic of the legislative process in Brussels.

Q32 Chairman: Thank you very much. You have in fact answered the question I might have finished with, which was: Would it improve the influence? I think you have said: Yes, it will, because it will change the political process on that. It is the hope of those who were at the COSAC meeting in Slovenia last week and certainly in this Parliament that it will make a difference. Could I thank you for attending and, as usual, giving us very interesting and insightful responses to our

questions. We will send you the document that we submitted to COSAC on subsidiarity about the prevention of terrorism and you might want to write to us about your opinion on that.

Professor Dashwood: I will do.

Chairman: I am conscious that Mr Hill has just returned - he is splitting his time between two select committees. He had indicated that if he was here he would like to ask you a couple of questions.

Keith Hill: Mr Chairman, thank you very much indeed. This is an unexpected opportunity and I would like to apologise to the Committee and Mr Dashwood for my late arrival. I was also split with an SI committee that I was required to attend.

Chairman: They say men cannot multi-task but you have proved that is not true.

Q33 Keith Hill: I always say, Chairman: "If you've got it, flaunt it." I would like to ask you a couple of general questions, Professor Dashwood, although the first one you have perhaps answered in your earlier replies. Is it, in your view, the proper constitutional function of national parliaments to attempt to hold EU institutions to account by sending them opinions of their proposals for legislation?

Professor Dashwood: Yes, I do believe so. It is my view that the European Union is a unique polity. It is what I call a constitutional order of sovereign states. The states retain their sovereignty but they have agreed to act together under arrangements which are constitution-like. It is difficult to ensure democratic legitimacy under these political arrangements. That is why, in my view, we have to have a system of dual legitimation through the European Parliament, which is directly elected, but also through the responsibility of ministers meeting within the Council to their national parliaments and electorates. I see the new subsidiarity mechanism as reinforcing that second aspect of the dual legitimation which the EU system requires.

Keith Hill: You have described a kind of pooling of sovereignty. Could I ask the converse question: In your view, have the EC Treaties imposed duties and functions on sovereign national parliaments? If so, is it proper to have done so?

Q34 Chairman: We are just talking in relation to subsidiarity.

Professor Dashwood: I do not think they have imposed obligations. I think they have conferred powers, or created opportunities rather. If national parliaments chose not to take advantage of the opportunities which are provided by the EU subsidiarity mechanism, I do not think anybody would argue that the Member State was in breach of an obligation under the Treaty because its parliament was not doing the job properly. One of my most vivid recollections of my time as a Council official is how sensitive we were, in drafting this kind of text, not to give the impression of imposing duties on national parliaments.

Q35 Keith Hill: It is not that a duty has been imposed, but an opportunity created.

Professor Dashwood: That is my view.

Q36 Keith Hill: There would have been an outcry, would there not, if that opportunity had not been created in this Treaty?

Professor Dashwood: I hope so. There would have been one from me, at any rate.

Mr Cash: There certainly would be from me.

Chairman: I think I might accuse Mr Hill of leading the witness. Thank you for attending and thank you for your insightful responses to our questions.