HOUSE OF COMMONS - EUROPEAN SCRUTINY COMMITTEE

SUBSIDIARITY AND THE ROLE OF NATIONAL PARLIAMENTS

Wednesday 18 June 2008

DR SIMON HIX

Evidence heard in Public Questions 37 - 64

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Oral Evidence

Taken before the European Scrutiny Committee

on Wednesday 18 June 2008

Members present

Michael Connarty, in the Chair

Mr Adrian Bailey

Mr David S Borrow

Kelvin Hopkins

Rt Hon Keith Hill

Mr Lindsay Hoyle

Mr Bob Laxton

Angus Robertson

Richard Younger-Ross

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Witness: Dr Simon Hix, Professor of European and Comparative Politics, London School of Economics and Political Science, gave evidence.

Q37 Chairman: Can I welcome you. I will call you by your Sunday name, Professor Hix, but I remember meeting you before. I am very glad you could come and give us evidence. We will just go ahead with the questions. Unfortunately, some of the Members are not here. There is a European Affairs debate in the House and there is also a one-line Whip on, which means people are not pressed by the Whips to be here, so we are very pleased that we have a good turn out for your session.

Dr Hix: I understand something important is going on.

Q38 Chairman: Can I ask you a very simple question to begin with? How would you define the principle of subsidiarity, in plain words?

Dr Hix: I would not define it in legal terms in the way it is defined in the treatise, I would define it in more straightforward political terms, in that policy should be done at the level of government where its objectives are best achieved. What I mean by that is that when people are deciding what level of government things should be done at, they are thinking of several principles. One is the sort of scale or benefits of doing it at a certain level of government. So clearly a single market on a Continental scale, created and regulated in Brussels seems the right thing and we all benefit from that. But one of the other key issues to bear in mind, which I do not think is necessarily recognised

in the legal work on subsidiarity but political scientists recognise it, is what we called externality. This is when you have a policy at a particular level of government but, say, immigration policy kept at the national level. Once you have a single market, there are negative effects on your neighbours. We have seen classic examples of this with Sweden, for example, or Denmark introducing a more restrictive asylum policy and it having an effect on asylum seekers in Sweden. These are externalities of you having de-centralised policies, which then suggests that if there are these externalities you need to centralise. Now, the question is, what do you do once you centralise them? Then a second set of political considerations comes in, which is how diverse are the views of the governments of the Member States on those policies? If they are relatively homogenous, if everyone shares the same thing, then there is no problem with passing policy up. Environment policy is a classic case. But in other areas where there are clearer differences of views, then you can see why there would be problems in passing it up to the central level. If you follow a purely legal definition of subsidiarity, you would say that defence policy should be done by the EU - scale effects, a collective defence, public goods would be provided more cheaply at the central level - but clearly we do not do that because of the fact that we have heterogeneous preferences on defence policies. I think it is impossible to define in purely legal terms subsidiarity criteria and it is really ultimately a political question.

Q39 Chairman: That leads naturally into the second consideration. Subsidiarity, as we are looking at it, as proposed in the Treaty, applies to proposals for legislation where a Treaty has already given the EU a level of competence, so do you not think that is a bit like trying to shut the door after the horse is running down the road and even in the paddock? If we are going to take subsidiarity seriously, should we not be more careful about conferring those competences and the level of competence we confer in the first place?

Dr Hix: Absolutely. It seems ironic that you would have subsidiarity introduced as a principle for considering whether or not legislation can be passed under policy competences already handed up to the European level. In practical terms, however, I can see a logic for saying that the Commission can strategically make legislative proposals under different Articles in the Treaty. We have seen this in the past. One of the clearest examples was tobacco advertising, which was a case where the Commission was proposing harmonisation of tobacco advertising rules under Health and Safety regulations, which require only qualified majority voting. So then you can argue what lawyers call this competence competence, who has the competence to decide on competences. In that instance what was fascinating was the Court of Justice basically policed this very effectively and basically said, "No, you can't do this. This is in breach of basically the policy competences which have been conferred to the EU for this specific purpose." So in a sense allowing national parliaments a say to police these kinds of competence boundaries - which is how I really interpret what this is about - is a sort of belt and braces approach. The Court of Justice already does it. There is no harm in letting national parliaments do it, too, and I think there are big transparency benefits in addition to allowing national parliaments to do exactly that job. So in very simple terms you could say, yes, it is like closing the door after the horse has bolted, but in practical terms it is about policing what powers are exercised within the policies which are already passed to the European level, because when policies are passed to the European level and unanimity is required, that is something qualitatively different than where policies are passed and majority voting is required. It is like, in a sense, saying, where unanimity is required, "We keep them at the national level," because everyone has to agree. So sovereignty is not being transferred, sovereignty is being kept. So what you are doing is policing the use of unanimity versus the use of QMV and in a sense that is subsidiarity in another name, and that in a sense is how I can see where the Court of Justice already plays a role and national parliaments could play a secondary role.

Q40 Keith Hill: Could you just talk us through the history of this? Who originated the proposal to add Article 5 to the EC Treaty and for what reason?

Dr Hix: In the Maastricht Treaty there was a variety of proposals. The negotiations came under the Treaty in the European Union and there was a variety of proposals at that time for a catalogue of competences, and the more federalist-oriented Member States were already proposing back then a catalogue of competences. They thought this would be much too tricky for us to actually define a catalogue of competences. Ironically, it turned out to be pretty easy, once they got to the Convention, to do it. They just described the status quo and everyone said, "We're happy with that." So subsidiarity in a way was seen as a substitute for a proper catalogue of competences as a principle of defining what could be done at what level with government in the European Union, and it was being pushed from several sides. It was being pushed by a side which was arguing that this would be an extra constraint on powers being conferred to Brussels and it was being pushed by the regions of Europe as well at the time, particularly the German Länder and the Belgian regions, who did not like the fact that they felt their national governments were exercising competences in Brussels that were actually their regional competences. So the German federal government can go off and vote in the Council on education policy and the Länders say, "No, that's a Länd policy. How dare you go and do that?" So they wanted some kind of principle in the treatise at that time that would recognise multiple levels of government, not just the national level or the European level.

Q41 Mr Bailey: Can you outline really how you think Article 5 is working in practice? You gave the example of tobacco advertising earlier. That was determined, I think you said, by the European Court of Justice. Have there been any significant examples where proposals have been substantially changed by Member States on the grounds of subsidiarity?

Dr Hix: Not that I can think of. I think subsidiarity, as it is defined in the EU and as it is written down in that Article, is not really justiciable in any clear sense by the Court. What the Court is doing is policing boundaries within other Articles of the treatise rather than using Article 5. I think politically, currently it is not really useable. So in a sense allowing national parliaments some kind of say on it gives it more power, because it is like turkeys do not vote for Christmas. The Member States, having already said they want to pass this, are not going to say, "Well, actually subsidiarity says we can't do that." One Member State might argue, being outvoted in the Council under QMV, "Well, we shouldn't do this under subsidiarity," but they have lost so they have not got any recourse. So in a sense this gives a hand to national parliaments. I can see transparency benefits. I am sceptical of any real political differences that would result from this, in that in our parliamentary systems we have governments control majorities in parliaments, so there is a limit to how much national parliaments can actually constrain what their governments are doing in Brussels. We have seen several parliaments be relatively effective on this matter, but that is more to do with the fact that they are coalition governments, or minority governments, as is the case in Denmark. Parliaments, dare I say it, where there tend to be single party majorities, tend to be weaker in controlling their governments in what they do in Brussels, and I think we have seen that empirically in the way national parliaments have worked in terms of their scrutiny and then sending off their ministers. So on the one side I would be sceptical, but on the other hand if what this Article does is increase some kind of transparency of the process of what is being legislated at the European level, if it allows MPs, and via the MPs and national parliaments the media to actually understand what is being done at the European level and why, and if - and this is my hope - what this does is force national governments to actually tell us what they are proposing in the Council, which currently they do not (the Council is still the most secretive legislature west of Beijing; it is a scandal), if it prises open the Council somewhat as a result of this procedure, then I could see huge benefits to it. I do not understand why we do not see amendments in the Council. I do not see any excuse for this. Why can you not, as national parliamentarians, and us as citizens see what our governments are

proposing in our name in the Council on legislation? We only ever get to see amendments in the parliament. We only get to see minutes plus debates, plus agendas for the Council, but we do not get to see actually amendments, and now amendments actually have to be proposed by groups of governments rather than individual governments as a result of enlargement and as a result of the new rules of procedure in the Council. We do not get to see that. So I hope that indirectly, as a result of this procedure, if it forces the Council to be more open because there is a sense that there is pressure from national parliaments to tell them what is going on, then I can see that potentially this could be significant.

Chairman: I want to bring Mr Hoyle in. You may have followed our dialogue with the Government about the Council's conclusions, where we entirely agree with that line, that we should see draft conclusions so we know what in fact is possibly going to be discussed at the Council. It is being resisted very strongly, as you know, by the Government.

Q42 Mr Hoyle: Just two quick questions. You mentioned the tobacco industry and it was very interesting, about transparency. Do you think the word "hypocrisy" ought to be used, because at the same time they are subsidising the tobacco royalties? I just wonder if "hypocrisy" could be a good word we ought to use. The second question is, which do you think is more democratic, the Chinese Government or the Council?

Dr Hix: In procedural terms, I would say that the EU is more democratic than the Chinese Government. In substantive terms, neither of them is democratic. Procedurally, the EU is democratic, checks and balances, free and fair elections, all the things you can check off in freedom house, the indices of democracy, but in substantive terms it is not. There is no sense that there is any kind of open debate, open contest or open politics about what the EU is doing. Then when there is, like there was last weekend, in Ireland, they go off to Brussels and pretend it has never happened. So in that sense I can understand exactly why people are frustrated with the fact that the EU is highly undemocratic. I think of myself as a staunch pro-European, but equally I am very critical of the fact that the EU is deeply undemocratic.

Q43 Mr Hoyle: What do you say about hypocrisy?

Dr Hix: I will pass on that!

Q44 Angus Robertson: A nice sideway to a question on whether subsidiarity covers sovereignty. For example, national parliament might want to object to a proposal for EU legislation and the burden of proof in criminal prosecutions on the grounds that the proposal intrudes unacceptably on its national sovereignty. Could such an objection be made under the yellow or orange card procedures?

Dr Hix: I think it would be difficult. Sovereignty is in two senses. Sovereignty is a kind of political sovereignty where we, as a national parliament, have the right to make law in the name of our people, but we also have the right to confer those rights to somebody else. In that sense, if the powers are conferred to Europe, in a sense so that we share sovereignty, even if we accept that we might lose and be on the losing side in some votes, I can see a case where you can argue that is a sovereignty question. But you are talking in a more strict legal sense and I do not think parliaments are the right place to make those kinds of interpretations. Those kinds of interpretations should be made at courts, courts making decisions about whether or not basic provisions of constitutions are being breached by the conferral of powers to the European level. What is interesting is that since the Brunner judgment, the judgment of the German Supreme Court on the Maastricht Treaty, most national supreme courts, the highest courts, have followed the line of the Brunner judgment, which

is that the national highest courts have the right to decide ultimately at the end of the day whether what the EU is doing is in breach of really fundamental rights as defined by national constitutions. So it is what we call a non-hierarchical set of norms. So the EU Court gets to decide whether there is a breach within the rules at the European level, but if that breach or if the questions being conferred to Europe relate to fundamental rights or fundamental questions as defined by national constitutions, national highest courts have the right to make that decision, not the ECJ. That is the sort of equilibrium which has been accepted by most courts across Europe, so in terms of the sovereignty you are talking about I do not think that really is relevant under the subsidiarity principle, because the subsidiarity principle is really saying a piece of legislation arrives on your desk and you have to make a decision about this, and there are two decisions you make there, as far as I can interpret Article 5. One is, is what the EU is proposing beyond what has been conferred to it, period, in terms of an informal hierarchy of competences? Two, if that is okay, is what the EU is proposing to do in this area being done under the appropriate rules (i.e. is it something being proposed here cheekily under QMV because they know it is easy to get through under this set of Articles than under this other set of Articles - which is used all the time, by the way)? That, I think, would be a very healthy check on the Commission using its strategic initiative powers.

Q45 Angus Robertson: Thank you for that. Sticking with courts, what is the ECJ's approach to subsidiarity and what inferences can be drawn from its case law?

Dr Hix: I am not a lawyer, but I can tell you my broad understanding of that. The interesting thing is during the negotiations on the Constitution, after they defined informally this catalogue of competences and then wrote it down in a series of Articles, which is really just a description of the status quo, there is nothing really changed in there. The second question is, who is policing this? Various proposals were on the table to say we should perhaps have a special body to police these boundaries on the basis of subsidiarity, until several people pointed out, "Who will you put in that special body?" and everyone said, "How about judges from our highest courts?" and then several people pointed out, "Isn't that already the ECJ?" Judges are nominated by each of the Member States, they go off to Brussels, and there is very little evidence that they go native and they are quite protective of individual rights and quite protective of the rights of Member States. So it is very hard to make a case that on subsidiarity grounds the Court of Justice has sort of run riot, and we have seen that in a variety of cases, one of which I mentioned, which is tobacco advertising. I think with enlargement there is some evidence to suggest the Court has become even more protective of the powers and rights of Member States, with the addition of new judges from the new Member States, who are not necessarily as federalist as some of the judges from some of the older Member States. There are certain problems with the fact that there may be too many judges in the Court right now and it is unwieldy to operate a court with 27 judges. There are some serious issues about how to redesign and work how the Chamber system in the Court works so that you get fair adjudication, depending on which area of law is covered, but generally I think the Court of Justice is quite a trustworthy and legitimate institution and I would rather trust the Court to make those highly technical legal decisions relating to competences than some other body, if it is not particularly expert.

Q46 Keith Hill: Twice you have touched on the relationship of subsidiarity to unanimity and majority voting. It sounds very interesting, but I do not think I have completely followed you on that, so I would be very grateful if you could take us through that argument again. In the light of that, is it your view that compliance, the principle of subsidiarity, is capable of objective assessment, or is that essentially a matter of political judgment?

Dr Hix: On the first one, think of it in two steps. Two decisions are made when a policy is added into the EU treatise. One is, is this something the EU should be doing? Two is, should this be done

via essentially an inter-governmental mechanism where every Member State can veto, or is this something which should be done by a sort of quasi-federal mechanism, where the Commission has a right of initiative, there are two chambers, parliament and council, the classic model, and there is ECJ judicial review? So plenty of checks and balances, even in the other sort of quasi-federal model. The first decision is what power should be passed up to the EU level. The second is, which mechanism are we using to pass those powers? So in a sense when powers are being passed up and they are being kept under the inter-governmental mechanisms - that was when justice and home affairs was purely inter-governmental, or when common and foreign security policy is still primarily inter-governmental, and most areas of economic and monetary union are largely inter-governmental, some areas of single market legislation are purely inter-governmental, tax, harmonisation, for example, so security harmonisation - it is difficult to make a case that even passing these powers up to the European level means that there is any limitation on national sovereignty because national governments still ultimately can say no. You still have the right to say no, whereas your right to say no on the other powers which are being conferred is dependent upon it being blocked. You may lose in the Council. The Danish Government, for example, faces this all the time. It is called the Common Market Relations Committee in the Danish Parliament. It would actually bind its ministers to go off to Brussels, and they would come back a week later and say, "I'm sorry, we were out-voted. We did exactly as you told us, but we were out-voted." Then you can say, "Okay. What's the point of binding your minister then?" So you can see a real qualitative difference between powers which have been conferred and been kept by unanimity and powers which have been conferred and moved to QMV. I am not saying they should not be moved to majority voting. There is good reason why they should be, and even when there is there are lots of checks and balances. You have got the check of Parliament, you have the check of the European Court of Justice, you have different types of majorities which get formed on different issues. The stuff within policing are the areas which have been passed up where there is predominantly majority voting, and this is where I think there needs to be far more transparency of what goes on in the Council and governments need to really feel the pressure of their national parliaments breathing down their necks when they are doing business on these issues, because they need to explain. If they do vote and they lose, they need to explain to their national parliaments why and why they were on the losing side, and still why it might be legitimate even to accept the fact that they were on the losing side but the legislation could still be accepted. That needs to be understood.

Q47 Mr Borrow: Just following on from that last point, taking the Danish example of Danish ministers being mandated, if you like, by their equivalent of the European Scrutiny Committee, surely one of the problems there is that if they are being mandated to take a certain line it risks reducing their flexibility in forming alliances with other Members to come up with something which is less perfect than what they would want but there is more chance of it actually being accepted by a majority in the Council than ending up in a position of one lone voice defending a position which nobody else will go along with?

Dr Hix: There are two elements to that. One is, that depends on how you mandate. A mandate could be, "These are the four issues on this legislation. This is our red line on this issue and these are the sorts of area of freedom, the boundaries within which we would be willing to accept something." So that gives some flexibility. But a mandate can be defined, and in a sense that is exactly what governments already do with the Permanent Representatives. Most of the bargaining is not done in the Council, most of the bargaining is done in the Committee of Permanent Representatives, and amongst the Perm Reps that is exactly the instructions they are getting from their ministers back home when you talk to them. They are saying, "Here are the five items we're discussing on this piece of legislation. Here are my boundaries, so I can move on these four, and here are the five where I have absolutely no room for manoeuvre whatsoever." That is what they are getting from back home. In fact, the reason why more than 50 per cent of legislation under the co-decision

procedure is now adopted at first reading is because the Perm Reps cannot stand the idea that you get to conciliation, because if you get to conciliation with the MEPs on one side of the table and the ambassadors on the other side of the table, the MEPs invariably win because the ambassadors are constrained by their instructions from back home and the MEPs can just make things up as they go along and get a deal and get it past their backbenchers. They are politicians; it works differently. So that is partly what is pushing everything back to first reading. They want a deal done before the legislative process opens up. That raises big transparency questions about how to understand what goes on and why it is so essential that national parliaments need to get in there before the first reading and why I am not sure that is workable, but really I do worry about the fact that everything gets done under the first reading. More than 50 per cent last year of all the legislation passed under co-decision was passed at first reading. In terms of the mandate, I do not see any particular problems. You can be sophisticated in how you give a mandate. The Danes are very sophisticated in how they give a mandate and I do not see why other parliaments could not do the same.

Q48 Mr Borrow: From what you have said so far, you seem to be saying it will be very difficult to define in advance in what circumstances something was a breach of subsidiarity. Are you actually saying that it would be impossible to develop a set of criteria by which it would be objectively possible to look at every case and say, "This falls on this side of the line and this one falls on the other side of the line"? Is that an exercise which is not even worth doing?

Dr Hix: A set of criteria could be defined. I would expect that those criteria could not be defined in purely legal terms, though, that is the problem. If you applied a set of legal criteria that said things should be passed at the European level because there are collective benefits for us on the grounds of scale. The cake gets bigger if we do it together rather than if we each do it separately. It is a kind of single market idea. We should pass it up to the European level because there are externalities of us not having it there. Environmental pollution crosses borders. It is better that we do it together. You then get to the point where there is a whole range of policies which meet both of those criteria, defence and immigration classically. Of all the theories of multi-level unions or federalism, the two areas you should pass to the centre are defence policy and immigration. Now, under any legal criteria you come up with it would suggest that there should be a purely European defence policy and purely European immigration policy. Clearly, it is for political reasons we do not have that. So any criteria you come up with would have to include political criteria, which is really the most important of these political criteria. How diverse are our views on this policy question? Because if our views are hugely diverse, there is no way we can reach agreement, and hence why we should be kept separate. So if you define it in purely legal terms, I do not think it is practical in any sense. You could define it in legal terms but add some political criteria as well, which is, are we likely to be on the losing side? How important is it that we are on the losing side if a majority decision is taken in this area? Is this something where it is not a huge issue? They are purely political questions which would have to be taken into account when allowing things to be done at the European level.

Q49 Mr Borrow: But is there a risk then that that would all fall apart were, of course, decisions to be challenged judicially, on the basis you would come up with some truly bizarre decisions by judges or courts as a result of drawing up a set of criteria but of a mixture of legal and non-legal aspects to it?

Dr Hix: Absolutely. This is why I do not think in practice you can come up with a clear set of criteria the courts would be able to exercise. Courts can police what is already in the treatise. Courts can police the boundaries between competences which are already in the treatise. Courts cannot really police the boundaries between what is in the treatise and what is not in the treatise, and it is politicians who have to police that boundary.

Q50 Mr Hoyle: So how do you think the so-called yellow card and orange card will work in practice? Has it really got any merits, or it is just another excuse to actually do something seriously? Is it just another stalling measure, is it just another way of dealing with situations we do not like?

Dr Hix: No, I do not think it is an excuse. I think it has not got as many teeth as I perhaps would have hoped.

Q51 Mr Hoyle: What colour would you like to see then?

Dr Hix: A direct sending off!

Mr Hoyle: The red card! Okay, let us have a red card.

Mr Bailey: The Graham Poll approach!

Q52 Chairman: I think in one of our submissions the Committee did suggest a red card might be a very good idea, but there were not any takers for a red card.

Dr Hix: Or a Commission sin-bin, perhaps! One thing which really I am a little sceptical of are the sorts of thresholds as defined in it, a quarter of national parliaments in the area of freedom, security and justice, half of national parliaments under the ordinary legislative procedure. Half of the national parliaments under the ordinary legislative procedure. That is a lot. That is really a high threshold to get to, because what happens then? Half of national parliaments say they think it is in breach of subsidiarity. It is virtually impossible for the Council to actually pass that legislation, even if you get a quarter or a third, because you can imagine a quarter of the 27 national parliaments say, "We think this legislation is in breach of subsidiarity." The governments from those national parliaments are then not going to go and vote in the Council to say this can go through. In real practical terms the thresholds are much, much lower, because the Council operates on a real culture of consensus, so it really is only going to take one, two, or three maximum, parliaments to essentially block anything because it is the Council ultimately which has to make a decision on a piece of legislation and those governments are going to have to feel they are going to vote "No" in the Council. That will be enough in the Council essentially. It is very, very rare that legislation gets passed with more than three Member States opposed. It is extremely, extremely rare. We now have about 50 per cent of legislation which passes through the Council which has at least one Member State opposed to it when it is passed, but in 90 per cent of those cases it is only one Member State, rarely two, and it is almost unheard of that it is three, one or two cases every two or three years. So the Council operates really under a culture of consensus, for good reason, because they all know they have to implement the laws which get passed, which then means in practice the threshold is low for just a few national parliaments saying they have problems with this. That is going to be a big pressure on the governments. In effect, that will stall it already in the Council.

Q53 Mr Hoyle: Is the reality then that it is a cop out for that one country, it is just because politically it is not quite suitable, so therefore, "Don't worry, we'll allow you to vote against," just to help their own situation?

Dr Hix: Another thing to bear in mind is that you cannot see national parliaments and governments as completely separate. We have parliamentary systems. The majority in the national parliaments are the governments. I am not saying that European Scrutiny Committees are beholden to their governments, of course not, but if there is a government which really does believe something should be passed in the Council and this is a good thing, I am sure it will do everything it can to stop the Scrutiny Committee saying that there is a subsidiarity concern. Put the other way round, if

a government really does not like something and would like a case to be made against subsidiarity, this mechanism and this protocol gives national governments effectively another chance to veto legislation. They just do it via their national committees.

Q54 Mr Hoyle: How do you feel about the governments which say, "Yes, let's implement, let's vote for it," but never implement in their own country?

Dr Hix: I am not sure that is directly related to this question.

Q55 Mr Hoyle: I just wonder how the two go together, because it rigs the voting, does it not?

Dr Hix: Not necessarily. It is very difficult -

Q56 Chairman: I do not want to wander too far into other issues.

Dr Hix: I can answer that very briefly in the following sense: it is very hard to make a case now that there is strategic voting by governments in the Council knowing they will not implement it. It may have been the case 10 or 15 years ago, but it is very hard to make that case now because the transposition records are now very, very high. Britain is mid-table.

Q57 Mr Hoyle: Do you mean the bottom?

Dr Hix: It varies year to year. I could tell you if I looked it up, but I would not like to say off the top of my head.

Mr Hoyle: Who would you guess was bottom?

Chairman: I think we will leave it there!

Q58 Richard Younger-Ross: You have touched on the nub of, I think, the failure of the yellow card/orange card system in that parliaments are their governments, because governments run their parliaments and they tell their parliaments how to vote, usually through the Whips or other devices, in most cases in Europe. If it is the reality that deals are actually done in smoke-filled rooms before, then a government is unlikely to allow its parliament to vote to veto the proposals which it has already stitched up in quiet. Would you agree with that analysis?

Dr Hix: I would make two points there. One is, it depends when the proposal is being sent to national parliaments. Most of the deals are done behind closed doors between the Commission proposal and first reading, so it is not that the deal is done before you, as a national parliament, receive it. You have got eight weeks to actually look at it. So in a sense the deals are going on in parallel to the scrutiny in the national committees and any backroom deal is not going on prior to you receiving the document, so then the government is trying to whip you to support it. That is the first point. I think the fact that you get this immediately upon a proposal from the Commission - and it is not true that the deals are done before it is initiated by the Commission, there is very little evidence of that. The Commission is very weak in the co-decision procedure. On most major pieces of legislation in the last couple of years the Commission has lost at the first reading, significantly. The Commission lost at first reading on take-overs, it lost at first reading on the Services Directive and it has just lost on working time and agency workers. There is a whole range of issues where you can say a deal at first reading between parliament and the Council is very different to what the Commission proposed. Bolkestein actually wanted to withdraw the Take-overs Directive to be done between parliament and the Council, so something different is going on in that period. At the same

time, parliaments scrutinise it. The second point is that not all parliaments are the House of Commons, meaning not all parliaments have extremely centralised parties and single party government and very powerful Whips, for good or ill. I am not saying negative things, I am saying it is an empirical fact that with committees in parliaments where there are coalition governments or where there are minority governments backbenchers are much more powerful against their governments. This is why the Scandinavian parliaments have traditionally been much more powerful against their governments on European affairs than either the Irish Parliament or the Spanish Cortes, or the House of Commons, where the government has tended to have its own way on European affairs, so I think there is a continuum. It is not a foregone conclusion that this is purely just national governments being able to use this to force the people to back them.

Q59 Richard Younger-Ross: There are two issues out of that. One is the eight weeks. Do you see the eight weeks working, because if you have a look at the legislative process of this House and how long it will take for it to come to this Committee for this Committee to look at it, or to go onto the floor of the Chamber when you look at the programme, the chance of proper scrutiny in this House is fairly minimal?

Dr Hix: Yes. That is a more a comment on your own rules and procedure and your own timetable than it is on the feasibility of eight weeks. The volume of legislation at the European level is pretty huge, as you know, so you will inevitably have to prioritise. You are going to have to know well in advance what is being proposed by the Commission and what is the timetable for that and organising your own agendas, but I do not see why you cannot haul ministers before you in that period and say, "These are the concerns we have in the Committee. You need to tell us what kinds of deals are being done and you need to give us a list of the amendments you are proposing in the first reading in the Council."

Richard Younger-Ross: We try!

Q60 Mr Bailey: Earlier you commented that countries operating the yellow card procedure are hardly likely to vote for it anyway, and there is obviously an indisputable logic about that, but given the fact that the larger countries are more likely to have more power in terms of voting within Europe, do you think they are more likely to exercise the yellow card procedure?

Dr Hix: There is little evidence that the size of a country is related to how often it votes against a proposal in the Council. The last period where the data exists, the last five year period, Germany and Sweden were the two Member States who were out-voted most in the Council. Britain was kind of mid-table again in that data. So there is no evidence that the size of a country is any proof, it is more the nature of what the legislation is. On a lot of more market liberalisation in legislation Germany tends to be opposed and loses. We saw that on a bunch of things. On other types of legislation we can see Britain sometimes being on the minority side.

Q61 Mr Bailey: So basically you would say in effect the voting pattern is determined by the issues rather than the size or relative power of the state involved?

Dr Hix: Yes. I would be very, very surprised if the absurd system of voting in the Lisbon Treaty will ever be implemented anyway.

Mr Bailey: That is an interesting comment.

Q62 Chairman: You have ranged across a number of aspects of the political structures which make the question of control or influence over governments more or less useful. We have in the past

discussed this question about the role of the Whips and the whipping system in Parliament, whether that would give the Chamber enough independence to react. On a previous recommendation the Modernisation Committee accepted that this Committee would be the committee to put up a proposal for a response to subsidiarity issues and possibly even put a motion to the floor of the House. As you have said, the influence of the Whips may negate that. Could you possibly sum up whether you think the provisions of the Lisbon Treaty or any provisions similar to this which may come in any other treaty which may exist post-Lisbon, or without Lisbon, are likely to make a significant difference to the influence of national parliaments in EU legislation rather than just within their own parliaments?

Dr Hix: In general this protocol and these procedures associated with it are a step in the right direction. It is a small step, but it is a necessary step and it is significant, in my opinion. Even if Lisbon does not enter into force, I could see that this is something which could be introduced by some other mechanism, either through legislative action or through some kind of inter-governmental protocol. Either way, I can see this is one of a subset of questions in the Treaty which could be implemented irrespective of whether or not the Treaty is ratified, which it probably will not be. But it is, I think, a step in the right direction because I think it will start to raise questions about when that whip is being used and why that whip is being used, and it will become more transparent about why and when that whip is being used. You and the public will be able to see, and backbenchers will be squealing, and they could publicly squeal that they are being put under pressure to vote a particular way when this is a clear case of actually a breach of subsidiarity. That to me is transparency and then we, as voters, can make a judgment about whether we agree with that person or whether we agree with what the Government is doing and the Whips. At least now, for the first time, we will have that type of information that we never would have had before. So even in the context of the House of Commons with very strong Whips, I see this as the right direction because I see that nine times out of ten, or perhaps 19 times out of 20 the Government will be able to get what it wants, but it is on that twentieth case than I can imagine a situation and a scenario where it is going to be difficult for the Government to get what it wants, particularly if it only has a small majority.

Chairman: Thank you very much. I have found that most interesting.

Angus Robertson: With your indulgence -

Chairman: Certainly.

Angus Robertson: You do not know what I am going to ask, Chairman! Professor, you have written very widely on European Union issues and obviously the big issue of the day is the vote which has taken place in Ireland. You have just said, as a sort of throw-away remark, that you do not see the Treaty being ratified. Could you just explain a little bit more your thinking on that?

Q63 Chairman: Could I caution you not to, because in fact we are wandering well outside the remit of this inquiry. It may be subject to a further inquiry and should the European Union Councils require your advice on it, we might call you in on that issue at a further stage, but there is a Council meeting tomorrow, which I am sure the Prime Minister will report back on.

Dr Hix: Can I just say one sentence?

Q64 Chairman: No.

Dr Hix: I will say it anyway! It is in my letter in today's Financial Times.

Chairman: I did read it, in fact, and I decided not to tempt you down that road! What I liked about your piece in the Financial Times was that you said that a lot of the things which might be beneficial could be reached without having the Lisbon Treaty, which was why I asked you about the possibility of reaching a subsidiarity arrangement or a subsidiarity check arrangement without having the Treaty.

Keith Hill: I merely wish to say that when I was the Deputy Chief Whip, they only squealed in private!

Chairman: I am not sure we wanted that on the record, but it is now in! Can I just say that I had the pleasure, with some other Members, of hearing you speak at the European Institute in Florence on the fiftieth anniversary of the Treaty of Rome and I found that very stimulating at the time, and I have also found your evidence to be very stimulating and it will certainly influence, I am sure, what we put in our report and hopefully will influence how the Government responds to it, so thank you for your attendance.