

HOUSE OF COMMONS - EUROPEAN SCRUTINY COMMITTEE

SUBSIDIARITY AND THE ROLE OF NATIONAL PARLIAMENTS

Wednesday 25 June 2008

MR JIM MURPHY MP and MS DEBORAH BRONNERT

Evidence heard in Public Questions 104 - 161

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Oral Evidence

Taken before the European Scrutiny Committee

on Wednesday 25 June 2008

Members present

Michael Connarty, in the Chair

Mr Adrian Bailey

Mr William Cash

Mr James Clappison

Ms Katy Clark

Mr David Heathcoat-Amory

Keith Hill

Kelvin Hopkins

Mr Bob Laxton

Richard Younger-Ross

Witnesses: Mr Jim Murphy MP, Minister for Europe, and Ms Deborah Bronnert, Head, EU Delivery, Foreign and Commonwealth Office, gave evidence.

Q104 Chairman: Before we get started, can I welcome our observers but particularly welcome the delegation from the Grand National Assembly of Turkey which is here today. I hope you find our proceedings enlightening; if not, at least informative! Can I welcome the Minister, Jim Murphy, and I may be the first select committee chairman to congratulate him on being named the "Minister of the Year" by the House magazine "for his excellent work on the European Treaty", it said. I am not sure that would be endorsed by all sides of the House but you certainly did a stalwart job in that respect. I do congratulate him and I hope his mother is proud of him, and his dad of course! Minister, you know that we are undertaking an inquiry into subsidiarity, particularly with reference to what was the impending endorsement and ratification of the Lisbon Treaty, where there were specific powers given to parliaments under what is known as the yellow card and the orange card to indicate the wish of national parliaments in Europe to have matters looked at again or withdrawn on the basis that they have breached subsidiarity. Things of course have moved, I would not say necessarily moved on, because of the failure of the Government of Ireland to get the approval of a referendum in their own country to ratify the Lisbon Treaty. Our questions are slightly different; we are still exploring the question of subsidiarity but not just in the context of the Lisbon Treaty, which may now have some difficulty in being implemented. My first question for you, Minister, is: if, for

whatever reason, the Lisbon Treaty were not ratified by all 27 Member States, what do you think would happen? What action, if any, do you think the EU could and would take?

Mr Murphy: On subsidiarity or generally?

Q105 Chairman: On subsidiarity if you wish to answer it in that context.

Mr Murphy: I will perhaps do both but the second one more briefly because that is a relatively open-ended question and invites itself to a very long answer which you would not thank me for providing. First of all, thank you for the kind comments, Chairman, at the start, on what was a pleasant surprise. On the specific point of what would the European Union do, I think you will be aware of the starting point of my answer which is that would depend on what Member States wish it to do. In the context of the changes in the international structure and international architecture that were envisaged by the Lisbon Treaty, there is no appetite, certainly from HM Government, or from many other governments, to unpick specific aspects of the Lisbon Treaty and try to implement them by a different route. There have been some public comments contrary to that assertion but, nevertheless, I think that is the very strong view of very many governments across the European Union. Where we would be is continuing to wait for the Irish Government to suggest the way to progress. At the European Council in October there is an expectation (not a compulsion but an expectation) that the Irish Government will return with proposals about how to progress, but we are very clear that should not be about renegotiating the Lisbon Treaty text, and we have said that publicly. It is for the Irish Government to suggest both the timescale and the content of how they want to move forward. More generally if the Lisbon Treaty were not implemented, we would find ourselves relying on the architecture designed by previous consecutive European Treaties and, ultimately, the rules are very clear: unless all 27 countries ratify this Treaty, not one single country can implement it. We are very, very clear about that and we respect that absolutely and will continue to do so.

Q106 Chairman: Can I just ask you to put this on the record for our information. My understanding is that the Government has undertaken that it will not deposit the country's instrument of ratification until judgment has been given in the Wheeler case which is before the courts. Will the Government similarly await the outcome of any appeal if that is lost? The second question: FCO officials, your own Department officials are reported as saying that they expect to deposit an instrument of ratification by the end of July. For the record, could you describe the process which is involved and how long it normally takes to prepare and deposit an instrument of ratification of an EU Treaty? You might want to introduce your colleague from the Department so that she is recognised by the Committee and on the record.

Mr Murphy: Deborah Bronnert, who is Head of EU Delivery at the Foreign and Commonwealth Office. On the two points raised - the External Action Service and the ratification - of course the Government was confident, and was proven to have well-placed confidence today of course with the judgment in the case regarding Mr Wheeler's attempt to seek court instruction that HM Government should indeed have a referendum on the Lisbon Treaty. We were confident of our case and that has proven to be with good reason. My understanding is that Mr Wheeler was refused that right of appeal this morning very clearly on the basis that there was no reasonable expectation that that would have much success. Of course, he still has the right to go to the Court of Appeal, as is his wish, and if he wishes to invest his own money in doing that, that is entirely his right. Our view is again very clearly, and I hope this helps to inform the Committee, we do not have a timeline by which we have to ratify, and the ratification process, as hon Members will be aware, is the depositing of a document which states that we will abide by the Treaty in international law, and that

will be deposited in Rome. One of the more arcane aspects of it is that it has to be written on goatskin, not by goatskin but on goatskin, so we are currently looking for the goat!

Mr Cash: It is separating the sheep from the goats.

Chairman: Can I indicate to the Committee that there is a division in the Commons and we will be suspended for ten minutes.

The Committee suspended from 2.42 pm to 2.51 pm for a division in the House

Q107 Chairman: Minister, welcome back. If you wish to recap on the second part based on the question of whether an appeal goes to the Court of Appeal.

Mr Murphy: Mr Cash, of course, was about to share with us his prognosis and strategy for separating the sheep from the goats, and I look forward to discussing that in more detail, if asked, as to our strategies and tactics for doing it. On the External Action Service, Chairman, to get back close to being in order, in light of the Irish referendum I think it is right that the work that was gone on in the External Action Service should stop. We have made that clear; the Prime Minister has made it clear, I made it clear at yesterday's Foreign Office Questions, and the Foreign Secretary had also made that clear. We think it would be wrong to continue that work unless, as I said in the Chamber yesterday, the Irish Government do come forward with a way ahead, but we do not expect that at the earliest until October, or unless the incoming French Presidency were to table proposals that we would be expected to respond to, and in those circumstances of course it would be wrong for us not to carry out the work and prepare a response. On the basis of the Irish vote we have stopped that work and it is important to put that on the record.

Q108 Chairman: So what you are saying is that the process of ratification of Lisbon has actually halted?

Mr Murphy: On the External Action Service. On the ratification process there is not a date by which we would have to ratify. As hon Members will recall, the earliest the Lisbon Treaty could have been implemented was 1 January 2009 and we can debate whether that is still feasible. That again is for the Irish Government to reflect on. There is no date by which we would have to ratify except under the old timetable it would have been January or late December, I would suspect, 2008, so we are in no rush; we do not have a deadline by which to do it. As to the response to Mr Wheeler's next move, the next move is Mr Wheeler's. As I say, we had great confidence in our case. We noted that the judge refused to grant him leave to appeal this morning and based on that judgment we cannot see how - and it is an issue for the judge or future judge, of course - but it is a very strong judgment today and I think that will be reflected in any decision the Court of Appeal would take, but that is not for me in any way to inform or decide. We will continue the technical process which on previous occasions has taken a number of weeks and that is a process that we are now involved in, so we have not stopped that process.

Q109 Mr Cash: The question that I think many people are asking themselves is why is it that in relation to the original Constitutional Treaty, when it became clear that the French and the Dutch had said no, the Prime Minister dropped the Bill (and the present Secretary of State for Justice was the then Secretary of State for Foreign Affairs) because he knew that there was no possibility of the Treaty being ratified? How do you distinguish in principle and in law between those circumstances and the present one with regard to the Irish position?

Mr Murphy: In law the position is the same. Unless all 27 ratify this then of course it cannot come into effect in any country. At that time under Nice, I am trying to recall how many Member States there were - and Mr Cash will of course recall - however many Member States there were at that time would all have to have ratified before it came into effect, so the legal position is the same under Lisbon as it would have been with Nice. What is different in practice is that under the old Constitution when the Dutch and French people voted No in their referenda both Governments of France and the Netherlands, I recall, made it clear that they were not going to ratify. On that basis the Constitution was not going to take effect because it would not have been ratified. As we sit today, the Irish Government have made no statement to that effect and have not declared that as their intention. They are working hard to find a way through this and until such time as the Irish Government were to respond and say whichever the course of action is, then that is where we would be. That is the difference. The Dutch and French Governments made it clear; at this point in time the Irish Government have done no such thing.

Q110 Mr Cash: There is of course a very important other difference and that is that almost exactly one year ago today we had the Secretary of State for Foreign Affairs here on the question of mandate, and of course it would not be unreasonable to assume that one of the reasons why the Irish are being put under persuasion, if not pressure, is that they signed a mandate which was described in various language which was very precise that they were under an obligation to carry this process through. Are you going to tell us that that matter has not been raised at all?

Mr Murphy: The hon gentleman knows that I was not yet in post a year ago but I feel as though I was because for the first six months of being in post I was quizzed about that exact hearing where the former Secretary of State appeared before hon Members on this issue about discussion versus negotiation and when was one one and when was one the other. I became very aware of that issue in terms of the evidence that was given in respect of the mandate. The Irish Government, as did the UK Government, entered into a political agreement. It is a political agreement and declaration that they supported the Treaty.

Q111 Mr Cash: Unprecedented.

Mr Murphy: They entered into a political agreement to support the Treaty. Our responsibility as a Government was to then bring proposals to ratify this Treaty to both the House of Commons and the House of Lords. We have done so and Parliament has spoken. The domestic constitutional responsibility of the Irish Government is of course entirely different. As we have rehearsed before, there are different aspects of constitutional history and part of their constitutional history is reflected in the relationship between our two great countries but that is partly how they ended up with Article 46(2) of the 1937 Constitution of the Republic of Ireland where it is very clear that they had to undertake that referendum. We have fulfilled our responsibility by Parliament giving its judgment. The Irish Government fulfilled its responsibility by inviting the public to give a judgment. We respect absolutely the Irish Constitution and we respect the outcome of the referendum. It is now for the Irish Government to tell us, as the party that gave political agreement to the Treaty, to suggest a way ahead.

Q112 Mr Bailey: Can we just focus on the subsidiarity provisions. This has left us with some difficulty, particularly with regard to yellow and orange cards and so on. Do you think there is any other way that the provisions for subsidiarity could come into force, either by a political undertaking by the Commission or possibly even under the existing Treaty?

Mr Murphy: I do not believe so. I think that the yellow and orange card proposals were innovative and I know there are different views as to how innovative and how effective, but they were an

innovation never before provided. The options available, I guess, would include an informal arrangement. I do not think that would work. There is already an informal arrangement in terms of the Commission notifying select committees and select committee processes with potential votes in both chambers of Parliament. I think it is more than informal actually. Do I think there is a likelihood of orange and yellow cards being introduced by another procedural means? I do not believe there is actually. As I say, we are not inclined to cherry-pick the existing Treaty. Equally, we are not inclined - and it is generally accepted that Croatia is probably the next Member State of the European Union, hopefully quite soon afterwards followed by Turkey, HM Government continues to support very strongly Turkey's accession to the European Union - we are not attracted either to turning Croatia's Accession Treaty into Croatia Plus, Croatia plus the parts of Lisbon that there is a degree of ambition to fulfil. Notwithstanding the fact that members of this Committee I know have reflected on the yellow and orange cards not being as strong as they would wish, it is nevertheless an improvement on the democratisation of the process. However, the Lisbon Treaty is a package and we are not interested in renegotiating the text of the package or unpicking parts and implementing by another route. The short answer is I think it is very unlikely.

Q113 Mr Bailey: So effectively, if you like, those who support a greater degree of subsidiarity have been stymied by this decision?

Mr Murphy: Obviously we have made our view in this place known, and there was strong support in both the Commons and the Lords for these improvements in accountability and democracy for both chambers, and that was important, but ultimately the Irish people have made their views known. As a close follower of the Irish referendum, the orange and yellow cards did not feature substantially. Many other things did feature. I do not think we can argue that the Irish referendum was a vote against subsidiarity but as a consequence of the vote, we are very clear on the consequences, the orange and yellow card proposal as part of the Lisbon Treaty could not be implemented in another means.

Q114 Mr Cash: How could it be renegotiated? How could you renegotiate it?

Mr Murphy: Mr Cash, we have no intention of renegotiating it.

Q115 Mr Cash: I know.

Mr Murphy: I said that very clearly.

Q116 Mr Cash: You accept that it is impossible to renegotiate this Treaty because of the Irish position because the text has to be exactly the same for any second referendum if it were to take place, which seems more than unlikely; I would say impossible.

Mr Murphy: Mr Cash, I have made clear, and I think the Foreign Secretary has made clear, that we are not interested in renegotiating the text of the Lisbon Treaty and we are not getting involved in that process.

Q117 Chairman: Can I just clarify your answer to the question from Mr Bailey. His question was would it be possible and you said it would be unlikely. I do not think he asked you would it be likely.

Mr Murphy: I do not think it would be possible. I do not think it would be desirable ---

Q118 Chairman: The evidence we have had from Professor Hix and the evidence that we have had from Vice President Wallström, regardless of the question of whether it would be likely or not likely, was that things can be delivered by a number of means and not necessarily just by Treaties. We know there is already in the Treaties that exist subsidiarity conditions and subsidiarity checks, not quite as important as the yellow and orange card, but the point is if we did not have a Treaty, given the votes of both the Lords and Commons and the strong support in speeches for subsidiarity checks, it would obviously be possible. Whether it is unlikely or not, it would be possible. It is not a thing that is not possible. We can have legislation without the EU to allow it.

Mr Murphy: Chairman, I absolutely respect Commissioner Wallström, of course I do, but Treaties are negotiated by Member States. Commissioner Wallström does not speak for HM Government or any other government. On the basis on which I understood Mr Bailey to be asking the question, which is is it possible for there to be a European-wide yellow and orange card system, then I think that is not possible. Is it possible for us to improve the way in which we scrutinise and are held to account in the Palace of Westminster? I have said repeatedly, from my experience of nearly three years in European standing committees, along with your good self and a small number of others, there have to be ways in which we continue to improve scrutiny of European business. I had that view before I became Europe Minister and I still hold firm to that view today, that we should be looking for ways to continually improve European scrutiny.

Chairman: I think your answer is clear.

Q119 Mr Heathcoat-Amory: Just to discuss this a little bit further, the principle of subsidiarity (which attempts a division of responsibility between the EU and Member States) had been in the Treaty for about 15 years and this Committee knows that it does not really work. We object constantly to the extension of powers breaching subsidiarity, without much effect. The Lisbon Treaty did at least try and give a new procedure for this without altering the concept. I never had much hope that that in practice would mean much but surely, with a bit of political will, the European Commission could simply say without any Treaty change or anything that they are in future going to respect the views of Member State parliaments and simply listen a bit more. I know that listening is difficult for them. There are terrible acoustics in the European Union and they can only hear the word Yes from Ireland, they have terrible difficulty with the word No, but at least when parliaments object they could say yes, we are not going to go ahead with this, it does breach subsidiarity. That does not need a great new elaborate procedure, it simply means respecting the principle, so why can this not be done under the existing rules with a bit of political will and respect for the status of the principle and the role of Member State Parliaments?

Mr Murphy: First of all, the subsidiarity point is a fair one, it has been around for a substantial period of time; much longer of course than the Maastricht Treaty. For fear of Mr Cash disagreeing with me, my understanding is that subsidiarity has been around since 1891 as a product of Catholic social teaching.

Q120 Mr Cash: Jesuit doctrine and I am informed by my colleague that actually goes back to Aquinas; he is the expert in this.

Mr Murphy: With the Chairman's permission, we may have time to talk about that, but my understanding is certainly Pope Leo XIII in 1891 spoke largely on Catholic social teaching, which is derived from a lot of Jesuit thinking, on this issue of subsidiarity. It took nearly 100 years for the British Conservative Government to catch up with Pope Leo XIII but catch up they did.

Q121 Mr Cash: But that was religious, not political.

Mr Murphy: Mr Cash, I think you will find it was a Papal response to laissez faire capitalism and the growth of Marxist thinking around that period in the late 19th century. It has a political and religious dimension, I think, but we can talk about that at length, if time allows. In terms of the question raised by Mr Heathcoat-Amory, the Commission listens; the Commission's responsibility is to respond to the determination of Member States. As a former European Minister Mr Heathcoat-Amory, you know that very clearly. Would it be suitable to have an informal agreement with the Commission of a shadow orange card and a shadow yellow card with no legal basis? I simply come to the point, Mr Heathcoat-Amory, that this improvement was part of the package of the Lisbon Treaty. The way we put it is this: we have been questioned by many hon Members of all parties in the last week or two about the danger of cherry-picking parts of the Lisbon Treaty and you are inviting me to do that this afternoon as well.

Q122 Mr Cash: You cannot do it.

Mr Murphy: Perhaps that is what I should just say to Mr Heathcoat-Amory, Mr Cash. We are not going to cherry-pick the Lisbon Treaty and we are not going to ask the Commission to do it, even on a voluntary basis.

Q123 Mr Heathcoat-Amory: I am not asking you to cherry-pick the Treaty. That is precisely the opposite of what I am suggesting. We should not pick out of the Lisbon Treaty this yellow and orange card procedure which we know the British Government thought was inadequate because during the Convention on the Future of Europe they pressed for something much stronger, so we know that the British Government did not agree with this procedure. It does not need this elaborate Treaty to implement. It just requires the European Union institutions to start listening, in this case to Member State parliaments, if they object to something on subsidiarity grounds. It might help counter those like me who say they are not interested in listening to anyone who has any opinion with which they disagree, and that is quite clear when the Irish voted No that message did not reach the Commission. In this case on subsidiarity, which is a very modest check, I think it would be possible to implement this administratively. It is just a question of political will. Why does the British Government not suggest this as a positive way forward. The Prime Minister says he wants to take a lead all the time. Instead of limping along behind all those in Europe wanting to implement this wretched Treaty by other means, why does he not take a lead on this specific idea which would ventilate the system and give us all a little bit more to do?

Mr Murphy: Mr Heathcoat-Amory, I would be delighted if a simple introduction of orange and yellow cards would change your mind on so many issues about Europe on the basis that the orange and yellow cards until a week or ten days ago were likely to be implemented and supported in this Treaty and I could not sense a great shift in your view on these matters, but the debate will continue. I simply do not believe that this would work unless it was on a clear legal framework and a clear legal basis with clearly established rules and arrangements, and for that to happen in a pure, transparent, fair, technical legal way, it is certainly my view that it would require a legal Treaty to make that happen rather than an informal political agreement that I do not think would stand the test of time.

Richard Younger-Ross: I note that the Minister knows his Catholic social teaching, as I would expect he would. He is entirely right in what he was saying.

Mr Bailey: As always.

Q124 Richard Younger-Ross: The Minister referred earlier to sheep and goats. I am not too sure about the sheep and goats; what is certain is that this Treaty does appear to be as dead as the proverbial parrot. However, whilst the parrot may be dead we were told by yourself, Minister, and we were told by previous ministers and we were told by previous Secretaries of State, that elements of the Treaty were absolutely essential. It is not a matter of cherry-picking; it is a matter, where there was essential reform, of sitting down reasonably and saying we need to look at what is key to this, and subsidiarity clearly has to be a key area for moving forward in Europe if this is dead. Do you agree to that?

Mr Murphy: Subsidiarity is not under threat of course, Mr Younger-Ross. What is under threat are the new mechanisms for policing subsidiarity, so the principle and legal position is not under threat; it is long-established. The Lisbon Treaty's text on subsidiarity is a modest change but it is a change respecting of regionalism and localism, so the principle of subsidiarity is not under threat as a consequence. It is long-established initially from the Single European Act in a legal sense on environmental issues through to the Maastricht Treaty and further enshrined by the Amsterdam Treaty. That is not under threat. What cannot be taken forward is a legal framework for national parliaments to have more power to police subsidiarity.

Q125 Richard Younger-Ross: Can I refer the Minister then to Protocol 30 of the EC Treaty which says "subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty." Objectives: are they measurable or are they a matter of political opinion?

Mr Murphy: Objectives set out in the Treaty are objectives.

Q126 Richard Younger-Ross: Is there a set of criteria they can be measured against or is it a matter of political opinion? Is it measurable? How do you measure it?

Mr Murphy: On subsidiarity?

Q127 Richard Younger-Ross: Yes.

Mr Murphy: I think hon Members have heard evidence from other witnesses as to whether a set of criteria should be established, a benchmark, in addition to the legal definition, and I think the evidence hon Members have received, certainly from reading the transcripts, is that would be impractical and would not serve the purpose. There is a set legal definition of subsidiarity starting, as I say, from the Single European Act and evolving which is well understood and I do not think there is a need for a separate set of criteria.

Q128 Richard Younger-Ross: How would you define subsidiarity and whether it was working?

Mr Murphy: You judge as to whether it is working as to when Member States raise their concerns about subsidiarity, they are listened to, and on the basis of strong grounds a proposal is then blocked on the grounds of subsidiarity.

Q129 Richard Younger-Ross: So if there were to be political will in a country but there were whipped votes which meant the parliament voted one way whilst the will of the rest of parliament and the people goes another, would you say subsidiarity was working in that case?

Mr Murphy: On the basis of the arrangements that currently exist - and minus Lisbon this is the way they would remain - it would be for Member States' governments to object on the basis of subsidiarity. The current arrangements for select committees and democratic structures through

national parliaments do not compel national governments to then follow the will of their national parliament because it is the governments of Member States that are signatories to this. The opportunity for a greater role for national parliaments is currently lost if the Treaty is (as I think you wrongly say) dead as a parrot. However, I do not share your pessimism and we look forward to the Irish Government coming forward with their proposals about the future of the Treaty.

Chairman: Mr Clappison?

Q130 Mr Clappison: Can I apologise for my late arrival, Chairman. I was at another meeting at which I had a commitment to be present. I apologise for any discourtesy to the Minister. Minister, you have just said that the principle of subsidiarity has been around for a little while and you have referred to the possibility of member governments objecting to something on the grounds of subsidiarity. Can I put to you a question which I have put to other witnesses who have come before this Committee: can you give us any concrete example of an occasion on which governments of the EU have said, when the Commission or anybody else has come forward with a proposal, "Hang on chaps, this offends the principle of subsidiarity"? Can you give us any concrete example?

Mr Murphy: Chairman, I do not take any offence at the hon gentleman being late. If I were frank, privately I take some relief at him being late. I am just publicly disappointed that his other understandable engagement did not run over! On the specific points, I hope I can further add to the hon gentleman's sense of cheeriness by saying there are examples I will happily share with the Committee, and I am happy to read them into the record if the Committee would wish.

Q131 Mr Clappison: Yes, let us hear them.

Mr Murphy: In 2003 the UK successfully argued that a Commission proposal to abolish the UK's VAT zero rates on food and children's clothes, et cetera, was inconsistent with subsidiarity and therefore it was proper that we be allowed to continue with existing policy. The European Council eventually reached a deal in February 2006 leaving the UK's zero rates unchanged. Financial services: some Member States were opposed to having a waiver in the Directive for small firms disapplying some of the provisions for small and medium enterprises, to help reduce burdens on them. The UK argued, consistent with the principle of subsidiarity, each Member State should be allowed to choose whether to grant SMEs a waiver. The final Directive adopted in November 2007 did allow Member States this discretion. The Green Paper on labour law: the Commission produced this paper in 2006 with the aim of determining what next was needed on labour law at a European level in particular and it provoked a contentious debate. The House of Lords produced a report concluding that there was no need for new labour law legislation at an EU level. There was a process; the Commission's follow-up concluded there was no need for new legislation but instead further co-operation on this matter. On better regulation there was a series of proposals. Last year the Commission stopped three planned initiatives on the basis of the impact assessments because they showed that the EU would not add sufficient value at that time. These initiatives were on the establishment of full proportionality between capital and control rights; on amending the 14th Company Law Directive concerning cross-border transfer of registered offices; and then witness protection.

Q132 Mr Clappison: That is very helpful, Minister, because I counted out the examples you gave us there and there were four from 2003 onwards. How many proposals have been brought forward by the Commission since 2003? I think we can take it that your officials or somebody prepared that list for you in anticipation of the question, so you have been able to tell us through exhaustive research that there have been four occasions since 2003 when the subsidiarity point has arisen one way or

another. How many pieces of legislation have come across ministers' desks from the EU since 2003?

Mr Murphy: There is not a central record of the number of proposals the Commission makes. The idea that we would keep a record of proposals the Commission makes and then does not follow through with, the informal proposals, the formal proposals, the ones on subsidiarity, the ones that do not command Member State support on the basis of policy. We do not keep such a record; no government has kept such a record.

Mr Clappison: It is pity they do not because every week this Committee meets and we have hundreds of documents of a type similar to the four which you have described. Every week we have hundreds of documents and all the time we are told that whatever the problem is, whatever is being raised, whether it is climate change, international development, defence, world peace, more European power is the answer.

Chairman: Mr Clappison, I am sure somewhere in there there is a question but I cannot find it at the moment.

Q133 Mr Clappison: Is it not the case that subsidiarity is a dead duck and it is sometimes trotted out as an excuse or rationale for decisions which are taken on other grounds and that we cannot really set much store by it at all?

Mr Murphy: Mr Clappison, you are right in saying that in the same way that I have prepared that answer in anticipation of your question, I think you had prepared your second question in the expectation of me not having an answer. The fact is that subsidiarity is long-established and we had an interesting conversation about the history of subsidiarity earlier. The legal principle of subsidiarity is well-understood and it is well-established, it is not jeopardised; in fact I think we could argue very strongly, as we did in the passage of the Bill through the Commons and subsequently in the Lords, that the governing architecture for parliaments' control on subsidiarity was enhanced by the Lisbon Treaty. Far from being under threat the legal position is established. Further powers were proposed for national parliaments which would have improved the position not jeopardised it.

Q134 Mr Clappison: I think when we were debating this on the floor of the House of Commons I could have added a fifth example to the four which you have given us. I think there was the Zoo Directive as well, so that is five occasions on which it has proved to be of use.

Mr Murphy: The sheep and the goats will be delighted!

Q135 Mr Clappison: Can I ask another question which I think is of great interest to the Committee. If the House of Commons were invited to vote on a motion to approve the sending of written opinions to the Commission about the non-compliance of a proposal with the principle of subsidiarity, would the Government whip the votes?

Mr Murphy: First of all, our view would be that in terms of the grounds of subsidiarity there has always to be an arguable case. I think we have made it clear that where there is an arguable case HM Government will always take cases under Article 8 when requested to do so by a resolution of both Houses. It is important for us to say that we would now make clear that we would do so. As to the voting arrangements, I am sure Mr Clappison accepts that is an issue beyond my power or influence.

Q136 Keith Hill: Just back on Mr Clappison's point, Minister, would I be right in thinking that many of the proposals by the Commission to which Mr Clappison refers would in any circumstance be perfectly consistent with the principle of subsidiarity?

Mr Murphy: That is right, yes.

Q137 Keith Hill: In other words, the Commission is in very many cases implicitly respecting the principle of subsidiarity?

Mr Murphy: The fact is - and I do not think Mr Clappison agrees with your question - but I do not think he is allowed to answer your question.

Q138 Chairman: It is better focusing on one witness at a time.

Mr Murphy: The fact is that there is evidence on for example better regulation that the Commission is more acutely focusing on the principle of proportionality and subsidiarity and particularly on better regulation, where there is a realisation about the determination of a very substantial number of Member States to be pretty strong about this issue of subsidiarity, so I am certain that in the corridors of the Commission, as they have their conversations and ideas are thought about, that very early on the conclusion is arrived at that this will not fly clearly on the legal position on subsidiarity.

Q139 Keith Hill: I think you have probably anticipated my follow-up question to that which is that it would be fair to say that other Member States are themselves asserting the principle of subsidiarity in relation to Commission policies.

Mr Murphy: At gatherings of European ministers and foreign ministers at the General Affairs Council and from meetings I have - I was in Paris last evening for example - with other Europe Ministers and Foreign Ministers, there is a very strong determination to protect national policy, to protect the rights of Member States to assert absolutely their legal position on subsidiarity. The Commission are very clear and this Commission is more clear than possibly any other on this matter.

Q140 Keith Hill: This particular Commission? Why do you suppose that is?

Mr Murphy: I think under President Barroso there is a particular focus on proportionality, in particular, so there is a Commission/political (with a small 'p') understanding of the sensitivity on better regulation, about proposals being proportionate to the nature of the problem, not trying to go further, particularly on business burdens, there is a real focus now in the Commission on proportionality and subsidiarity. It is really very important.

Q141 Keith Hill: So we can conclude that the principle of subsidiarity is alive and kicking?

Mr Murphy: Long established, very alive, very much kicking, but as a consequence of the Lisbon Treaty the opportunity that was afforded to strengthen a further democratised subsidiarity is currently stalled very clearly, yes.

Q142 Kelvin Hopkins: I think the question I intended asking has been asked by Mr Clappison already but I shall continue with that. Imagine a situation where we do not have the present Government - and I hope we would have it forever but it may not happen like that - and just supposing there is a much narrower parliamentary majority for one party or another, or even a

coalition government, who knows, and the Government wants to take a particular line and Parliament takes another line, would it not be unprecedented for Parliament to be asked to express a view, to submit a view to the European Commission, and for the Government to say we do not agree with it? What would happen in those circumstances?

Mr Murphy: In the circumstances whereby Lisbon was implemented - and I do not argue with the first basis, it is unusual for us to agree on anything in these committees but on the first part of your question, Mr Hopkins, I agree about the politics - the idea of course would be that on the yellow card, if a third of the votes of Member States' parliaments were against then the Commission would have to reconsider. If it was half of the votes of Member States' parliaments, if either the European Parliament or the European Council was to share that view, then the proposal would actually fall. I think it is inconceivable that in a situation where half of Member States' parliaments independently come to a view on subsidiarity that either the European Parliament or the European Council would not share that view. I think the Lisbon architecture gives a stronger protection than sometimes is realised. However, I accept it is not inconceivable that the Government of country X could technically within these structures come to a different view to one of the chambers of its parliament.

Q143 Kelvin Hopkins: Imagine moving forward again, with rising levels of euro scepticism across Europe, at some point there might just be elected a government who is less euro-enthusiastic than the governments we presently have, and at that point a government and a parliament together might choose to stretch the boundaries of subsidiarity, to want to draw back to a decision by themselves and their parliament away from the European Commission and use subsidiarity to push the boundaries. At what point does it start to crack?

Mr Murphy: I think, Mr Hopkins, your view is that you want to turn this Government into that Government!

Q144 Kelvin Hopkins: I would actually agree with that.

Mr Murphy: I accept you do not wish another Government that is more euro sceptic; you just want this Government to be euro sceptic. I think the rather dry answer - and I apologise for being rather dry - would be that under this important concept of parliamentary sovereignty a parliament could do such a thing, a government could do such a thing, but the consequences would be extraordinarily significant in that that doctrine of parliamentary supremacy would allow us to seek to withdraw from our agreements on the legal understanding of subsidiarity, and our legal position on various treaties but, as a consequence, we would no longer be members of the European Union. This is a debate that myself and Mr Cash had at great length on day six or seven at the Committee stage of the EU Amendment Bill about this issue of parliamentary supremacy. Parliament/government could do such a thing but in the full knowledge of the consequences of doing such a thing. No longer adhering to the rules of the club would require you no longer to be a member of the club.

Q145 Kelvin Hopkins: We could look forward to interesting times in future years perhaps.

Mr Murphy: We are always in interesting times, even in these years.

Q146 Chairman: Minister, very much in our minds is the consequence of having Lisbon and having this set of safeguards in place. We were told by Professor Simon Hix of the London School of Economics that really the EU is such a consensual body that in the Council of Ministers, even though there may be formal voting patterns and qualified majority voting on some issues, if about three countries have a serious concern on matters before the Council, it is very unlikely that people will force the matter through because they are so keen to get consensus. That was very enlightening

for us. In a situation where we had a vote in the House of Commons and we had a position expressed by the House of Commons - and I will come to the House of Lords later - would that influence the way ministers behave in Council? If it is known that back in the parliament that without a whip (and we assume that a whipped vote is not necessarily as good as an unwhipped vote because you have parliament behind you, by whatever means) there was dissent, would a minister use that consensual nature of the Council to convince his or her colleagues that it was time to take stock rather than force an issue through?

Mr Murphy: On a specific policy?

Q147 Chairman: On a specific policy.

Mr Murphy: On the grounds of subsidiarity?

Q148 Chairman: Yes.

Mr Murphy: Under the current arrangements certainly and, Chairman, you will be aware of this through your greater experience of this than myself, the procedures would allow hypothetically that type of circumstance to occur whereby the relevant select committee of either House could after an inquiry engineer a vote of either or both Houses. In that circumstance, that view of the House, to my understanding on the hypothetical legal position, would not be binding on the Government, but I do not think it would be a very sensible minister to behave in that way.

Q149 Chairman: I think we have on record very many pieces of correspondence and formal reports of this committee that lend hope. We have built up a relationship with the ministers, yourself and others where our scrutiny reserve is in the main respected, apart from technical matters, and there are very few deliberate breaches on the basis of policy disagreement, and we respect that what you are explaining is a situation that may be irrelevant but with subsidiarity formalised, should we have the Lisbon Treaty, then it becomes much more sensitive.

Mr Murphy: Again with the caveat that I accept some Members do not believe that the yellow and orange card is strong enough. However, the situation where both Houses came to a view separately that they object on the grounds of subsidiarity, I think while it is technically still possible the politics of that would then be very difficult. On a pure technical hypothetical scenario that could arise but I think again the politics would be very difficult, and I acknowledge the politics would be very difficult in the same way they would be just now. In fact they would be more difficult under those new arrangements I think.

Q150 Chairman: I know you would not want to offend the other place but I must ask the question: if there was a difference of opinion between the Commons and the Lords, what stance would you take in the Council then?

Mr Murphy: I would not wish to offend the other place or this place and so therefore, in the spirit of not seeking to offend but also in the spirit of being frank, we have not taken a view on these sorts of things and we had not got to a view before the Irish referendum. This is the sort of issue that we expect or expected to have with select committees, the Leader of the House, the Deputy Leader of the House and come to a view as to how the House manages its business and the relationship between that and how the Government behaves. That is a conversation that I think is still important but I acknowledge it is a conversation that might be difficult for members of the Committee to enter into on the basis that, for example Mr Younger-Ross said the Treaty is dead, so it would be hard for them to enter into a conversation about how to operate these processes. That is not for me to decide.

Q151 Chairman: We have had an annex amongst the papers that we have been submitted a letter that was submitted to the House of Lords by the Leader of the House of Lords referring to the debate of 9 June. Attached to that is a document saying "Statement on JHA Opt-in", which is unsigned. Obviously it has been submitted by the Leader of the House and being a Minister of the Crown it has some prominence in government departments. My question is - and we can talk about what it says - is this a document that is owned by the Foreign Office? Is it a statement of policy of the Foreign Office?

Mr Murphy: It is a statement of policy by HM Government so it is owned by every department of HM Government including the Home Office and the Ministry of Justice.

Q152 Chairman: So it is owned by government departments by which you are bound as well as is the Foreign Secretary and others?

Mr Murphy: Yes.

Q153 Mr Heathcoat-Amory: That is very interesting and rather important. Of course it was designed to apply to the whole range of justice and home affairs matters under the Treaty of Lisbon and it does give greater powers to this Committee, as well as the equivalent one in another place, through an ability to summon ministers to give evidence about the intention to opt in to the measures concerned, to recommend for debate, and that debate would be amendable. Meanwhile the scrutiny reserve would remain so that the Government would not be able to opt into these measures until that process had been completed. This goes beyond what is the present practice. My question is this: if that is a statement of the Government's intention, which you have just confirmed, why do you not apply it now to those measures which the Government is opting in to under the present Treaty?

Mr Murphy: Mr Heathcoat-Amory, I hope you found the initial answer helpful in saying that it was a document owned and proposed by HM Government. The background to it, as a very close follower of these issues, was that of course with JHA pillar collapse, it was felt, certainly with the tone of the debate in the House of Lords, reasonable that as part of a package in terms of the new JHA opt-in/opt-out architecture, pillar collapse, Community method and everything else that goes with it, that as part of that it was right to offer a balance and that balance was a greater say for Parliament as part of this new process of pillar collapse, and that was the rationale for it.

Mr Heathcoat-Amory: If I may say so, I do not think that is a very convincing answer.

Q154 Chairman: It is the answer.

Mr Heathcoat-Amory: The statement on justice and home affairs matters does not differentiate and it certainly includes matters of immigration and border controls and asylum matters which the Government is presently now opting into, so it is clearly covered by this and I think you are in danger, Minister, I am afraid, of being a little disingenuous if you are saying that in order to get a bill through another place you give all sorts of assurances but suddenly they do not apply to existing procedures on very important matters connected with immigration, to take an example, which certainly is of interest to the public. If these new matters are so important and were to be covered by this new procedure giving additional power to this Committee, why do you not follow through the same logic and give us those powers now, which is certainly within your power to do so? You have just said that it was issued on behalf of the Government as a whole so it was not simply for their Lordships, it also was for Parliament, so will you reflect on that and give a slightly more considered

view as to why you suddenly, apparently, changed your mind and what was so good for the other House is no longer to apply to here?

Mr Murphy: I am always happy to reflect, Mr Heathcoat-Amory; it is not a wise man who refuses to reflect. I would never wish to appear to be disingenuous, but I accept that does not stop you alleging that I am. The allegation and the facts do not always meet on this, but the fact is I have never wished to give the impression of being disingenuous. I thought I was being remarkably open rather than disingenuous. It was a reflection of the debate in the House of Lords. I think also it was the type of thing that was discussed in the House of Commons as well when I think in particular the Chairman of the Select Committee on a number of occasions asked me about greater powers for this Select Committee and in the other place. I said it is not right, we do not have proposals, but we will continue to listen and discuss them. As a consequence, the idea of a Code of Practice and this package of JHA opt-in measures is a consequence of the pillar collapse on Lisbon and I think it was the right response to that. We still believe in the Lisbon Treaty. We still believe that it could improve the way in which the European Union works, part of which is pillar collapse in justice and home affairs. If pillar collapse in justice and home affairs does happen then this was, if one likes, the way of balancing the greater changed architecture and decision-making on JHA with greater powers for select committees and parliaments. However of course, I am always happy to reflect on these matters. This will be the second and last time I say it today: we always look for ways to improve the way in which we scrutinise European business. Mr Heathcoat-Amory, we do not agree on European policy but I hope, in principle, you agree that that is a view that I have held every day that I have been Europe Minister and for much longer before.

Q155 Chairman: Can I just press for some clarification because it is accepted and you accept that the EC Treaty does cover these matters, if there is a delay, for whatever reason, rather than a final failure to ratify, will the Minister think about how these offers - and I see them as being like Lisbon Treaty offers - might be brought forward earlier? Since they are in principle something the Government supports, and I recall his very strong support for the Lisbon opt-in offers during the debate, that it might be something that the Government would consider bringing forward? Certainly it would help this Committee and I believe it would help also the British public to have some sense of engagement with the process that we are going through because the area of opt-in has always been a contentious area. I might take a position that we should opt in more quickly and more fully; others may take a different view, but at least it should be in the public domain, and if we have a long delay for Lisbon, is it something the Minister would consider?

Mr Murphy: I think, Chairman, you are on record as very publicly saying that we should opt into very many more of these justice and home affairs issues and policies than even the Government has seen fit to do. We all come to our own judgments on these things.

Q156 Chairman: "We are better when we are bolder" is the phrase.

Mr Murphy: I am not getting involved in that. I remember that conference well but that is not what we are here to discuss. I do not have to keep you in order, Chairman, do I? On this point, it really was part of the Lisbon package. As I said to Mr Heathcoat-Amory, it is important that we continue to reflect how we enhance scrutiny, but this was an offer as part of the changed environment of JHA decision-making. It is a good package but it was part of a balancing package as a consequence of the changes. If the Committee wishes to reflect on whether this sort of thing should be brought forward in any case, we look forward to hearing that recommendation if that is the judgment that the Committee would come to.

Q157 Chairman: Can I therefore ask the Minister to answer some questions on the offer, which was an offer in its framework clearly to go to the Lords. Reading it in some detail, could you be clear for the record what it envisaged. If you look at bullet point four, it says that "The committees" - and I presume that means the committees of the Lords and Commons - "if they wish to make a recommendation for debate on a motion ...; would that motion be a motion framed and put down by for example this Committee to the House of Commons?"

Mr Murphy: First of all, you are right in saying that in bullet point four it is indeed both committees. As to which specific committee of which House we are relatively open-minded about but it makes sense it would be this committee.

Q158 Chairman: I think that was the recommendation from the Modernisation Committee of the House some years ago that it should be this Committee.

Mr Murphy: It seems sensible. If the House comes to the view that it is this Committee then that is what it should be. As to the formulation of the motion, we are relatively open-minded about that and it is again through the Deputy Leader of the House and the work that she is leading on that is the type of thing where there is a need for a dialogue between select committees of both Houses and the Deputy Leader of House. It is not prescriptive in bullet point four.

Q159 Chairman: I think the consensus of this Committee is that this Committee feels very strongly that it is this Committee that should put a motion to the House of Commons on matters relating to EU opt-ins. Coming to the to fifth bullet point it says "For the Commons, such a debate would usually be in Committee." I have to say I do not see how that can be sensible in that if we are making a recommendation of a motion for debate in which you wish to involve Parliament, to refer it to a Committee, and if that is meant to be an EU Committee it would be a whipped committee with a Government majority, many of whom would never have sat on a committee before (and you know our expressed opinion on the random nature of EU committees, that they are not necessarily people who have given it great thought) so many people who would have something to contribute to such a debate and who would wish to be involved in such a debate would be denied unless it was on the floor of the House. Could I ask the Minister if he would reconsider the idea that we should (if it is us who is putting a motion) put it to a committee rather than to the floor of the House because opt-ins if it is parliamentary legitimacy must be after a parliamentary debate not a committee debate.

Mr Murphy: I understand the point you are making, Chairman. We have both served on those committees and I think that is a fair observation about the relatively random nature on some occasions and the way in which members find themselves on a committee that they did not volunteer for ---

Q160 Chairman: Exactly.

Mr Murphy: And up until that point had not shown a close interest on the specific issue before them. Beyond the seven bullet points is reflected the point: "The package of measures will be reflected in a Code of Practice, to be agreed with the Scrutiny Committees." This is an offer to be agreed in conjunction with the respective scrutiny committees and which we would then table as a Code of Practice to be followed by the Government, so these seven bullet points are the headlines of the offer and it is now an issue of dialogue between the select committees. This will be led - and I hope it reassures hon colleagues - by the Deputy Leader of the House rather than myself so I do not wish to tread on her toes.

Q161 Chairman: I do not want to negotiate in an evidence session but I just had to clarify what is in the document at the moment for the record.

Mr Murphy: The status as such is that it is an offer for us to have a dialogue before coming to a set position.

Chairman: Any further questions? Can I thank the Minister for making it clear that this is a document which we will discuss further through the office of the Deputy Leader of the House. Clearly we welcome anything that makes a more concrete offer on the question of how we go with opt-ins. Can I thank him for his evidence on the question of subsidiarity, with or without the Lisbon Treaty. I think everyone who has been engaged in this for such a long time, as he has as a member of this Committee even before his membership of the august office of Minister of Europe back in the days of the Constitution, is looking with some expectation and trepidation together at what will come out from the Irish Government on this matter. Thank you for your attendance.