



House of Commons  
European Scrutiny Committee

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# Subsidiarity, National Parliaments and the Lisbon Treaty

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Thirty-third Report of Session 2007–  
08

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

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## European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

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

The expression “European Union document” covers —

- i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
- ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
- iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
- iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
- v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
- vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at [www.parliament.uk](http://www.parliament.uk).

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# 1 Introduction

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1. The Lisbon Treaty contains provisions which are intended to “encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on draft legislative acts ... as well as on other matters which may be of particular interest to them”.<sup>1</sup> The Committee decided to conduct an inquiry into these provisions.

2. The referendum on the Treaty in the Republic of Ireland took place during the course of our inquiry. The “no” vote in Ireland raised the question of whether to continue with our work. We decided to do so for two main reasons: the first is that, irrespective of the Lisbon Treaty, the principle of subsidiarity will remain an important part of EU and Community law; and the second is that the UK will retain its right to decide whether to opt into European legislation on visas, asylum and immigration under Title IV of the present EC treaty.

3. The Lisbon Treaty makes provision for national parliaments to “contribute to the good functioning of the Union” by:

- being kept informed by the EU Institutions and having draft legislative acts forwarded to them;
- “seeing to it” that the principle of subsidiarity is respected;
- taking part in evaluating the implementation of EU policy in the area of freedom, security and justice;
- being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities;
- taking part in the procedures for any further revision of the Treaties;
- being notified of applications for accession to the Union; and
- taking part in inter-parliamentary cooperation between national parliaments and with the European Parliament.<sup>2</sup>

4. We heard oral evidence from Professor Alan Dashwood CBE (Professor of European Law, University of Cambridge), Professor Simon Hix (Professor of European and Comparative Politics, London School of Economics and Political Science), Commissioner Margot Wallström (Vice President of the European Commission with responsibility for relations with national parliaments), and Mr Jim Murphy MP (Minister for Europe at the Foreign and Commonwealth Office). We also received six memoranda. We are grateful to everyone who contributed to the Inquiry.

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1 Preamble to the Protocol to the Lisbon Treaty on the role of national parliaments in the European Union.

2 The Government has prepared “Consolidated Texts of the EU Treaties as amended by the Treaty of Lisbon” (Cm 7310). Article 12 of the Government’s consolidated text of the Treaty on European Union contains the provisions summarised in this paragraph.

## 2 Information for national parliaments

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5. The Protocol to the Treaty on European Union on the role of national parliaments in the European Union as amended by the Lisbon Treaty requires the Commission to send national parliaments:

- its consultation documents (green papers, white papers and communications);
- its annual legislative programme and other planning documents; and
- its drafts of legislation.<sup>3</sup>

6. The Protocol also states that national parliaments should be sent:

- proposals for legislation originating from the European Parliament, a group of Member States, the European Court of Justice, the European Central Bank or the European Investment Bank;
- the agendas for, and notice of the outcome of, Council meetings; and
- the annual report of the European Court of Auditors.

In addition, national parliaments should be given advance notice of any intention of the European Council to amend the Treaties.

7. There is little that is new in this. Since 1997, the Treaty establishing the European Community (the EC treaty) has required the Commission not only to send all consultation documents to national parliaments but also to make legislative proposals “available in good time so that the government of each Member State may ensure that its own national parliament receives them”.<sup>4</sup> Moreover, since September 2006, under what has become known as the “Barroso initiative” the Commission has voluntarily sent parliaments its proposals for legislation and consultation papers.

**8. We welcome the requirement in the Lisbon Treaty for the transmission of documents to national parliaments because, in some Member States, the government does not automatically bring EU proposals to the attention of its parliament. The requirements will, however, not affect scrutiny in the House of Commons because all EU documents covered by Standing Order No. 143 are deposited by the Government.<sup>5</sup>**

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3 See pages 201 to 203 of the Protocol attached to the Government’s consolidated text of the Treaty on European Union as amended by the Lisbon Treaty (Cm 7310).

The references in our Report to Articles on the role of national parliaments are references to that text unless the contrary is stated.

4 9th Protocol to the EC Treaty, Article 2.

5 SO No. 143.

## 3 The principle of subsidiarity

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### Exposition of the provisions

9. The principle of subsidiarity was introduced into Community law by the Treaty of Maastricht in 1993. Article 5 of the EC Treaty provides that:

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

Article 2 of the EU Treaty currently provides for the application to measures adopted under the EU Treaty of the principle of subsidiarity as defined in Article 5 of the EC Treaty.

10. Professor Dashwood told us that the function of the principle of subsidiarity “is to guide the choice between acting collectively through the Community institutions or using national powers where either possibility would be legally permissible under the treaties ... In guiding that choice the principle says ... that action by Member States individually should be preferred unless the need for acting at the level of the Community can be clearly demonstrated.”<sup>6</sup>

11. We asked Professor Dashwood whether the principle of subsidiarity is capable of objective assessment. He did not think a set of objective criteria could be developed and said that whether a measure complies with the principle “is bound to be a matter of judgment”.<sup>7</sup>

12. Professor Hix agreed. He told us:

“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 central level — but clearly we do not do that because of the fact that we have heterogeneous preferences on defence policy. I think it is impossible to define in purely legal terms subsidiarity criteria and it is really ultimately a political question.”<sup>8</sup>

13. Commissioner Wallström said that she thought that the overall assessment has to be political.<sup>9</sup> And the then Minister for Europe (Mr Jim Murphy) told us that he did not think that a set of criteria was needed to assess compliance with the principle of subsidiarity.<sup>10</sup> He also said that the principle is “long established, very alive, [and] very kicking”.<sup>11</sup>

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6 Q3.

7 Q19.

8 Q38.

9 Q68.

10 Q127.

11 Q141.

14. Article 5(3) of the EU Treaty (as amended by the Treaty of Lisbon) says that:

“Under the principle of subsidiarity, in all areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at Union level.

“The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principle of subsidiarity ... . National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”

15. With the exception of the last sentence, the substance of Article 5(3) is identical to the provisions on subsidiarity in the EC Treaty. It is not clear whether the last sentence is intended to be descriptive or if it imposes a duty on national parliaments. In either event, there is no precedent for the statement in the EC Treaty.

16. Similarly, Article 12(b) of the amended EU Treaty is unprecedented. It says that national Parliaments contribute to the good functioning of the EU “by seeing to it that the principle of subsidiarity is respected in accordance with the procedure provided for in the Protocol”.

17. The main provisions of the Protocol to the Lisbon Treaty about the application of the principles on subsidiarity and proportionality are as follows:<sup>12</sup>

- All draft legislation should contain a statement explaining why the proposal is compliant with the principle of subsidiarity. The reasons for concluding that an EU objective can be better achieved by EU action should be substantiated by qualitative and, wherever possible, quantitative indicators.
- Within eight weeks of the transmission of a proposal for legislation to national parliaments in all the official languages of the EU, any chamber of any national parliament would have the right to send the Council, European Parliament and Commission a reasoned opinion saying why it considers that the proposal does not comply with the principle of subsidiarity. “It will be for each national parliament or each chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers.”<sup>13</sup>
- Each national parliament would have two votes (one for each chamber in a bi-cameral parliament and two for the only chamber in uni-cameral parliaments).
- Where reasoned opinions stating that the proposal is not compliant with the principle of subsidiarity represent one-third of the votes, the Council, European

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12 Protocol on the application of the principles of subsidiarity and proportionality, Consolidated Texts of the EU Treaties as amended by the Lisbon Treaty, pages 204 to 207 (Cm 7310).

13 *Ibid*, Article 6, first paragraph, last sentence.

Parliament and Commission (and any other institution which has proposed the legislation) would be required to review the proposal.<sup>14</sup>

- After review, it would be open to the institution which originated the proposal to maintain, amend or withdraw the proposal. It would be required to give reasons for its decision. (*This procedure is commonly known as the ‘yellow card’.*)
- Where the Commission originated a proposal and the proposal was subject to qualified majority voting and co-decision by the Council and the European Parliament, if a majority of national parliaments gave reasoned opinions explaining why they believed that the draft legislation was not compliant, it would be open to the Commission to maintain, amend or withdraw the proposal.
- If it decided to maintain the proposal, the Commission would be required to refer its own and the national parliaments’ reasoned opinions to the Council and the European Parliament. If 55% of the members of the Council or a majority of the European Parliament concluded that the proposal did not comply with the principle of subsidiarity, the draft legislation would fall. (*This procedure is commonly known as the ‘orange card’.*)
- The European Court of Justice would have jurisdiction to decide cases brought by a Member State on behalf of its national parliament (or a chamber of it) on the grounds that EU legislation infringes the principle of subsidiarity.

18. We note that if national parliaments trigger the yellow or orange card procedures, the decision on whether a proposal is compatible with subsidiarity will continue to rest with the EU institutions.

19. Some of the evidence we received suggested that “the early-warning mechanism” — the yellow and orange card procedures — will significantly enhance the role of national parliaments in the EU decision-making machine. For example, Professor Dashwood told us that he was enthusiastic about it. It seemed to him that use of the early warning mechanism would have “a real impact on the political dynamic within the Community”. He added that, if there were a significant number of national parliaments which took the view that a proposal infringed the principle of subsidiarity:

“that is bound to have an impact on the prospect of the measure being adopted, whichever of the procedures applies. I think it would also make a difference ... to any proceedings that might eventuate in the [European] Court of Justice ... .”<sup>15</sup>

20. Others disagree. For example, Richard Corbett MEP said “in practice, I do not think that the ‘yellow’ and ‘orange’ card mechanisms will be extensively used”. He cites the experience of the Finnish Parliament. It has had a subsidiarity control mechanism since its accession to the EU in 1995 and “in that time has hardly ever found a case where they felt that a Commission proposal violated the principle of subsidiarity”. Mr Corbett said that the principle is taken seriously by the Community’s institutions and that the Commission’s

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14 The required number of votes is a quarter of the total where the proposed legislation is on police and judicial cooperation in criminal matters.

15 Q27.

legislative proposals can be adopted only if they have the support of the overwhelming majority of Member States.<sup>16</sup>

21. Andrew Duff MEP goes further. He says that:

“there is a danger that, in assessing the Treaty of Lisbon, national parliaments become obsessed by the early warning mechanism on subsidiarity. It was understood by those of us involved in its drafting and, then, re-drafting that the mechanism, although a necessary addition to the system of governance of the Union, was not really intended to be used. It is, in Bagehot’s terms, more a dignified part of the European constitutional settlement than an efficient one.”<sup>17</sup>

22. Professor Hix had doubts about the effect of the early warning mechanism but could also see some potential benefits. On the one hand, he was sceptical that the mechanism would make any real political difference in parliamentary systems, such as the UK’s, where the governments have a substantial majority and so the extent to which national parliaments can actually constrain what their government are doing in Brussels is limited. On the other hand, there would be major benefits if use of the mechanism led to an increase in transparency about what happens in the Council of Ministers.<sup>18</sup>

23. Professor Hix also suggested that the “thresholds” attached to the yellow and orange cards are too high. The threshold for the orange card procedure, for example, is a majority of national parliaments. Professor Hix contrasted this with the actual practice of the Council of Ministers. He said that:

“It is very, very rare that legislation gets passed [by the Council] with more than three Member States opposed”.<sup>19</sup>

24. We asked Commissioner Wallström for her views on the thresholds. She said that the Commission should listen to the views of national parliaments even if the number of votes did not reach the threshold.<sup>20</sup>

25. Professor Hix told us that he believed that many of the Lisbon Treaty’s provisions on the role of national parliaments could be introduced by some other means — such as legislation or an intergovernmental protocol — if the Treaty were not ratified.<sup>21</sup>

26. We asked Mr Murphy if he agreed. He told us that he did not think an informal arrangement would work. Moreover, he did not think there was a likelihood of the yellow and orange cards being introduced by another means. The Government is not attracted by the idea of adding parts of the Lisbon Treaty to the Treaty on the accession of Croatia to the EU. Moreover, in the Government’s view:

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16 EV36.

17 EV38.

18 Q41.

19 Q52.

20 Q85 and Q86.

21 Q62 and Q64.

“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”.<sup>22</sup>

## Our views and conclusions

27. Ever since the principle of subsidiarity was introduced, this Committee and our predecessors have scrutinised every EU document to see if it complies with the principle. This is an essential part of the evaluation of the political and legal importance of the document. Where we have concerns about compliance, we seek to persuade Ministers to take up the concerns with the European Commission and other Member States in the Council.

28. We agree with the oral evidence we have received that the question whether a proposal complies with the principle is unlikely to be capable of an entirely objective assessment but is also a matter of political judgement. We are reinforced in this view by an article written by Dr Stephanie Rothenberger and Dr Oliver Vogt, former members of the COSAC Secretariat. Their article was based mainly on their analysis of the way national parliaments had interpreted the principle in checks coordinated by COSAC.<sup>23</sup> They concluded that it was:

“clear that parliaments seem to interpret the principles of subsidiarity and proportionality in very different ways. Naturally the National Parliaments’ assessment whether new European legislation would bring added value is based on historical, political and social experience at home.”<sup>24</sup>

29. In our experience, it is very rare for the entirety of a proposal for legislation to be inconsistent with the principle of subsidiarity. It is not uncommon, however, for one of the provisions not to comply. For example, in December 2007, the Commission proposed a draft Decision to make 2010 the European Year for combating poverty and social exclusion. When we considered the draft in January 2008, we noted that Article 6(3) would require the national body responsible for organising the Year in each Member State to consult its National Advisory Group, which should be composed of:

“a broad range of relevant stakeholders, including civil society organisations defending or representing the interests of those who experience poverty and social exclusion, national parliament representatives, social partners, and regional and local authorities”.

30. We questioned why it was necessary for EC legislation to prescribe Member States’ arrangements for taking part in the Year. In particular, we found it wholly inappropriate for EC legislation to require the appointment of representatives of national parliaments to the National Advisory Groups. That proposal was, in our view, clearly inconsistent both with the principle of subsidiarity and the right of parliaments to regulate their own affairs.

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22 Q73, Q79 and Q84.

23 The Conference of European Affairs Committees of the parliaments of the Member States.

24 Rothenberger S and Vogt O: Fifty Years of Interparliamentary Cooperation, 13 June 2007, Berlin: The “Orange Card”: A fitting response to national parliaments’ marginalisation in EU Decision-Making?

31. We asked the Minister to discuss the point with the Commission and his colleagues in the Council. We were pleased to learn in April that, in the course of the discussion of the draft Decision, it had been agreed that Article 6 should be less prescriptive and, in particular, that the requirement for the appointment of National Advisory Groups should be removed.<sup>25</sup>

32. There have also been occasions when we have questioned a proposal on grounds of sovereignty. For example, in June 2007 the Commission published a *Green Paper on the future Common European Asylum Policy*.<sup>26</sup> It invited views on the ingredients of the next stage in the development of the EC's asylum policy. It asked, for example, if the current minimum common standards should be replaced by mandatory requirements, removing the discretion allowed to Member States by the existing EC legislation. We concluded that the Green Paper posed important questions, some of which touched the sovereignty of a Member State to decide for itself how and to whom refugee status should be given. The Green Paper was debated on the Floor of the House on 29 November 2007.

33. There may in future be proposals where it might be difficult to deny that collective action by the EU would be the most effective way to achieve a Treaty objective, but where a national parliament would strenuously object to the proposal because it infringes national sovereignty. If a proposal were objectionable on grounds of sovereignty alone, neither the yellow nor orange card procedures would be available to national parliaments.

34. Some may argue that:

- nothing can prevent the House from expressing its opinion to the Government and the Commission without the early warning system;
- if the adoption of a proposal requires unanimity in the Council, a Government can prevent adoption if persuaded by the arguments of its national parliament;
- where the adoption of legislation is by qualified majority voting and co-decision and the UK will not be bound by legislation unless it opts into it, the measure will not apply if the Government agrees with the House that it should not opt-in; and
- Commissioner Wallström told us that she believed that the Commission would listen to national parliaments' opinions even if the thresholds were not attained.

35. In relation to the thresholds required to stop a proposal when national parliaments have triggered the orange card procedure, we reiterate our earlier finding, contained in our first report on the Intergovernmental Conference that adopted the Lisbon Treaty: "... since this degree of opposition [in the European Parliament and the Council] would in any event be sufficient to prevent adoption of a measure by co-decision, we consider that the procedure adds very little by way of democratic control over the Commission and the EU institutions. In our view, the required thresholds for preventing further consideration of a proposal must be much lower if the procedure is to have any real utility."<sup>27</sup>

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25 (29276) 16600/07: see HC 16-xxii (2007-08), chapter 1 (30 April 2008).

26 (28694) 10516/07: see HC 41-xxxi (2006-07), chapter 1 (18 July 2007).

27 See HC 1014 (2006-07), para 68.

36. We also reiterate our earlier finding on the Lisbon Treaty's provisions on national parliaments, contained in our first report on the Intergovernmental Conference that adopted the Treaty: "... we doubt the significance of the "greater opportunities" for national parliaments to be involved in any meaningful manner in the workings of the EU without ... a "red card" system that compels the Commission to withdraw any proposal which threatens to breach the subsidiarity principle."<sup>28</sup>

**37. Our conclusions on the provisions of the Lisbon Treaty on subsidiarity are as follows:**

- **The substance of the subsidiarity Article in the Lisbon Treaty is the same in its effect as the existing Article in the EC Treaty.**
- **Examination of EU proposals for compliance with the principle of subsidiarity is a long-established and fundamental part of the scrutiny process of the European Scrutiny Committee of the House of Commons.**
- **Whether a proposal does or does not comply is a matter of political judgement and is unlikely to be capable of an entirely objective assessment.**
- **It is very rare for the whole of a proposal to be inconsistent with the principle. It is less rare for one of the provisions not to comply. We see no reason to expect that this will change, although the extension of the EU's competence under the Lisbon Treaty will offer additional areas for subsidiarity disputes if that Treaty is ratified.**
- **Where we have concerns, we presently draw them to the attention of the Government and, where it shares our assessment, Ministers take up the concerns with the Commission and other Member States. Again, we see no reason to expect that this will change.**
- **We expect the Commission to listen to the views of national parliaments even if the number of opinions does not reach the levels set for the yellow and orange cards. We warmly welcome Commissioner Wallström's statement that the Commission should listen to the views of national parliaments even if the number of votes does not reach the threshold.**
- **For these reasons, we doubt whether the Lisbon Treaty's new subsidiarity provisions about the role of national parliaments would make much practical difference to the influence presently enjoyed by the UK Parliament.**

## 4 Procedure in the House

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38. In view of the present status of the Lisbon Treaty, and the Minister for Europe's rejection of any informal adoption of a yellow and orange card procedure,<sup>29</sup> there is little

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28 See HC 1014 (2006-07), para 19.

29 See para 26.

point served by considering in detail the possible ways in which the House might adapt its procedures in order to present objections. However, having taken evidence and considered these matters, we believe that the House has a reasonable expectation of receiving the opinion of the European Scrutiny Committee. We therefore offer the following comments as a contribution to the discussion on how the House might proceed should the provisions for national parliaments need to be implemented by the House.

39. The question arises as to how the House might give effect to the provisions described above<sup>30</sup> and commonly referred to as the “yellow” and “orange” cards. Before the provisions relating to national parliaments could come into effect, the House would need to decide:

- who is to identify draft legislation which appears not to comply with the principle;
- who is to draft the reasoned opinion; and
- who is to decide whether the non-compliance is sufficiently serious to justify presenting a reasoned opinion.

40. The first task would be to identify possibly non-compliant proposals, following which there would need to be a decision on whether the non-compliance was sufficiently serious to present a reasoned opinion. Since only the European Scrutiny Committee (ESC) is systematically examining EU documents, it is only the ESC which could systematically undertake the first aspect, especially within the eight weeks allowed. Therefore the ESC would at least need to initiate the procedure for objecting to EU proposals on grounds of subsidiarity. It would also have to draw up the reasoned opinion, since it is not clear who else could do so.

### *Previous consideration of the issues*

41. The proposals contained in the Lisbon Treaty are not new. They are identical in substance to those in the draft Constitutional Treaty with one exception: the Constitutional Treaty allowed national parliaments only six weeks in which to present a reasoned opinion, whereas the Lisbon Treaty allows eight. An appropriate starting point for any discussion of how the House might give effect to the provisions of the Treaty is therefore the relevant sections of the report of the Modernisation Committee on the same subject three years ago.

42. In its Report on the scrutiny of EU business, the Modernisation Committee said:

“We recommend that the European Scrutiny Committee should have responsibility for identifying those proposals which potentially breach the principle of subsidiarity. The system should work as follows:

- a) The Committee decides that the proposal or part thereof does not comply with the principle of subsidiarity and sets out the reasons for this decision in a Report.

b) The Chairman, or another member of the Committee acting on behalf of the Committee, puts a motion on the Future Business Section C to the effect ‘That, in the opinion of this House, [the proposal] does not comply with the principle of subsidiarity for the reasons set out in the [First] Report of the European Scrutiny Committee’.

c) Not less than five and not more than eight sitting days after notice of the Motion has been given, the Government puts the Motion on the Order paper.

d) The Questions on the Motion and any Amendment to it which is selected are put forthwith to the House.

e) If the Motion is agreed to, the Speaker sends the text of the Resolution, together with a copy of the European Scrutiny Committee’s Report, to the relevant EU institution.”

There appeared to be broad agreement between the Modernisation Committee, the then Leader of the House and the previous European Scrutiny Committee on these arrangements. We consider however that, in addition, prior to the Question on the Motion and any Amendment to it being put to the House, the Chairman or designated member of the European Scrutiny Committee should outline the reason for the Opinion in a short speech to which a Minister may reply on behalf of the Government.

43. The Committee and its predecessors have very rarely concluded that the whole of a proposal for legislation does not comply with the principle of subsidiarity. The introduction of a procedure for considering the views of national parliaments does not of itself alter the likelihood of subsidiarity issues emerging. There is therefore no reason to expect that there will be more non-compliant proposals in future than there were in the past. On the other hand, the Lisbon Treaty would expand the EU’s legislative competence into fields that might give rise to greater subsidiarity concerns, such as sport, civil protection and broader areas of criminal justice. However, the House might not want to give a reasoned opinion unless the breach of the principle were on an important matter. It seems unlikely, therefore, that the House’s procedure for considering whether to give a reasoned opinion will need to be used frequently.

44. The Lisbon Treaty would allow national parliaments eight weeks in which to give opinions. While more generous than the period provided by the Constitutional Treaty, in terms of parliamentary scrutiny, eight weeks is still tight. The Committee would not wish to consider a proposal before it had received the Government’s Explanatory Memorandum (EM) on it. There would then be very little time to obtain further information from Ministers, take account of the views of the devolved assemblies, draft the reasoned opinion and obtain the approval of the House to give a reasoned opinion.

45. The procedure recommended by the Modernisation Committee in 2005 recognised these difficulties. It acknowledged that:

- the timetable is tight;
- the European Scrutiny Committee is best placed to identify possible non-compliant proposals;

- it is also best placed to draft the reasoned opinion (in the form of a Report);
- it is desirable to give the opinion the authority of the House itself;
- the Motion should not be proposed by the Government but by the European Scrutiny Committee; and
- partly because of the shortness of time and partly so as to make clear that the opinion is that of the House rather than the Government, the Motion should not be debated.

**We see no reason to diverge from the recommendations of the Modernisation Committee as forming the basis for consideration of how the House should give effect to the provisions on subsidiarity, should they ever be implemented. We consider however that, if a debate is not to take place, the Chairman or designated member of the European Scrutiny Committee should outline the reason for the Opinion in a short speech to which a Minister may reply on behalf of the Government.**

### ***Devolved Assemblies***

46. The European Scrutiny Committee would not be in a position to act on behalf of the devolved assemblies in spotting what — for them — might be objectionable proposals. It might not be apparent that a proposal contained objectionable material until the EM arrived or that a proposal contained material which was likely to be objectionable to one of the devolved Assemblies or Parliaments but not to others (for example, because there was a conflict with Scottish law but not with that of England and Wales). The Committee considers therefore that it:

- should place the onus on the devolved Assemblies or Parliaments to obtain draft legislation, vet it and tell the Committee as quickly as possible if they have objections; and
- should invite the comments of the devolved Assemblies or Parliaments on the Committee's drafts of opinions where the draft includes reference to a matter on which one or more devolved assemblies have expressed a view.

If a devolved Assembly or Parliament were not ready to express its views until after the Committee's Motion had been proposed, or if the Committee disagreed with the views, the Assembly or Parliament should be invited to send its views to the Committee for onward transmission to the Government.

47. Similarly, we do not believe the timetable would make it possible to consult other national parliaments before the Committee decided whether a reasoned opinion was necessary. The National Parliament Office in Brussels would, however, act as the Committee's eyes and ears and would be able to give us early warning of proposals about which other national parliaments had concerns regarding non-compliance. It is planned that any reasoned opinion by a parliament will be logged on the IPEX database.

## 5 Evaluation of Eurojust and scrutiny of Europol

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48. The Lisbon Treaty makes provision for national parliaments to “contribute to the good functioning of the Union” by being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities.

49. At its meeting in Tampere in 1999, the European Council concluded that:

“to reinforce the fight against serious organised crime, the European Council has agreed that a unit (Eurojust) should be set up composed of national prosecutors, magistrates or police officers of equivalent competence ... . Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases ... .”

Eurojust was established by Council Decision in February 2002. The “College” of Eurojust comprises one member from each Member State. It is based in The Hague.

50. Article 85 of the amended EU Treaty:<sup>31</sup>

- defines Eurojust’s job as being to strengthen and support coordination and cooperation between Member States for the prosecution of serious crimes affecting two or more Member States;
- requires the Council and European Parliament (EP) to make Regulations determining Eurojust’s structure, operation, tasks and “field of action”; and
- requires those Regulations, in addition, to “determine arrangements for involving the European Parliament and national parliaments in the evaluation of Eurojust’s activities”.

51. The European Police Office (Europol) was set up in 1999. It facilitates the exchange of information between Member States’ law enforcement authorities and collects, analyses and disseminates intelligence about serious crime affecting two or more Member States. Europol is mainly concerned with terrorism; illegal trafficking in drugs, arms and people; and money laundering. It has no powers of investigation or arrest. It, too, is based in The Hague.

52. Article 88 of the amended EU Treaty:

- says that Europol’s mission is to support and strengthen action by, and cooperation between, Member States’ law enforcement authorities to prevent and combat serious crime affecting two or more Member States and “forms of crime which affect a common interest covered by a Union policy”;

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<sup>31</sup> The Government has produced “Consolidated texts of the EU Treaties as amended by the Treaty of Lisbon”. (Cm 7310). Article 85 of the consolidated text of the amended EU Treaty is about Eurojust and Article 88 about Europol.

- requires the Council and the EP to make Regulations to determine Europol's structure, operation, "field of action" and tasks; and
- requires the Regulations to "lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with the national parliaments.

53. Both sets of Regulations would be subject to co-decision and qualified majority voting.

54. The amended EU Treaty does not define the meaning of the "evaluation" of Eurojust or the "scrutiny" of Eurojust. Presumably the two processes differ but how is uncertain. This is not the only question unanswered by Articles 85 and 88. Others include:

- what is the purpose of the evaluation or scrutiny and what action, and by whom, would be taken on their findings?
- what would be the constitutional implications if the Regulations made by the Council and the European Parliament were binding on national parliaments;
- similarly, what would be the constitutional implications if the European Court of Justice were given jurisdiction over the compliance of national parliaments with the Regulations?
- would each chamber of every national parliament be involved in the evaluation and scrutiny? and
- if every chamber had one representative and the European Parliament had equal representation, there would be about 100 representatives at evaluation and scrutiny meetings — is this intended?

55. These are important questions and many of them could be answered only by the Eurojust and Europol Regulations. If the Treaty is ratified it will be important for the Council and European Parliament to consult national parliaments about drafts of the Regulations, giving them reasonable time in which to consult each other in COSAC and prepare their comments.

## 6 Scrutiny of opt-in decisions

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56. In the course of the Committee's inquiry into the Intergovernmental Conference (IGC) and what became the Lisbon Treaty, we paid close attention to the arrangements by which the UK reserved a right to 'opt-in' to proposals in the field of freedom, security and justice<sup>32</sup>. Under the existing Treaties, the UK has a right (under the Protocol on the position of the United Kingdom and Ireland) to decide whether or not to 'opt-in' to a proposal made under Title IV EC (i.e. into measures relating to visas, asylum, immigration and judicial cooperation in civil matters). This right may be exercised by the UK or Ireland within three months of the submission of a proposal to the Council. If the UK or Ireland

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32 See HC 1014 (2006-07) and HC 16-iii (2007-08).

notifies the Council within this time of its wish to take part in the adoption and application of such a measure, then the country making the notification is entitled to take part.

57. The Lisbon Treaty amends the existing EU and EC Treaties by moving the subject-matter of what is now dealt with intergovernmentally and by unanimity under the EU Treaty (i.e. police and judicial cooperation in criminal matters) along with the existing subject-matter of Title IV EC to a new Title IV entitled “Area of Freedom, Security and Justice”. Consequential changes were made by the Lisbon Treaty to the Protocol on the position of the United Kingdom and Ireland so as to make the Protocol, with its opt-in arrangements, applicable to the new Title IV.

58. In the course of taking evidence in our earlier inquiry into the IGC it became clear to us that, once having “opted-in”, the UK had no right to “opt-out” if the negotiations (which would be conducted on the basis of QMV voting) led to a result which was unwelcome to the UK. Noting that the “opt-in” decision would become one which might “lead to serious consequences for the UK through the transfer of jurisdiction on important measures dealing with civil and criminal justice”, we concluded that it was important that the consequences of any decision whether or not to opt in were clearly understood and open to full Parliamentary scrutiny and approval and that the arguments for and against opting in were the subject of the closest scrutiny by Parliament.

59. In reply, the Government stated that it would assess carefully the overall substantive and procedural context each time it decided whether or not to opt in, and that the Government would “keep Parliament informed, as now, of opt-in decisions”.<sup>33</sup> Quite what keeping Parliament informed amounted to was further examined in the course of proceedings on the European Union (Amendment) Bill. On 9 June the Leader of the House of Lords (Baroness Ashton of Upholland) deposited in the library of both Houses a “Statement on JHA Opt-ins” (see Annex). In evidence to us on 25 June the Minister for Europe confirmed that the statement was a statement of policy by HM Government<sup>34</sup>

60. The “Statement on JHA opt-ins” set out seven commitments which would be reflected in a Code of Practice to be agreed with us and stated the Government’s belief that the scrutiny reserve resolution should be amended, or a new resolution brought forward, to incorporate these commitments. These commitments included the following :

“The Committees, as with all proposals, can call a Minister to give evidence and can make a report to the House, if they wish with a recommendation for debate, on a motion that would be amendable<sup>35</sup>...

“For the Commons, such a debate would usually be in Committee. In the Lords, where a Committee determines that a decision on whether to or not to opt-in to a measure should be debated, the Government will undertake to seek to arrange a debate through the usual channels.

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33 European Union Intergovernmental Conference: Government Responses to the Committee’s Thirty-fifth Report of Session 2006-07 and the Committee’s Third Report of Session 2007-08 HC 179.

34 Q151.

35 Emphasis in original.

“As a general rule, except where an earlier opt-in decision is necessary, not to override the scrutiny process, by making any formal notification to the Council of a decision to opt-in within the first 8 weeks following publication of the proposal. Where the Government considers an early opt-in to be essential, it will explain its reasons to the Committee as soon as is possible. The Government will continue to keep the Committees fully informed as negotiations develop.”

61. The Statement was deposited shortly before those voting in a national referendum in Ireland rejected the Lisbon Treaty. When the Minister for Europe appeared before us on 25 June he was asked if the Government would apply it in respect of opt-in decisions under the present EC Treaty. In reply, the Minister stated :

“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.”<sup>36</sup>

62. Questioned further on why the commitments in the Statement should not apply to existing opt-in decisions the Minister replied:

“...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”<sup>37</sup>.

63. The Minister later added:

“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.”<sup>38</sup>

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

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36 Q153.

37 Q154.

38 Q156.

## Conclusions and recommendations

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1. We welcome the requirement in the Lisbon Treaty for the transmission of documents to national parliaments because, in some Member States, the government does not automatically bring EU proposals to the attention of its parliament. The requirements will, however, not affect scrutiny in the House of Commons because all EU documents covered by Standing Order No. 143 are deposited by the Government. (Paragraph 8)
2. Our conclusions on the provisions of the Lisbon Treaty on subsidiarity are as follows:
  - The substance of the subsidiarity Article in the Lisbon Treaty is the same in its effect as the existing Article in the EC Treaty.
  - Examination of EU proposals for compliance with the principle of subsidiarity is a long-established and fundamental part of the scrutiny process of the European Scrutiny Committee of the House of Commons.
  - Whether a proposal does or does not comply is a matter of political judgement and is unlikely to be capable of an entirely objective assessment.
  - It is very rare for the whole of a proposal to be inconsistent with the principle. It is less rare for one of the provisions not to comply. We see no reason to expect that this will change, although the extension of the EU's competence under the Lisbon Treaty will offer additional areas for subsidiarity disputes if that Treaty is ratified.
  - Where we have concerns, we presently draw them to the attention of the Government and, where it shares our assessment, Ministers take up the concerns with the Commission and other Member States. Again, we see no reason to expect that this will change.
  - We expect the Commission to listen to the views of national parliaments even if the number of opinions does not reach the levels set for the yellow and orange cards. We warmly welcome Commissioner Wallström's statement that the Commission should listen to the views of national parliaments even if the number of votes does not reach the threshold.
  - For these reasons, we doubt whether the Lisbon Treaty's new subsidiarity provisions about the role of national parliaments would make much practical difference to the influence presently enjoyed by the UK Parliament. (Paragraph 37)
3. We see no reason to diverge from the recommendations of the Modernisation Committee as forming the basis for consideration of how the House should give effect to the provisions on subsidiarity, should they ever be implemented. We consider however that, if a debate is not to take place, the Chairman or designated member of the European Scrutiny Committee should outline the reason for the Opinion in a short speech to which a Minister may reply on behalf of the Government. (Paragraph 45)

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

# Formal minutes

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**Wednesday 10 September 2008**

Members Present

Michael Connarty, in the Chair

Mr Adrian Bailey	Kelvin Hopkins
Mr William Cash	Mr Anthony Steen
Mr James Clappison	Richard Younger-Ross
Mr David-Heathcoat-Amory	

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## **1. Draft Report on Subsidiarity**

Draft Report (*Subsidiarity*), proposed by Mr William Cash, brought up and read.

Motion made and Question proposed, That the draft Report be read a second time, paragraph by paragraph.  
— (*Mr William Cash.*)

The Committee divided.

Ayes 4	Noes, 3
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Kelvin Hopkins
Mr David-Heathcoat-Amory	Richard Younger-Ross
Mr Anthony Steen	

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

The Committee's attention having been called to the fact that five Members were not present, the Committee adjourned till a day and time to be fixed by the Chairman.

[Adjourned to a day and time to be fixed by the Chairman.]

**Wednesday 8 October 2008**

Members present:

Michael Connarty, in the Chair

Mr Adrian Bailey	Mr David Heathcoat-Amory
Mr David S Borrow	Mr Keith Hill
Mr William Cash	Kelvin Hopkins
Mr James Clappison	Mr Lindsay Hoyle
Ms Katy Clark	Mr Anthony Steen
Jim Dobbin	Mr Richard Younger-Ross
Greg Hands	

## **1. Draft report on Subsidiarity, national parliaments and the Lisbon Treaty.**

The Committee deliberated.

Motion made and question put, that the Committee consider Mr Cash's draft Report (subsidiarity) prior to the Committee's public session on the scrutiny of documents.— (*The Chairman.*)

The Committee divided.

Ayes, 6

Mr Adrian Bailey  
Mr David S Borrow  
Jim Dobbin  
Keith Hill  
Kelvin Hopkins  
Mr Lindsay Hoyle

Noes, 6

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory  
Mr Anthony Steen  
Richard Younger-Ross

Whereupon the Chairman declared himself with the Ayes.

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Motion made and question put, that Mr Cash's draft Report (subsidiarity) be not further considered.— (*The Chairman.*)

The Committee divided.

Ayes, 8

Mr Adrian Bailey  
Mr David S Borrow  
Ms Katy Clark  
Jim Dobbin  
Keith Hill  
Kelvin Hopkins  
Mr Lindsay Hoyle  
Richard Younger-Ross

Noes, 4

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory

Draft Report (Subsidiarity, national parliaments and the Lisbon Treaty), proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 17 read and agreed to.

A paragraph — (*Mr David Heathcoat-Amory.*) — brought up, read the first and second time and inserted (now paragraph 18).

Paragraphs 18 to 25 (now paragraphs 19 to 26) read and agreed to.

Paragraph 26 (now paragraph 27) read.

Amendment proposed in line 6, at the end to add the words "generally speaking subsidiarity has never been applied since the Maastricht Treaty." — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory

Noes, 8

Mr Adrian Bailey  
Mr David S Borrow  
Ms Katy Clark  
Jim Dobbin  
Keith Hill  
Kelvin Hopkins  
Mr Lindsay Hoyle  
Richard Younger-Ross

Paragraph 27 (now paragraph 28) agreed to.

Paragraph 28 (now paragraph 29) read.

Amendment proposed in line 1, to leave out the word “very”.— (*Mr Richard Younger-Ross.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5

Mr William Cash  
Mr Greg Hands  
Mr David Heathcoat-Amory  
Kelvin Hopkins  
Richard Younger-Ross

Noes, 6

Mr Adrian Bailey  
Mr David S Borrow  
Ms Katy Clark  
Jim Dobbin  
Keith Hill  
Mr Lindsay Hoyle

Amendment proposed in line 1, to leave out from the beginning to “For” in line 3 and to insert the words “It is not uncommon for at least one or more provisions of legislation to be clearly in breach of subsidiarity on any interpretation of the principle of subsidiarity”.— (*Mr James Clappison.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory  
Richard Younger-Ross

Noes, 5

Mr Adrian Bailey  
Mr David S Borrow  
Ms Katy Clark  
Jim Dobbin  
Keith Hill

Whereupon the Chairman declared himself with the Noes.

Another amendment made.

Paragraph, as amended, agreed to.

Paragraphs 29 to 31 (now paragraphs 30 to 32) agreed to.

Paragraph 32 (now paragraph 33) read.

Amendment proposed, in line 5, at the end to add “We are deeply disturbed by this.”— (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory  
Richard Younger-Ross

Noes, 5

Mr Adrian Bailey  
Mr David S Borrow  
Jim Dobbin  
Keith Hill  
Mr Lindsay Hoyle

Whereupon the Chairman declared himself with the Noes.

Paragraph 33 (now paragraph 34) read.

Amendment proposed, in line 1, to leave out the words “We do not see this as a major defect because” and to insert the words “Some may argue that:” — (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory  
Kelvin Hopkins  
Richard Younger-Ross

Noes, 5

Mr Adrian Bailey  
Mr David S Borrow  
Jim Dobbin  
Keith Hill  
Mr Lindsay Hoyle

Paragraph, as amended, agreed to.

A paragraph — (*Mr David Heathcoat-Amory.*) — brought up, read the first and second time and inserted (now paragraph 35).

Another paragraph — (*Mr David Heathcoat-Amory.*) — brought up, read the first and second time and inserted (now paragraph 36).

Paragraph 34 (now paragraph 37) read.

An amendment made.

Another amendment made.

Amendment proposed, line 23, at the to end add “We are not remotely convinced that this will happen.”— (*Mr William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4

Mr William Cash  
Mr James Clappison  
Mr Greg Hands  
Mr David Heathcoat-Amory

Noes, 7

Mr Adrian Bailey  
Mr David S Borrow  
Ms Katy Clark  
Jim Dobbin  
Keith Hill  
Kelvin Hopkins  
Richard Younger-Ross

Paragraph, as amended, agreed to.

Paragraphs 35 to 39 (now paragraphs 38 to 42) read and agreed to.

Paragraph 40 (now paragraph 43) read, amended and agreed to.

Paragraph 41 (now paragraph 44) agreed to.

Paragraph 42 (now paragraph 45) read.

Amendment proposed, in line 18, at the end to add “We believe that where 150 MPs sign a Motion objecting to an EU legislative proposal, the House must hold a free vote on the matter before it goes to the Council and that standing orders should be amended accordingly.”— (*Mr. William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Mr David S Borrow
Ms Katy Clark	Jim Dobbin
Mr Greg Hands	Keith Hill
Mr David Heathcoat-Amory	Kelvin Hopkins

Whereupon the Chairman declared himself with the Noes.

Paragraph agreed to.

Paragraphs 43 to 51 (now paragraphs 46 to 54) read and agreed to.

Paragraph 52 (now paragraph 55) read.

Amendment proposed, in line 1 to leave out from beginning to “If” in line 2 and insert the words “The definition of criminal law and procedure, the bringing of prosecutions and the administration of justice are all matters which should be determined solely at a national level. We note the vagueness of the definitions of the roles of Europol and, in particular, Eurojust and the uncertainties over their constitutional arrangements regarding them outlined above. We therefore believe it is important to be vigilant as to the risk that these European level organisations which have been established to promote co-operation do not evolve in a way which leads to trespass into areas which should remain ones of exclusive national competence.”— (*Mr James Clappison.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Mr David S Borrow
Mr Greg Hands	Ms Katy Clark
Kelvin Hopkins	Jim Dobbin
Richard Younger-Ross	Keith Hill

Whereupon the Chairman declared himself with the Noes.

Paragraph agreed to.

Paragraphs 53 to 60 (now paragraphs 56 to 63) agreed to.

Paragraph 61 (now paragraph 64) read.

Amendment proposed, in line 2 to leave out from the word “process” to the end of the paragraph and to insert the words “We need rigorous scrutiny of opt-in decisions both in respect of the opt-in arrangements which already apply to significant areas of asylum and immigration and judicial cooperation in civil matters and, in the event that the Lisbon Treaty comes into force, in respect of the potentially weighty matters which may be

subject to opt-in decisions under the new arrangements in the Treaty. We are particularly concerned that the Government's 'Statement on JHA opt-ins' permits opt-in without any scrutiny where the Government decides that an earlier opt-in decision is necessary and that where scrutiny does take place any debate would be confined to a Committee; we feel that it would be more appropriate for such a debate to take place on the Floor of the House. In these and other respects we feel that careful consideration needs to be given to the adequacy of the Government's proposals for scrutiny of opt-in decisions".— (*Mr James Clappison.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 5	Noes, 6
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Mr David S Borrow
Mr Greg Hands	Ms Katy Clark
Mr David Heathcoat-Amory	Jim Dobbin
Kelvin Hopkins	Keith Hill
	Richard Younger-Ross

Another amendment proposed, in line 6, at the end to add "We insist that the Government's commitments are carried through and that this whole issue must be debated on a free vote on the floor of the House." — (*Mr. William Cash.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 5
Mr William Cash	Mr Adrian Bailey
Mr James Clappison	Mr David S Borrow
Mr Greg Hands	Jim Dobbin
Mr David Heathcoat-Amory	Keith Hill
	Kelvin Hopkins

Paragraph agreed to.

*Resolved*, That the Report, as amended, be the Thirty-third Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

Several Memoranda were ordered to be reported to the House for printing with the Report.

*Ordered*, That the provisions of Standing Order No.134 (Select committees (reports)) be applied to the Report.

[Adjourned till Wednesday 15 October at 2.30 p.m.]

## Witnesses

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### Wednesday 14 May 2008

Page

**Professor Alan Dashwood**, Professor of European Law, University of Cambridge

Ev 1

### Wednesday 18 June 2008

**Professor Simon Hix**, Department of Government, London School of Economics and Political Science

Ev 9

### Monday 23 June 2008

**Mrs Margot Wallström**, Vice President, Commissioner for Institutional Relations and Communications Strategy, **Mr Patrick Costello**, Deputy Head of Cabinet, **Sten Ramstedt** Member of Cabinet, European Commission, and **Mr Reijo Kemppinen**, Head of the European Commission Representation in the UK

Ev 17

### Wednesday 25 June 2008

**Mr Jim Murphy**, Minister for Europe and **Ms Deborah Bronnert**, Head of Europe Delivery Group, Foreign and Commonwealth Office

Ev 25

## List of written evidence

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- |   |  |       |
|---|--|-------|
| 1 | Memorandum submitted by the Office of the City Remembrancer  | Ev 36 |
| 2 | Memorandum submitted by Richard Corbett MEP, Labour Spokesman on Constitutional Affairs in the European Parliament                 | Ev 36 |
| 3 | Memorandum submitted by Andrew Duff MEP, Spokesman on Constitutional Affairs, Alliance of Liberals and Democrats for Europe (ALDE) | Ev 38 |
| 4 | Memorandum submitted by Professor Juliet Lodge, Jean Monnet European Centre of Excellence, University of Leeds                     | Ev 39 |
| 5 | Memorandum submitted by Diana Wallis MEP, Vice President of the European Parliament  | Ev 42 |
| 6 | Memorandum submitted by the Local Government Association   | Ev 42 |

# Annex

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## Statement on JHA Opt-ins

The Government believes that it is important for the EU Scrutiny Committees, and Parliament as a whole to have a clear idea of the Government's approach to JHA; individual JHA measures should be seen in this context. The Government is keen to ensure that the views of the Scrutiny Committees, benefiting from expertise in the area and having a strategic overview of the UK policy on the EU and our engagement on Justice and Home Affairs business, inform the Government's decision making process. As such, the Government therefore commits:

- To table a report in Parliament each year and make it available for debate, both looking ahead to the Government's approach to EU Justice and Home Affairs policy and forthcoming dossiers, including in relation to the opt-in and providing a retrospective annual report on the UK's application of the opt-in Protocol;
- To place an Explanatory Memorandum (EM) before Parliament as swiftly as possible following publication of the proposal and no later than ten working days after publication of the proposal. That EM would set out the main features of the proposal, as now, and, in particular, to the extent possible, an indication of the Government's views as to whether or not it would opt-in. Where the Government is in a position to provide them at that stage, the EM will also cover the factors affecting the decision. The European Scrutiny Committees of the two Houses will then be able to fully review the proposal and, where it has been possible to give a view, the Government's approach to the opt-in;
- Provided that any such views are forthcoming within 8 weeks of publication, to take into account any opinions of the Committees with regard to whether or not the UK should opt-in;
- The Committees, as with all proposals, can call a Minister to give evidence and can make a report to the House, if they wish with a recommendation for debate, on a motion that would be amendable (other debates in the Lords to take note of Committee reports are not usually amended).
- For the Commons, such a debate would usually be in Committee. In the Lords, where a Committee determines that a decision on whether or not to opt-in to a measure should be debated, the Government will undertake to seek to arrange a debate through the usual channels.
- As a general rule, except where an earlier opt-in decision is necessary, not to override the scrutiny process, by making any formal notification to the Council of a

decision to opt-in within the first 8 weeks following publication of a proposal.<sup>1</sup> Where the Government considers an early opt-in to be essential, it will explain its reasons to the Committee as soon as is possible. The Government will continue to keep the Committees fully informed as negotiations develop;

- To ensure that a Minister is regularly available to appear before the Scrutiny Committees in advance of every Justice and Home Affairs Council.

This package of measures will be reflected in a Code of Practice, to be agreed with the Scrutiny Committees, setting out the Government's commitment to effective scrutiny. The Government believes that the Scrutiny Reserve Resolution should also be amended, or a new resolution brought forward, to incorporate these commitments.

This will be reviewed three years after the entry into force of the Treaty to ensure that the enhanced scrutiny measures are working effectively.

We believe that this package, in addition to the strengthened role for national parliaments in the Treaty, strikes the right balance between ensuring that the Government can exercise the opt-in effectively within the Treaty deadline, whilst ensuring that Parliament's views are fully considered.

*Deposited in the Library of the House of Lords, 9 June 2008.*

*The Rt Hon Baroness Ashton of Upholland*

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<sup>1</sup> An example of where an early opt-in may be necessary is on the opt-in to the final text of a readmission agreement. These are often concluded very close to meetings with the third states concerned, to be signed at the meeting. In order to allow signature at the meeting, the Government undertakes to EU partners to complete the domestic opt-in process quickly.

# Oral evidence

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## Taken before the European Scrutiny Committee

on Wednesday 14 May 2008

Members present:

Michael Connarty, in the Chair

Mr Adrian Bailey  
Mr David S Borrow  
Mr William Cash  
Mr James Clappison  
Ms Katy Clark

Keith Hill  
Kelvin Hopkins  
Mr Bob Laxton  
Angus Robertson  
Richard Younger-Ross

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

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

**Professor Dashwood:** Thank you very much.

**Q2 Chairman:** You know the context in which we have invited you back. We have a number of outstanding issues coming from the discussion of the Lisbon Treaty in the House and we decided to look at a number of procedures that we may recommend to the House in our report. One of these, obviously, is looking at the question of subsidiarity and the conditions and terms which the new Treaty, as proposed, offers to national parliaments.

**Professor Dashwood:** Yes.

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

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

**Q4 Chairman:** Thank you. That is most helpful. Protocol 30, as you know, of the EC Treaty, which is about the application of the principle of subsidiary, paragraph three, says: "subsidiarity is a dynamic concept and should be applied in the light of the

objectives set out in the Treaty. It allows the Community action within the limits of its powers to be expanded where circumstances so require and, conversely, to be restricted or discontinued where it is no longer justified." Could you tell us how you think that passage from the Protocol should be interpreted?

**Professor Dashwood:** Thank you, yes, I will do my best. I think it has to be read in its context together with the preceding paragraph. It is a provision that was put into the Protocol in order to reassure those Member States that were fearful that the subsidiarity principle would have a dampening effect on the development of the community. It goes back to the informal text that was agreed at the European Council at Edinburgh in December 1992. I very well remember the discussions which preceded that conference because I sat through many of them in COREPER II, and there were essentially two points of view, those who wanted to promote the principle of subsidiarity and those who were fearful of its implications. And I think the purpose of paragraph 3, together with paragraph 2, is to provide reassurance that in applying the principle it will sometimes be appropriate to expand the field of Community action, though always within the limits imposed by the Treaties, and it will sometimes be appropriate to refrain from acting, or even to discontinue action which has previously been taken. That is how I understand paragraph three.

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

**Professor Dashwood:** I think I am in danger of anticipating the answer to some of the other questions that I have seen. I believe that subsidiarity is a legal notion, but it is a legal notion that has a heavy policy load and it is, therefore, one which is difficult for courts to apply. I believe that it is a more fruitful principle at the stage of law-making as a guide to action by the Commission in formulating

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proposals and by the Council and European Parliament in enacting them, and I believe that it has had a useful impact on the practice of the legislative institutions over the past 15 or so years. It is very difficult to prove that. As you know, there is a paragraph in Protocol 30 which requires the Commission to produce an annual report on subsidiarity. Nowadays these are known—it sounds rather silly—as the *Better Law-making Reports*.

**Q6 Mr Cash:** I was thinking about those.

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

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

**Chairman:** Can we leave that.

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

**Q7 Mr Cash:** You mean like fishing?

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

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

principles of subsidiarity”? Can you give me any specific example of where subsidiarity has prevented an action being taken?

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

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

**Professor Dashwood:** Do I have 45 minutes?

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

**Professor Dashwood:** Very briefly, in the early 1990s there was a fierce debate as to whether the principle of subsidiarity was justiciable. I think it is perfectly clear, in the light of the case law, that it is justiciable, but the intensity of review will vary with respect to different aspects of compliance with the principle as it is formulated in Article 5. For instance, whether a given measure falls within an area of exclusive Community competence is a purely legal issue which the Court of Justice would feel completely comfortable in resolving. There was a time when some commentators believed that the internal market was an area of exclusive Community competence, and, indeed, there were Advocates General who took that view. The Court, in fact, ruled very clearly in one of the Tobacco cases that the internal market is an area of sheer shared competence, so that is not an issue any more. But if the legislator had taken the view that the internal market was an area of exclusive Community competence and that, therefore, the principle of subsidiarity would not apply to the adoption of harmonising legislation under Article 95, so that subsidiarity simply was not addressed during the legislative process, then that would have provided grounds for the annulment of the measure. As I said, that is not an issue any more and I do not think that the other areas of exclusive Community competence are liable to give rise to any problems with respect to subsidiarity. There may, in some cases, be a challenge based on the formal requirement in Article 190 of the EC Treaty to give reasons why a measure is necessary. The Court has said it is sufficient if the recitals refer to factors which establish compliance

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with subsidiarity; it is not necessary for there to be an express reference to the principle. But, I suppose, if it could be shown in a particular case that the elements mentioned in recitals on which the Council and the Commission relied to establish compliance with the subsidiarity principle, if those elements of fact could be shown to be erroneous, then you would have the possibility of bringing a successful legal challenge. That has not happened to date, but I can see that is a possibility. In most situations, under most legal bases in the EC Treaty, the conditions for the conferral of competence on the Community have something to do with freedom of movement or the removal of distortions of competition. In any legal basis, for example Article 95 on harmonisation measures for the purposes of the well functioning of the internal market, on which an awful lot of Community legislation is based, if the conditions for the exercise of competence are fulfilled, the subsidiarity principle will automatically be satisfied because you can only remove restrictions on freedom of movement or distortions of competition by a measure adopted at the level of the Community. So, although that kind of issue does arise, I think it will almost always be addressed as an issue going to the existence of competence under Article 95 rather than subsidiarity, and there are several recent cases where the Court has considered a subsidiarity argument and rejected it on that ground. The more difficult cases are in policy areas like social policy or the protection of the environment, where Community competence does not have to be triggered by some kind of transnational element. In that kind of case—I suppose the leading example is the case on the *Working Time Directive*—the Court of Justice has shown that it is extremely reluctant to substitute its own judgment for that of the political institutions; so one would expect nothing more than the most marginal kind of review. The upshot of all of this is that, in my view (and it may be different under the regime of the Treaty of Lisbon), under the existing arrangements the subsidiarity principle, while I believe it to be useful at the stage of law-making, is largely inoperable at the stage of adjudication.

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

national Parliament on the grounds that it asserted the political will to achieve subsidiarity, for example, by abolishing fishing in its own repatriation of powers? Could you give us some views about the supremacy of Parliament in that context? That was also a tripos question.

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

**Q11 Mr Cash:** I am just a simple politician.

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

**Q12 Mr Cash:** Or thrown overboard.

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

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

**Professor Dashwood:** What would happen in practice in that kind of situation is that an action would be brought by the Commission against the

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United Kingdom under Article 226 of the Treaty for infringement of the United Kingdom's Community obligations.

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

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

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

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

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

**Professor Dashwood:** No. I think it is going to adopt the kind of approach that it normally adopts towards economic legislation where the institutions of the Union have a very considerable discretion. For example, agricultural legislation. The Court does not try to second-guess the Council as to whether this was a sensible measure or not; it does not substitute its own judgment as to the merits of the measure for that of the political institutions. So it operates what is known as marginal review; in other words, review that is limited to abuse of power or manifest error. For example, if the factual elements mentioned in the recitals of an instrument and relied upon by the Council and the Commission to demonstrate compliance with subsidiarity are found to be factually incorrect, then the Court would, acting judicially, be in a position to annul the measure. It is a kind of area where the Court has to defer, as courts always do, to the political judgment to the law-maker. The Court is at its strongest when the issue can be proceduralised in some way.

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

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

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

**Professor Dashwood:** The substantive test of subsidiarity, is the dual test in Article 5, paragraph two of the Treaty: that the objective of the proposed measure could not have been sufficiently achieved by the Member States and could, therefore, because of its scale and likely effect, be better achieved by the Community. Protocol 30 insists on both elements of the tests, though they have always seemed to be two sides of the same coin. It is a test which, I think, is not capable of being applied directly by a court. It is essentially a test to guide those involved in the political process of enacting legislation. It will be for the court to ensure that the principle was genuinely applied in the course of the legislative process and

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that the justifications which are given both in the Commission's explanatory memorandum and at other appropriate stages in the legislative process, the Council's statement of Reasons when it adopts a common position under the co-decision procedure and, finally, the recitals of the Act which is formally adopted—all of that—satisfy the subsidiarity test; but that, I think, is as far as the court is able to go, for the reasons that I have been explaining.

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

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

**Professor Dashwood:** I am afraid that I do not. I think it is bound to be a matter of judgment. We have some criteria in paragraph five of Protocol 30 which are pretty broad: "The issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States", but "actions by Member States alone or lack of community action would conflict with the requirements of the Treaty" by, for example, creating obstacles to freedom of movement or distortions of competition. Under Protocol 30, "Action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States". I must say, we wracked our brains back in the early 1990s to think of a more circumstantial list and did not come up with one, but I think that is why it is more important to focus on procedure rather than substance.

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

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

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

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

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

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

**Professor Dashwood:** There is. It is a danger to which the Court of Justice is alert. In the Tobacco Advertising case, for example, it rejected the Commission's argument that the Directive could be justified on the grounds that it removed distortions of competition. The Court thought that the possible effect on competition of different rules on tobacco advertising in the different Member States was too remote, at least in the case of some forms of advertising, and, therefore, it rejected that argument. It is very difficult to say how much distortion of competition the internal market can tolerate. I do not think anybody could give a precise answer to that. It is a matter of feel. When this committee, in the future, is considering a particular Commission proposal, testing it against the principle of subsidiarity, you will have to look at the Commission's explanation. And, if the Commission is relying upon the distortion of competition argument and you feel that, in the circumstances, it is exaggerated, then you would be perfectly entitled to take the view that the subsidiarity principle has been infringed. And if sufficient other national parliamentary chambers take the same view, then you will be able to trigger either the yellow card or the orange card procedure.

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

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

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

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

**Q25 Chairman:** Yes.

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

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

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

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

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

**Professor Dashwood:** I am rather enthusiastic about it, because, as I said earlier on, it seems to me that national parliaments are the right body to make the initial judgment as to whether the subsidiarity principle has been complied with. No doubt this new opportunity which the Protocol provides, if it is

taken full advantage of by national parliaments, will be a considerable additional burden, because there will be a lot of legislation to be vetted. But it seems to me that potentially it enhances significantly the relevance of the subsidiarity principle. Mr Cash was sceptical about whether the principle had much of an impact on the legislative institutions of the Union. I am less sceptical about that, but under the new dispensation the bodies initially applying the principle will be those that have the greatest interest in its effective operation, namely the national parliaments. Under the yellow card procedure, if we have votes amounting to a third of the available number in a union of 27—that would be 18 votes out of a possible 54—then the Commission will have to review its proposal; and, if it decides to maintain the proposal, it will have to give reasons for that. Under the orange card procedure, if there is a simple majority of national parliaments adopting reasoned opinion to the effect that the subsidiarity principle has been infringed, then the Commission will have to adopt a formal reasoned opinion; and, what is more, there will have to be a formal moment in the legislative process when these matters are considered by the European Parliament and the Council. It seems to me that this will have a real impact on the political dynamic within the Community. If there are a significant number of national parliaments which take the view that the proposal infringes the principle of subsidiarity—that all things considered, it is something that would be better left at national level, rather than done at the level of the Community—that is bound to have an impact on the prospect of the measures being adopted, whichever of the procedures applies. I think it would also make a difference, as I suggested earlier, to any possible proceedings that might eventuate in the Court of Justice, because the Court would be faced with more extensive documentation than it has at the moment. If somebody was challenging the validity of a measure which had been adopted after the yellow card or the orange card procedure had been triggered, the Court would have in front of it reasoned opinions from at least 18, perhaps more, national parliamentary chambers; it would have the Commission's statement of reasons or reasoned opinion, depending on which procedure was being followed; and there would have to be some kind of minute of the view that was taken within the European Parliament and in the Council on the reasoned opinions which had been submitted to them. All of that would provide the Court with alternative political appreciations, and this would help to proceduralise the issues. Instead of the Court being faced with the substantive issue of whether or not the test of subsidiarity was satisfied, it would be able to consider whether the Commission and the other institutions had taken proper account of the reasoned opinions that would have been put to them, and whether the argumentation on which they rely meets the points which have been made by the national parliaments. So by proceduralising the subsidiarity issue, I think this facilitates the task of the Court of Justice itself, if things ever get that far.

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

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

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

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

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

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

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

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

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

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

**Professor Dashwood:** I will do.

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

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

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

**Q33 Keith Hill:** I always say, Chairman: “If you’ve got it, flaunt it.” I would like to ask you a couple of general questions, Professor Dashwood, although the first one you have perhaps answered in your earlier replies. Is it, in your view, the proper

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constitutional function of national parliaments to attempt to hold EU institutions to account by sending them opinions of their proposals for legislation?

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

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

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

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

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

**Professor Dashwood:** That is my view.

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

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

**Mr Cash:** There certainly would be from me.

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

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## 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:* **Professor Simon Hix**, Department of Government, 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 treaties, 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 is that when people are deciding what level of government things should be done at, they are thinking of several principles. One are the scale benefits of doing a policy 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 such as 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, where Denmark introduced a more restrictive asylum policy and it had an effect on asylum seekers in Sweden. These are externalities if you are having de-centralised policies, which then suggests that if there are these externalities you need to centralise that particular policy. Now, the question then 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 opinions, then there is no problem with passing policy up to the EU level. 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 the harmonisation of tobacco advertising rules under health and safety regulations, which require only qualified majority voting. So then you can argue about what lawyers call ‘competence competence’; who has the competence to decide on competences. In that instance what was fascinating was that the Court of Justice policed this very effectively and basically said, “No, you can’t do this. This is in breach of 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

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transparency benefits in addition by 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 to the European level 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 of 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 could go off and vote in the Council on education policy and the Länder would say, “No, that’s a Land policy. How dare you go and do that?” So they wanted some kind of principle in the treaties at that time that would recognise multiple levels of government, not just the national level and 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 treaties 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 powers. 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 who 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), 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 European parliament. We only get to see minutes plus debates, plus agendas for the Council, but we do not get to see actual amendments. Also now amendments 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 this process. 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.

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**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, with 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, 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 by 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 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 the questions being conferred to Europe, relates 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 require unanimous voting. 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 Luxembourg, 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 run riot, and we have seen that in a variety of cases, one of which I mentioned, on 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

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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 out 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 treaties. 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 quasi-federal model. So the first decision is what power should be passed up to the EU level and the second is which mechanism are we using to pass those powers? When powers are being passed up to the European level, many of them are kept under the inter-governmental mechanisms—for example justice and home affairs was purely inter-governmental, 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, such as tax harmonisation, or social 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 in the Common Market Relations Committee in the Danish Parliament. The committee would sometimes 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 are good reasons why they should be, and even when there they have been passed to QMV there are lots of checks and balances. You have got the check of European 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 worth 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 they were on the losing side, and still why it still might be legitimate 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:** 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. So a mandate can be defined like this, which in a sense 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 get from their ministers back home when you talk to them. They say, “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 is the item where I have absolutely no room for manoeuvre.” 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 of conciliation. If they 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

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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 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. So, 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. Or, we should pass a policy up to the European level because there are externalities of us not having it there. For example 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, such as 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. The most important of these political criteria is 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 the policy should be kept at the national level. So if you define it in purely legal terms, I do not think it is practical in any sense. Another political criteria 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? These

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 treaties. Courts can police the boundaries between competences which are already in the treaties. Courts cannot really police the boundaries between what is in the treaties and what is not in the treaties, 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 I am a little sceptical of are the thresholds defined in the protocol, a quarter of national parliaments in the area of freedom, security and justice; and 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 would be virtually impossible for the Council to pass a piece of legislation, with even a quarter or a third of national parliaments opposed, because you can imagine a quarter of the 27 national parliaments saying, "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 allow the legislation to go through. In real practical terms the thresholds are much, much lower, because the Council operates on a culture of consensus, so it really is only going to take one, two, or three 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 vote "No" in the

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Council. That will be enough in the Council essentially. It is 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 opposed: One or two cases every two or three years. The Council operates under a culture of consensus, for good reason, because the governments all know they have to implement the laws which get passed. This means in practice that the threshold is low for just a few national parliaments saying they have problems with a piece of legislation. 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 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 here. One is that, 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 the Takeovers Directive, 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

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European affairs. 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 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 organise 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 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 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 an 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 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 that 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

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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! I refer the Committee to 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.

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## Monday 23 June 2008

Members present:

Michael Connarty, in the Chair

Ms Katy Clark  
Mr David Heathcoat-Amory  
Kelvin Hopkins

Mr Lindsay Hoyle  
Mr Anthony Steen

*Witnesses:* **Mrs Margot Wallström**, Vice President, Commissioner for Institutional Relations and Communications Strategy, **Mr Patrick Costello**, Deputy Head of Cabinet, **Sten Ramstedt**, Member of Cabinet, European Commission, and **Mr Reijo Kemppinen**, Head of the European Commission Representation in the UK, gave evidence.

**Q65 Chairman:** Vice President Wallström, to give you your full title, welcome to the European Scrutiny Committee. We are in, I think, a more pleasant room than we normally use. This is one of the more modern committee rooms, hopefully we can relax and be frank with each other. Did you intend making a statement of any kind before the questions?

**Mrs Wallström:** No, I was advised not to. Only if you invite me to do so.

**Q66 Chairman:** Would you like to introduce your support team?

**Mrs Wallström:** Yes, I would be happy to do so. Here is Sten Ramstedt who is a member of my cabinet responsible for especially this issue of contacts with national parliaments. This is Patrick Costello, who is British, but also the deputy head of cabinet. And Reijo Kemppinen you know, he is head of our delegation or our representation office here in London.

**Q67 Chairman:** I know your colleague at the end. Very well. Can I just move then into a very straight question: is compliance with the principle of subsidiarity capable of objective assessment against a set of criteria or is it essentially a matter of political opinion?

**Mrs Wallström:** It is more a matter of political opinion, I would say, than possible to check against a list of criteria, so it is sort of built into the nature of a subsidiarity test. Still we do it on a daily basis in the Commission, every proposal in the impact assessment that we carry out is also a subsidiarity check.

**Q68 Chairman:** The definition in Article 5 of the Treaty seems to imply that there is, if you like, a range of responsibilities and achievements that you can match, ones that can be achieved by countries in their own jurisdiction, and ones that it is better or necessary to do on a much larger scale, that can only be done by European Union. You are saying really that that is just according to the political balance of the time, and not really objective, so the people of a country are subject to a political whim, rather than an objective judgment?

**Mrs Wallström:** No, but I think that the general assessment is a political one: at what level do we best take action, at what level are we most effective in

taking action? This is really what the subsidiarity test is all about, and by now, we have some very useful experience, of course, in sending out also our proposals to the national parliaments, and the responses and opinions that we have received I think is as much a matter of national parliaments saying go as saying no, because in many cases, they have actually mentioned the fact that this is best dealt with at the European level rather than at the national level. So I think that the overall assessment has to be a kind of political one. Of course you can give some guiding principles for how to apply it, but in the end, it is more of a political commitment and a political rule than objective criteria.

**Q69 Chairman:** So what you are saying basically is political judgment is when it is better to do it at EU rather than when it is necessary, because if it was necessary, it would be a clear objective criteria.

**Mrs Wallström:** Yes.

**Q70 Mr Heathcoat-Amory:** Commissioner, as you know, this Committee looks at proposals on subsidiarity grounds, so we try and check whether this principle is working. Over the years, we have looked at things like, just to take three examples, a programme to prevent violence to children and women, a programme on mental health and one on youth policy. Now all these things are very desirable, but it is not clear to me certainly why it is that the European Union is better at doing these things than Member States, because they are all quite expensive, and of course they all have budgetary amounts attached to them, and this country contributes large sums to the European Union budget, so we are paying people in Europe to suggest things that we do here on highly desirable things like mental health which we do anyway, so do you think the subsidiarity principle is actually working and has real meaning?

**Mrs Wallström:** I take it, Honourable Member, that these are examples of issues where Member States have the competence and that these are not legislative proposals, but rather voluntary programmes where Member States contribute. These are traditionally, and according to the treaties, not areas where the European Union has a competence or where the Commission can legislate;

I guess in most cases, this would be the kind of programmes or co-operation between Member States.

**Q71 Mr Heathcoat-Amory:** No, these are suggestions for action, and certainly in the case of mental health, it was pointed out actually by this Committee that the World Health Organisation and the Council of Europe already have programmes dealing with these important matters, so my question to you is: why do we pay very talented officials in Europe to suggest that we do things which both ourselves in this Member State and also other international organisations are doing anyway, and when we have enquired, it is often said to us that the subsidiarity reason is that it is very good to exchange best practice at European Union level, so we tell each other how well we are all doing and this somehow validates the concept of European Union action, but to me, as a hard pressed taxpayer, I am unclear about this. So do you believe that social programmes in general, and I have mentioned three, are really better or only done at European Union level, and if your answer to that is no, why are we bothered in this Committee by these endless proposals?

**Mrs Wallström:** It is, of course, naturally very difficult to judge, because I do not know exactly the details of these proposals, and what kind of actions were proposed. I think very often, I guess, Member States can see also added value of exchanging best practices, for example, and I guess that can actually save a lot of money in most Member States. This is at least the experience we have. But if in these cases, the proposed action, what kind of nature that is, I guess it is not legislation, but maybe there are these type of co-operations or programmes where you exchange best practices, I think very often it is for practical reasons and also for the reasons of saving money, if we can learn from each other, this is effective. But I would have to look at these particular proposals to know exactly.

**Q72 Mr Heathcoat-Amory:** My question is really this: if the concept of exchanging best practice is a way of satisfying the subsidiarity test, then everything qualifies, because there is always some virtue in talking to other people in other countries, and therefore, the subsidiarity test seems to me without content, and everything qualifies. So to the ordinary citizen, they see this sort of endless progress of decision-making upwards because everything satisfies subsidiarity, so it is not a real division of responsibility that anyone can understand or make sense of.

**Mrs Wallström:** No, but what we have introduced is the use of impact assessments in our better regulation programme, and I think this has been a very effective tool also allowing us to actually withdraw a number of proposals, those which have been sort of on our table for a long time, where Member States have not taken action, or we see that it has come to a stop, or things that have become obsolete. We actually have a couple of thousand of examples of these things that we simply take out of

the EU agenda, and I think this is also important, but in the impact assessment that we carry out on a regular basis on all proposals that we have in our work programme, we also do a subsidiarity test. I would not say that we take it easy or that we regard this as something that can sort of allow anything to pass by, but then again, this is a political judgment, of whether you think this is at all something for the European Union to engage in, even non-legislative but maybe at programme level, where you have an exchange of best practices.

**Q73 Chairman:** Can I just ask, there are clearly differences of view, whether it is objective or political, in the nature of the area in which each country is working, and the proposals going forward. There is a very short time for objections, eight weeks, from, I think, the final language version, which means we will probably get a few weeks extra as an English speaking nation. Can you reassure the Committee that even those reasoned opinions that are given that are more interim in nature, in other words they are reactive on the political level, because of people's sense that the EU proposal is duplicating something which we may think is already being done, that these interim proposals or reasons will be accepted by the Commission as going over the threshold for reaching the yellow card? It does seem in the beginning that there is a necessary sensitivity required if there is to be any credibility that subsidiarity really matters.

**Mrs Wallström:** I really sort of accept that as a very relevant question, but it is too early to respond to exactly the detailed rules of implementation, and I think that can only be sort of designed later on, and this is not clear exactly how this will be done. We have gathered some experience from working with the national parliaments over some time now, and sending them also all our proposals, but when we see that everything is clarified with ratification et cetera, we can start to prepare also for implementation. But that is too early to answer to exactly how this will be done, that will have to be planned in detail by the Commission in due time.

**Q74 Mr Steen:** You will excuse me being a little facetious, but this idea of impact assessment, is it sort of men in white coats with test tubes who work out whether the assessment is working that much or that much, and if it is the right amount, you say subsidiarity, if you do not, you take control in Brussels; how does it all work? You have a lot of countries with individuality, they want to determine things themselves in areas that they feel they would like to, but it seems, in David Heathcoat-Amory's examples, you take on more and more and more, and I am wondering if I may ask you, Vice President, what is your view of subsidiarity? We may have a different definition, and I would like to know what your definition is.

**Mrs Wallström:** Well, basically, my definition is to find out what is the right level for decision and action. Is the right level to leave it to Member States

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or is the right level to do it at the European level? I think that is the core of subsidiarity, the subsidiarity test.

**Q75 Mr Steen:** That is the men with the white coats.

**Mrs Wallström:** Is it necessary to do it, so to say, at the European level, or should it be best done and most effectively done at the national level? But the impact assessment is, of course, an instrument for the European Union to do the sustainability test, so it is more than only the subsidiarity, but subsidiarity is part of our whole better regulation and impact assessment matter.

**Q76 Mr Steen:** You have a laboratory of people working out—

**Mrs Wallström:** Well, they do not actually appear in white coats with test glasses but they—

**Q77 Chairman:** Social scientists.

**Mrs Wallström:** They are an impact assessment board, and they check it against, as I mean, the sustainability criteria, environmental, economic and social criteria, is this effective, is it something that we can defend long-term and are we the right level to take action? I can use the emissions trading system as an example, and then you can say, when we started the emissions trading, and I was Environment Commissioner at the time, we chose to leave it to the national level to do the allocations of emissions trading, but we saw that this was not effective in the end, and Member States admit that this was not the most effective method. So actually you have to move it to the European level in order to have a fair and effective system, and you can see, after some time, with experience, that it would be better controlled and better carried out or exercised at the European level. So we have a number of examples where we can actually also change, we can say okay, we leave it to Member States, but if this is not most effective—

**Q78 Chairman:** I think you picked a very good example from your point of view, because that was really a scientific analysis, because it is about something you can quantify. We did have an example, just in defence of the concerns of my Committee members, where the impact assessment showed an eleven times benefit for the EU, but when you looked at that impact assessment done by our Government, there was almost parity. There was very little for us in it, maybe a great deal for the EU in general, and I think that is where people see the concern. Where we do an impact assessment, it does not show these massive benefits, because you are talking about benefits across countries that maybe do not have the developed social systems that we have. Therefore on social policy, it is often much more difficult for a country that prides itself on trying to do its best in social policy to see why it should be subsumed into a scheme for the EU, and there is no flexibility, it is a scheme for everyone or a scheme for no one.

**Mrs Wallström:** But Honourable Chairman, I have taken an oath on looking at the European project in all of this, to make sure that we as a Commission also exercise and work according to the existing treaties and that we look at the European interests. We are not there to defend a national interest or take instructions from a government, we are there to look at the European picture, of course, and this has to be the role of the Commission. I know that you have had Professor Dashwood here as well, who has been able to explain court cases, and you have asked also on court cases, for example, and he has explained the difficulty in sort of using all the subsidiarity test, because it is a broader concept which is also a political commitment, but I think we all would welcome court cases to see if—and I am sure that in the future, this will be also probably tempting for a lot of Member States not least to see if—and of course with such a big role for the national parliaments to play in all of this, and the whole idea with this, with consultation, is to find out. We do not pick things out of the blue. Very often, it is a procedure of two years before, in consulting different stakeholders, before we come to a conclusion that this could become a proposal or a piece of legislation or something like that. So it is not that we, in our chambers, closed up, make up all kinds of fantastic ideas.

**Q79 Mr Heathcoat-Amory:** Just on a specific, I mentioned an example about violence against women and children. I am associated with a charity that does what it can, and the sum of money here is €50 million a year being spent on this programme to set up a helpdesk, apparently, in the EU. Now my charity had certainly never heard of that helpdesk, and nobody in trouble in my constituency has to my knowledge ever telephoned the helpdesk in Brussels when they are in trouble. So it just adds to the feeling at Member State level that there is a sort of layer of well-meaning bureaucracy up there that nobody really can grapple with, nobody knows about it, but we are all paying for it. I think this is a breach of the subsidiarity principle which is not working, it is too general, because it can always be said, "Oh we must discuss these things on a Continental level, I am sure we can all gain from it", but to the ordinary person at the receiving end of this sort of violence, and it is very serious, this is really no help at all, quite frankly.

**Mrs Wallström:** I would like to say—

**Q80 Chairman:** I do not think this is a question, Mr Heathcote-Amory is just giving an example to emphasise his earlier point.

**Mrs Wallström:** But can I just say, I am absolutely convinced that you might find other examples of things that are not necessary, things that I would even think are wasteful, of where we could save money at the European level, I absolutely share that view, that there are things that we have to be very vigilant, we have to look at all of these examples, are they really helpful? I think we have in the Barroso Commission actually introduced a number of working methods, both when it comes to auditing,

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when it comes to the internal procedures of checking, are we really doing the right things? Do we have to do them at the European level or can we leave it to Member States, and is this not a waste of money? I am sure you can find examples of that. I do not know if this is an example of it, but I am sure that if we look very carefully, we will find it, and we have to continue to look out for those things, and we have to be more effective and spend money in a way which shows the added value of Europe. So I can only agree that you will probably find examples of this, but it does not say that we are not carrying out sort of good impact assessments, so that we are not improving things. I think we can show that we have improved our own impact assessment and the subsidiarity test, and this will be even better with national parliaments keeping control also over what we are doing.

**Q81 Ms Clark:** We were told by one witness last week that it will be rare for measures to be adopted by the Council if only three Member States object. Do you broadly agree with that statement?

**Mrs Wallström:** I do not know if I understood your question.

**Q82 Ms Clark:** We heard evidence last week that it is rare for measures to be adopted by the Council if only three Member States object to the proposal, whatever that proposal may be.

**Mrs Wallström:** Well, I think what you refer to is the so-called Ioannina clause, that if a significant number of Member States disagree or if you can find sort of a convincing majority, then Council will not be willing to take a decision. Of course with the debate on the new treaty, the Ioannina clause was debated a lot, because the Polish also wanted this to be sort of written into the rules, and this is just to make sure that they will not be run over, that even if you have formally a majority, that there is the respect for minority position also on important issues. I think this is the kind of flexibility you need in a very diverse European Union such as the one we have today, with 27 Member States with different democratic traditions and decision-making procedures and sometimes very diverging views, so I think this just reflects a respect for the minority, if you want to.

**Q83 Ms Clark:** If that is the case, that there is going to be respect for minority views, and that if, say, three Member States object then a proposal would not proceed, do you think it is necessary to require one third of parliaments to express an opinion, which I understand is the rule, before the yellow card procedure begins?

**Mrs Wallström:** I think, as I said, the implementation rules for all of this, how to count, how to tally, how to register the whole timing, *et cetera*, has to be worked out when we see that ratification is ready, and I think it is too early to say anything on the details of it, but just to say that the rules are clear of course from the rulebook. I think also we have already shown by starting to transmit all the proposals to the national parliaments that we

take this again as a political commitment, and we are willing to listen to the opinions, and not only on the subsidiarity test but on the substance issues as well. So I think we should not start by sort of questioning -- these are the rules that have been agreed, and then it is a matter of implementing rules that have to be put in place later on.

**Q84 Ms Clark:** But you do understand there is a great deal of concern about the rules, because potentially Britain, for example, could be put in a position where proposals proceed which perhaps are not proposals that Britain agrees with, and that is the implication of the new rules.

**Mrs Wallström:** Well, this is for the national parliaments, it is an opportunity for the national parliaments to express their views, and of course it takes a lot of work, I think, also, between the national parliaments to agree on how should they deliberate on this and how should they decide on actions. So it is still a long way before the system is sort of fully up and running, and I think there are still a lot of discussions between the national parliaments as well, on the process.

**Q85 Chairman:** The point is well made, I think, by Katy Clark, if the reality is that the Council is a consensual organisation, and does not even like to take a forced decision if it cannot convince others to at least accept the logic of the proposal, it does seem that parliaments are being required to do something that is much more conflict-based. "Stop us if you dare", rather than, "We must convince you before we move on". So it does appear that there is a threshold, that threshold must be reached, but if it is clear a number of parliaments are beginning to express disquiet, it is as if the Council and the Commission, because the Commission will run this, are not prepared to see this and react to it by amending the proposals or withdrawing the proposals. They are saying, "Force us, get 25% or get 33% or get 55% for a yellow card or an orange card". That does not seem to be giving the same status to parliaments' opinion as you would appear to be giving to the Ministers in the Council, and I think that is the point being made.

**Mrs Wallström:** I kind of disagree, because really if they wanted to, they could count votes, which they rarely do in the Council, but they are allocated a number of votes, specific votes, and if they wanted to, they could say, "Okay, you can say whatever you like, but we take it to vote". But you are absolutely right in saying that most of the time, the Council tries to agree, because it is better to have a consensus, a way forward, implementation is very often more effective that way, if you agree. Again, the rules are clear, but then it is a matter of the practice and sort of the whole attitude, and I think the attitude behind giving the national parliaments a voice in all of this is the democratic anchoring of the European agenda, that we actually think it is more democratic if national parliaments, the democratic tradition in this particular country or in any other country, is also involved in the background of developing a proposal, and we will have your views, and it is an

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opportunity for national parliaments, and then, of course, also for you to impress your national government and their position, and where you already have a role to play, so I think all these elements that have to be seen together to be effective. To me it is more democratic to give also the national parliaments this opportunity. The rules have to be clear in case they have to be used, maybe it will turn out that we do not have to count votes in that way, because it should send a signal to us at an early stage also if we design a proposal, if so many of the national parliaments react, of course, we would.

**Q86 Chairman:** Even if they do not get to the threshold?

**Mrs Wallström:** Even if they do not get to the threshold, yes.

**Q87 Kelvin Hopkins:** Does subsidiarity cover sovereignty? For example, a national parliament might want to object to a proposal for EU legislation on the burden of proof in criminal prosecutions, on the grounds that a proposal might intrude unacceptably on its national sovereignty. Could such an objection be made under the yellow or orange card procedures?

**Mrs Wallström:** It sounds as if this is not the type of issue that would go under the subsidiarity test, because if this is on legislation or that a Member State would have to change its legislation or to implement existing legislation, that would have come up in another way, or before that.

**Q88 Kelvin Hopkins:** At some point, there might come a serious clash between a Member State government and the Union, especially given the rising levels of Euroscepticism across the whole of Europe. You have lost three referendums now, possibly four, if you include the Swedish referendum on the Euro membership, and at a point, a Member State government might become more Eurosceptic and might dig its heels in and say, "No, this is sovereignty, we are not going to move on this". At what point does the thing start to fracture?

**Mrs Wallström:** Well, this is part of the everyday working of the European institutions, the kind of clash, if you like, or the kind of different views that we have, and this is how we prepare proposals as well. We would get a signal very early on if there was a problem that had to do with constitutional issues in a certain Member State, they would signal that at an early stage from their diplomats or whatever to say that this goes totally against our legislation, it would not be an unknown issue to us, but the other issue that has to do with Euroscepticism or the atmosphere right now, I think that is part of the discussion we are having. It is a good debate in a democracy, and sometimes controversy makes a more lively debate, and it is good for democratic functioning, so I think this is only natural. You have that kind of tension sometimes also between the national level and the European level, I think this is good, because it makes us think, do we have to do it at the European level or is it better done at the national?

*The Committee became inquorate from 3.02 pm to 3.10 pm*

**Mr Steen:** We have not had an opportunity to have a full and frank exchange and we are shadow boxing a bit, but the point is that the French said no, so what do you do, you get rid of the constitution, call it a treaty, and call it the Treaty of Lisbon. The Irish then say, "We do not like it". You say, well, there is something wrong with the Irish. There is never a thought that there is something wrong with the Commission, or something wrong with Europe, it is always something wrong with the people who say they do not like Europe, as if the machine has to keep running on because it cannot ever face criticism and it certainly will not listen, and what is happening is every European country that has a referendum says no and yet every time they say no, the Commission just goes on regardless, and that is our concern, I think, many of us who are not Eurosceptic, who are quite Eurorealist, are worried about Europe not listening, and having listened, they do not want to act.

**Q89 Chairman:** I think we have already been through that.

**Mrs Wallström:** Could I just give a very short answer, because the fact is 19 Member States have ratified --

**Mr Steen:** By parliament.

**Q90 Mr Hoyle:** Not by the people.

**Mrs Wallström:** But I guess in the parliament, also here, that you would consider a vote by national parliament as democratically legitimate as a referendum, at least that is the Commission's view, that it is as democratically legitimate as a referendum, and Member States choose the method for ratification, so 19 Member States have ratified by now. Also all the 27 leaders signed the Lisbon Treaty and that means also that they have an international obligation to do everything in their power to make sure that they can come to ratification. So this is, of course, what they are considering right now, if so many Member States have ratified already, can we identify the problems or the reasons why the Irish people said no, so that we can do something about it? I do not think that is less democratic in analysing the problems and looking at how you can do something about it, as was done after the French and the Dutch no's, they looked at the reasons and they were able to find a solution to allow them to go ahead. I think people want to move on to do the real business, to engage in the issues that are of concern to citizens, so the high food prices, the high oil prices, the energy crisis, all of those things that we know, growth in jobs in Europe, and we think we can do it more effectively without—

**Q91 Chairman:** None of them require the Lisbon Treaty, that is the point. Business as usual, as someone said, after the French and German referenda, it is the institutions that want the change, not the issues.

**Mrs Wallström:** Two Member States have also had positive referenda.

**Q92 Mr Heathcoat-Amory:** You mentioned the seven year reform process, started by the Laeken declaration. As it happened, I was on the Convention on the Future of Europe that took the instructions to simplify and to create a Europe closer to its citizens, they were the instructions we were given. They were completely ignored. We created a constitution and now a treaty which is even more complicated and decisions are taken not nearer the citizen but further away, in new policy areas. So they did not just ignore, they completely contradicted the instructions given to them seven years ago. So is it not a little bit late to now suddenly say, well, we must now find out why people are voting no. You, Vice President, are in charge of communication strategy. What do you think the Irish are trying to communicate to you, and to the European Union, when they vote no?

**Mrs Wallström:** Well, we know fairly well already, we have carried out, as we did after the French and the Dutch no, we of course interviewed people, to know, to better understand. A lot of them, of course, say, "Well, you present such a complex text, like a treaty text", they will say, "We had too little information or we did not fully get sort of the content of the proposal", and they ask for more information. Other mentioned Irish neutrality, they mentioned taxes, they mentioned a number of individual issues behind, even those that are not sort of in the treaty, including abortion, and they mentioned a number of different reasons why they voted no. Of course, part of the campaign was if you do not know, vote no, the same as last time they had a referendum. This is, of course, always problematic, but we do take it seriously and we try to analyse, is there then a way forward? These concerns on neutrality or what have you, how can the European Union respond to that, but I think this is the process the Irish are in right now.

**Q93 Kelvin Hopkins:** A very quick question, people are voting no not just about the treaty, they are voting no surely about the direction of travel, from democratic nation state parliaments towards the European Union. They are saying this is too far and we want to stop here or even to raise up again the powers of democratic national parliaments.

**Mrs Wallström:** I am afraid you cannot make that interpretation about the Irish, because both the yes side and the no voters declared that they were clearly in favour of the European Union and the membership, and they were not against the European Union.

**Q94 Kelvin Hopkins:** It is a matter of degree, not absolute in or out.

**Mrs Wallström:** I mean, they of course can do much more of an analysis, but this is not at all the interpretation, even in Ireland, because they have basically a very positive view on the EU membership and the European Union, so it was much more on some of these particular substance issues and also the fact that the yes side was seen to be much more effective and also creating sort of a fear of changing the status quo.

**Q95 Kelvin Hopkins:** Was there not strong opposition on the left in the light of the ECJ ruling on *Viking Line*, for example, apparently giving more power to employers rather than employees?

**Mrs Wallström:** It was one of the elements mentioned, absolutely. There were a number of elements behind the no vote, so this is important to analyse, and this is what the Irish have asked for, give us some more time to make the analysis and see, is there a way forward, when so many Member States have already concluded their ratification, and the fact that we want to move on to sort of the substance issues, and the business that we are expected by our citizens to deal with, and that is, I think, what we all hope for.

**Q96 Ms Clark:** As you said, it would seem that what happened in Ireland and indeed what happened in Holland and in France was that people voted not necessarily only on the text of the treaty in front of them, but a whole range of other issues.

**Mrs Wallström:** On the context.

**Q97 Ms Clark:** On the context, and basically, it was concerns about the thrust of many of Europe's policies. It has already been said that there is a lot of concern on the left around issues about workers' rights, and what is called the neo-liberal agenda of Europe, the sort of move towards privatising everything, and of course Britain has been at the forefront of that, so that may be less of an issue here because we are already so far down that path. Do you not think there is something really quite fundamental we have to learn, that people feel they have to vote against a treaty because it is the only way they feel they have an influence, to actually have a say over European policy?

**Mrs Wallström:** I do not think you can have such a far-reaching interpretation, because I think it is important that we do the follow-up and the interviews and get to know better exactly what is behind, and is very comfortable for all of us to try to interpret it the way we want, but we have already asked, in the Eurobarometer follow-up survey, and the Irish may themselves do that kind of analysis, and I think we have to give them time to do it, but this is true for all these referenda or even for the national ratification, that the bigger picture of course plays into any decision and into any vote, and this is something you always have to counter, but we also had a couple of referenda with yes, and I think they, of course, constantly insist on also being respected, that they have referenda saying yes to the treaty. So this is exactly where we are, can we find a way out, and only the Irish can give us an idea of how that could be done, and they want some more time and that has been given to them.

**Q98 Mr Hoyle:** I think you have answered my question in one sense, that a yes in Europe means yes, a no has to mean yes, I think that is what is coming across loud and clear. The other issue is that the difference this time is that nations have not allowed referenda, because if we had had a referendum right across—the reason people were

not allowed a referendum was because they would have said no and unfortunately they are opposed to the federalisation of their own states. This is a federal agenda that is not acceptable, and therefore really what should happen, it should go to the public and let them decide whether they want to become a federal state of Europe or whether they want to remain within their own sovereign parliaments, and that will be the way forward. If it all came out as a vote yes, no arguments, but when it is no, please accept people do mean no and it does not mean yes.

**Mrs Wallström:** No, but as I said, no is an answer but it is not a solution to the problems that are behind and the problems we are trying to solve, through a co-operation and a discussion and a procedure that has been going on for so many years, and this is what the leaders feel a responsibility to do. I think the other thing has to do with the nature of any referendum, and it is for Member States to decide if they use the national parliament procedure or if they use a referendum, but the nature of a referendum means that when you put a text, of course, that is so complex and that can be interpreted in so many different ways, it adds an element of uncertainty. It is always very difficult to interpret the result—

**Q99 Mr Hoyle:** Why do you not go back to the people who said yes and say, "We do not really think you have got this right, why don't you have another look at it and why don't you have another rethink?" You are happy to accept a yes but never a no.

**Mrs Wallström:** The basic provision is of course that all Member States have to ratify, they have to come to a yes in one way or the other, if this is to be accepted as a new treaty, and that is why of course they want to continue to analyse, to see, is there a way to get over these problems, can we solve the Irish concerns in one way or the other? I think that is also part of the democratic tradition.

**Q100 Mr Heathcoat-Amory:** You mentioned that people want to get on with policy matters, such as energy and climate change. Can you explain why one needs a new treaty for climate change, to take an example? There is lots going through at the minute on renewable energy and carbon reduction on the existing treaty base, and there are only six words in the Treaty of Lisbon dealing with climate change. So why is it that you are so obsessed with changing the powers all the time, and getting more influence and powers and majority voting and a bigger budget and new policy instruments in Brussels, when it seems to be working perfectly well at the minute? We have enlarged twice, there is no paralysis, this Committee is deluged with weekly documents of new initiatives in Brussels, so I do not quite understand why—these problems you keep referring to, what are they? Why can you not just accept that people do not want any more and get on with it?

**Mrs Wallström:** I am glad if you think that we are effective and sending proposals, and that we are dealing also with issues like climate change, but is it not significant that these would be—actually the two

new areas that would be added to a treaty would be climate change and energy, that we point out that these—

**Q101 Mr Heathcoat-Amory:** Six words.

**Mrs Wallström:** Yes, but the most important, I would say for our generation, that we actually add, it is not in there, it is not in the treaties, and it would give us that as an overall objective for the European Union, so I think this is very significant. I think the problem is that it is too easy to block decisions with a provision of unanimity on so many policy areas, and this is why maybe this is not the best example, because now there is a political will, we can write on that, but you have in the area of co-operation in judicial matters or what have you, where things have been blocked for years and years and years, where we have not been able to be effective, and if we have 27 Member States, we should not play according to the rules that were designed for 12 or 15, it is evident. I will miss most of all the chapter that is called participatory democracy, allowing actually for citizens to have a voice in all of this as well, and the role for national parliaments. I think this is a very strong signal, and Council having to meet in public, not being able to meet behind closed doors. I think these are some of the examples that are evident and would help us a lot in the future.

**Q102 Chairman:** Can I thank you? I hope we can sum up in one minute, I have to say that the conundrum or the lack of logic in the present situation where we say 27 countries must ratify, and I think formally only 10 have deposited their instruments, not 19. We have had in the past some yes referendums, for Mr Hoyle's benefit, in the last constitutional vote, there was one in Spain and one in Luxembourg, so not everyone is necessarily going to go for a no. We do have one country where it has been said they will not go back for a second referendum, their constitution under the *Crotty* case is quite clear, to get the treaty through they must have a referendum, so they are not going to have a referendum, so it is never going to be 27 countries. I just cannot understand where we are going and what this analysis and flash opinion polls are all about. There is something fundamentally blocking the road. You can either drive a new road or turn back, and I just cannot understand why that is not being talked about publicly and honestly. We are talking about subsidiarity on issues, the Commission appears to be saying the most fundamental issue, the democratic right of the people, we are going to ignore it, and I cannot see how there is any other conclusion can be drawn.

**Mrs Wallström:** But nobody ignores it and I think it is for the Irish, it is only them who can say, no, we have come to the end of the road, this will never be possible, so we just have to leave it with that, or they will come back and say, we think that this is the way forward, this is how we can contribute to the European institutional block that we have created now, this is how we can overcome, this is how we can

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remedy the concerns of the Irish people, it is only them, so let us not prejudge—

**Q103 Chairman:** So you are saying drive a new road, which means more amendments to the constitution, 27 other ratification processes.

**Mrs Wallström:** It is for them to tell us, it is really for the Irish, and we respect the no vote, and they have to tell us if there is a way forward, but I do not think it is something to be surprised over, that they want

to find out more what was behind the no, since they know they have all the political parties and a society which is EU friendly basically, and have enjoyed the EU membership so much and benefitted from it.

**Chairman:** Can I thank you for coming along and giving your evidence, both formal and informal. I think we are all now wishing to get into the Chamber to hear the statement. The ruling here is if you do not hear the beginning of the statement, you do not get called for a question. So thank you for your attendance.

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## 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

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*Witnesses:* **Mr Jim Murphy MP**, Minister for Europe, and **Ms Deborah Bronnert**, Head of Europe Delivery Group, 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. 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

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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 10 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 going 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

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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—

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**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 treaty 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

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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 10 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

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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

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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 theme. Imagine a situation where we do not have the present Government—and I hope we would have it forever but it may not happen—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 which is less euro-enthusiastic than the governments we presently have. At that point a government and a parliament together might choose to stretch the boundaries of subsidiarity, to want to draw back to have a decision taken by themselves

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and their parliament, away from the European Commission, and to 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. 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

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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 and 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 provenance 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.

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**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 areas of opt-ins have 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. 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). 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 seeking 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.

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25 June 2008 Mr Jim Murphy MP and Ms Deborah Bronnert

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**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.

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# Written evidence

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## **Memorandum submitted by the Office of the City Remembrancer**

I am writing in response to the Committee's announcement last month of an inquiry into the role of National Parliaments under the Lisbon Treaty. We are not in a position to make a full substantive submission to the inquiry but, as you'll be aware, the City has for some time strongly supported the enhancement of the Parliamentary scrutiny process. The proposals in the Lisbon Treaty, therefore, insofar as they achieve that, are to be welcomed. We look forward to seeing the practical consequences of the new provisions when they take effect.

The City maintains a keen interest in the work of the Committee and we intend to follow the progress of this inquiry closely.

*April 2008*

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## **Memorandum submitted by Richard Corbett MEP, Labour Spokesman on Constitutional Affairs in the European Parliament**

House of Commons Scrutiny Committee inquiry into the role of National Parliaments under the Lisbon Treaty.

This is the evidence of Richard Corbett MEP to the inquiry of the House of Commons European Scrutiny committee into the role of national parliaments under the Lisbon Treaty.

### INTRODUCTION

The primary focus of debate on the provisions of the Lisbon Treaty has been on its more glamorous elements—the longer-term President of the European Council, the status of the “double-hatted” High Representative on Foreign policy, the extensions of Qualified Majority Voting and extension of co-decision powers for the European Parliament.

Less noticed have been the provisions affecting the role of national parliaments. The role of national parliaments in the EU legislative process varies widely from country to country, with some more effective than others at scrutinising EU legislation and the positions taken by their government ministers. Nonetheless, at present, national parliaments have no formal role in EU law making. Legislation is adopted by national governments in the Council (in most, but not all, cases jointly with the European Parliament). The Lisbon Treaty contains a number of provisions that will increase the role of national parliaments.

These innovations, taken with the increased role for the European Parliament through making the co-decision procedure the normal legislative procedure applying to virtually all European legislation, will greatly increase the parliamentary scrutiny and democratic accountability of the European Union.

### MORE TIME, AND A CHANCE TO REACT

Protocol 9 extends the period of time between the publication of a Commission legislative proposal and placing it on the Council agenda from six weeks to eight weeks. The new Protocol states that there are to be eight weeks “between a draft legislative act being made available to national parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure”. There would then be at least 10 days between placing on the agenda and the adoption of a position.

It also spells out national parliaments are to receive documents directly from the EU institutions rather than having to wait for the documents to be deposited by national governments.

That same protocol also offers the Member States the possibility, if the national legal system allows such provision, of bringing an action before the Court of Justice, on behalf of their national parliament or one of its chambers, against a legislative act on the grounds that it violates the subsidiarity principle.

Most commentators have focused on the “yellow” and “orange” card procedure (which was, in large part, a UK idea) whereby national parliaments will have the power to send proposals back to the Commission. These give national parliaments the right to express concerns, directly to the Commission, that a legislative proposal breaches the subsidiarity principle, whereby the EU can only act in matters where action is more effectively taken at EU rather than national level. National parliaments will have eight weeks to submit “a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity”. The Commission will then be required to reconsider its proposal, and their adoption by the Council would anyway be less likely.

The “yellow” and “orange” card mechanisms have been cited as a defence for national parliaments to guard against swathes of unwanted EU legislation. In practice, however, I do not think that the “yellow” and “orange” card mechanisms will be extensively used. They are important safeguards that can be used

where necessary, but this will, in practice, be infrequent. For example, the Finnish Parliament has had a subsidiarity control mechanism since their accession to the EU in 1995, and in that time has hardly ever found a case where they felt that a Commission proposal violated the principle of subsidiarity. This is because the principles of subsidiarity and proportionality have been part of the treaties since Maastricht. It is a legal requirement taken very seriously by the institutions. Besides, it should be remembered that Commission legislative proposals are usually in response to the express wishes of the Member States or the European Parliament, and can only be adopted if they have the support of the overwhelming majority of Member States.

I think the significance of the eight-week period will lie elsewhere, namely in that it will give national parliaments and their committees more opportunity to help shape the position taken by the relevant minister before he or she goes off to Brussels and not just be told about it afterwards. In short, it will make it easier for them to take a more proactive rather than reactive approach to draft EU legislation not so much on the odd occasion that subsidiarity is questioned, but on the substance of proposals.

This is a significant improvement to the democratic accountability of the Union and will. Indeed, it will provide an additional “quality control” to EU legislation.

#### INCREASING PARLIAMENTARY COOPERATION BETWEEN WESTMINSTER AND BRUSSELS

The Protocol also provides a basis in the Treaty for cooperation between national parliaments and the European Parliament who “shall together determine the organisation and promotion of effective and regular interparliamentary cooperation”. This is a logical step. The Lisbon Treaty establishes co-decision, whereby the European Parliament, directly elected by the citizens of Europe, and the Council of Ministers representing national governments, are equal partners in the EU’s bi-cameral legislature, as the ordinary legislative procedure. Under the Lisbon Treaty, virtually all EU legislation will be subject to the double approval of the Parliament and Council. This extension of the European Parliament’s powers, coupled with the increased role for national parliaments should lead to a closer relationship between parliamentarians in Westminster and Brussels.

At present, when a potentially controversial decision or item of European legislation is to be discussed, the select committee in question calls the Minister to give evidence. The extension of co-decision, and the consequential increase in power for the European Parliament’s committees, should mean that departmental select committees also take a closer eye on the work of individual European parliamentary committees and influential MEPs, particularly those who are on committees dealing with legislation or the budget.

I believe that the proposal that MEPs must come more often to Westminster is an excellent one. It already happens to a degree. I myself have appeared before Parliamentary Scrutiny Committees on a number of occasions. Some national parliaments systematically involve the MEPs from their country in their scrutiny committees as non-voting members or permanent observers. This idea should be considered in Westminster.

However, that is not to say that there is little cooperation between Westminster and the European Parliament at present. Indeed, it has developed, particularly since the Amsterdam Treaty, which gave a formal opportunity for scrutiny of draft EU legislative proposals by national parliaments. Tripartite meetings between MPs, British MEPs and Peers are held three times per year. Joint parliamentary meetings of various kinds are held in the European Parliament, to which parliamentarians from all national parliaments are invited. Last but not least, there is COSAC, thanks to which many MPs dealing regularly with European issues in national parliaments now know their colleagues from other countries rather well.

#### CONCERNS

The European Scrutiny Committee<sup>1</sup> has voiced concerns about the passage in the text that reads “national parliaments contribute to the effective functioning of the Union”. This was amended during the IGC from “national parliaments shall contribute to the effective functioning of the Union”, a phrase which some felt inferred a legal obligation on national parliaments. I do not share these concerns. On the contrary, the passage formalises the fact that national parliaments, not just the EU institutions and national governments, are involved in formulating European policies, and, consequently, has been welcomed by the vast majority of national parliaments across the EU.

With regard to claims made by some opponents of the Treaty that the Reform Treaty is “self-amending” and so “the powers of the EU could be increased without the need for any new treaty”, it is worth pointing out that no change to the EU treaties can be made without the approval of each and every Member State. Even minor changes, according to the treaty, must be “notified to the national parliaments”, and if even a single one objects, the changes “shall not be adopted”.

<sup>1</sup> House of Commons European Scrutiny Committee report “*European Union Intergovernmental Conference: Follow-up report*”, 3rd Report, 27 November 2007, p6–7

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 CONCLUSIONS

Taken individually, none of these improvements are revolutionary or ground-breaking: However, taken as a package they amount to a set of reforms that should improve the quality of scrutiny of EU legislation by national parliaments and make explicit their role in drawing up EU law.

The Lisbon Treaty offers national parliaments a number of tools with which they can scrutinise European legislation more effectively. The new system, with more powers for directly elected parliamentarians at both national and European level, should allow for the development of EU law within an institutional framework that is more transparent and has more clear lines of democratic accountability than ever before.

May 2008

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**Memorandum submitted by Andrew Duff MEP, Spokesman on Constitutional Affairs,  
Alliance of Liberals and Democrats for Europe (ALDE)**

**THE ROLE OF NATIONAL PARLIAMENTS**

1. The Treaty of Lisbon makes significant improvements to the role of national parliaments within the European Union system, not least in terms of clarification. The issues surrounding the role of national parliaments have been discussed in depth and at length since the Convention on the Future of Europe began its work in 2002 and they do not need to be repeated here. I would just like to make a few new points which I hope will be useful to the Committee.

2. First, there is a danger that, in assessing the Treaty of Lisbon, national parliaments become obsessed by the early warning mechanism on subsidiarity. It was understood by those of us involved in its drafting and, then, re-drafting that the mechanism, although a necessary addition to the system of governance of the Union, was not really intended to be used. It is, in Bagehot's terms, more a dignified part of the European constitutional settlement than an efficient one. Or, in other words, if it were ever necessary actually to deploy the mechanism to block a legislative proposal, that deployment would signal a critical failure of the normal procedures. We would, in short, be facing a crisis of confidence in which a majority of member state governments had lost the support of their national parliaments on an important European issue, and in which the European Commission had not listened to warning signals from national parliaments at the earlier stage of proceedings.

3. The principle of subsidiarity has a respectable part to play in EU decision making but its importance should not be exaggerated. Instead, law making at the EU level would profit from more regular dialogue with national parliaments not on the problematic issue of subsidiarity but on the quality or direction of the actual measure. MEPs hear many views about our legislative work from trade, business and professional bodies, NGOs, social partners and member state and other governments: we hear little at the appropriate early phase of legislation from the relevant committees of national parliaments.

4. To encourage such interaction, in the case of the UK, more frequent contact between MEPs, MPs and peers would be valuable. It is frustrating that the promise of a reform of Westminster scrutiny procedures involving MEPs has not yet borne fruit.

5. A working party of COSAC is to examine how national parliaments could collaborate with respect to the early warning mechanism, and in particular how the IPEX system could be adapted to keep a tally on the various subsidiarity checks. However, it would be wrong, in my view, for COSAC to seek to turn itself—or to become by accident—a forum in which national parliaments were driven to commit themselves to a collective view in favour of wielding early warnings. Such a development would not only be a radical revision of the function of COSAC (calling into question the European Parliament's continued membership of that body), but would also impinge upon the sovereign rights of each and every parliament to decide things for itself. COSAC will fail quite quickly if its main purpose becomes to promote the use of the early warning mechanism.

6. The last point I would make concerns the relationship between national and regional parliaments. As you know, the Treaty of Lisbon raises the profile of sub-national assemblies with legislative powers. They too must be included in the formal consultative and scrutiny procedures where their competences are affected. Having spoken to the Scottish Parliament and Welsh Assembly on this matter, there is clearly interest in exploring the possibility of achieving a more formal agreement between them and Westminster in order to facilitate such collaboration. I hope that the Committee will be able to encourage a strengthening of its links with the Edinburgh, Cardiff and Belfast parliaments.

May 2008

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**Memorandum submitted by Professor Juliet Lodge, Jean Monnet European Centre of Excellence,  
University of Leeds**

## 1. SUBSIDIARITY AND PROPORTIONALITY

The comments below address the likely practical considerations that must be taken into account if the new provisions for national parliaments are to be harnessed to the benefit of national parliaments and their electorates.

The ability of national parliaments to perform a watchdog role vis-à-vis EU legislation depends on far more than the Lisbon treaty provisions on subsidiarity and proportionality.

It requires:

- i) Reappraisal of national procedures for information exchange and due scrutiny;
- ii) liaison with MEPs for strategic purposes;
- iii) effective and timely negotiation, coordination and coalition building with other member states' parliaments;
- iv) improved communication with sub-national elected bodies charged with implementing EU legislation "close to the citizen";
- v) greater cooperation within COSAC whose role is likely to be enhanced by virtue of informal decisions to "liaise" in order to have impact;
- vi) timely access to information (from the Commission, Council and European Parliament, EcoSoc; reports and briefings of EU agencies as appropriate eg Europol, Eurojust, Frontex);
- vii) timely scrutiny by the relevant national parliament committee and liaison with other domestic scrutiny committees and departments with an interest in the subject matter under discussion;
- viii) liaison with parliamentary parties at home and with the respective party groups of the European Parliament;
- ix) appreciation of coalitions within EU member governments and across parliaments for purposes of using Lisbon provisions to invoke yellow card, subsidiarity and blocking or facilitative blocs; and
- x) exchange of experience with MEPs and former MEPs in order to improve appreciation of effective tactics for maximising influence over the content of draft EU legislation.

The Lisbon Treaty provides national parliaments with a long overdue opportunity to play a role in the assessment of draft EU legislation. The framing of the role as a subsidiarity and proportionality check, implying that national parliaments will be able to apply a "brake" on European integration.

This is but the starting point for national parliaments to view themselves as part of the supranational political process, performing communication, education, control and vigilance functions on behalf of the electorate.

## 1. OVERSIGHTS OF THE LISBON TREATY

The Lisbon Treaty provides welcome improvements in general terms of the formal institutional accountability requirements and possibilities for democratic scrutiny of draft legislation by the European Parliament and national parliaments. It is a prisoner of its time and reflects a traditional approach to a regulatory framework divorced from the information age, regardless of Commission and national governments' commitment to 2015.

2. National parliaments should draw attention at the outset to the problems that arise from insufficient attention to the means for accessing and transmitting information whether between institutions within an administration, across administrative departments within a locality, region, state or internationally and/or across agencies with common interests, as in the justice and home affairs and security sectors. Citizens' interests are inadequately reflected. The risks of this are compounded by inadequate attention to a risk and impact assessment of co-decision in practice. The increase in informal brokerage of agreements between the Council and the European Parliament increase efficiency of decision-making without necessarily improving or enhancing democratic scrutiny and accountability.

3. The evolution of standing committees on an ad hoc basis within existing institutions and EU agencies may be warranted for the purpose of enhancing administrative efficiency and contributing to operational effectiveness. But, this does not necessarily enhance transparent and accountable decision-making if "information" is defined or held in inaccessible ways or "ad hoc" bodies.

4. Weak provisions on legislative scrutiny processes, coupled with the establishment of barely visible committees, mean that significant issues escape public view. Lack of transparency could impede the work of national parliaments. An illustration of such weakness is provided by the provision that the EP and national parliaments "shall be kept informed of the proceedings".

5. The element of discretion in the timing of the extent and disclosure of information aggravates the suspicion that in practice genuine parliamentary oversight could be hampered. Cooperation, coordination and similar arrangements allow for diversity in practice. Leaving decisions in the hands of member governments when harmonisation, common or single rules might better serve the interests of citizens and parliaments is risky. National parliaments could add value by ensuring that their own citizens are not placed in a less equal position to those of other member states and that they themselves have as much access to pertinent information as their counterparts in other member states.

6. The absence of a clear legal base for many measures under the AFSJ means that opt-outs will further weaken the ability of parliaments and citizens to turn “access to documents” into a strong tool for demanding accountability. “Access to documents” becomes problematic and the rights of the European Parliament and national parliaments could be curtailed by provisions that offer only the opportunity to receive draft documents, or be “notified” (in the event that the emergency brake is applied) of enhanced cooperation agreements among a specific number of states. It cannot be assumed that all nationals of EU states will be treated equally as EU “citizens” if some states have opted out of provisions regarding cross-border cooperation and the Charter on Fundamental Rights.

7. The Lisbon Treaty overlooks the use of information and communication technologies that (i) offer the potential to expedite information sharing, mutual access to documents and online re-drafting and amending of documents; and (ii) make visible the steps and procedures reached as a piece of draft legislation progresses through the legislative process. Both might be seen as improving access, transparency and democracy but the extent to which national parliaments are as yet linked into existing parliamentary document exchange systems is unclear, as is any use they might make of them.

## 8. ADDING VALUE

The provisions for an enhanced role for national parliaments is designed to add value to political processes at the European and national levels. This implies that national viewpoints as distilled by the representatives of the electorate, rather than the administrations and executives, will complement the representation of national positions through the Council and Coreper, for example. If that is to happen, greater coherence and consensus in the presentation of the national position has to be facilitated.

9. This in turn implies action to construe the role not simply as a subsidiarity and proportionality check function, but as one that considers taking on a broader impact assessment function, and a role in communicating more with regional parliaments and the Committee of regions, as appropriate. This implies further reappraisals of existing working practices and links.

10. Domestic party political differences will have to be subsumed in the distillation of a common national interest or position. Different national parliaments may have different approaches but it is probable that those more accustomed to exercising a role *vis-à-vis* their Ministers and/or in conjunction with regional assemblies/parliaments will have good practice models worth considering. It is also likely that they would hope to see their practices transferred to others.

11. The opportunity for national parliaments to play an enhanced role, notably in invoking subsidiarity “brakes”, must not be misused for domestic political purposes. In election periods, or where the stability of coalitions is fragile, there may be a temptation to use the subsidiarity role as an excuse or opportunity to frustrate or strengthen positions *vis-à-vis* government ministers.

12. It would be prudent for national parliaments to interpret their functions imaginatively. Bicameral legislatures must collaborate to maximise their impact and capitalise on existing expertise, something that may require a change in current working practices.

13. There are extensive opportunities for national parliaments to influence the content of proposed policies in respect of justice and home affairs. Note should be taken of proposed measures adopted without reference to parliaments in order to perform a subsidiarity and proportionality check, and to assess the financial implications for individual member states. The European Parliament is not always in a position to do so.

14. Those national parliaments and MPs unaccustomed to working in the supranational arena face particular challenges. Some have engaged reluctantly with their natural allies—Members of the European Parliament—in the past. National parliaments have much to learn from the history of the European Parliament in terms of effectively influencing legislation from pre-decisional to adoption stage.

15. It is essential to view MEPs and the committees on which they sit as allies and essential sources of expertise, information and advice on tactical matters regarding the exercise of effective political influence *vis-à-vis* the Commission, crucially both informally and formally. The development of trusted relationships with MEPs and their staff can be beneficial on many levels to national parliaments.

16. There are many opportunities for significantly expanding the impact of national parliaments both on the formal political agenda and priorities in the EU and on the public mind. Arts. 9 & 10 must be fully exploited.

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17. Art 2 of the Protocol must be carefully addressed in practice in order to secure agreement on the meaning of “exceptions” warranting no or little consultation by the Commission.
18. Art 5 of the Protocol puts a premium on national parliaments’ ability to consult swiftly with sub-national parliaments having legislative powers. Equally, the latter may lobby national MPs.
19. Bargaining and coalitions. As part of the supranational political process, no one national parliament can influence effectively draft proposals or outcomes without the support of a significant number of other parliaments. The starting point for cooperation is inevitably COSAC.
20. Art 7(i) of the Protocol signifies an obligation for other institutions to take account of the reasoned opinion of the national parliaments, or of a Chamber of national parliaments.
21. COSAC’s role is likely to increase for reasons of functional necessity to support national parliaments in identifying issues, providing possibly an overview of the financial impacts and associated displacement of burdens arising from and legislative proposals from the Commission and others.
22. COSAC may also provide a means for avoiding duplication of effort but especially bicameral national parliaments must appraise their own committees’ roles to avoid duplication of effort, to improve information sharing, and to distribute and share responsibility for undertaking subsidiarity reviews with a view to providing each other with a preliminary evaluation.
23. A clear understanding of what subsidiarity (and proportionality) mean(s) in practice must be agreed. In 2006 national parliaments wrangled over the meaning of the term subsidiarity.
24. There must be provisions within a national parliament to make any deviation from any emerging cross-national parliament consensus known in an appropriate form to national Ministers and MEPs.
25. National parliaments should collate their own statistics and provide an annual report to the Commission, Council, European Parliament, EcoSoc and the Committee of regions on the outcome of their subsidiarity reviews, indicating reasons why they either agreed or diverged from the champions of the legislative proposal, and identifying any significant problems in practice, process of consultation, and emergent divisions over policy areas.
26. COSAC should become the administrative repository and political “memory” of national parliamentary inputs.
27. The mere right to be consulted can be meaningless in terms of the exercise of influence. Clarity is needed over the technological means by which information will be transferred, shared, stored and accessed.
28. The reason for any review, amendment or withdrawal of a proposal (art 7.3) will be made known to national parliaments within imprecise deadlines. There is need for access to the information (presented to the Commission and others) which informed the reasoned opinion and subsequent action.
29. Automated exchange of information may magnify the accountability and democratic deficits. Automatic information sharing is to be facilitated by identity management systems as the gateways to partial or full information disclosure. Such systems are central to the effective implementation of e-government for mundane purposes (like renewing television licences, commercial transactions, etc) and at the heart of the envisaged cross-border exchange of information for policing and law enforcement purposes. Decisions on the latter may be taken by obscure committees within the Council framework, for example. Their invisibility in the decisionmaking process makes it hard for national parliaments to track them and to discover the potential impact the implementation of decisions they take may have for national conceptions of proportionality and subsidiarity.
30. Information sharing, categorisation of data, judicial cooperation, uncoordinated implementation of the principle of availability, inconsistency across and within agencies and special investigative methods<sup>2</sup> need to be addressed in a coherent way to avoid duplication and contradictory practices and outcomes. Differences in accountability among EU states are likely to persist but national parliaments could highlight them to the benefit of citizens.
31. The subsidiarity check function given to national parliaments therefore could be exploited to the benefit of wider generalised respect for the principles of parliamentary accountability and control.
32. Where the freedom, security and justice area is concerned, national parliaments’ roles need to be revisited and strengthened individually vis-à-vis their domestic law enforcement agencies and all those other agencies who are and will be increasingly engaged in bilateral and, multilateral information exchange and intelligence exchange. For example, a common intelligence framework may imply a need for a single database. National parliaments are likely to have particular views on whether or not this meets subsidiarity and proportionality criteria. Making a judgement on this, however, will inevitably make additional demands for expertise.
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<sup>2</sup> Council of the EU, *Implementation of the EU Counter-terrorism strategy*—Discussion Paper, 15448/07, Brussels, 23 Nov 2007.

33. Technological capabilities (that vary greatly among EU27) define agendas in ways which allow bureaucrats greater input than elected politicians. The blurring of administrative boundaries impacts on accountability at all levels. This needs addressing especially if there is a temptation to use “softer” bilateral channels and agreements with EU members and third states’ agencies that elude national and European parliamentary supervision and control.

34. The political dynamics of giving national parliaments a role, however limited, will have major repercussions on the way in which they organise their own work in their domestic scrutiny committee processes (especially in bicameral systems and those where regional parliaments and assemblies have some deliberative and consultative functions).

35. It will be important that the opportunity for national parliaments to have a say is construed constructively. It must not become another vehicle for political posturing against the government of the day. Coalition governments are common in many states. The temptation to delay or frustrate government goals using whatever means is available may lure national parliamentary representatives to divide among themselves in a way that inhibits them from presenting a coherent, consistent and sustainable “national” viewpoint. If national parliaments are to present a national view, they will have to find means of creating consensus among MPs used to sometimes working against each other.

36. A constructive and mutually reinforcing relationship between the European Parliament and national parliaments would help both to perform their roles to the benefit of democratic accountability. It was also help to close the democratic deficit at both levels.

*May 2008*

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**Memorandum submitted by Diana Wallis MEP, Vice President of the European Parliament,  
Spokesperson for Legal Affairs (ALDE Group), Representative of the ALDE Political Group on the  
Working Party on Reform of the European Parliament**

1. The relationship between the European Parliament and national Parliaments should be based on openness and respect. It seems obvious to me that if an early warning mechanism on subsidiarity is created for the benefit of national Parliaments by the Treaty of Lisbon, these new powers will indeed be used.

2. The European Parliament is already preparing for such an eventuality, and would also do well to improve its own subsidiarity check, which is currently underused. I would like to insist upon the importance of the European Parliament working together with national Parliaments and improving relations, rather than dismissing any possibility of the early warning mechanism being used. For instance, Rapporteurs on any particular file in the European Parliament should become more accustomed to visiting national capitals, and in particular national Parliaments, to exchange valuable insights at the earliest possible stage.

*June 2008*

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**Memorandum submitted by the Local Government Association**

**SUBSIDIARITY AND LOCAL GOVERNMENT**

With approximately 50% of regulation implemented by local government emanating from the EU, local communities feel the impact and opportunities resulting from policy making in Brussels, whether this is from new opportunities for local businesses from the European market or the changing demography of our villages and cities resulting from the free movement of labour within the EU. It is at the local level that EU policy making becomes real. As councils manage the impact and delivery of EU law, we feel that local government needs a better partnership with Government to influence the development of policy.

The LGA would like:

More effective involvement of local and regional government in the scrutiny of proposed EU law. EU regulation and law has profoundly affected local communities. There have been many positive benefits. For example EU environmental standards have helped create a better living space for us all. But there has also been a negative impact where the local dimension has not fully been addressed. The LGA has increasing concerns that inflexible EU law-making can ignore the impact that directives can have at a local level. The sight of fridge mountains in 2002 served as a graphic reminder of what happens when the full implications of EU laws are not properly considered. More effective and responsive scrutiny of decisions being made in Brussels is urgently needed to make sure that the British people don't suffer the consequences of poorly debated directives from Brussels. We would like to work with the Government on a bold step and consider establishing a scrutiny committee which includes Parliamentarians and local councillors or reforming the existing system to ensure that local government's voice is better and more systematically heard. This will

better enable us to influence the course and content of new EU laws that will affect local communities and could be a joint local/central partnership in ensuring that the EU will not act where a task can be better achieved at the local or regional level (the “subsidiarity” principle).

The obligation on the EU to minimise the financial and administrative burdens of new EU law to be more stringently enforced. In making new EU laws, there is an obligation on legislators to consider how cumbersome and costly they will be to implement, and to keep burdens on local authorities to a minimum. We have welcomed the development of Impact Assessments (a British invention) and we would like to see steps taken to include a clear local angle into this area of work. The LGA could also be equated with the devolved administrations and consulted by Ministers when examining EU proposals at the same time as devolved administrations are consulted to ensure a consistent and full dialogue with the bodies that often end up implementing policy.

*June 2008*

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