



European Scrutiny Committee

Oral evidence: [Animal Cloning: the use of Article 352 TFEU](#),
HC 1226

Wednesday 9 April 2014

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Members present: William Cash (Chair); Andrew Bingham; Michael Connarty; Kelvin Hopkins; Jacob Rees-Mogg; Henry Smith; Stephen Phillips

Questions 1-27

Witnesses: **George Eustice MP**, Parliamentary Under-Secretary of State, Farming, Food and Marine Environment, Department for Environment, Food and Rural Affairs, **Simon Waterfield**, Head of the On-Farm Animal Welfare Team, and **Simon Parker**, Defra lawyer with responsibility for EU legal matters, gave evidence.

Q1 Chair: Welcome, Mr Eustice. Thank you for responding so quickly to our request to give evidence. Before we begin, I would just like to remind you that the draft Directive on the placing on the market of food from animal clones does remain under scrutiny. Today, we want to deal with your approach to the parliamentary scrutiny of the draft Directive and, in particular, the question of the use of Article 352 of the TFEU as a legal base for this proposal. This Article of course has very considerable competence. It is very serious, as we all know and have done for many years. This is especially the case when what we are seeing concerns a proposal that clearly breaches the subsidiarity principle. You will be aware, from the reasoned opinion that we recommended and the reports we produced, that we consider the Government has not properly policed the use of Article 352 TFEU as a legal base. The use of the flexibility of provision must be justified by first establishing whether the measure to be adopted is “necessary” within the framework of the treaties. It must then be established that the treaty does not otherwise provide the “necessary” powers. Do you agree that it is important for the Government to police these requirements proactively, and at an early stage in the legislative process, to avoid the risk of precedent-setting in competence creep? The second question is whether you accept that the existence of safeguards at later stages of the legislative process, namely the requirement of unanimity and approval by the Act of Parliament, under the European Union Act, does not relieve the Government of this responsibility.

George Eustice: On the first one, about whether or not a legal precedent would be set, the important thing to recognise is that unless it entered force, it would not set a legal

precedent. As I made clear in the debate that we had on this some weeks ago, the Government does indeed share some of the Committee's concerns about the use of Article 352 as the legal basis for this. We have written to the Commission raising those concerns. We have not yet had a response back to that.

We share some of the concerns, but we do also think it is important for us to stay engaged with that discussion, given that some member states have views that are not always in line with our own on this issue around cloning and how we regulate it. We do not see any benefit in excluding ourselves from the discussions on this proposal. We do not think that by engaging in discussions, we do anything to prejudice our position in terms of our ability to use a veto. Simon, I do not know if there is anything you wanted to add.

Simon Parker: No, I think that is right. In relation to the question about whether the fact that there is unanimity relieves the Government, it is important to emphasise that where policy and legal arguments are aligned, there are not the same tensions as when those are different. Certainly, we often have experience where we can be supportive of a measure. We will need to be much clearer around legal issues we have, so that the balance can be struck between the risk of competence creep against the policy imperative on that particular issue. In this case, the policy and legal issues are aligned, which is why we were not more forthcoming on the legal analysis. That does not change the fact that it was there and was done. We do recognise that Article 352 is an important issue, and needs to be subject to careful scrutiny.

Q2 Stephen Phillips: Given that the Government accepts that Article 352, when it is used as a legal basis, is an important issue, why is the explanatory memorandum, Minister, which you signed on 14 January 2014, completely silent as to whether or not the Government considered the choice of Article 352 as the draft Directive's legal base was in fact legitimate? There is no mention in this EM at all, is there?

George Eustice: With hindsight, that probably should have been included in the EM. We acknowledge that. I would say this: as Mr Cash pointed out, when it comes to assessing whether or not 352 is a legitimate basis, the first test is whether it is necessary and whether it meets one of the treaty objectives. That is the number one hurdle to clear. In our view, it would fall on that hurdle. What the explanatory memorandum does is set out, very clearly, why we did not believe that that policy move was necessary. That was pertinent to the very first part of the test on 352. As I said, with hindsight, we have conceded this. We probably should have explained in more detail the objections that we had.

Q3 Chair: Basically, you agree with our concern, in a nutshell?

George Eustice: We agree. I made clear in the debate that we do share the concerns that the Committee has about the use of 352 in this instance. We do not believe that it is pursuing any of the objectives contained in the Lisbon treaties.

Q4 Stephen Phillips: So, the explanatory memorandum should have included reference to the appropriateness and legitimacy of Article 352 as the draft Directive's legal base. We are agreed about that, yes? But it did not.

George Eustice: Yes, it did not. We have made that point.

Q5 Stephen Phillips: On the question of subsidiarity, which is discussed at paragraph 6 of the EM, the Government indicated that it did not believe the proposals were necessary. Again, there is no reference or challenge in the explanatory memorandum to whether or not the proposal complies with the principle of subsidiarity, notwithstanding that the Government says that it thinks the measure is unnecessary. Why is that?

George Eustice: The principle of subsidiarity is the third of the three tests that you apply when looking to see whether Article 352 is the correct legal basis to advance such a proposal. As I said, we do not believe it even passes the first test. It certainly would not pass the second test. As we can see it, there is no other legal basis under which they could bring forward such a proposal, which is around consumer perception, as much as anything else.

Q6 Stephen Phillips: Given that there is a discussion of subsidiarity in the explanatory memorandum, why is there no detailed challenge to subsidiarity and whether or not it fulfils the test for the purposes of the third limb of Article 352? Would you accept that that is another failing in the explanatory memorandum?

Simon Parker: Just to clarify, the first question is about, with the principle of conferral of competence, you having to look at whether there is a power under the treaty. That is before you get to the subsidiarity. Subsidiarity is a second question. If you decide you are outside Article 352, you never get to subsidiarity. As we said in the explanatory memorandum, we saw the proposal was not necessary. Consistent with that, Article 352 would not be available. In those discussions, we would not get to subsidiarity. We would still be disagreeing with the proposal and challenging it, but not so much on the basis of subsidiarity but on the basis of legal-base concerns.

What we did say in the explanatory memorandum was that if you did manage to pass the Article 352 test—which we do not think you would—and you were able to demonstrate that it was necessary, it is likely that the proposal would be consistent. That does reflect the case law to some degree, with working time, which is a challenge to the legal base, and subsidiarity. When it came to it, they said, “On subsidiarity, it is within legal base.” We can see that once we have got that far, on this basis, it is hard to challenge.

Q7 Stephen Phillips: You would accept, Mr Parker, would you not, that subsidiarity is a separate ground of challenge upon which the draft proposal could be challenged? That is correct, is it not?

Simon Parker: That is correct.

Q8 Stephen Phillips: This is a question for the Minister. There should, should there not, have been a challenge on the grounds of subsidiarity as well, and that should have been discussed in the explanatory memorandum and was not? Is that correct, Minister?

George Eustice: We made clear that with hindsight, yes, we would have done more to explain the legal concerns we had about Article 352. I have said that now two or three times.

Chair: In our report on the whole question of European scrutiny, we put some very special emphasis, for the very reasons that Mr Phillips is raising, about the importance of the explanatory memoranda and getting them right. We are increasingly concerned that in some Departments we do not get the best kind of memoranda that the House deserves.

Q9 Stephen Phillips: Let us move on from there. As you will be aware, Minister, the Committee requested a detailed legal analysis on the choice of Article 352 as the legal base. We have not received it. Why?

Simon Parker: The response after the debate was brief. It said that we had reservations that the proposals are necessary and, hence, over the legal base. That was to show there was a link there. It was a judgment that was taken in that response that it was sufficient, in light of what we had discussed in the debate. That fitted in with the general reticence, for the reasons of negotiation, not to get too explicit. That has been the general reason.

Q10 Stephen Phillips: Can we leave it like this? Minister, will you undertake now, in the face of this Committee, to provide the detailed legal analysis that we have requested, and which has not so far been provided?

George Eustice: Yes, I am happy to do that. We share some of the concerns that the Committee have on this. To be honest, I thought we had covered this issue in some depth when we had debated it before. I am very clear that if we are going to have proposals like this, where the UK has got reservations but where other countries have concerns and political pressures of their own that they are reacting to, it is better for us to be in those discussions and be engaging with those countries, which might take a different view to us and might have their own political pressures. It is better to take those discussions forward around a table where you potentially have a veto, or do have a veto, in your back pocket, should it be needed.

It is better to have those discussions there than to displace discussions to other areas where QMV might potentially apply and there will be less chance of getting a successful outcome. It is the right forum to engage other countries in the concerns that they have in this area. It is very important that we do not exclude ourselves from that discussion, because I think we are a country that brings some common-sense analysis to the substance of this issue. I take on board the views of lawyers who have clear views on this. I take on board the point that the Committee has made. The approach that we have taken, in maintaining a dialogue with countries that have got concerns on this issue and this basis, is the right way to do it.

Q11 Henry Smith: Minister, welcome. Can you explain why the Government has apparently changed its position on subsidiarity compliance?

George Eustice: Could you elaborate on that? I am not quite sure that we have.

Henry Smith: It seems to this Committee that the Government's position on that has changed, but if there is an argument as to why the Government's position has not changed, I would be happy to hear that.

George Eustice: We support the Committee's exercise of its powers under Protocol 2 of the treaty. As I explained at the beginning, we take a slightly different view to the Committee about the reasons why we object. As I said, there are three hurdles—it is a three-stage process. The first question you need to ask yourself is whether a proposal is necessary and whether it pursues an objective in the treaty. To us, that is the first trigger point to which we object. It is less about subsidiarity. If we felt it did meet a treaty objective and there was not an alternative Article to use, then you get to number three, which is about subsidiarity. That is the point at which you would have the discussion about subsidiarity. As far as we are concerned, by applying this test in the correct way, you do not even get to number three because we are meeting it head-on at that first hurdle.

Q12 Michael Connarty: Can I follow that up? I think that is so inadequate. The Government does not believe something is necessary. It is not necessary at any level, because of the arrangements that are already there. I think I am quoting the explanatory memorandum of 14 January correctly: there is an “absence of human health concerns associated with cloning and the protection already offered by the existing EU animal welfare and novel foods regime”. It is not necessary. If something is not necessary, and then you decide to allow the EU to legislate for that across the EU, you are clearly breaking subsidiarity. If it is not necessary at the local level, which means the level at which it is already arranged, then why should they proceed to use this clause to force something that is not necessary on the rest of the EU, including the UK? If it is the UK, it then breaches subsidiarity.

George Eustice: They would have, as I said. Through that three-stage process, as far as we are concerned, it falls at the first hurdle.

Q13 Michael Connarty: But it did not.

George Eustice: What do you mean?

Michael Connarty: But they did use 352.

George Eustice: They are using 352. We have written to them—

Q14 Michael Connarty: The horse is still running, Minister. It has not fallen at all.

George Eustice: Yes, but we think that if you are objecting to the legal basis for this, then the right way to object on it is through that first test and hurdle, rather than through the third.

Q15 Michael Connarty: If you fail, do you just give in? If you think you are right and they say you are wrong, and you do not win, you just give in. Is that what you are saying?

George Eustice: No. I just think you have to be clear about where your strongest arguments are and go through that sequential test. It is as simple as that. I do not really accept your analysis that you would give up. To do what you are suggesting, you would give up on the first two tests and just defend the third hurdle. We are not suggesting that at all

Q16 Stephen Phillips: Minister, you say that you pursue your strongest argument. As I understand it, the Government feels that there is a subsidiarity challenge that can be mounted. Subsidiarity arises under a different treaty; it is an alternative ground of challenge to the draft proposal. Are you telling this Committee that you have effectively given up on any subsidiarity challenge?

George Eustice: We are not saying that at all. We have said that we have done what you would expect us to do, which is write to the Commission and highlight those concerns. They are similar concerns to those expressed by the Committee. We are awaiting a response to that. That is the correct approach to take.

Q17 Andrew Bingham: In earlier responses, you said to the Chairman that you shared the Committee's concerns. In a response to Mr Phillips, you said, "With hindsight, yes". For clarity and for the record, do you now accept that there is a heightened need for the Government to police the use of Article 352 as a legal base for a measure when there are clear subsidiarity concerns, because this might be used again and again? Do you accept that there is a heightened need to keep a watching brief on this?

George Eustice: Yes. As a Government, we regularly have issues that come our way, where we might agree with a particular proposal that is coming through, but where we have concerns about the legal base under which it is being done. We will sometimes object specifically on a legal base. I come back to what I said at the beginning: no precedent is set, provided we do not have measures going through under Article 352 in this instance. In the meantime, before we get a response from the Commission, we think it is right to stay engaged and in a dialogue with those countries who have got different perspectives to us on this issue, in this particular forum where we would, after all, ultimately have a veto anyway.

Q18 Michael Connarty: Minister, I have to say that I am finding this more and more puzzling. I believe you acknowledged, during the debate, that a veto existed in respect of the current document. You also said in the explanatory memorandum that this was not necessary. You appear to argue very strongly that the EU are doing something that you do not think is necessary and you could stop, even if they use 352, but you did not do it. I just do not understand why we have got to where we are, if you did not think it was necessary. It is clear that the mood of the nation and the Parliament is not to allow the EU to extend its powers into areas where it is not necessary and we can stop with a veto. We do not need to get new competences there; we have powers already, which could have been used. You said the Commission had no express powers with the treaty. Does this mean that you consider that, in

the absence of a specific power, Article 352 can be used automatically to fill any legal base gap, contrary to views of the Court of Justice? The Court of Justice also said that this was not necessary and it did not have this power. It seems to me you are just lying down and letting the EU walk all over us when you have the power to stop them. They quite clearly did not have the power to force you to comply or force us to comply.

George Eustice: It comes back to what I said earlier: these are a set of proposals around cloning and, in the case of this particular proposal for a directive, about banning the sale of cloned material that might come from other countries. We have to accept that, while we have a clear position here and we do not think there are any justifiable reasons, there are other countries that, for their own political reasons, have a view and have expressed views previously that they would like something done about this. We should also accept the political reality that the European Parliament sent a very strong signal to the European Commission that they wanted them to look at this issue.

The question then arises that, if you are going to look at this issue, have a discussion about it, work through a sensible and constructive discussion with other countries about the concerns that they have and try to persuade them that their concerns are wrong, is it better to have that discussion under an Article where you have a veto, or is it better to end up with the risk that you displace some of that discussion around a different forum, where QMV applies? I can tell you now, having how seen negotiations work, I would rather be around a table with a veto in my back pocket than around a table where QMV might apply.

We just have to recognise the reality that there has been a clear signal from the European Parliament to the Commission to look at this. A lot of other member states have concerns in this area. Let us have a dialogue with them, engage with them, and walk through the concerns that they have, and try to persuade them that those are wrong. If we were going to do that sort of discussion, this is as good a forum as any. None of that takes away from the fact that we have concerns about the legal basis for the use of 352 in this instance, as I have pointed out. That is why we have raised those concerns with the Commission and that is why we are waiting for their response.

Q19 Michael Connarty: Are you saying you have a veto you either have used or are willing to use?

George Eustice: Exactly. We have a veto and we would be willing to use it.

Q20 Michael Connarty: You will potentially use that veto.

George Eustice: Of course, yes.

Chair: Good. We have established that and that sounds encouraging. Where there is a veto and you can use it, sometimes we ought to.

Q21 Kelvin Hopkins: Can you explain why the Government's position, as expressed in your last letter to the Committee, has changed, on the use of Article 352 as a legal base? Why does the Government now have reservations?

George Eustice: I made this clear in the debate: we do have reservations about the use of 352 and we have raised those with the Commission. I am not sure that there is a great deal to add to what I have already said. Applying the three-stage test, we do not think it is necessary and we do not think it pursues an objective of the treaty. On that first hurdle, we think this particular proposal falls. That is why we have reservations about the use of Article 352.

Simon Parker: Our view on 352 is that it is not a free-standing area of legal competence. It cannot be used to extend EU competence. It is a power to take action, in support of EU objectives where other treaty Articles are not available. It is a flexibility provision, but the Court is very clear that it cannot be used to expand EU competence; that is from Opinion 2/94. We have looked at the Commission's rationale in this case for the use of Article 352; it is not convincing. In terms of whether it is necessary to attain an EU objective, they have mentioned animal welfare. They mention that animal welfare is not an EU objective. They have accepted that internal markets is not a basis in this case. There are no specific cases and no objectives that 352 can be attached to. They refer to consumer protection, but we would not agree that consumer perception, in this sense, would not be necessary to attain consumer protection. It is very marginal and very clear. We would say that there is no objective to attach 352 to. That is our position. That is why we are sceptical.

Q22 Stephen Phillips: In the letter where the Minister says, "We will be very clear that the UK Government has reservations about the policy objectives", what that actually means is the UK Government is clear in its own mind that there is no justification for the use of Article 352 as a legal base for this proposal, yes?

Simon Parker: As I said, the reticence related to the wider negotiation and a reluctance to be as clear.

Q23 Stephen Phillips: I understand the political side, and that can be dealt with by the Minister. As far as the legal side goes, the advice to the Minister is very clear that there is no Article 352 legal base for this proposal. Is that correct?

Simon Parker: We would not agree with the Commission legal base.

Stephen Phillips: So the answer to my question is "yes".

Simon Parker: Yes.

Q24 Chair: 352 is such a contentious issue; it used to be Article 308. We have known about it for the last 25 or 30 years. There are masses of controversy over it. The plain fact is: if in doubt, out. That would be my view.

Moving on to the next one, the Court of Justice considers that the flexibility of provisions, as they are put, confers on the European Union an option but not an obligation to legislate. Mr Eustice, do you think that the political pressure on the Commission from the European Parliament means that the Commission has been wrongly "obliged" to legislate in this case, and that its choice of legal base, in other words, has not been based on objective factors?

George Eustice: I think it is true. There was a signal sent from the European Parliament that they felt the Commission should look at this. The Commission is trying to fulfil that wish of the European Parliament to do just that—to look at it. As I made clear in the debate we had previously on this, the fact that they have used Article 352 in the first place suggests that they are not confident that there is an alternative legal basis under which to bring this forward. It would suggest that they concur at least with our view—

Q25 Chair: They want it. We do not. You are allowing the process to go forward, despite the fact that you have a veto, in what appears to be a response to a desire to be politically engaged with them—to go back to your earlier comments, it is better to have a discussion where we might influence. There are occasions, are there not—coming from your background, if I can put it that way round—to say “No” at the beginning and be done with it, when you know that there is no real basis on which they are proceeding? Would that not be a better way of dealing with this?

George Eustice: As you say, I do have a eurosceptic pedigree, although not quite as good or as longstanding as your own. Nevertheless, this is an issue that I have always deeply cared about. If there is political pressure coming from the European Parliament and from other member states to have a discussion about this issue and to give consideration to a proposal of this sort, I would rather have consideration to this proposal given around a table where we had a veto in our back pocket than I would have that type of discussion potentially displaced to a different forum where QMV might apply, and where you would have a very different sort of discussion. We made it clear that it is doubtful that there would be an alternative legal base for them to pursue this type of measure. There is always a risk that an alternative legal base would be found to advance discussions in a similar type of area. If there is pressure to have a discussion, let us have the discussion. Let us engage in a sensible dialogue, but let us do it in a forum where there is a veto, rather than one where a QMV might apply.

Q26 Kelvin Hopkins: Having a veto that you keep in your back pocket and do not use is a bit of a feeble position to have, is it not, if you are nervous of offending other member states even if you do have a veto? It might just be that some of those would like you to use our veto, but they do not want to put their heads above the parapet. We would be more expected to do that. If we constantly back off from using a veto when we have got it, it makes us look weak.

George Eustice: This Government has demonstrated that it does not back off using a veto. The Prime Minister has done so in very high-profile ways at times. As I made clear earlier, of course we would be willing to use a veto in this. You have to consider that part of your objective is to have a sensible discussion with other countries and to work through the concerns that they have. There are working groups that have been convened. We have already flagged up our concerns of the legal basis of the use of 352 with the Commission. We are awaiting their response. The sensible thing to do is engage in a dialogue on the substance of the issue. That does nothing at all to compromise your ability to veto at the end of the process. Crucially, that does not set a legal precedent, because no precedence is set for the use of Article 352 unless the measure is adopted. There are no downsides to using this particular space as a means of working through the concerns that other member states have.

Q27 Chair: That is as much as we need to go into this afternoon, save only to remind you that we have asked for the detailed explanation. We would like to have a further explanatory memorandum on this. Perhaps you can reflect on what has been said in the transcript, to incorporate into that explanatory memorandum some of the exchanges that we have had this afternoon. Thank you very much indeed.

George Eustice: Following comments that the Committee has made, we have already asked officials to review the guidance they have in terms of how they draft explanatory memoranda. We are looking at that. We will also try to get back to you with a more detailed explanation of the legal basis.

Chair: We would not like to go through this procedure with every Minister on the question of the use of 352. There are circumstances in which it is better to get on with it. If it is a veto question, because there is no reason for having that particular proposal, then get on with it and vet